

1989

THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MIGRATION LEGISLATION AMENDMENT BILL 1989

EXPLANATORY MEMORANDUM

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

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

2011

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF REVENUE

NOTICE OF TAXPAYER'S RIGHTS

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OUTLINE

This Bill represents the Government's legislative response to the Report of the Committee to Advise on Australia's Immigration Policies as it relates to the Migration Act 1958 (the Act).

2 The Act is to be amended to provide for a statutory two tier system of review of prescribed immigration decisions. The first tier of review will be conducted by specially authorised review officers within a unit in the Department of Immigration, Local Government and Ethnic Affairs (the Department) followed by appeals to an external review body called the Immigration Review Tribunal (IRT). The present jurisdiction of the Administrative Appeals Tribunal in criminal deportation matters will not be affected. The IRT will operate independently of the Department and will have as its objective providing a mechanism of review that is fair, just, economical and quick.

3 The Act also puts in place the means by which the broad discretions currently found in the Act will be exercised by reference to decision criteria to be prescribed in the Migration Regulations (the Regulations). Once criteria for a class of application have been prescribed a decision maker will be bound by them, as will both tiers of review (where the decision is one which is prescribed as reviewable). A decision will not be reviewable under the new two tier system unless decision criteria have been prescribed in the Regulations and the decision was made on the basis of those criteria.

4 The Bill also gives legislative effect to a modified points system applicable to prescribed classes of visa decisions and entry permit decisions. Points will be allocated for criteria satisfied and an aggregate point score will be derived for each application. To ensure program control, a pooling system will operate in relation to visa applications with prescribed marks being varied by notice in the Gazette. The Minister may also make a direction providing for cessation of the receiving or processing of certain applications to ensure migration program objectives are achieved.

5 The Act will also provide for mandatory deportation orders for illegal entrants (previously prohibited non-citizens) in addition to the current discretionary deportation of illegal entrants. Once all avenues of review for an illegal entrant have been exhausted and the person has not departed Australia within the time limitations provided, the Minister, upon being satisfied the person is liable to deportation, must sign a deportation order against that person.

6 There are provisions allowing for the release of illegal entrants from custody on conditions and expansion of the provisions creating debts to the Commonwealth for the costs of detention and deportation. There is also a provision dealing with the detention of assets of persons who owe, or are likely to incur, a debt to the Commonwealth as a result of their custody and deportation.

7 To assist in the recovery of funds expended by the Commonwealth on the detention and deportation of persons who subsequently seek to re-enter Australia, provision is to be made in the Act that such persons are not to be granted a visa or entry permit unless the Minister is satisfied that appropriate arrangements have been made for repayment of the debt owing.

8 The provisions governing the conduct of persons performing services in relation to the Migration Act have also been amended by repealing the previous migration agent provisions and inserting new and updated provisions which deal more adequately with present day circumstances.

9 New search provisions have been included in the Act to provide effective measures to protect the safety of officers arresting persons under the Act and to assist officers in the performance of their duties under the Act.

10 The Act has also been amended to increase the penalties for offences against the Act to bring them into line with those currently existing in other Commonwealth legislation. In line with the Government's policy regarding sexist language in Commonwealth legislation, the Act has also been amended to remove such references.

11 The Act has also been amended to deal with the situation of other governmental agencies wishing to bring persons arrested in Australian waters to Australia for the purpose of prosecution for offences against Commonwealth, State or Territory legislation. The amendment allows such persons to be kept in custody for the purpose of the prosecution and be deemed not to have entered Australia while being prosecuted or serving any sentence of imprisonment. In this manner such persons may ultimately be removed from Australia without invoking deportation procedures.

FINANCIAL IMPACT STATEMENT

Accountable Decision Making

12 The establishment of the IRT forms part of the Government's decision to introduce a two-tier, statutory review system. In the recent past, review was conducted by means of the former Immigration Review Panels at an estimated cost of \$2.7m in 1989-90 and \$3.4m in 1990-91 and subsequent years. The additional cost of the new system, which includes assumptions of a higher caseload and establishment costs, is \$6.9m in 1989-90 and \$9.2m in a full year.

