

1998-1999-2000-2001

The Parliament of the
Commonwealth of Australia

THE SENATE

As read a third time

**Migration Legislation Amendment
(Judicial Review) Bill 2001**

No. , 2001

**A Bill for an Act to amend the *Migration Act 1958*,
and for related purposes**

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1 THIS bill originated in the Senate; and,
2 having this day passed, is now ready for
3 presentation to the House of
4 Representatives for its concurrence.

5 HARRY EVANS
6 *Clerk of the Senate*

7 The Senate
8 26 September 2001

9 **A Bill for an Act to amend the *Migration Act 1958*,**
10 **and for related purposes**

11 The Parliament of Australia enacts:

12 **1 Short title**

13 This Act may be cited as the *Migration Legislation Amendment*
14 *(Judicial Review) Act 2001*.

15 **2 Commencement**

16 (1) Subject to this section, this Act commences on the day on which it
17 receives the Royal Assent.

18 (2) Subject to subsection (3), Schedule 1 commences on a day to be
19 fixed by Proclamation.

1 (3) If Schedule 1 does not commence under subsection (2) within the
2 period of 6 months beginning on the day on which this Act
3 receives the Royal Assent, it commences on the first day after the
4 end of that period.

5 **3 Schedule(s)**

6 Subject to section 2, each Act that is specified in a Schedule to this
7 Act is amended or repealed as set out in the applicable items in the
8 Schedule concerned, and any other item in a Schedule to this Act
9 has effect according to its terms.

1
2 **Schedule 1—Judicial review**

3 **Part 1—Amendments**

4 *Administrative Decisions (Judicial Review) Act 1977*

5 **1 Paragraph (da) of Schedule 1**

6 Repeal the paragraph, substitute:

7 (da) a privative clause decision within the meaning of subsection
8 474(2) of the *Migration Act 1958*;

9 *Migration Act 1958*

10 **2 Subsection 5(1) (definition of *judicially-reviewable***
11 ***decision*)**

12 Repeal the definition.

13 **3 Subsection 5(1)**

14 Insert:

15 *privative clause decision* has the meaning given by subsection
16 474(2).

17 **4 Subsection 32(2)**

18 After “that” (first occurring), insert “the Minister is satisfied”.

19 **5 Subsection 36(2)**

20 After “whom”, insert “the Minister is satisfied”.

21 **6 Section 73**

22 Omit all the words before “a bridging visa” (second occurring),
23 substitute “If the Minister is satisfied that an eligible non-citizen
24 satisfies the criteria for a bridging visa as prescribed under subsection
25 31(3), the Minister may grant”.

26 **7 Part 8**

1 Repeal the Part, substitute:

2 **Part 8—Judicial review**

3 **Division 1—Privative clause**

4 **474 Decisions under Act are final**

5 (1) A privative clause decision:

- 6 (a) is final and conclusive; and
7 (b) must not be challenged, appealed against, reviewed, quashed
8 or called in question in any court; and
9 (c) is not subject to prohibition, mandamus, injunction,
10 declaration or certiorari in any court on any account.

11 (2) In this section:

12 *privative clause decision* means a decision of an administrative
13 character made, proposed to be made, or required to be made, as
14 the case may be, under this Act or under a regulation or other
15 instrument made under this Act (whether in the exercise of a
16 discretion or not), other than a decision referred to in subsection (4)
17 or (5).

18 (3) A reference in this section to a decision includes a reference to the
19 following:

- 20 (a) granting, making, suspending, cancelling, revoking or
21 refusing to make an order or determination;
22 (b) granting, giving, suspending, cancelling, revoking or refusing
23 to give a certificate, direction, approval, consent or
24 permission (including a visa);
25 (c) granting, issuing, suspending, cancelling, revoking or
26 refusing to issue an authority or other instrument;
27 (d) imposing, or refusing to remove, a condition or restriction;
28 (e) making or revoking, or refusing to make or revoke, a
29 declaration, demand or requirement;
30 (f) retaining, or refusing to deliver up, an article;
31 (g) doing or refusing to do any other act or thing;
-

