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THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

SENATE

MIGRATION AMENDMENT BILL (No 4) 1991

EXPLANATORY MEMORANDUM

Circulated by authority of the Minister
for Immigration, Local Government
and Ethnic Affairs

The Hon Gerry Hand MP



MIGRATION AMENDMENT BILL (No 4) 1991

OUTLINE

This Bill introduces minor policy and technical amendments to the Migration Act 1958 (the Act).

2 These amendments:

- . clarify which regulations a review authority is to have regard to in a review of a points assessment under section 30 of the Act;
- . distinguish the power to detain a person under section 92 and 93 of the Act from the power of arrest in the Crimes (Investigation of Commonwealth Offences) Amendment Act 1991;
- . increase certain penalty provisions under the Act in line with Commonwealth criminal law policy and allow consistent application of pecuniary penalties under the Crimes Act 1914;
- . provide that where an endorsement is recorded in a notified data base, that will satisfy the obligation to endorse a visa or entry permit where this is a requirement under subsections 20(4) or (5); and
- . ensure that illegal entrants are not prevented by section 37 from making a further application, within the period allowed by the Act.

FINANCIAL IMPACT STATEMENT

3 The amending provisions will have no financial impact.

NOTES ON INDIVIDUAL CLAUSES

Claus 1 Short titl

This clause provides that the Act will be called the Migration Amendment Act (No.4) 1991 and that the "Principal Act" means the Migration Act 1958. In this document the Migration Act 1958 is referred to as "the Act".

Clause 2 Commencement

2 This clause provides that

- (a) sections 1, 2 and 6 will commence on Royal Assent. These provisions relate to the title, commencement and amendments to endorsement on a notified data base, and section 37;
- (b) sections 3 and 5 will commence 28 days after Royal Assent. These provisions relate to the meaning of assessment and the revision of the penalties;
- (c) sections 4 and 7 will commence on a day to be fixed by Proclamation or six months after the Act receives Royal Assent. These provisions relate to:
 - . the amendments to sections 92 and 93 with regard to the power to detain in custody;
 - . the consequential amendments to sections 68, 69, 93, 94 and 97; and
 - . the transitional provision "deeming" persons already arrested under sections 92 and 93 to be persons detained under those sections.

Clause 3 Review of assessments made under section 30

3 This clause introduces a new section 121A clarifying which regulations govern a review authority under the Act in its review of the primary assessment of an applicant's point score under section 30 of the Act.

4 In its review of this assessment, the review authority must only have regard to the set of regulations prescribing points and qualifications that are more favourable to the applicant. The set of regulations must be either:

- . those regulations in force at the time of the primary assessment; or
- . those regulations in force at the time of the decision of the review authority in relation to the assessment.

5 This amendment makes clear that a review authority cannot combine points and qualifications prescribed at various times over the full period of the decision-making process. It also clarifies that the points and qualifications prescribed when an application for a visa is lodged are not relevant, unless they are in force at the time of primary assessment.

Clause 4 Amendments relating to custody

6 This clause amends the Act as set out in Schedule 1 and will commence on a date to be fixed by Proclamation or six months after Royal Assent:

SCHEDULE 1

This eliminates references to arrest in sections 92 and 93 of the Act. Instead the expression "detain in custody" will be used to distinguish the power to detain in custody under the Act from the power to arrest for an offence. The effect of the Crimes (Investigation of Commonwealth Offences) Amendment Act 1991, which amends the Crimes Act 1914, indicates that the power of arrest applies in respect of Commonwealth offences and not to situations such as those arising under sections 92 or 93.

Sections 92 and 93 of the Act are amended to clarify that the power to arrest illegal entrants and deportees under those sections is for the purpose of processing those persons under the Act and/or removing them from Australia. The term 'arrest', which has the connotation of arrest for a criminal offence, has therefore been replaced by the term 'detain in custody'. This clarification is desirable to avoid confusion which might otherwise arise concerning the applicability of restrictions on the power of arrest in respect of criminal offences (located in the Crimes Act 1914 as amended by the Crimes (Investigation of Commonwealth Offences) Act 1991).

The restrictions in the Crimes Act 1914 on the power to arrest for, and investigate, criminal offences will continue to be applicable to offences created by the Act. However the amendments will more clearly distinguish the powers created by sections 92 and 93 from the legal regime provided by the Crimes Act 1914.

Sections 68, 69, 94 and 97 of the Act are amended to reflect the changed terminology used in sections 92 and 93.

section 68

The first occurrence of the word "arrested" is replaced with "detained in custody". Subsequent references to "arrested" are replaced with "detained".

section 69

All occurrences of the word "arrested" are replaced with the word "detained" and the definition of "arrested person" in subsection 69(6) is replaced with "detained person".

subsection 92(1)

The word "arrest" is replaced with "detain in custody".

subsection 92(2) and (3)

Every occurrence of the word "arrest" is replaced with "detain".

subsection 92(8) and (10)

Occurrences of the word "arrest" is replaced with "detain in custody".

subsection 93(1)

The word "arrest" is replaced with "detain in custody".

subsection 93(2)

The word "arrested" is replaced with "detained".

subsection 93(3)

The word "arrests" is replaced with "detains". The word "arrested" is omitted and the word "arrest" is replaced with "detention in custody".

subsection 93(4)

All occurrences of the word "arrested" is replaced with "detained". The word "arrest" is replaced with "detention in custody".

subsection 93(5)

The phrase "an arrested" is replaced with "a detained" and the phrase "the arrested" is replaced with "the".

subsection 93(7)

The word "arrested" is replaced with "detained".

subsection 93(10)

The word "arrest" is replaced with "detain in custody".

subsection 94(3)

The word "arrested" is replaced with "detained in custody".

subsection 97(1)

The phrase "has been arrested and" is omitted.

