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Mr Owen Walsh
The Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
CANBERRA ACT 2600

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Dear Mr Walsh

Migration Litigation Reform Bill 2005

The New South Wales Bar Association is grateful for the invitation to provide a submission to this parliamentary inquiry.

The New South Wales Bar Association, in the time available, makes short submissions on the issues in which the Committee is particularly interested but would be pleased to supplement the submissions either in writing or by giving oral evidence if the Committee's timetable allows.

The issues identified as being of particular interest to the Committee in the Secretary's letter are as follows:

- The possibility of costs orders against lawyers and voluntary organisations;
- Provisions for summary decisions;
- Constitutionality of privative clauses; and
- The time limits imposed by the Bill.

There is an important distinction between the second of these issues and the remainder given that the provisions for summary decisions are to be of general application, not limited to migration litigation. Therefore this matter is addressed first.

Provisions for Summary Decisions

The New South Wales Bar Association does not, of course, support the commencement or continuation of proceedings or parts of proceedings that are bound to fail or that are not arguable.

The difficulty is in defining with sufficient clarity the circumstances in which the three courts, the High Court, the Federal Court of Australia and the Federal Magistrates Court, should summarily dismiss a proceeding or part of a proceeding. The Attorney-General in the second reading speech for the bill refers to the bill strengthening the power of the courts to deal with 'unmeritorious matters' but no further detail or specificity is given.

One thing which is clear from the extrinsic materials is that the bill proposes to depart from the test in *General Steel* (1965) 112 CLR 125 although it may be said that what that test is and how it is to be applied is not a matter of certainty. Indeed as recently as 21 March 2005 the High Court of Australia granted special leave to appeal in *Favell v. Queensland Newspapers Pty Limited* [2005] HCA Trans 172 which may well involve revisiting *General Steel*.

The thrust of the submission on this issue is that the Parliament should take the opportunity to state with more clarity what it is that is meant by the words proposed to be inserted as s25A of the *Judiciary Act 1903* (for the High Court), s31A of the *Federal Court of Australia Act* (for the Federal Court) and s17A of the *Federal Magistrates Act* (for the Federal Magistrates Court). The common words are that the court may give judgment in relation to the whole or any part of a proceeding if the court is satisfied that the party 'has no reasonable prospect' of successfully defending the proceeding or part of the proceeding or successfully prosecuting the proceeding or part of the proceeding. In each case it is also said that for the purposes of that section a proceeding or part of a proceeding need not be hopeless or bound to fail for it to have no reasonable prospect of success.

What is clear therefore both from the terms of the proposed sections and from the extrinsic material is that each court is to have a broader power and is to be able to give summary judgment in a wider range of cases than cases which are brought or continued but which are hopeless or bound to fail.

It is also to be noted that the proposed provisions do not adopt the language of either rr 292 and 293 of the *Uniform Civil Procedure Rules (Qld)* or Rule 24.2 of the *Civil Procedure Rules (UK)*. In each case the test is whether the party has no real prospect of success *and* there is no need for a trial. As to the position in Queensland see *Gray v Morris* [2004] 2 Qd R 118 and for the UK see *Swain v Hillman* [2001] 1 All ER 91. The

position in Queensland may be affected by the ultimate decision of the High Court in *Favell* (above).

There is a difference between 'no real prospect' and 'reasonable prospect'.

The expression 'reasonable prospects of success' has some history attached to it. It was included for example, in the *Limitation Act 1969 (NSW)* s57(1).

More recently and more relevantly the expression is found in the *Legal Profession Act 1987 (NSW)* for example in s198J, a section limited to the provision of legal services on a claim or defence of a claim for damages.

Two things may be said about that section. First there is more specificity as to what reasonable prospects of success means. For example s198J gives context to the expression 'reasonable prospects of success' because it specifies that the solicitor or barrister should reasonably believe on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence has 'reasonable prospects of success'. It goes on to say that a fact is 'provable' only if the solicitor or barrister reasonably believes that the material then available to him or her provides a proper basis for alleging that fact.