- 1 (h) conduct preparatory to the making of a decision, including
2 the taking of evidence or the holding of an inquiry or
3 investigation;
4 (i) a decision on review of a decision, irrespective of whether
5 the decision on review is taken under this Act or a regulation
6 or other instrument under this Act, or under another Act;
7 (j) a failure or refusal to make a decision.
- 8 (4) For the purposes of subsection (2), a decision under a provision, or
9 under a regulation or other instrument made under a provision, set
10 out in the following table is not a privative clause decision:
11

Decisions that are not privative clause decisions		
Item	Provision	Subject matter of provision
1	section 213	Liability for the costs of detention, removal or deportation
2	section 217	Conveyance of removees
3	section 218	Conveyance of deportees etc.
4	section 222	Orders restraining non-citizens from disposing of property
5	section 223	Valuables of detained non-citizens
6	section 224	Dealing with seized valuables
7	section 252	Searches of persons
8	section 259	Detention of vessels for search
9	section 260	Detention of vessels/dealing with detained vessels
10	section 261	Disposal of certain vessels
11	Division 14 of Part 2	Recovery of costs
12	section 269	Taking of securities
13	section 272	Migrant centres
14	section 273	Detention centres
15	Part 3	Migration agents registration scheme
16	Part 4	Court orders about reparation
17	section 353A	Directions by Principal Member
18	section 354	Constitution of Migration Review Tribunal

Schedule 1 Judicial review
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Decisions that are not privative clause decisions		
Item	Provision	Subject matter of provision
19	section 355	Reconstitution of Migration Review Tribunal
20	section 355A	Reconstitution of Migration Review Tribunal for efficient conduct of review
21	section 356	Exercise of powers of Migration Review Tribunal
22	section 357	Presiding member
23	Division 7 of Part 5	Offences
24	Part 6	Establishment and membership of Migration Review Tribunal
25	section 421	Constitution of Refugee Review Tribunal
26	section 422	Reconstitution of Refugee Review Tribunal
27	section 422A	Reconstitution of Refugee Review Tribunal for efficient conduct of review
28	Division 6 of Part 7	Offences
29	Division 9 of Part 7	Establishment and membership of Refugee Review Tribunal
30	Division 10 of Part 7	Registry and officers
31	regulation 5.35	Medical treatment of persons in detention

1 (5) The regulations may specify that a decision, or a decision included
2 in a class of decisions, under this Act, or under regulations or
3 another instrument under this Act, is not a privative clause
4 decision.

5 **Division 2—Provisions relating to privative clause**
6 **decisions**

7 **475 This Division not to limit section 474**

8 This Division is not to be taken to limit the scope or operation of
9 section 474.

1 **475A Section 476 not to affect the jurisdiction of the Federal Court**
2 **in certain cases**

3 Section 476 does not affect the jurisdiction of the Federal Court
4 under section 39B or 44 of the *Judiciary Act 1903* in relation to:

- 5 (a) a privative clause decision that is a decision made on a
6 review by a Tribunal under Part 5 or 7 or section 500; or
7 (b) any other decision in respect of which the Court's
8 jurisdiction is not excluded by section 476.

9 **476 Federal Court does not have any other jurisdiction in relation to**
10 **certain privative clause decisions**

11 (1) Despite any other law, including sections 39B and 44 of the
12 *Judiciary Act 1903*, the Federal Court does not have any
13 jurisdiction in relation to a primary decision.

14 (2) Despite any other law, including sections 39B and 44 of the
15 *Judiciary Act 1903*, the Federal Court does not have any
16 jurisdiction in respect of a decision of the Minister not to exercise,
17 or not to consider the exercise, of the Minister's power under
18 subsection 37A(2) or (3), section 48B, paragraph 72(1)(c),
19 section 91F, 91L, 91Q, 345, 351, 391, 417 or 454.

20 (2A) Despite any other law, including sections 39B and 44 of the
21 *Judiciary Act 1903*, the Federal Court does not have any
22 jurisdiction in respect of:

- 23 (a) a decision of the Principal Member of the Migration Review
24 Tribunal or of the Principal Member of the Refugee Review
25 Tribunal to refer a matter to the Administrative Appeals
26 Tribunal; or
27 (b) a decision of the President of the Administrative Appeals
28 Tribunal to accept, or not to accept, the referral of a decision
29 under section 382 or 444.