New Points System

13 Implementation of the new system is estimated to cost 115 ASL and \$13.2 million over the three-year period commencing in 1988-89. The annual ongoing cost of the system is estimated to be 25 ASL and \$4.2 million commencing 1991-92.

Enforcement

14 An amount of \$100,000 has been provided in 1988-89 to engage consultants to advise on the cost and design of new immigration detention facilities, required security levels and the merits of alternative options, including exclusive reliance on State Government facilities. The need for and extent of funding for improvements to existing Detention Centres is to be considered in the 1989-90 budget context. The proposed detention of assets of deportees will improve debt recovery and help defray the cost of detention by producing revenue estimated at \$0.2 million in a full year.

NOTES ON INDIVIDUAL CLAUSES

Clause 1 - Short Title etc

1 Provides that the Act may be cited as the Migration Legislation Amendment Act 1989.

Clause 2 - Commencement

2 Sections 1 & 2 of the Act commence on the Act receiving Royal Assent.

3 Repeal of section 11 of the Migration Amendment Act (No. 2) 1980, (subclause 2(2)), is to commence on 19 June 1990 which represents the 10th anniversary of the commencement of this provision which relates to the 'Regularisation of Status Program'.

4 Subject to the provision requiring proclamation within 6 months or automatic commencement, section 27 is to commence on proclamation. This provision has a separate proclamation date in order that the IRT may be established in anticipation of the commencement of the review provisions.

5 The remaining amendments (except section 35A) shall come into operation on a day to be proclaimed or after the expiry of 6 months after Royal Assent whichever is the earlier. The delayed operation of the Act will allow necessary amendments to the Migration Regulations to be in place prior to the commencement of the Act. Section 35A which deals with renumbering the Act, will commence on the day after the provisions referred to in subsection (4) commence.

Clause 3 - Principal Act

6 In Part II of the Act the words 'Principal Act' mean the Migration Act 1958.

Clause 4 - Interpretation

7 This clause amends and inserts a number of definitions. Notably:

'applicable pool entrance mark', 'applicable pass mark' and 'applicable priority mark' all relate to the pooling system. The applicable pool entrance and priority marks represent the upper and lower limits respectively of the pool and the applicable pass mark as prescribed is the mark against which persons in the pool are compared.

'approved form' is defined to mean a form approved in writing by the Minister.

the definitions of 'diplomatic or consular representative' and 'aged parent' merely transpose those at the former subsection 8(4) and paragraph 6A(4)(a).

'entry permit' is amended to mean permission to enter and remain in Australia and 'visa' is amended to mean permission to travel to Australia. Also included are definitions of 'valid entry permit' and 'valid visa' which are entry permits or visas granted under the Act.

'exempt non-citizen' has been defined to a large extent to be the same as the current exemptions under section 8 of the Act, namely members of the armed forces, diplomats, crew and certain other exempt persons. The definition of 'crew' has been amended to ensure that only legitimate 'crew' are exempt. Without this amendment tourists and other such persons on board pleasure vessels may be able to claim 'crew' status, and therefore the benefit of the exemption. Crew members who wish to enter Australia for more than 28 days will now need an entry permit.

the definition of 'officer' in subsection 5(1) of the Act is deleted and a new provision is substituted. The new provision differs from the current provision by firstly deleting the specific reference to 'the exercise of any power or the discharge of any duty or function under this Act' to ensure that the definition also applies to the Regulations. Secondly, the clause deletes paragraph (d), ie. the 'other person... authorised by the Minister...' and inserts two new paragraphs which refer to a member of the police force of an external territory and to officers of the Australian Protective Service. The means by which other 'persons' may exercise powers is now by virtue of the delegation provisions contained in new section 66DA.

'payment' for the purposes of Division 6 of Part II of the Act, ie. provisions dealing with persons performing services in relation to the Act is defined to cover property other than money. Where payment is made by the transfer of property rather than money, the amount taken to have been charged for the service shall be the money value of the property.

'period of grace' means the period set out in section 5J.

'permanent entry permit' and 'temporary entry permit' are distinguished on the basis of whether there is any restriction as to time to remain in Australia.

