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THE PARLIAMENT OF THE COMMONWEALTH  
OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MIGRATION AMENDMENT BILL (NO 2) 1992

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for  
Immigration, Local Government and Ethnic Affairs,  
the Honourable Gerry Hand MP)

## MIGRATION AMENDMENT BILL (No 2) 1992

### OUTLINE

This Bill introduces a number of amendments to the Migration Act 1958.

These amendments:

- . introduce a scheme to allow the Minister to maintain effective control of the refugee processing system. The Minister is authorised to deal with applications for refugee status in such order as the Minister considers appropriate. In addition, the Minister's obligation to decide refugee claims where the applicant holds a permanent entry permit or entry visa, or a PRC (temporary) entry permit, is removed.
- . establish a mechanism for the cancellation of business permits or business visas in specified circumstances. This cancellation power is only available for 3 years from the time of grant of the entry permit or entry into Australia. The power is reviewable by the Administrative Appeals Tribunal. The provisions also introduce a reporting mechanism for holders of business entry permits with the sanction of a penalty or an 'infringement notice'.
- . create a liability in favour of the Commonwealth in respect of illegal fishermen who have been taken into custody under section 88(3) of the Act. The amount of the liability is recoverable from either the person in custody or the master, owner, agent and charterer of the vessel who brought the person to Australia, or a third party who holds or will hold moneys on behalf of the person in custody.
- . clarify certain of the provisions which relate to review of applications made under the Migration Act. In particular, the amendments:
  - ensure that the period in which an application for review may be made depends on the physical location of the applicant in the primary application rather than the applicant in the review application;
  - eliminate unnecessary steps in the review process by allowing the review authority to remit decisions to the decision-maker;
  - bring section 137 into line with section 115 in respect of the tabling requirements where the Minister sets aside a decision of a review authority.

introduce various technical amendments which:

- clarify when a person is taken to have entered Australia;
- clarify when a person becomes an illegal entrant;
- provide that certain persons are to be exempted from the operation of subsection 14(2);
- clarify the circumstances in which non-citizens become illegal entrants.

Amendments which modify the operation of the Act in relation to prohibited entrants and illegal entrants are included to achieve much needed clarification of existing provisions. The Government is currently reviewing the legislative basis for dealing with persons not lawfully in Australia. Further legislative amendment is likely next Parliamentary sittings.

#### **FINANCIAL IMPACT STATEMENT**

The proposed amendments will have minimal financial impact. The amendment made by clause 10 of the Amending Bill which inserts new Division 8A - "Recovery of costs from certain persons" - is not primarily a cost recovery mechanism. Its purpose is to act as a disincentive to illegal fishermen. Under the amendment, persons convicted of illegal fishing who serve gaol sentences will not be able to take funds out of Australia until the Commonwealth has been repaid certain costs relating to their custody, transport and removal. In a full financial year not more than \$10,000 is expected to be realised from this cost recovery.

## **NOTES ON INDIVIDUAL CLAUSES**

### **Clause 1            Short Title**

This Clause provides that the Act is cited as the Migration Amendment Act (No 2) 1992 and that the term 'Principal Act' is a reference to the Migration Act 1958.

### **Clause 2            Commencement**

This clause provides that the Act is to commence operation of the day it receives Royal Assent.

### **Clause 3            Interpretation**

This clause amends section 4 to clarify when a person is taken to have entered Australia. A person is not to be taken to have entered Australia by disembarking from a vessel other than an aircraft if an authorised officer believes on reasonable grounds that the person was on board the vessel when it was used in connection with the commission of an offence against a prescribed law of the Commonwealth, a State or Territory. Such persons may then be dealt with under section 88 and the new Division 8A.

### **Clause 4            Period of Grace**

This clause amends section 13 of the Principal Act to take into account the introduction of the power to cancel business permits and business visas [new section 50A]. When the period of grace expires an illegal entrant is liable to deportation. This clause provides that the period of any Federal Court review of a cancellation decision is not part of the period of grace of the business migrant seeking review or the members of that person's family unit who have also been subject to a cancellation decision.

### **Clause 5            Illegal entrants**

This clause inserts a new paragraph (2A) into section 14 of the Principal Act to overcome an anomalous situation. The effect of the amendment is that where a person produces a bogus document or makes a false statement in relation to an application for an entry permit after entry into Australia, the person will acquire the status of illegal entrant at the time of grant of the entry permit not at some earlier time. At present illegal status is acquired from the time of original entry even though the bogus document is provided or false statement is made in connection with an application made after entry for the grant of a further entry permit.

## **Clause 6 Exemptions**

This clause allows for certain persons to be exempted from the operation of sub-section 14(2) of the Principal Act. This sub-section provides that a person who is a person to whom section 20 of the Principal Act applies is in specified circumstances an illegal entrant. The intention of the provision is to allow guests of Government to be exempted from the operation of section 20 of the Principal Act on arrival in Australia.

