1

Introduction

The Migration Legislation Amendment Bill (No. 2) 2000

1.1 The Migration Legislation Amendment Bill (No. 2) 2000 ('the Bill') was introduced into the House of Representatives on 14 March 2000. The Bill amends the *Migration Act 1958* ('the Act') to:

- give effect to the Government's policy intention of restricting access to judicial review in visa related matters in all but exceptional circumstances by prohibiting class actions in migration litigation and limiting those persons who may commence and continue proceedings in the courts;
- clarify the scope of the Minister's power under section 501A to set aside a non-adverse section 501 decision of the delegate or the Administrative Appeals Tribunal (AAT) and substitute his or her own adverse decision; and
- rectify an omission in subsection 140(1) and paragraph 140(2)(a), which allow for the consequential cancellation of visas, so that they also apply where a person's visa is cancelled under section 128.

1.2 The Bill also amends the *Migration Legislation Amendment Act (No. 1) 1998* and the *Migration Legislation Amendment (Migration Agents) Act 1999* to correct a number of misdescribed amendments of the Act.

1.3 The Bill is an omnibus bill that makes a number of amendments to the *Migration Act 1958* which are set out in two Schedules to the Bill.

1.4 Schedule 1, entitled 'Jurisdiction and proceedings of the courts' makes a number of amendments to the judicial review scheme set out in Part 8 of the Act and introduces a new Part 8A into the Act. These amendments:

- prohibit class actions in migration litigation;
- limit the persons who may commence and continue proceedings in the Federal Court;
- introduce time limits for applications to the High Court under section 75(v) of the Constitution for review of migration related matters; and
- clarify the jurisdiction of the Federal Court in relation to remitted matters.

1.5 Schedule 2, entitled 'Technical amendments' makes amendments to the Act:

- to clarify the scope of the Minister's power under section 501A to set aside a non-adverse section 501 decision of the delegate or the Administrative Appeals Tribunal and substitute his or her own adverse decision;
- to rectify an omission in subsection 140(1) and paragraph 140(2)(a), which allow for the consequential cancellation of visas, so that they also apply where a person's visa is cancelled under section 128; and
- to correct several misdescribed amendments to the Act.[1]

Rationale for the Migration Legislation Amendment Bill (No. 2) 2000

1.6 The Bill reflects the Government's policy intention to restrict access to judicial review in migration matters in all but exceptional circumstances.

1.7 DIMA advised that the amendments to the *Migration Act 1958*:

> seek to address a recent trend, which has seen class action litigation being used by people with no lawful authority to remain in Australia to obtain a bridging visa and thereby substantially extend their time while they are here.[2]

1.8 DIMA's submission states that the Government reached its view in the light of the extensive merits review rights in the migration legislation, and concerns about the growing cost and incidence of migration litigation. According to DIMA, this litigation has been used by many unsuccessful applicants to delay their removal from Australia.[3]

1 DIMA, Submission, p. 45.

2 DIMA, Evidence, p. 2.

3 DIMA, Submission, p. 46.

1.9 The Government has proposed restricting access to class, or otherwise grouped, court actions because it believes that:

> class actions are being used to encourage large numbers of people to litigate in circumstances where they would not otherwise have litigated. Large numbers of people are being encouraged to participate in class actions in order to obtain a visa. They do not have a lawful entitlement to be in Australia but use class actions in order to access a bridging visa.[4]

1.10 DIMA has advised the Committee that it is concerned about the increasing cost and incidence of migration litigation. Migration litigation cost the Department $11 million in the 1998/99 financial year, with a projected cost of more than $20 million in 2001/2002.

1.11 According to DIMA there were 401 applications for judicial review of migration decisions in 1994/95. In 1998/99 the number of applications for judicial review had increased to 1139. At the end of April 2000 applications in the 1999/2000 financial year had exceeded 850. On current trends, applications are projected to reach 1800 by 2001/2002.[5]

1.12 A further reason for introducing the Bill is to ensure that the standing requirements of Part 8 of the *Migration Act 1958* are extended to any challenge in the Federal Court. That is, the only person who can bring a proceeding in the Federal Court that raises an issue in connection with a visa or deportation decision or a removal action is the *subject* of the visa decision, deportation decision or removal action.