30 (2B) Despite any other law, including sections 39B and 44 of the
31 *Judiciary Act 1903*, the Federal Court does not have any
32 jurisdiction in respect of a decision of the Minister under
33 Division 13A of Part 2 to order that a thing is not to be condemned
34 as forfeited.

- 1 (4) Despite section 44 of the *Judiciary Act 1903*, the High Court must
2 not remit a matter to the Federal Court if it relates to a decision or
3 matter in respect of which the Federal Court would not have
4 jurisdiction because of this section.
- 5 (5) The reference in subsection (2) to section 345 is a reference to
6 section 345 of this Act as in force before the commencement of
7 Schedule 1 to the *Migration Legislation Amendment Act (No. 1)*
8 *1998*.
- 9 (6) In this section:
- 10 *primary decision* means a privative clause decision:
- 11 (a) that is reviewable, or has been reviewed, under Part 5 or 7 or
12 section 500; or
- 13 (b) that would have been so reviewable if an application for such
14 review had been made within a specified period.

15 **477 Time limits on applications for judicial review**

- 16 (1) An application to the Federal Court under section 39B of the
17 *Judiciary Act 1903* for:
- 18 (a) a writ of mandamus, prohibition or certiorari; or
19 (b) an injunction or a declaration;
- 20 in respect of a privative clause decision in relation to which the
21 jurisdiction of the Federal Court is not excluded by section 476
22 must be made to the Federal Court within 28 days of the
23 notification of the decision.
- 24 (2) The Federal Court must not make an order allowing, or which has
25 the effect of allowing, an applicant to lodge an application referred
26 to in subsection (1) outside the period specified in that subsection.
- 27 (3) The regulations may prescribe the way of notifying a person of a
28 decision for the purposes of this section.

29 **478 Persons who may make application**

- 30 An application referred to in subsection 477(1) may only be made
31 by the Minister and:
-

- 1 (a) if the privative clause decision concerned was reviewable
2 under Part 5 or 7 or section 500 of this Act and a decision on
3 such a review has been made—the applicant in the review by
4 the relevant Tribunal; or
5 (b) in any other case—the person who is the subject of the
6 decision; or
7 (c) in any case—a person prescribed by the regulations.

8 **479 Parties to review**

9 The parties to a review of a privative clause decision resulting from
10 an application referred to in subsection 477(1) are the Minister and:

- 11 (a) if the privative clause decision concerned was reviewable
12 under Part 5 or 7 or section 500 of this Act and a decision on
13 such a review has been made—the applicant in the review by
14 the relevant Tribunal; or
15 (b) in any other case—the person who is the subject of the
16 decision; or
17 (c) in any case—a person prescribed by the regulations.

18 **480 Intervention by Attorney-General**

- 19 (1) The Attorney-General may, on behalf of the Commonwealth,
20 intervene in a proceeding resulting from an application referred to
21 in subsection 477(1).
22 (2) If the Attorney-General intervenes in such a proceeding, the
23 Federal Court may make such orders as to costs against the
24 Commonwealth as the court thinks fit.
25 (3) If the Attorney-General intervenes in such a proceeding, he or she
26 is taken to be a party to the proceeding.

27 **481 Operation etc. of decision**

28 The making of an application referred to in subsection 477(1) does
29 not:

- 30 (a) affect the operation of the decision; or
31 (b) prevent the taking of action to implement the decision; or
-

- 1 (c) prevent the taking of action in reliance on the making of the
2 decision.

3 **482 Changing person holding, or performing the duties of, an office**

4 If:

5 (a) a person has, in the performance of the duties of an office,
6 made a privative clause decision; and

7 (b) the person no longer holds, or, for whatever reason, is not
8 performing the duties of, that office;

9 this Part has effect as if the decision had been made by:

10 (c) the person for the time being holding or performing the
11 duties of that office; or

12 (d) if there is no person for the time being holding or performing
13 the duties of that office or that office no longer exists—such
14 person as the Minister specifies.