Nevertheless the second point to be made about even that section is that it is not at all clear what it means. The possibilities are considered by Barrett J. in a recent decision *Degiorgio v. Dunn (No. 2)* [2005] NSWSC 3 at paragraphs 16 to 28. His Honour says that in some contexts 'reasonable prospects of success' signifies no more than 'arguable'. It connotes something less than likelihood of success. Barrett J refers to an article by N Beaumont 'What are Reasonable Prospects of Success?' (2004) 78 ALJR 812 in which the author suggested that a claim satisfied the New South Wales statutory requirement 'if it is not hopeless or entirely without merit'.

The New South Wales Bar Association submits that the opportunity now exists for greater specificity in the proposed provisions referred to above: much court time and parties' expense will be spared if the Parliament were now to make it clearer which of the range of meanings of the expression 'reasonable prospect of success' was intended. The matter has more particular significance in the present bill because the expression is also central to the provisions that impose new obligations on advisers and a new potential liability for costs orders against advisers in migration litigation.

Constitutionality of Privative Clauses

Clause 15 of the bill proposes to add two subsections to section 474 of the *Migration Act.*

It is not entirely clear why these two new proposed subsections are necessary. It is noted that proposed s474(7) begins with the expression 'to avoid doubt' and it may be that the draftsman was also of the view that the provisions were not necessary. Indeed one of the classes of decision in proposed ss474(7) was the subject of the proceedings before the

High Court in *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Applicants S134/2002* (2003) 211 CLR 441 and the High Court was not apparently troubled by the idea that it fell within the scope of ss474(2).

Leaving aside the question of the necessity of the provisions proposed to be inserted by clause 15 of the bill, it would seem that with one possible exception the provisions would be read down to preserve validity consistently with the High Court's approach in *Plaintiff S157/2002 v. Commonwealth of Australia* (2003) 211 CLR 476, that is, the words in each proposed paragraph 'under subsection …' would be construed to mean decisions not affected by jurisdictional error. The possible exception, because it does not use the word 'under', is proposed paragraph 474(7)(b). As a matter of drafting therefore it would be preferable to specify the sections, subsections or paragraphs under which those decisions would be made or purportedly made. It may be noted that it is most unlikely that any such decision would be the subject of challenge.

In the submission of The New South Wales Bar Association therefore no new question arises under the bill in relation to the constitutionality of privative clauses. As submitted above, these proposed provisions would be construed consistently with *Plaintiff S157/2002* (above).

The time limits imposed by the Bill

On one view the time limits themselves may operate as a type of privative clause. They are considered here separately because they have been identified as a separate issue in the letter from the Secretary.

There is a discussion of the relationship between time limitations and ouster or privative clauses at pages 860 and following of *Judicial Review of Administrative Action* by Aronson Dyer & Groves (3rd ed Law Book Company 2004).

The proposed new sections 477 and 477A of the *Migration Act* impose time limits in relation to applications for judicial review of migration decisions made to the Federal Magistrates Court and the Federal Court respectively. Such application must be made to the relevant court within 28 days of the actual (as opposed to the deemed) notification of the relevant migration decision. However the court has a discretion to extend this time by 56 days to a maximum of 84 days if the application is made within 84 days of the actual notification and the court is satisfied that it is in the interests of the administration of justice so to extend the 28 day period. It seems that after 84 days from the date of the actual notification of the decision the court may no longer extend time and therefore an application to the court for a remedy may no longer be made after that period.

Because these sections deal with the Federal Court and the Federal Magistrates Court no question of constitutional validity would seem to arise.

The equivalent time limit provision in relation to the High Court is proposed section 486A. As with the Federal Court and the Federal Magistrates Court, applications must be

made to the High Court within 28 days but the court has power to extend the time within which an application may be made by a further 56 days, to a maximum of 84 days, if satisfied that it is in the interests of the administration of justice to do so.

There is a question as to whether this provision would be constitutionally valid. It has the effect of denying the court the jurisdiction vested by section 75(v) of the *Constitution* once the maximum 84 day period has expired. It will be recalled that *Plaintiff S157/2002* (above) involved a non-extendable 35 day time limit. Only Callinan J. found it necessary to consider the validity of that time limitation. His Honour said at [173]-[176] that if the time limit could be characterised as being regulatory in nature rather than constituting in substance a prohibition on judicial review applications then it would be valid, but his Honour was of the view that the 35 day period was too short.

It is to be noted that the time limit is intended to apply both to non-jurisdictional and to jurisdictional error.

