SUBMISSION TO THE LEGAL AND CONSITUTIONAL COMMITTEE
MIGRATION LITIGATION REFORM BILL 2005

BY

THE MIGRATION INSTITUTE OF AUSTRALIA LIMITED

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The Migration Institute of Australia Limited ("the MIA") is opposed to the Migration Litigation Reform Bill 2005 in its current form.

The MIA is the peak association advocating the benefits of migration and advancing the stand of the migration profession.

The MIA represents over 1,200 registered migration agents who provide professional migration services to families, businesses and industries throughout Australia.

As such the MIA liaises with Government departments on behalf of our members providing a forum for communication and a platform for submissions on aspects of migration policies and programs.

The MIA sets and administer standards for the conduct of members who commit to operate in accordance with our Code of Ethics.

The MIA welcomes the opportunity to participate in the committee process and supports any measures that will enhance efficient management of migration cases, advance the standing of the migration profession and are consistent with Australia's international obligations.

The Migration Litigation Reform Bill 2005 introduces changes to the Migration Act 1958 which directly affects litigants, legal representatives and migration agents.

As stated earlier the MIA is opposed to the Migration Litigation Reform Bill 2005 in its current form.

The MIA is not satisfied that this legislation in its proposed form is necessary or will be successful in addressing the issues identified in the Explanatory Memorandum.

The Attorney General the Hon. Phillip Ruddock has stated that the measures in this Bill are drawn from recommendations of the Migration Litigation Review Committee 2003. [1]The terms of reference for the review required the team to have regard to:

- The costs imposed by delays in the resolution of claims relating to migration status especially refugee status;

- The need to ensure that all migration cases are dealt with expeditiously and efficiently (whether by tribunals or courts and including on appeal); and

[1] P Ruddock, Second reading: Migration Litigation Reform Bill,2005 House of Representatives, *Debates*, 10 March 2005.

- The need to reduce the large numbers of unmeritorious cases while preserving access to justice for cases with merit.

And to inquire into and report on:

a) Measures for the more efficient management and quicker disposition of migration cases and for the reduction of the large numbers of unmeritorious cases including procedures , time limits, grounds for dismissal of applications, restrictions on appeals such as leave requirements and fee rules including provisions for waivers and exemptions;
b) The adequacy of the existing framework for ensuring that migration agents and members of the legal profession do not encourage the bringing of unmeritorious migration cases.
c) The effect that non compliance with specific provisions of the Migration Act 1958 should have on review rights; and
d) Any other matter that the review considers is relevant to the more efficient management and disposition of claims relating to migration status.

As the report of the Migration Litigation Review Committee has not been made public, the MIA is unable to make a comprehensive assessment of the need for changes proposed in the Bill. However we do note that the Bill seeks to remedy some of the proposed problems raised in the terms of reference for the Review.

In particular the new Bill focuses on what the Government refers to as unmeritorious claims.

The new Bill seeks to address these by

- allowing the Court to summarily dismiss proceedings if it is satisfied there are no reasonable prospects of the case succeeding (ss31A, 17A,4A),
- imposing obligations on a person encouraging litigants to commence or continue proceedings in a court, where there is no reasonable prospect of success, (s486E) and
- introducing a requirement that lawyers certify that there are reasonable grounds for believing case will be successful before the Court accepts the case(s486(1)).

Submissions to the Migration Litigation Review Committee 2003, expressed concerns regarding claims Government success in 92.5% of cases determined by the courts, means cases are overwhelmingly without merit.[2] However the MIA is concerned that this figure may not reflect the number of cases which were either withdrawn prior to hearing or which may have been settled.

[2] Arnod Bloch Leibler submission to, *Migration Litigation Review*, 25 November 2003

These claims have been repeated with the release of this Bill.[3]

The Human Rights and Equal Opportunities Commission submission addresses the issue of unmeritorious claims and submits that it is ' fundamentally flawed to propose that access to justice should only be afforded to cases with merit…..as it is only access to justice which can properly determine the merit of any given case.[4]

The Law Institute of Victoria points out that prior to the High Courts decision in *Plaintiff S157*,[5] decisions that were favourable to the Government need not necessarily have been unmeritorious they merely may have not fitted the limited scope of judicial review.[6]

There also appears to be no grounds for assuming that the majority of cases determined by the courts were represented by lawyers or advised by migration agents who encouraged unmeritorious claims.

Despite this, the Bill introduces an obligation for migration agents and lawyers to ensure that the case has a reasonable ground for success and directs courts to consider whether a personal cost order should be made if they consider the case to be unmeritorious.

The MIA submits that any proposal along these lines will reduce the number of agents and lawyers prepared to represent applicants either for a fee or on a pro bono basis, thereby increasing the number of self represented litigants.

There may be situations where cases have a reasonable ground for success at the commencement of litigation, and due to other factors the case may be seen as unmeritorious at the time of decision resulting in a personal cost order.

If the imposing of obligations on a person encouraging litigants to commence or continue proceedings in a court, where there is no reasonable prospect of success means that a personal cost order will be made on that person, fees will increase to absorb such a possible outcome as a form of insurance to protect that person.

Judicial Review deals with the entire Migration Act and includes reviews of the MRT and RRT decisions and AAT appeals, plus habeas corpus. The nature

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[3] "If they were all bona fide cases, you would be concerned to bolster the courts' resources, to get matters resolved. But 90 per cent of the cases that are brought involving immigration matters are essentially without merit." P Ruddock, Daily Telegraph at meritthttp://dailytelegraph.news.com.au/story, 31 March 2005.