Clause 5 Amendments of penalty provisions

7 This clause amends all of the penalty provisions in the Act as set out in Schedule 2:

SCHEDULE 2

This provides for amendments of penalty provisions in the Act to take account of certain provisions of the Crimes Act 1914. In addition, subsection 171(1) of the Act is repealed because of the application of section 5 of the Crimes Act. The effect of section 5 is explained below.

Because of the formula contained in subsection 4B(2) of the Crimes Act, the reference to a pecuniary penalty in the following provisions is unnecessary and is therefore omitted:

- . subsection 67(8);
- . subsection 68(8);
- . subsection 77(1);
- . subsection 77(2);
- . subsection 77(5);
- . subsection 80(2);
- . section 81;
- . subsection 82(1);
- . subsection 97(2);
- . subsection 101(2);
- . section 102;
- . section 141;
- . subsection 142(1);
- . subsection 142(2);
- . subsection 142(3);
- . section 143;
- . subsection 148(3);
- . section 149;
- . section 167;
- . subsection 168(1);
- . subsection 168(2); and
- . subsection 171(2).

Subsection 4B(2) of the Crimes Act provides that in the punishment of a natural person a court may use a formula to convert a penalty expressed in terms of a period of imprisonment to a fine either as an alternative or in

addition to the period of imprisonment expressed in the provision. The formula is:

$$\frac{\text{Term of Imprisonment (in months)}}{6} \times \$3,000$$

The pecuniary penalties in sections 71, 72, 73 and 74 are doubled from \$2,000 to \$4,000 in line with Commonwealth criminal law policy.

The pecuniary penalties in subsections 64(5), 70(1), 78, 79, 83(5), 85(7), 89(5), and 90(2) are doubled from \$5,000 to \$10,000 in line with Commonwealth criminal law policy.

The pecuniary penalties in subsections 85(1), 85(2), 85(3), 85(4), and 99 are doubled from \$10,000 to \$20,000 in line with Commonwealth criminal law policy.

In subsection 68(7) the period of imprisonment is deleted because an offence against this provision is only applicable to a body corporate. Accordingly, the pecuniary penalty is increased from \$5,000 to \$30,000 in line with Commonwealth criminal law policy.

Subsection 171(1)

This provision makes it an offence to aid a person to escape from lawful custody. It is repealed because subsection 5(1) of the Crimes Act will apply to a person who aids, abets, counsels or procures or is in any way directly or indirectly knowingly concerned in, or party to, the commission of an offence against Commonwealth law. In such circumstances the person is deemed to have committed the principal offence itself. In the case of section 171 of the Act the principal offence is set out in subsection 171(2). This makes it an offence to escape or attempt to escape from lawful custody under any relevant provision of the Act.

Subsection 181(1)(j)

In line with Commonwealth criminal law policy, the prescribed penalty on a natural person convicted of an offence against section 76 of the Principal Act is to be reduced from \$3,000 to \$600. This allows the use of a formula contained in subsection 4B(3) of the Crimes Act where the offence is committed by a body corporate. Subsection 4B(3) of the Crimes Act provides that, subject to the Court's discretion, a pecuniary penalty which applies to a natural person may, in a Court's discretion, be multiplied by 5. This means that a body corporate convicted under section 76 of the Act is liable to a fine not exceeding \$3,000.

Clause 6 Other Amendments

8 This clause amends the Act as set out in Schedule 3:

SCHEDULE 3

Insertion of new subsections 20(4B) and 20(5A)

The regime of section 20 of the Act provides for a person to whom subsection 20(1) or (2) applies to give the Secretary a notice in the prescribed form stating that he or she is a person to whom section 20 applies. If a visa and/or entry permit is granted to the person, it must be endorsed with a statement recognising that the holder is a person to whom section 20 applies.

This amendment provides that the obligation to endorse the visa and/or entry permit will be satisfied if the statement is recorded against a notified data base of the Department of Immigration, Local Government and Ethnic Affairs.

Amendments to subsection 4(1)

The amendments are:

- . a technical amendment to paragraph (b) of definition of "properly endorsed valid entry permit" in subsection to correct the reference from "20(4)" to "20(5)";
- . an amendment to definition of "properly endorsed valid entry visa". This amendment brings the definition into line with subsections 20(4) and 20(4A) where it is the person granting the visa or the authorised officer who recognises the holder to be a person to whom subsection 20(1) would apply, and not the Secretary as currently drafted.

Amendment to section 37

This amendment clarifies the relationship of sections 36, 37 and 121 of the Act.

Where an illegal entrant has been notified under section 121 to make a further application for a visa or an entry permit within 10 working days of the notification, it is arguable that section 37 prevents the making of that application. This potential consequence was not intended and the proposed amendment to section 37 will ensure that an illegal entrant is able to make that application.

Clause 7 Transitional - custody

9 This provision places persons who have been arrested under sections 92 or 93 of the Act before the commencement of this section in the same position as persons who have been detained in custody after the commencement of this section.

NOTE ABOUT SECTION HEADINGS IN THE MIGRATION ACT

- (a) The phrase "review applied for" in the heading to section 36 is substituted with "notification under section 121" to make it clear that section 121 is the only section under which notification may be given;
- (b) The phrase "Prohibited entrants" in the heading to section 87, which is currently not defined in the Act, is substituted with "Certain persons"; and
- (c) The phrase "prohibited entrant" in the heading to sections 88 and 89 is substituted with "certain persons" also because it lacks definition in the Act.