## **Claus 7 Circumstances in which non-citizens may become illegal entrants.**

This clause clarifies the criminal convictions that are relevant for the purpose of subparagraph (1)(d)(iii) of section 20 of the Principal Act. The Federal Court held in a recent decision that unconnected sentences of imprisonment could not be added together unless they resulted in one unbroken period of imprisonment. This amendment makes it clear that unconnected sentences of imprisonment can be aggregated even though the periods of imprisonment are not consecutive or relate to separate incidents of criminal activity. The operation of this clause is affected by transitional provisions in clause 17 of this Act.

## **Claus 8 Refugees**

This clause inserts a new Division after Division 1 of Part 2 of the Principal Act.

### **Section 22AA**

This section empowers the Minister to determine that a person is a refugee. Pursuant to this section the Minister may also revoke a determination that a person is a refugee.

### **Section 22AB**

This section provides that regulations may be made dealing with the making of applications for refugee status and the procedures for consideration of such applications.

### **Section 22AC**

This section makes it clear that the power to determine that a person is a refugee under this Division applies only to persons present in Australia. Applications for a determination of refugee status may not be made by a person who is outside Australia.

### **Section 22AD**

This section removes the Minister's obligation to decide refugee claims where the applicant holds a permanent entry permit, a permanent entry visa, or a PRC (temporary) entry permit (ie a temporary entry permit granted to a person on the basis of being a citizen of the Peoples' Republic of China and who was in Australia on or before 20 June 1989).

Where a person does not hold one of the above mentioned entry permits, the Minister is required to decide an application. The Minister is, however, authorised to dispose of applications in such order as he or she thinks fit. This allows the Minister to determine processing priorities among applications for determination of refugee status.

The section also has the effect that a departure from chronological processing of applications will not of itself mean that there has been "unreasonable delay" in the processing of the undecided applications.

**Clause 9                      Cancellation of business permits and business visas**

This clause inserts a number of provisions after section 50 of the Principal Act.

**Section 50A**

This section empowers the Minister to cancel a business permit or a business visa in specified circumstances. The section also provides that where the Minister cancels a business permit or visa the Minister is required to cancel any business permit or visa held by members of that person's family unit. A family unit member's visa or permit is not required to be cancelled if the Minister is satisfied that the cancellation would result in extreme hardship to the person whose visa or entry permit is so cancelled.

A person whose business permit or business visa is cancelled must be provided with reasons for cancellation and a statement to the effect that the holder may apply to the Administrative Appeals Tribunal for review of the cancellation decision.

Cancellation can only occur if a notice under new section 50B has been provided to the holder of the business permit or business visa within a three year period commencing from when the holder:

- .     if in Australia when granted the business permit or business visa, on the day on which the holder was granted the permit or visa; or
- .     if not in Australia when granted the business permit or business visa, on the day on which the holder first entered Australia.

This power is affected by new subsection 50B(4).

New section 50A also provides the time from when cancellation will take effect.

### **Section 50B**

This section imposes a duty on the Minister to give the holder of a business permit or a business visa a written notice of intention to cancel the permit or visa which also invites the holder to make representations within a specified period. The Minister must give the representations due consideration and is required to give the permit or visa holder written notice if he does not intend to proceed with cancellation.

This section also provides that if a response to the notice is received after the expiry of the period specified in subsection 50A(9) and the Minister does not make a decision within 90 days, the Minister is not to proceed with the cancellation.

### **Section 50C**

This section provides that the Administrative Appeals Tribunal has jurisdiction to review a decision to cancel a business visa or entry permit.

### **Section 50D**

This section allows the Government to determine the extent to which the goals of the business migrant category are being achieved both in aggregate terms and against individuals. The section introduces a reporting mechanism for all holders of a business permit or a business visa. During either the first 3 years after the permit or visa was granted in Australia or the first 3 years after the permit or visa holder arrives in Australia permit and visa holders will be required to complete survey forms. Failure to complete such a form within the specified 28 day period is an offence with a penalty of \$5,000. An alternative to prosecution for this offence is payment of a prescribed penalty not exceeding \$1,000 [clause 15].

### **Clause 10      Recovery of costs from certain persons**

This clause inserts a new Division 8A after section 100 of the Principal Act.

### **Section 100A**

This Division applies to persons who are taken into custody under section 88(3) of the Principal Act. This section applies to persons fishing illegally in Australian waters. This is extended to include a person who is taken from 88(3) custody to a processing area under section 89A. This will allow recovery of maintenance costs for the period the person was in subsection 88(3) custody. It will also allow the recovery of removal costs

### **Section 100B**

This section provides that a person who is in custody under subsection 88(3) and while in that custody is convicted of an offence against a prescribed law which relates to the control of fishing, is liable to pay the Commonwealth certain costs. These costs relate to maintaining the person in custody, transporting the person to a place of custody and between places of custody, transporting the person to the vessel or other vessel and removing the person from Australia. Liability is also extended to the master, owner, agent and charterer of the vessel on which the person travelled to Australia.