15 **483 Section 44 of the *Administrative Appeals Tribunal Act 1975***

16 Section 44 of the *Administrative Appeals Tribunal Act 1975* does
17 not apply to a privative clause decision.

18 **484 Exclusive jurisdiction of Federal Court**

19 (1) The jurisdiction of the Federal Court in relation to privative clause
20 decisions is exclusive of the jurisdiction of all other courts, other
21 than the jurisdiction of the High Court under section 75 of the
22 Constitution.

23 (2) To avoid doubt, despite section 67C of the *Judiciary Act 1903*, the
24 Supreme Court of the Northern Territory does not have jurisdiction
25 in matters in which a writ of mandamus or prohibition or an
26 injunction is sought against the Commonwealth or an officer of the
27 Commonwealth in relation to privative clause decisions.

28 (3) To avoid doubt, jurisdiction in relation to privative clause decisions
29 is not conferred on any court under the *Jurisdiction of Courts*
30 (*Cross-vesting*) *Act 1987*.

31 **7A Subsection 486A(1)**

1 Omit “decision covered by subsection 475(1), (2) or (4)”, substitute
2 “privative clause decision”.

3 **7B After section 486A**

4 Insert:

5 **486AA Intervention by Attorney-General**

6 (1) The Attorney-General may, on behalf of the Commonwealth,
7 intervene in a proceeding resulting from an application referred to
8 in subsection 486A(1).

9 (2) If the Attorney-General intervenes in such a proceeding, the High
10 Court may make such orders as to costs against the Commonwealth
11 as the court thinks fit.

12 (3) If the Attorney-General intervenes in such a proceeding, he or she
13 is taken to be a party to the proceeding.

14 **486AB Operation etc. of decision**

15 The making of an application referred to in subsection 486A(1)
16 does not:

- 17 (a) affect the operation of the decision; or
18 (b) prevent the taking of action to implement the decision; or
19 (c) prevent the taking of action in reliance on the making of the
20 decision.

21 **7C Subsection 486C(1)**

22 Omit “(the *relevant issue*)”.

23 **7D Subsection 486C(2)**

24 Repeal the subsection, substitute:

- 25 (2) Those persons are:
26 (a) a party to a review mentioned in section 479; or
27 (b) the Attorney-General of the Commonwealth or of a State or a
28 Territory; or

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- 1 (c) a person who commences or continues the proceeding in
2 performing the person's statutory functions; or
3 (d) any other person prescribed by the regulations.

1

2 **Part 2—Application provisions**

3 **8 Application**

- 4 (1) If an application for judicial review of a decision under the *Migration*
5 *Act 1958* is lodged before the commencement of this Schedule, the
6 *Migration Act 1958*, the *Administrative Appeals Tribunal Act 1975* and
7 the *Administrative Decisions (Judicial Review) Act 1977*, as in force
8 immediately before that commencement, apply in respect of the
9 application, and in respect of the review, as if this Schedule had not
10 been enacted.
- 11 (2) The *Migration Act 1958* and the *Administrative Decisions (Judicial*
12 *Review) Act 1977*, as amended by this Schedule, apply in respect of
13 judicial review of a decision under the *Migration Act 1958* if:
14 (a) the decision was made on or after the commencement of this
15 Schedule; or
16 (b) the decision:
17 (i) was made before the commencement of this Schedule;
18 and
19 (ii) as at that commencement, an application for judicial
20 review of the decision had not been lodged.
- 21 (3) A reference in subitem (1) or (2) to an application for judicial review of
22 a decision is a reference to:
23 (a) an application for review of the decision under:
24 (i) section 44 of the *Administrative Appeals Tribunal Act*
25 *1975*; or
26 (ii) Part 8 of the *Migration Act 1958*; or
27 (iii) the *Administrative Decisions (Judicial Review) Act*
28 *1977*; or
29 (b) an application for a writ of mandamus, prohibition or
30 certiorari or an injunction or a declaration in respect of the
31 decision under:
32 (i) section 75 of the Constitution; or
33 (ii) section 39B or 67C of the *Judiciary Act 1903*.

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Part 2 Application provisions

1 (4) The amendments made by items 7A and 7B apply to decisions made
2 after the commencement of those items.

3 (5) The amendments made by items 7C and 7D apply in relation to
4 proceedings that are commenced after the commencement of those
5 items.