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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MIGRATION LEGISLATION AMENDMENT (JUDICIAL REVIEW) BILL 2001

REVISED EXPLANATORY MEMORANDUM

(Circulated by authority of the
Minister for Immigration and Multicultural Affairs,
the Hon. Philip Ruddock MP)

**THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE
SENATE TO THE BILL AS INTRODUCED**

MIGRATION LEGISLATION AMENDMENT (JUDICIAL REVIEW) BILL 2001

OUTLINE

Overview

1 The Migration Legislation Amendment (Judicial Review) Bill 2001 ("the Bill") implements a number of Government initiatives in the Immigration and Multicultural Affairs portfolio.

2 The Bill amends the *Migration Act 1958* and the *Administrative Decisions (Judicial Review) Act 1977*.

3 The amendments to the *Migration Act 1958* and the *Administrative Decisions (Judicial Review) Act 1977*, in relation to judicial review of immigration decision-making:

- introduce a new judicial review scheme, in particular a privative clause, to cover decisions made under the *Migration Act 1958* relating to the ability of non-citizens to enter and remain in Australia;
- apply the new judicial review scheme to both the Federal Court and the High Court; and
- allow specified decisions to be reviewable under the *Administrative Decisions (Judicial Review) Act 1977*.

FINANCIAL IMPACT STATEMENT

4 The amendments to the *Migration Act 1958* in relation to judicial review of immigration decision-making will, if they operate as predicted by reducing the issues to be addressed and allowing cases to be resolved more quickly, deliver substantial savings. It will take some time before the scheme is fully effective given a backlog of cases to which it will not apply and for any initial court challenges to it to be resolved.

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NOTES ON INDIVIDUAL CLAUSES

Clause 1 Short title

1 The short title by which this Act will be known is the *Migration Legislation Amendment (Judicial Review) Act 2001*.

Clause 2 Commencement

2 Subclause 2(1) provides that, subject to this section, this Act commences on day on which it receives the Royal Assent.

3 Subclause 2(2) provides that, subject to subsection 2(3), Schedule 1 commences on a day to be fixed by Proclamation.

4 Subclause 2(3) provides that Schedule 1 will commence 6 months after the Royal Assent unless Proclamation occurs first.

Clause 3 Schedule(s)

5 Clause 3 provides that, subject to section 2, the provisions of the various Acts that are set out in the items of Schedule 1 are amended or repealed as indicated.

SCHEDULE 1 - Judicial review

Part 1 - Amendments

Administrative Decisions (Judicial Review) Act 1977

Item 1 Paragraph (da) of Schedule 1

6 This paragraph excludes from the jurisdiction of the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* ("the ADJR Act") privative clause decisions under the *Migration Act 1958* ("the Migration Act") (and regulations and other instruments made under the latter Act). This amendment confines the Federal Court's jurisdiction under the ADJR Act in respect of migration matters to those decisions listed at the new subsection 474(4) of the Migration Act and any prescribed under new subsection 474(5).

Migration Act 1958

Item 2 Subsection 5(1) (definition of *judicially-reviewable decision*)

7 This definition is repealed consequential to the changes to judicial review under the Migration Act.

Item 3 Subsection 5(1)

8 A new definition - "privative clause decision" - is inserted in relation to the new judicial review provisions for those decisions covered by new subsection 474(1) and made under the Migration Act (or regulations or other instruments made under that Act).

9 The definition has the meaning set out at new subsection 474(2). Note however that subsection 474(2) needs to be interpreted having regard to subsections 474(3).

Item 4 Subsection 32(2)

10 Section 32 deals with the creation of, and criteria for the grant of special category visas. This amendment makes clear that the Minister's satisfaction is required in relation to whether a person satisfies the legal pre-conditions for a visa to which section 32 of the Migration Act refers. Section 65 of the Migration Act requires the Minister to be "satisfied" that specified legal pre-conditions are satisfied in order for the visa to be granted. This amendment is intended to put it beyond any doubt that the Minister's satisfaction applies to the grant of a visa to which section 32 of the Migration Act refers.