There is a question however as to whether time limits of this kind will operate to prevent collateral attack or collateral challenge (where no remedy is sought) in a cases where the applicant seeks a remedy within time in relation to a migration decision.

Assuming the validity of this provision in a general sense one particular matter noted by Aronson Dyer & Groves at page 862 (op. cit.) is whether the time limitation should apply to an application for judicial review on the ground of fraud, which the learned authors note is a ground unlikely to emerge contemporaneously with the making of the impugned decision.

Although it may not be strictly relevant to the time limits issue, section 486D as proposed to be inserted in the *Migration Act* is also notable. It provides that a person must not commence a proceeding in the Federal Magistrates Court or in the Federal Court or in the High Court in relation to a tribunal decision unless the person when commencing the proceeding discloses to the court any judicial review proceeding already brought by the person in that or any other court in relation to that decision.

One question is why proposed section 486D is limited to a requirement to notify only tribunal decisions rather than, for example, Minister's decisions.

More importantly the proposed provision does not appear to specify what the consequence is of failing so to notify the relevant court.

Is it the intention that an application that does not disclose a previous judicial review proceeding is not a valid application? If that is to be the position it may have an unintended and harsh consequence in relation to the time limits discussed above. If that is not the intention then it is not at all clear what the consequence may be of a failure to disclose prior judicial review proceedings.

Proposed New Obligations and Liabilities on Advisers

The key provision is proposed section 486E which provides that a person must not encourage another person (the litigant) to commence or to continue migration litigation in a court if both:

(a) the migration litigation has no reasonable prospects of success; and

(b) either:

(i) the adviser does not give proper consideration to the prospects of success of the migration litigation; or

(ii) a purpose in commencing or continuing the migration litigation is unrelated to the objectives which the court process is designed to achieve.

This provision is related to, but contains no more clarity than, the proposed summary judgment provisions for the High Court, the Federal Court and the Federal Magistrates Court considered at the beginning of this submission. Further no guidance is given as to what 'proper consideration' is and there is no guidance as to whose purpose it is that is referred to in proposed s486E(1)(b)(ii). Further the word 'purpose' is fraught with uncertainty. The expression here is 'a purpose' but does that mean any purpose however insignificant or must it amount to a 'real purpose' or a 'substantial purpose'?

It is also to be noted that proposed s486E uses the expression 'a person must not *encourage* another person (the litigant) to commence or continue migration litigation' in certain circumstances. Since this section is the gateway to possible costs orders it should be made clear whether encourage has the meaning of 'assist' or, which in the present context is submitted to be preferable, it has the narrower meaning of 'incite'. In other words, in the submission of The New South Wales Bar Association, s486E should not be breached where a lawyer explains any weaknesses in the proposed migration litigation to his or her client but the client, having considered those weaknesses, decides to commence or continue the migration litigation.

Also the expression 'the objectives which the court process is designed to achieve' should be specified. If the expression is intended to mean 'delay' then that should be stated.

Section 486F deals with costs orders where a person acts in contravention of s486E. As drafted this provision is opposed because there is no clarity in relation to the matters considered above, ie: reasonable prospects of success, 'encourage', 'proper consideration', 'purpose' and 'the objectives which the court process is designed to achieve'. The courts should not be left to work out the content of these expressions over time and to the prejudice of litigants and advisers.

The last important proposed provision is s486I. Under that provision, which is limited to lawyers, a lawyer must not file a document commencing migration litigation unless the lawyer certifies in writing that there are reasonable grounds for believing that the migration litigation has a reasonable prospect of success. Further a court must refuse to accept a document commencing migration litigation if the document is required to be certified under s486I(i) and it has not been.

Without setting them out again, The New South Wales Bar Association repeats its submissions in this context in relation to the uncertainty of the test of 'reasonable prospects of success'. The uncertainty is compounded where a lawyer is obliged to certify that there are reasonable grounds for believing that the migration litigation has a reasonable prospect of success.

The task therefore in relation to this bill is to take the opportunity to provide as much certainty as possible for courts, litigants and lawyers in relation to the concept of 'no reasonable prospect of success'. Once that is given certainty, and the requirement is not set so as to prevent litigants with arguable cases having their day in court, then it will be possible to form a concluded view on the proposed provisions imposing new obligations on advisers and lawyers in relation to migration litigation.

Yours faithfully

Ian G. Harrison SC
<u>President</u>