

1989

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

MIGRATION LEGISLATION AMENDMENT BILL 1989

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments And New Clauses To Be Moved
On Behalf Of The Government

(Circulated by authority of the Minister for
Immigration, Local Government and Ethnic Affairs,
Senator the Hon Robert Ray)

MIGRATION LEGISLATION AMENDMENT BILL 1989

OUTLINE

The supplementary amendments to this Bill represent agreed changes as a result of comments by the Senate Standing Committee for the Scrutiny of Bills, comments by the opposition and ethnic community groups and also to reflect a need for the Migration Act 1958 (the Migration Act) to deal with the situation where illegal fishermen (for instance) apprehended in Australian waters are forceably brought to Australia for prosecution and/or repatriation.

The major proposed supplementary amendments effect the following changes:

- a) retain the Minister as principal decision maker;
- b) provide that decision criteria regulations for visa and entry permit applications will lapse 2 years after commencement unless otherwise provided in the regulations themselves;
- c) days excluded from the 'period of grace' provision will include the period where an entry permit refusal is being considered by the Federal Court in defined circumstances;
- d) the power for the Minister to suspend the processing of visa and entry permit applications will not apply to applications made on the basis that the person is the spouse, child or aged parent of an Australian citizen or permanent resident;
- e) amending certain review provisions such as extending application times for persons not present in Australia, providing for interpreters in the IRT and for the resolution of decision where the IRT is constituted by two members; and
- f) the amendment to section 36 as discussed above.

A provision has also been inserted to allow for the renumbering of the Act.

FINANCIAL IMPACT STATEMENT

There will be no effect on either Commonwealth revenue or Commonwealth expenditure as a result of these amendments.

NOTES ON INDIVIDUAL CLAUSES

Clause 2

This clause has been amended as a consequence of the insertion of new clause 35A - the renumbering provision - in order to allow clause 35A to commence immediately after the commencement of all the other provisions other than Part 3.

Clause 5

The definition of 'excluded day' in new subsection 5J(2) is amended by inserting new paragraph (c) to provide that 'excluded day' includes any period commencing when the person applies to the Federal Court under the Administrative Decisions (Judicial Review) Act 1977 or Section 39B of the Judiciary Act 1903 for review of a decision refusing that person an entry permit or when the person lodges an application to a single judge of the Federal Court to appeal the decision of the IRT to refuse him or her an entry permit. The period ends when the Federal Court's decision is handed down. (An excluded day does not include applications lodged, appealing a decision of a single judge of the Federal Court to the full Federal Court).

Clause 6

Sections 11D and 11P

New sections 11D and 11P are amended by inserting in both new subsections (5) which provide that the regulations made under paragraphs 11D(2)(b) and 11P(2)(b) shall be taken to be repealed at the expiry of 2 years after their commencement, unless either earlier disallowed or otherwise provided for in the particular regulation.

Sections 11N and 11Y

New sections 11N and 11Y are amended to include a requirement that the relevant notices providing the "priority mark" and "pool entrance mark" for visas and the "passmark" for both visas and entry permits are tabled in Parliament. This is a notification provision and there is no provision for disallowance.

Sections 11J and 11W

New sections 11J and 11W are amended by inserting in both new subsections (2A) which provide that where an application for a visa or an entry permit (respectively) has been made on the ground that the person is the spouse, child or aged parent of an Australian citizen or of the holder of a valid permanent entry permit a notice issued under section 11J or 11W shall have no effect.

In addition there are several amendments to sections in the clause which give effect to the change from "Secretary" to "Minister" as the principal decision maker.

Clauses 8, 9, 10 and 11

These amendments are merely technical amendments to reflect the change from "Secretary" to "Minister" as the principal decision maker.

Clause 12

New subsection 21D(14) is amended to allow the Secretary to issue search warrants for the purposes of the section. The Secretary will be able to delegate this power in accordance with new subsection 66DA(2). However it is anticipated that such delegation will be limited to senior officers to take into account the Scrutiny of Bills Committee's concerns.

Clause 14

New subsection 27(1)(c) is amended to remove strict liability for the offence of becoming an illegal entrant. That is, the person must have knowledge of the false or misleading nature of the material that lead to the operation of paragraph 11A(1)(b) or (c) or subsection 11A(2) in respect of him/her.

Clause 15

This amendment to section 31A merely replaces the Secretary with the Minister as the person who may require an illegal entrant to leave Australia.

Clause 17

The insertion of the new subsections into section 36 allows for persons who are in Australian waters and who are on board a vessel used in connection with the commission of an offence against Commonwealth, State or Territory legislation (e.g. fisheries) to be brought to Australia for prosecution and/or repatriation without being deemed to have entered Australia for migration purposes. This allows for the person to be removed from Australia without the need to invoke deportation procedures.

The provision allows for non-citizens to be kept in custody, for an initial period of up to 14 days, during which time a decision to prosecute must be taken and actual prosecution proceedings commenced. Where this occurs within 14 days the person may be kept in custody for the purpose of the prosecution in connection with the offence (on which basis they were brought to Australia). This includes the period during which the prosecution proceedings take place, any period during which the person is serving a sentence of imprisonment and any period relating to appeals from the original proceedings.

Persons in the new subsection (1B) custody and indeed subsection (1) or (1A) custody will not be deemed to enter Australia by being brought ashore unless they are granted a valid entry permit. Where custody under subsection (1B) is no longer available the person must be expeditiously removed from Australia. However they may be maintained in custody until such removal.

Clauses 19 and 20

These amendments are again merely to give effect to the change from "Secretary" to "Minister".

Clause 23

New section 53A is amended to provide that the instruments of exemption that may be made pursuant to that section must be published in the Gazette. This amendment is made to ensure that the contents of such instruments will be notified to, and will be able to be accessed by, the public.

Clause 26

Section 61 and 62

New sections 61 and 62 are amended by omitting the proposed subsections 61(3) and (4) and 62 (3) and (4) and substituting new subsections new subsections (3) and (4) to provide that regulations concerning reviewable decisions may not specify a total period longer than 28 days where the person the decision concerns, physically present in Australia, and a period of 70 days where the person concerned is outside Australia. (These maximum periods to lodge an application/s apply regardless of whether one or two tiers of review are available to the person).

The provisions are also reworded to give better effect to the plain English intention of legislation. The substance of the provisions other than as discussed above remains the same.

Section 64H

Section 64H, which provides for the exercise of the Tribunal's powers, currently enables the view of the member who decides against the applicant in a two member Tribunal, to be the decision of the Tribunal. The section is amended to provide that where the Tribunal is constituted by two members, the decision of the Presiding Member will prevail.

There are also several amendments to change "Secretary" to "Minister".

Section 64P

There is currently no provision in the Bill which indicates that an interpreter may be used. New subsection 64P(7) will allow a person appearing before the Tribunal to have access to an interpreter where the Tribunal is of the view that there a need for an interpreter.

Clause 34

The regulation making power in section 67 of the Migration Act is amended to allow for passenger cards to be collected from persons travelling in Australia on an international air carrier. This will close a possible loophole concerning the recording of arrival and departure of persons which could be used by criminals.

Clause 35

There are several amendments to schedules 2, 3 and 4 of the Bill which are merely technical amendments.

Clause 35A

This new clause is inserted in order to effect a complete renumbering of the Migration Act in order to satisfy concerns that the numbering of the Migration Act after the amendment would cause difficulties.