'presiding member' in relation to the IRT is defined to mean - where the IRT is constituted by 2 or 3 members, the member who, in accordance with section 64J, is to preside and where the IRT is constituted by one member - that member.

'properly endorsed valid entry permit' applies in relation to persons who are caught by the terms of section 11A. Such a person must be the holder of such a permit to either enter legally or to regularise their status after entry. The term is defined to cover both situations: where an entry permit is granted prior to the commencement of the new section 11A and where an entry permit is granted after that commencement.

'reviewable decision' is defined as a decision prescribed by regulations made under section 61 or 62.

'review authority' means both a review officer and the Immigration Review Tribunal.

'review officer' means an officer or an officer included in a class of officers of the Department prescribed for the purposes of this definition.

'score' in relation to a visa application and an entry permit application is the number of points that the applicant receives pursuant to the sections which regulate the assessment of points.

the terms 'member', 'Principal Member' and 'Senior Member' are also defined.

'valid entry permit' and 'valid visa' have been defined to include entry permits and visas issued prior to commencement of section 4 of this Act (the definitions section).

an application is 'finally determined' when either a decision has been made on the application and it is not or is no longer subject to any form of review provided in Part III, or when the decision was capable of review pursuant to Part III but the period within which the review could be instituted has passed.

Clause 5 Certain children taken to enter Australia at birth
How a person stops being an exempt non-citizen, and
Visa applicable to 2 or more persons

8 This clause inserts a number of provisions after section
5C of the Principal Act.

Section 5D

9 This section transposes those provisions contained in
the former paragraph 6AAA(a) to provide that a child who is
born in Australia and is a non-citizen is taken to have entered
at the time of birth.

Section 5E

10 This section outlines the situations in which the
various exempt non-citizens defined in section 5 lose that
status. It mirrors former subsection 8(3) except that it is
the new subsection 6(4) which makes the person an illegal
entrant, not section 5E itself.

Section 5F

11 This provision transposes the former subsection 11C(6).

Section 5G

12 This provision defines 'custody' for the purposes of the
Act. This removes any doubt as to the nature of custody for
migration purposes. The definition covers certain specific
places and also where the person is in the company of and
restrained by an officer.

Section 5H

13 This section excludes the operation of section 88E of
the Marriage Act 1961 for the purposes of the Migration Act.
This amendment is necessary to ensure certain marriages such as
bigamous, polygamous or under age marriages etc are not
recognised as valid marriages for migration purposes.

Section 5J

14 This provision establishes the period of grace after which an illegal entrant becomes liable to mandatory deportation pursuant to section 17A.

15 The period of grace for an illegal entrant starts on the day on which the person became an illegal entrant and ends when the total number of days from commencement amounts to 28 days. The period from when a person applies for an entry permit to when notified of the decision, the period from when the person, if entitled, applies for review to when notified of the decision and the period from when the person applies or appeals to the Federal Court under the Administrative Decisions (Judicial Review) Act, 1977 the Judiciary Act, 1903 or the Migration Act, 1958 until the court gives its decision at first instance are excluded from the calculation of the 28 day period. That is, the 28 day 'clock' will stop running while a person's application for an entry permit or for review of an entry permit decision is pending. It is intended that for applications for entry permits and review of decisions under this Act to stop the 'clock' they must be made in accordance with the regulations and any prescribed fee must be paid. The 28 day period continues to run when there is a 'cap' in place, pursuant to section 11W, even where the period would otherwise have amounted to 'excluded days' as defined.

Clause 6 - Repeals Divisions 1 and 1A of Part II and inserts a number of provisions

16 Division 1 relates to control of entry into Australia.

Section 6

17 This section establishes the situations in which a non-citizen on entering Australia will become an illegal entrant and how a non-citizen in Australia becomes an illegal entrant. If the person falls within the terms of section 11 the entry may be before or after the commencement of this section. If the non-citizen is not the holder of a valid entry permit and entry was not authorised under section 9 or he/she does not have a properly endorsed valid entry permit (if the non-citizen is a non-citizen to whom subsections 11A(1) or (2) applies) the non-citizen becomes an illegal entrant.