[4] Human Rights and Equal Opportunity Commission submission to *Migration Litigation Review,* 2003 at http://www.humanrights.gov.au/legal/submissions/migration.html.

[5] *Plaintiff S157/2002 v Commonwealth(2003) 211 CLR 476*

[6] B. O'Shea submission to Law Institute of Victoria, , *Migration Litigation Review*, 04 December 2003 at http://www.liv.asn.au/news/pro_issues/livesubs/2003/20031205migrationlitigation.pdf

and complexity of the review system ensures that unrepresented litigants are at a serious disadvantage.

The 2003- 2004 Annual Report of the Federal Magistrates Court explains the complexity of the system and the implications of constant changes to the Act and their interpretation by the Courts:

> "Since the decision of the High Court in Plaintiff S157 it is necessary for the court to consider whether a decision maker has exceeded or failed to exercise the jurisdiction conferred by the Migration Act. Many cases involved difficult questions such as the scope of natural justice or lack of procedural fairness and the interaction between statutory and common law principles. Because the application of the broad principles of jurisdictional error in this context is a recent development the Court has often been faced with a situation where there is no authority from a higher court"[7] .

Another example can found in matter A159 of 2002 v Minister of Immigration & Multicultural Affairs [2003] FCA1087 (10 Oct 2003), where Selway J made a number of statements regarding the lawyers conduct in that matter and awarded cost against the lawyers.

Spender J. in Kaur v Minister of Immigration & Multicultural Affairs [2005] FCA 230 held that the criterion at the time of the making of the application is what should be applied and took the opposite view to that of Selway J in Aomatsu v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 1544 who held that the criterion at the time of the delegate's decision is what should be applied.

Indeed it is the complexity of the law coupled with the rise in self represented litigants that concerns both the Federal Court and the Federal Magistrates Court.

The Annual report of the Federal Court of Australia raises these issues:

> "In recent years the growing number of self represented litigants has presented a range of problems for the Court. The complexity of the substantive law in a developed society and statutory and judicial elaboration of procedural fairness and efficiency, make it difficult for many kinds of litigation to proceed in the most efficient way for all parties and the Court without the parties being legally represented."[8]

The report states that thirty four percent of matters in the court involved at least one party who was not represented at some stage in the proceedings. In 21% of cases the Court cannot determine if they involved self represented litigants…This is particularly common in migration cases and appeals where about 40% of cases involve a self represented litigant.[9]

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[7] Federal Magistrates Court of Australia, *Annual Report 2002- 2004* p. 26
[8] Federal Magistrates Court of Australia, *Annual Report 2002-2004* p.23
[9] Federal Court of Australia, *Annual Report 2002- 2004* p 26

The Federal Court adopted a 'Self Represented Litigants Management Plan' to address problems raised in respect of self represented litigants. This plan includes the provision of more staff to assist litigants.

Similarly the Federal Magistrates Court was forced to introduce new procedures to accommodate the rise in self represented litigants:

> "As many litigants in migration matters are self represented particularly those seeking review of protection visa decisions there is a greater need for pro bono representation or other legal representation particularly as legal aid is not available to protection visa applicants who are in migration detention, the court has found it essential to establish a pro bono scheme"[10]

The MIA submits that proposed obligations and penalties placed on migration agents who are lawyers and other lawyers will deter them from taking on cases and further lead to an increase in self represented litigants.

This will only increase the workload of the Federal Magistrates Court and the costs associated with handling such cases. It will not achieve the aim of reducing 'unmeritorious cases' nor assist in faster resolution of cases before the Court.

The MIA agrees with the Human Rights and Equal Opportunities Commission submission to the Migration Litigation Review Committee that stated

> "one way to reduce the number of unmeritorious claims would be to increase the availability of legal advice, assistance and representation." [11]

The Bill also introduces uniform time limits which are shorter than those previously in place for applying for review.

Whilst the MIA recognise the intent of introducing uniform time limits is to simplify process the MIA remains concerned at the shortened time period which is being imposed. This together with the responsibility for agents and lawyers to determine merit before application is lodged, increases the burden on those making the assessment and further dissuades them from assisting with judicial review cases.

Furthermore the MIA agrees with concerns raised by the Bill Digest that the proposed definition of a purported decision is so broad as to reduce the ability for people to know that a reviewable decision or action has been made and they need to lodge an application for review, and that this may lead to lodgement of 'precautionary appeals' leading to a conflict between the ability

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[10] Federal Magistrates Court of Australia, *Annual Report 2002- 2004*

[11] Human Rights and Equal Opportunity Commission submission to *Migration Litigation Review*, 2003 at http://www.humanrights.gov.au/legal/submissions/migration.html.

to adhere to strict time limits and the prohibition on appealing if there is 'no reasonable prospect of success linked to personal costs.[12]

In Summary

The MIA is opposed to the Migration Litigation Reform Bill 2005 in its current form.

While the Bill is focussed on visa applicants who it is claimed wish to use the courts to extend their time in Australia, it must be remembered that there are visa applicants who are outside of Australia whose sponsors are also caught by this legislation. The MIA finds that this position is unacceptable.

Current legislation and in particular Part 8 of the Migration Act 1958 already restricts avenues for visa applicants to proceed to the Federal Courts.

The Kaur (supra) and Aomatsu (supra) matters demonstrate that the issue as to whether a matter has merit is in the eyes of the individual presiding judicial officer.

[12] Bills Digest no 132,2004 ,p.6