#### **Section 100C**

This section provides that the Secretary may give a notice to a person liable to pay a debt under new section 100B requiring payment of an amount specified. This amount then becomes a debt recoverable by the Commonwealth in a court of competent jurisdiction or by garnishee notice.

#### **Section 100D**

This section provides that the Secretary may issue a garnishee notice requiring a third party to pay to the Commonwealth the amount specified. It allows the Commonwealth to have recourse to State and Territory gaols, banks and other financial institutions who may, or who may at some later time, be holding funds on behalf of the person in custody up to the amount of their liability.

#### **Section 100E**

This section provides that where a person is given a garnishee notice and fails to comply with it to the extent that he or she is capable, the amount of the debt outstanding is a debt due to the Commonwealth that is recoverable in a court of competent jurisdiction or by a further garnishee notice.

#### **Section 100F**

This section defines a future debt to be a debt that the Secretary believes on reasonable grounds that the person will become liable to pay under new section 100B. Future debts would include the cost of the removal of a person from Australia which may not have been incurred at the time the notice of liability is issued.

#### **Section 100G**

This section provides the basis for the Commonwealth to recover future debts. The Secretary is required to give notice to a third party who holds or may later hold monies on behalf of the person, to retain an amount specified in the notice for a period not exceeding 28 days. Where a future debt is held by the third party as required and in the period of 28 days changes from a future debt to a real debt, a garnishee notice will be issued pursuant to new section 100D.

#### **Section 100H**

This section makes it clear that the Division applies to the Commonwealth Government and instrumentalities, State Governments and instrumentalities, the Governments and instrumentalities of the Australian Capital Territory and Northern Territory. This section also provides that any notice may be given to the Commonwealth, State or Territory by giving that notice to a person who has a duty to disburse money.



#### **Clause 11            Internal review of certain decisions**

Section 115(3) of the Principal Act provides that regulations may be made specifying a period in which an application for review may be made. The period is linked to whether the applicant is physically present in Australia. There has been some doubt as to whether the reference to the 'applicant' was a reference to the applicant in the primary application or the applicant for review. This clause amends section 115(3) of the Principal Act to make it clear that the reference is to the applicant in the primary application.

#### **Clause 12            Applications for review by Tribunal**

This clause has a similar effect to clause 11 except in so far as it applies to an application for review to the Immigration Review Tribunal rather than to an application for internal review. The clause amends section 116(3) to make it clear that the reference to an applicant is a reference to the applicant in the primary application.

#### **Clause 13            Determinative powers**

General principles of administrative law require that a decision-maker not act under the dictation of another person in making a decision. This clause amends section 118 of the Principal Act to allow the review authority to remit a decision to the original decision maker in accordance with the review authority's directions subject to regulations which prescribe the matters which may be remitted. This amendment, which is supported by the Immigration Review Tribunal, will lead to speedier review decisions in that it will eliminate unnecessary steps in the review process.

#### **Clause 14            Minister may set aside Tribunal's decision etc.**

Where the Minister makes a decision to set aside or vary a decision of a review authority for a decision more favourable to the applicant he or she is required to table a statement in Parliament setting out the reasons for that decision. At present the tabling requirements are different in respect of decisions to set aside a decision on internal review and a decision by the Immigration Review Tribunal. This clause amends section 137 to bring the tabling requirements where the original decision was a decision of the Immigration Review Tribunal into line with the tabling requirements where the original decision was a decision on internal review. The requirement in both cases will now be that tabling in the Parliament is required to occur within 15 sitting days of either 1 July or 1 January depending on when the decision was taken.

#### **Clause 15            Regulations**

This clause amends section 181 by introducing new sub-section 181(ja). This provision authorises the making of regulations enabling a person who has failed to provide information as required by new section 50D to pay a prescribed penalty as an alternative to prosecution. The maximum prescribed penalty is \$1000. The penalty applicable on prosecution is \$5000.

**Clause 16            Application of Amendments - tabling of statements  
before Parliament**

This clause provides that the amendments to section 137 incorporated by clause 14 apply only to decisions made after the commencement of this section.

**Clause 17            Transitional - Illegal Entrants**

This clause provides that if a person was in Australia at commencement of this Act and the person would apart from this clause have come within the operation of section 20(1)(d)(iii) as amended, the person is exempt from the operation of the amendment in respect of any convictions which have occurred before the commencement of this Act.

The clause also provides that where a person is not in Australia at commencement of this Act, but had been in Australia lawfully at any time in the past and, immediately before commencement, was either an exempt non-citizen, the holder of a visa or satisfied the criteria for the grant of a visa, the person is exempt from the operation of the amendment in respect of any convictions which have occurred before the commencement of this Act.













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