18 Reflecting the current Act, if an exempt person who is not the holder of an entry permit loses that status, he/she becomes an illegal entrant. Also reflecting the current Act, if a non-citizen who is in Australia ceases to be the holder of a valid entry permit, he/she will become an illegal entrant.

Section 7

19 This provision provides that subsection 6(1) does not apply in relation to the entry of exempt persons as defined in section 5 of the Act. The Act previously exempted such persons from the operation of all of Division 1 of Part II at entry. However, this in practical terms really only meant an exemption from the requirement to hold an entry permit at entry and this has been reflected in the new provisions. In addition, subsection 6(1) does not apply to statutory visitors. This reflects the current situation whereby statutory visitors do not obtain entry permits to enter Australia.

Section 8

20 This provision merely reflects the old subsection 8(2).

Sections 9 to 11

21 These provisions enact clause 7 of the Migration Amendment Act (No 2) 1988 (No 151) which has yet to be proclaimed. The only difference is that sections 9 and 10 will not apply to all visas granted after the commencement of the section but only to visas in a certain manner and form specified by the Minister. These visas are to be termed 'entry visas'. Those visas which are not in such a manner and form will operate in their current fashion, and an entry permit will be required at entry.

Section 11A

22 This section outlines the circumstances in which an entry permit holder becomes an illegal entrant. This provision deals with those situations covered by the current section 16 with a number of style changes. In addition, the provision allows for the exact circumstance by which the person falls within section 11A to be recognised. This is achieved by the person providing a notice of a certain date in which they disclose the reason they fall within section 11A. Any endorsement will then indicate that the person granting the entry permit recognizes the person to be a person to which section 11A applies for the reason set out in the notice of that date. The endorsed entry permit will allow the person to be the holder of a 'properly endorsed valid entry permit' as defined.

23 In this manner if a person has several section 11A circumstances, he/she will not regularise his/her status or enter Australia legally by obtaining an endorsed entry permit unless all of those circumstances are disclosed in the notice to the person granting the entry permit.

24 This provision also makes it clear that a non-citizen producing a bogus document or passenger card containing misleading etc information or making a false and misleading statement etc does not have to know that such matters were in fact untrue etc. This amendment was necessary to clarify the question of whether 'intent' must be proved in such cases. The definition of 'bogus document' also makes it clear that validly issued documents which have been fraudulently altered will be caught by section 11A.

Section 11B

25 This section merely transposes the former subsections 16(5) and (6).

Section 11C

26 This section is a machinery provision that provides the manner in which an illegal entrant who is in Australia can in fact lose that status. It is designed to prevent persons with several circumstances which bring them within the terms of section 11A from being able to declare one of those circumstances for the purposes of having an entry permit endorsed and thereby allowing their status to be regularised upon being granted the endorsed permit.

27 For the person to lose their illegal entrant status all circumstances relevant to section 11A must be disclosed and noted in the section 11A notice given to the person granting the endorsed entry permit. That entry permit will then be a 'properly endorsed valid entry permit' as defined.

Division 1A - Visas

Section 11D

28 This section extends the regulation making power of the Act. In order for the new migration regime to operate, including the establishment of decision-making criteria in the Regulations, it is necessary for the Regulations to provide for the granting of visas subject to any conditions and for different classes of visas to be prescribed.

29 Regulations made pursuant to paragraph 11D(2)(b) are to be taken to be repealed at the expiry of 2 years after their commencement, unless either earlier disallowed or otherwise provided in the regulations.

30 The section also allows for provisions necessary for the operation of the pooling system to be included in the Regulations. The section also allows for the issue of certain visas, which after entry will operate as entry permits, not to be valid entry permits for the purpose of section 11ZD; that is, applications for permanent entry permits after entry. Some visas may be issued which will be subject to the condition that the person will not be entitled to any entry permit whatsoever after entry. This provision will allow special entry facilitation arrangements to be entered into with other countries for tourism and related purposes.

Section 11E

31 This section only applies where a person makes an application for a particular class of visa in an approved form in accordance with the regulations and where the applicable fee is paid. If the section does not apply, a visa may not be granted to the person, neither may the application be considered.