1.13 With respect to section 501A, the amendments seek to clarify, rather than change, the original policy intention behind section 501A. This policy was considered by the Parliament during deliberation on the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* which inserted section 501A. The amendments seek to ensure that the Parliament's intent in inserting that section is given full effect in the legislation.[6]

1.14 The intent of the Character Act was to:

- strengthen the Minister's personal powers to refuse or cancel a visa on character grounds:
  - ⇒ to enable the Minister to personally exercise a special power to intervene in any case to substitute his/her own decision to refuse to

---

4 DIMA, Submission, p. 46. Bridging visas are intended to provide interim lawful status whilst some form of processing takes place.

5 DIMA, Submission, p. 47.

6 DIMA, Submission, p. 57.

grant or cancel a visa. This decision may be revoked if made without prior notice to the person.[7]

1.15 The amendments to section 501A seek to give full effect to Parliament's original intention by:

- removing the incorrect suggestion in paragraph 501A(1)(c) that the AAT has a power to grant a visa when reviewing a delegate's subsection 501(1) decision;
- putting it beyond doubt that the Minister can intervene under section 501A where a delegate or the AAT makes a decision not to exercise the power in section 501 because -
  - ⇒ the delegate / Tribunal is satisfied that the person passes the character test; or
  - ⇒ the delegate / Tribunal is not satisfied that the person passes the character test but exercises his or her discretion not to refuse to grant the visa or to cancel the visa; and
- ensuring that the Minister can intervene under section 501A at any point after a non-adverse decision under subsection 501(1) has been made by a delegate or the AAT whether the intervention occurs immediately or after a decision to grant a visa has been made.[8]

Context of the proposed legislation

1.16 The *Migration Reform Act 1992*, which came into operation on 1 September 1994, increased and enhanced rights to independent merits review and restricted access to judicial review of migration decisions by the introduction of the present Part 8. Independent merits review was extended to many decisions previously not covered, most significantly, by the creation of the Refugee Review Tribunal (RRT) to provide independent merits review of refugee determinations under Part 7 of the *Migration Act*.[9]

1.17 The Migration Legislation Amendment Bill (No. 5) 1997, which was intended to implement the Government's policy commitment to restrict access to judicial review in all but exceptional circumstances, was introduced into Parliament in June 1997 and was subsequently passed by the House of Representatives. However, the 1997 Bill was awaiting debate by the Senate when the Parliament was prorogued for the 1998 federal election.

---

7 DIMA, Submission, p. 57.

8 DIMA, Submission, pp. 57-58.

9 DIMA, Submission, p. 48.

1.18 The amendments proposed by the 1997 Bill were reintroduced into the Senate in the Migration Legislation Amendment (Judicial Review) Bill 1998 on 2 December 1998.

1.19 DIMA advised that the judicial review amendments contained in the Migration Legislation Amendment Bill (No. 2) 2000 are not a substitute for those in the Judicial Review Bill. They are complementary measures.[10]

Establishment of the review

1.20 On 12 April 2000 the Minister for Immigration and Multicultural Affairs, the Hon Philip Ruddock MP, referred the Bill to the Joint Standing Committee on Migration for consideration and report to Parliament.

Conduct of the review

1.21 The review was advertised nationally in capital city newspapers on 15 and 19 April 2000. In addition, the Committee wrote to a range of individuals and organisations inviting submissions, including the Law Council of Australia, the Migration Institute of Australia, the Refugee Immigration and Legal Centre, the International Commission of Jurists, Amnesty International, the Human Rights and Equal Opportunity Commissioner and other representative bodies.

1.22 The Committee received 31 submissions which are listed at Appendix A. Submissions which were received electronically were placed on the Committee's web-site. The Committee also received one exhibit from the Islamic Council of Victoria.

1.23 Evidence was taken at public hearings held in Canberra, Sydney and Melbourne. A list of witnesses who gave evidence at the hearings is provided at Appendix B.

1.24 In addition to the above evidence, the Committee sought expert opinion on specific issues relating to the Bill.

10 DIMA, Submission, p. 47; Evidence, p. 2.

Structure of the report

1.25 The report is structured around the main issues which were raised in evidence to the Committee. They are:

- Australia's international obligations;
- the principle of judicial review;
- class actions;
- 'standing' provisions;
- technical amendments: 'character test';
- the constitutional validity of clause 486A; and
- the limitation of 28 days for applications to the High Court.

1.26 Generally each chapter provides the background or context to the relevant part of the Bill and outlines the proposed changes. It then considers the issues raised in relation to that part of the Bill and the Committee's conclusions.