Item 5 Subsection 36(2)

11 Section 36 deals with the creation of, and criteria for the grant of protection visas. This amendment makes it clear that the Minister's satisfaction is required in relation to whether a person satisfies the legal pre-conditions for a visa to which section 36 of the Migration Act refers. Section 65 of the Migration Act requires the Minister to be "satisfied" that specified legal pre-conditions are satisfied in order for the visa to be granted. This amendment is intended to put it beyond any doubt that the Minister's satisfaction is necessary to the grant of a visa to which section 36 of the Migration Act refers.

Item 6 Section 73

12 Section 73 deals with the criteria for the grant of bridging visas. This amendment makes it clear that the Minister's satisfaction is required in relation to whether a person satisfies the legal pre-conditions for a visa to which section 73 (and section 37) of the Migration Act refer. Section 65 of the Migration Act requires the Minister to be "satisfied" that specified legal pre-conditions are satisfied in order for the visa to be granted. This amendment is intended to put it beyond any doubt that the Minister's satisfaction is necessary to the grant of a visa to which section 73 (and section 37) of the Migration Act refers.

Item 7 Part 8

13 Part 8 of the Migration Act, which dealt with the review of decisions by the Federal Court, is repealed and replaced by the new judicial review provisions.

PART 8 - Judicial review**Division 1 - Privative clause****474 Decisions under Act are final**

14 New subsection 474(1) introduces a privative clause for decisions made under the Migration Act, regulations made under that Act or other instruments under that Act except for decisions made under the provisions set out in new subsection 474(4) or as prescribed under new subsection 474(5). A privative clause affects the extent of judicial review by both the Federal Court and the High Court of decisions covered by the clause.

15 A privative clause is a provision which, although on its face purports to oust all judicial review, in operation, by altering the substantive law, limits review by the courts to certain grounds. Such a clause has been interpreted by the High Court, in a line of authority stemming from the judgment of Dixon J in *R v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598, to mean that a court can still review matters but the available grounds are confined to exceeding constitutional limits, narrow jurisdictional error or *mala fides*.

16 The intention of the provision is to provide decision-makers with wider lawful operation for their decisions such that, provided the decision-maker is acting in good faith, has been given the authority to make the decision concerned (for example, by delegation of the power from the Minister or by virtue of holding a particular office) and does not exceed constitutional limits, the decision will be lawful.

17 New subsection 474(2) defines a "privative clause decision" as a decision made under the Migration Act, or regulations or other instruments made under that Act, except for the decisions specified at new subsection 474(4), or prescribed under new subsection 474(5):

- the specified decisions, and any prescribed decisions, are reviewable under the ADJR Act - see this Bill's proposed amendment to paragraph (da) of Schedule 1 to that Act.

18 New subsections 474(2) and (3) make it clear that "decision" is to be given a wide meaning. New subsections 474(2) and (3) are substantially in the same form as the definition of "decision" for the purposes of the ADJR Act, with the addition of "conduct preparatory to the making of a decision", and actions specific to the Migration Act such as the "cancelling" of visas.

19 New subsection 474(4) specifies the decisions which are not subject to the operation of the privative clause in new subsection 474(1).

20 New subsection 474(5) allows for flexibility for exempting additional decisions from the operation of the privative clause by way of regulations made under the Migration Act.

Division 2 - Provisions relating to privative clause decisions

21 As set out above in relation to new subsection 474(1), a privative clause has been interpreted by the High Court to permit judicial review of decisions covered by such a clause on restricted grounds. Division 2 of this Bill makes provision for these matters to be litigated subject to the limitations contained in that Division, to the Federal Court under sections 39B and 44 of the *Judiciary Act 1903* and to the High Court under section 75 of the Commonwealth Constitution. Division 2 of this Bill also ensures that application for judicial review of privative clause decisions cannot be made to the Federal Court unless applicants have exhausted their merits review rights.

Section 475 This Division not to limit section 474

22 This new section makes it clear that new Division 2, by implication or otherwise, in no way limits the scope or operation of new section 474.

Section 475A Section 476 not to affect the jurisdiction of the Federal Court in certain cases

23 This new section makes it clear that the Federal Court has jurisdiction to review decisions of the Migration Review Tribunal, the Refugee Review Tribunal and the Administrative Appeals Tribunal, and any other decision not excluded by proposed section 476 (for example, certain visa decisions which attract no merits review rights under Part 5 or Part 7 or section 500 of the Migration Act).