32 This section also requires the Minister, when he/she proposes to grant a visa, to notify the applicant of this and require the applicant to notify, in the manner and time etc prescribed, if there has been a material change in circumstances since the application was made. Where no response is received within the prescribed time and in the prescribed manner, the applicant is deemed to have notified the Minister that there has not been a material change in circumstances. If there had in fact been a material change in circumstances the person will be taken to have made a false and misleading statement for the purpose of section 11A.

33 Where the Minister, after assessing any notified changes or taking into account the fact that no notification has been received, is satisfied there has been no material change which diminishes the person's eligibility to be granted a visa, the Minister is required to grant same. If there has been a material change in circumstances the Minister is required to reconsider the person's application (including the notified unfavourable circumstances) against the decision criteria. This process may also involve a reassessment of the points assessed under section 11L.

34 Where the Minister is not satisfied the person is entitled to a visa (according to the Regulations), the Minister is required to refuse to grant a visa unless the application is subject to the pooling system in which case the Minister may (depending upon the terms of section 11M) put the application aside and deal with it in accordance with section 11M.

35 The provision is subject to the capping provision in section 11J and to the requirement that outstanding debts to the Commonwealth are paid or arrangements have been made for payment pursuant to section 11F. Section 11F is not specifically referred to in section 11G of the Act as it will be referred to in the Regulations; that is, one of the decision criteria will be that the person is not a person to whom section 11F applies.

36 The Minister may also impose conditions on the visa where the Regulations permit this or must impose conditions where the Regulations require same.

Section 11F

37 This clause ensures that a person who has been deported from Australia, and is indebted to the Commonwealth for the costs of his/her detention or deportation or the costs of deporting his/her spouse or children under section 19, cannot be granted a visa unless the Minister is satisfied that appropriate arrangements have been made for repayment of the debt. Currently the Commonwealth can incur considerable expense in detaining and deporting a person from Australia. Such costs are generally difficult to recover even if the person returns to Australia. Under this provision the Minister could require full payment of the debt or could enter into some arrangement, prior to visa issue.

Section 11G

38 This section reflects the current section 11B and gives the Minister the power to cancel a valid visa in his or her absolute discretion.

Section 11H

39 This section provides that where a name of a spouse or a child is included in a passport or other document of identity, a visa granted to the holder of the passport shall extend to cover those other persons included in the passport. This provision, subject to style changes, merely reflects subsection 11A(4) of the current Act.

Section 11J

40 This provision allows the Minister to place a 'cap' on the processing of visa applications of a particular class. The provision is designed to allow for 'fine tuning' of the migration program. The provision stops any action in relation to the visa until the resumption day. This provision also prevents the review of a visa application or the continuance of a review while a 'cap' is in place but it does not prevent action being taken to implement a decision which has already been made in relation to the visa application.

41A However, this 'capping' will not apply to applications which have been made on the basis of the applicants being the spouse, child or aged parent of an Australian citizen or holder of a valid permanent entry permit.

Section 11K

41 This section applies Subdivision B to visa decisions where one of the prescribed criteria for the decision is that the applicant must achieve the 'necessary score'. That is, the decision is one to which the points system applies.

Section 11L

42 In dealing with applications to which the 'points system applies', the Minister must, in assessing the application, allocate to the prescribed characteristics of the applicant, the number of points as prescribed in the regulations at the time the assessment is made.

Section 11M

43 This provision provides the mechanism for the 'pooling' of visa applications. If a person achieves the priority mark his/her application will continue to be processed at that stage. If the person achieves less than the pool entrance mark his/her application will be rejected on the basis that he/she has not satisfied the decision criterion requiring him/her to achieve the 'necessary score'.

44 Where the person achieves the pool entrance mark but not the priority mark the person's application is placed in the pool ie dealt with in accordance with regulations made under subsection 11M(4).

45 Once a person is in the pool, it is intended that his/her score as assessed should then be measured against the 'passmark' which may be varied from time to time pursuant to section 11N. The passmark will be set according to the needs of the program. The pooled application will not be compared against the 'passmark' until it is next varied pursuant to section 11N. Each later consideration against the passmark will occur each time a new notice is gazetted pursuant to section 11N. This comparison with the passmark process will occur the number of times prescribed in the Regulations.