Section 476 Federal Court does not have any other jurisdiction in relation to certain privative clause decisions

24 New subsection 476(1), in combination with the proposed new definition of “primary decision” in new subsection 476(6) makes it clear that the Federal Court does not have any jurisdiction in relation to a primary decision, where:

- the decision has been the subject of a merits review decision by a Tribunal under Part 5 or 7 or section 500 of the Migration Act; or
- the decision is still subject to the merits review processes under Part 5 or 7 or section 500 whether because it is still going through those processes or an application for merits review has not yet been made and the time specified for such an application has not expired; or
- the decision would have been merits reviewable had a merits review application been made within the time specified for such an application.

25 Judicial review by the Federal Court of matters which involve merits review rights is restricted to the decision made by the review body. Accordingly, if a person has a merits review right under Part 5, Part 7 or section 500 of the Migration Act and fails to exercise it or cannot exercise it because the time in which a merits review application can be made has passed, the Federal Court does not have jurisdiction in relation to that matter. If a person has begun to exercise that person's merits review right(s), the Federal Court does not have jurisdiction unless and until that person has exercised the right(s) to the fullest extent possible and the merits review processes have been finalised. The jurisdiction of the High Court is unaffected.

226 New subsection 476(2) excludes from the jurisdiction of the Federal Court decisions of the Minister not to exercise, or not to consider the exercise of, the specified personal public interest powers of the Minister. The jurisdiction of the High Court is unaffected.

27 New subsection 476(2A) provides that the Federal Court does not have any jurisdiction in respect of:

- a decision of the Principal Member of the Migration Review Tribunal or of the Principal Member of the Refugee Review Tribunal to refer a matter to the Administrative Appeals Tribunal; and
- a decision of the President of the Administrative Appeals Tribunal to accept, or not to accept, the referral of a decision under section 382 and 444 of the Migration Act.

28 This is the case despite any other law, including sections 39B and 44 of the *Judiciary Act 1903*.

29 These decisions are not judicially-reviewable decisions under existing Part 8 of the Migration Act. New subsection 476(2A) ensures that this continues to be the case under new Part 8 which is inserted into the Migration Act by this item.

30 New subsection 476(2B) provides that the Federal Court does not have any jurisdiction in respect of a decision of the Minister under Division 13A of Part 2 of the Migration Act to order that a thing is not to be condemned as forfeited. This is the case despite any other law including section 39B or 44 of the *Judiciary Act 1903*.

31 Decisions made under Division 13A of Part 2 of the Migration Act are not judicially-reviewable decisions under existing Part 8 of the Act. New subsection 476(2B) ensures that this continues to be the case under new Part 8 which is inserted into the Migration Act by this item.

32 New subsection 476(4) limits the remittal of matters from the High Court to the Federal Court where the restrictions in new section 476 apply in order that a person cannot seek to bypass the restrictions by making a review application in the High Court and seeking to have the High Court remit the matter to the Federal Court.

33 The purpose of this limitation in relation to new subsection 476(1) is to encourage persons to utilise the less formal and less expensive merits review processes before resort is made to the Courts. The limitations in relation to the powers referred to in new subsection 476(2) reflect the special nature of these powers and scrutiny is provided by Parliament through the tabling of statements of reasons by the Minister where such powers are exercised.

34 New subsection 476(5) provides that the reference in new subsection 476(2) to section 345 is a reference to section 345 of the Migration Act before the commencement of Schedule 1 to the *Migration Legislation Amendment Act (No. 1) 1998*.

35 This latter Act omitted section 345 from the Migration Act and new subsection 476(5) makes it clear which version of section 345 is referred to in new subsection 476(2).

36 New subsection 476(6) provides a definition of “primary decision” for the purposes of new section 476. A “primary decision” is defined to mean a privative clause decision:

- that has been the subject of a merits review decision by a Tribunal under Part 5 or 7 of section 500 of the Migration Act; or

- that is still subject to merits review processes under Part 5 or Part 7 or section 500 of the Migration Act whether because it is still going through those processes or an application for merits review has not yet been made and the time specified for such an application has not expired; or
- that would have been merits reviewable had a merits review application been made within the time specified for such an application.

Section 477 Time limits on applications for judicial review

37 New section 477 ensures that judicial review is sought in a timely manner and it provides certainty in relation to actions of the Commonwealth that may flow from decisions, such as the detention and removal of unlawful non-citizens.