46 If a person in the pool achieves the 'passmark' his/her application will continue to be processed against health, character etc criteria. If the person does not achieve that passmark he/she will be left in the pool for a further comparison with the passmark when it is gazetted. After the person's score has been compared to the gazetted passmarks the prescribed number of times and the score does not equal the passmark, then the application will be refused on the basis that the person has not achieved the necessary score to satisfy the 'necessary score' criterion.

47 While a person remains in the pool there will be no decision on the application and by virtue of subsection 11M(6) it cannot be said that the Minister has failed to take a decision for the purposes of the Administrative Decisions (Judicial Review) Act, 1977.

Section 11N

48 This provision provides that the Minister may by notice in the Gazette specify in relation to visas the applicable pool entrance mark, priority mark and pass mark. Such a notice will operate to revoke all previous notices made under the section. Copies of such notices must be tabled in both Houses of Parliament within 15 sitting days of publication in the Gazette.

Division 1B - Entry Permits

Section 11P

49 Similarly to section 11D, section 11P extends the regulation-making power of the Act to provide for classes of entry permits and to allow for prescribed criteria to be considered in deciding whether an entry permit should be granted or not. One of the criteria may be that the person achieves the 'necessary score' which allows for the application of the points system with respect to entry permits. The section also gives the power for regulations to be made for the recording and evidencing of entry permits, in relation to the effect and operation of entry permits and in relation to the cancellation of entry permits.

50 A condition may be that the entry permit is not a valid entry permit for the purposes of section 11ZD, or that the person is not entitled to a further entry permit whatsoever after entry.

51 Regulations made pursuant to paragraph 11P(2)(b) are taken to be repealed at the expiry of 2 years after commencement unless either earlier disallowed or otherwise provided in the Regulations.

52 It also allows for conditions to be imposed regarding working in Australia. This merely reflects what was in subsection 6(6A) of the current Act.

Section 11Q

53 This section only applies when a person makes an application for a particular class of entry permit in accordance with the Regulations and the applicable fee has been paid. This removes any doubt as to when an application has been made. Unlike section 11E, there is no requirement in this section for applications to be made in the approved form. This is to enable applicants for certain classes of entry permits to apply in a manner other than by written application, for example, where entry permits may be granted at the point of entry.

54 If the section does not apply, the application is not required to be considered and there is no power to grant an entry permit.

55 Section 11Q also provides for the grant or refusal of an entry permit to an applicant for a particular class of entry permit who appears to the Minister respectively to be entitled or not entitled to an entry permit of that class.

Section 11R

56 This section replaces the current section 7 which provides for the cancellation of temporary entry permits in the Minister's absolute discretion. The section also provides for the deemed cancellation of entry permits held by persons who are illegal entrants by operation of subsection 6(2). That is, where the person is an illegal entrant by virtue of being caught by the terms of section 11A.

57 This additional amendment is necessary to clarify the current situation whereby, as a result of the present section 16, a person is deemed to be a prohibited non-citizen; but the Act does not indicate what the status is of any entry permit that person holds.

Section 11S

58 This section overrides section 64C where there has been a prescribed change in circumstances since the 10 working days referred to in section 64C and where no section 17A deportation order has been signed. That is, the person is entitled to make another application for an entry permit.

59 The section also operates in cases where the decision is subject to both tiers of review and where section 64C has already operated at the first tier. In order that the IRT may aggregate decisions and prevent further applications being made after that later aggregation, the operation of section 64C which occurred at the first tier review is overridden for this purpose.

Section 11T

60 Where a decision has been made to refuse an entry permit to a person irrespective of whether the person was an illegal entrant at the time or not, a person who is an illegal entrant is only entitled to make a further application for an entry permit where there has been a prescribed change in the person's circumstances or a notification under subsection 64C(2) has been given and there is no section 17A deportation order in respect of the person. This provision is intended to prevent 'repeated' applications made to delay the person's removal from Australia.

Section 11U

61 This section replaces the former subsections 6(7) and 6(8). It extends the operation of an entry permit issued in a family passport to include a spouse and children (as defined in section 5) whose names are included on the passport and who are entering Australia with the bearer of the passport.