38 New subsection 477(1) requires any application to the Federal Court under section 39B of the Judiciary Act, in relation to a privative clause decision in respect of which the Federal Court has jurisdiction, to be made within 28 days of the notification of that decision.

39 Express reference to mandamus, prohibition, certiorari, injunction and declaration has been made to ensure that the time limit applies to them.

40 New subsection 477(2) prohibits the Federal Court from making an order allowing, or which has the effect of allowing, an applicant to lodge an application referred to in proposed subsection 477(1) outside the 28 day time limit.

41 New subsection 477(3) provides that the regulations may prescribe the way of notifying a person of a decision for the purposes of new section 477. Note that there are currently extensive notification provisions in the Migration Act. This new subsection expressly allows for additional notification provisions to be made by way of regulation if necessary.

Section 478 Persons who may make application

42 New section 478 delimits who may make an application to the Federal Court under section 39B of the Judiciary Act in relation to a privative clause decision (by reference to new subsection 477(1)) to:

- the Minister; and
- if there are merits review rights under Part 5 or Part 7 or section 500 and a decision on such a review has been made, the applicant in the review before the Tribunal; or
- in any other case, the person who is the subject of the decision; or
- in any case, a person prescribed by the regulations. For example, it would be possible to prescribe in the regulations that the “next friend” of a minor or mentally disabled person can make an application to the Federal Court for

judicial review under new subsection 477(1) on behalf of the persons mentioned in new paragraphs 478(a) and 478(b), as appropriate.

43 The jurisdiction of the High Court is unaffected.

Section 479 Parties to review

44 New section 479 delimits the parties to any judicial review by the Federal Court under section 39B of the Judiciary Act in relation to a privative clause decision (by reference to new subsection 477(1)) to:

- the Minister; and
- if there are merits review rights under Part 5 or Part 7 or section 500 and a decision on such a review has been made, the applicant in the review before the Tribunal; or
- in any other case, the person who is the subject of the decision; or
- in any case, a person prescribed by the regulations.

45 The jurisdiction of the High Court is unaffected.

46 Note that new section 480 allows for the Attorney-General to be a party if the Attorney-General intervenes.

Section 480 Intervention by Attorney-General

47 This new section enables the Attorney-General to intervene on behalf of the Commonwealth in proceedings resulting from an application under new subsection 477(1). New subsection 480(2) enables the Federal Court to make an order for costs against the Commonwealth resulting from the Attorney-General's intervention. New subsection 480(3) provides that if the Attorney-General intervenes, he or she is taken to be a party to the proceeding.

Section 481 Operation etc. of decision

48 This new section makes it clear that the mere making of an application for judicial review of the kind referred to in new subsection 477(1) does not of itself prevent the decision for which review has been sought from continuing to have a legal effect pending the outcome of the judicial review.

49 For example, if the decision for which review has been sought results in a person becoming or remaining an unlawful non-citizen, any action to detain or remove that person is lawful, subject to the provisions of the Migration Act. However, a court is not prevented by this section from making whatever interim orders it is otherwise empowered to make.

Section 482 Changing person holding, or performing the duties of, an office

50 This new section ensures that, where a person has made a decision to which the privative clause applies and the person no longer holds nor is performing the duties of the office then held, or the office no longer exists, this Part has effect as if the decision was made by the person performing the duties of the office at the relevant time or as specified by the Minister.

Section 483 Section 44 of the *Administrative Appeals Tribunal Act 1975*

51 Section 44 of the *Administrative Appeals Tribunal Act 1975* allows for appeals from the Administrative Appeals Tribunal to the Federal Court on a point of law. New section 483 prevents section 44 from applying to a privative clause decision. Therefore, an application to the Federal Court in respect of such a decision needs to be made under section 39B of the Judiciary Act.

Section 484 Exclusive jurisdiction of Federal Court

52 This new section establishes that the jurisdiction of the Federal Court in relation to a privative clause decision is exclusive of the jurisdiction of all other courts, other than the jurisdiction of the High Court under section 75 of the Commonwealth Constitution. No other Courts may consider review applications in relation to privative clause decisions.

53 New subsections 484(2) and (3) put the exclusive jurisdiction of the Federal Court beyond doubt by ousting the jurisdiction of the Northern Territory Supreme Court under the Judiciary Act and the operation of the *Jurisdiction of Courts (Cross-vesting) Act 1987*.

Item 7A Subsection 486A(1)

54 This item makes a technical amendment to subsection 486A(1), which is to be inserted into the Migration Act by item 4 of Part 1 of Schedule 1 of the Migration Legislation Amendment Bill (No. 1) 2001.

55 The purpose of the amendment is to ensure that proposed subsection 486A will operate as intended after the commencement of this Act.

56 The effect of the amendment is that an application to the High Court in its original jurisdiction under the Commonwealth Constitution in respect of a *privative clause decision* must be made within 35 days of the actual notification of the decision.

Item 7B After section 486A

57 This item inserts new sections 486AA and 486AB after section 486A which is to be inserted into the Migration Act by item 4 of Part 1 of Schedule 1 of the Migration Legislation Amendment Bill (No. 1) 2001. These new sections mirror new sections 480 and 481.

Section 486AA Intervention by Attorney-General

58 New subsection 486AA(1) allows the Commonwealth Attorney-General to intervene in a proceeding resulting from an application to the High Court for judicial review of a privative clause decision under subsection 486A(1).

59 New subsection 486AA(2) allows the High Court to make cost orders against the Commonwealth if the Attorney-General intervenes in a proceeding.

60 New subsection 486AA(3) provides that if the Attorney-General intervenes in a proceeding, he or she is taken to be a party to the proceeding.

Section 486AB Operation etc. of decision

61 This new section makes it clear that the mere making of an application for judicial review of the kind referred to in new subsection 486A(1) does not of itself prevent the decision for which review has been sought from continuing to have a legal effect pending the outcome of the judicial review.

62 For example, if the decision for which review has been sought results in a person becoming or remaining an unlawful non-citizen, any action to detain or remove that person is lawful, subject to the provisions of the Migration Act. However, a court is not prevented by this section from making whatever interim orders it is otherwise empowered to make.

Item 7C Subsection 486C(1)

63 This item makes a technical amendment to subsection 486C(1) which is to be inserted into the Migration Act by item 6 of Part 2 of Schedule 1 of the Migration Legislation Amendment Bill (No. 1) 2001. The amendment is consequential to the amendment made by item 7D.

Item 7D Subsection 486C(2)

64 This item repeals subsection 486C(2), which is to be inserted into the Migration Act by item 6 of Part 2 of Schedule 1 of the Migration Legislation Amendment Bill (No. 1) 2001, and substitutes a new subsection 486C(2).

65 Section 486C imposes standing requirements in relation to the persons who may commence or continue a proceeding in the Federal Court that raises an issue specified in subsection 486C(1). It is primarily directed at collateral challenges to the migration legislation. It ensures that such a challenge, for example, could not be made by a person who did not have a relevant visa decision made about him or her.

66 It does not detract from the standing requirements in new Part 8 of the Migration Act in relation to the review of a privative clause decision by the Federal Court.

67 Under new subsection 486C(2), the persons who have standing to commence or continue a proceeding that raises an issue specified in subsection 486C(1) are:

- a party to a review mentioned in new section 479 which is to be inserted into the Migration Act by item 7 of this Schedule; or
- the Attorney-General of the Commonwealth or a State or Territory; or
- a person who commences or continues the proceeding in performing the person's statutory functions; or
- any other person prescribed in the regulations.

Part 2 - Application provisions

Item 8 Application

68 These provisions make it clear to which decisions the new judicial review provisions apply. Unless an application for judicial review has been made before the commencement of Schedule 1, the new judicial review provisions apply. If an application for judicial review has been made before that commencement date, then the previous judicial review schemes apply.

69 Express reference has been made to mandamus, prohibition, certiorari, injunction and declaration to ensure that the provisions also apply to them.

70 Subitem 8(4) deals with the application of the amendments made by items 7A and 7B in relation to section 486A which is to be inserted into the Migration Act by item 4 of Part 1 of Schedule 1 to the Migration Legislation Amendment Bill (No. 1) 2001. It provides that these amendments apply to decisions made after the commencement of those items.

71 Subitem 8(5) deals with the application of the amendments made by items 7C and 7D to section 486C which is to be inserted into the Migration Act by item 6 of Part 2 of Schedule 1 to the Migration Legislation Amendment Bill (No. 1) 2001. It provides that these amendments apply to proceedings that are commenced after the commencement of those items.