Section 11V

62 This section picks up and is a plain English translation of the remaining provisions of current section 6AAA of the Act to ensure that a child born in Australia who does not become a citizen at birth, and where either or both parents hold a valid temporary entry permit, does not become an illegal entrant but is deemed included in any temporary entry permit its parent(s) hold(s). If the sole parent in Australia or both parents are illegal entrants the non-citizen child will become an illegal entrant at birth as a result of the operation of subsection 6(1) and section 5D.

Section 11W

63 This provision allows for the Minister by notice in the Gazette, to place a 'cap' on the processing of entry permit applications of a specified class where the applicant has already entered Australia and remains in Australia. The 'cap' will apply until the resumption day specified in the notice. The provision does not prevent action being taken to implement decisions taken prior to gazettal of the relevant notice. The provision operates to prevent the commencement or the continuation of review by a review authority.

64 The 'capping' of applications will not apply where the applicant is the spouse, child or aged parent of an Australian citizen or holder of a valid permanent entry permit.

Section 11X

65 This provision applies in relation to applications made after entry for entry permits of a particular class which are prescribed to be subject to the points system, by including a requirement that the person achieves the necessary score.

66 In such cases the Minister in assessing the application must give the applicant a total score made up by allocating to the applicant the prescribed number of points for the prescribed characteristics possessed by the applicant. That total score will then be compared with the priority mark which is applicable to that class of entry permit at that time. If the person's score is more than or equal to the relevant priority mark the person will be taken to have achieved the necessary score and that particular criterion will be satisfied. If the criterion is not satisfied this will then lead the Minister to refuse the application pursuant to subsection 11Q(4).

Section 11Y

67 This provision merely allows the Minister to set the priority mark for various classes of entry permit by notice in the Gazette. A new notice operates to revoke a prior notice. The Minister must cause copies of such notices to be laid before both Houses of Parliament within 15 sitting days of publication in the Gazette.

Section 11Z

68 This provision provides that a person is not to be granted an entry permit before entry into Australia unless the person is the holder of a valid visa or exempted from holding a visa by virtue of subsection 53A(1).

Section 11ZA

69 This provision provides that where a non-citizen has entered Australia without an entry permit because the person is exempt from that requirement (ie subsection (6(1)) under subsection 53A(2), then the non-citizen shall not be granted an entry permit if the instrument made under section 53A(2) so specifies in accordance with subsection 53A(3).

Section 11ZB

70 This provision is similar to section 11H except that it applies to entry permits. It prevents the grant of an entry permit to a person who owes a debt to the Commonwealth pursuant to sections 21A or 21B unless the person has made suitable arrangements for the payment of the debt.

Section 11ZC

71 This provision makes it clear that an entry permit may only be granted upon arrival in Australia (subject to section 11Z) or after entry. It reflects subsection 6(5) of the current Act.

Section 11ZD

72 This section replaces section 6A of the current Act and modifies paragraph 6A(1)(b) by requiring the spouse or child of an Australian citizen or permanent resident to be the holder of a valid temporary entry permit, and for an aged parent of an Australian citizen or permanent resident to not only hold a valid temporary entry permit, but also to satisfy the balance of family test to be set out in the Regulations.

73 The current subsection 6A(1)(e) has also been split into two individual subsections; one relating to strong compassionate grounds and one dealing with strong humanitarian grounds.

74 The definition of 'prescribed non-citizen' in subsection 11ZD(7) has been amended so that it does not refer to students who sign an acknowledgement in their visa application that they will leave Australia on completion of their training or studies as in the past, but refers to prescribed classes of students or trainees. This reflects the desire to be able to grant permanent residence to certain classes of students such as private students.

75 The definition of 'child' has also been amended to remove any ambiguity. This is to make it clear that the child must be unmarried, not the child's parent.

Section 11ZE

76 This section prevents a person being granted an entry permit while a deportation order is in force. It is intended that in cases where a deportation order is revocable it would be revoked before an entry permit could be granted to the person. In the case of a person who is the subject of a section 17A deportation order or a deemed section 18A deportation order neither of which are revocable, the person could not legally be granted an entry permit. The provision is designed to prevent '11th hour' applications being made to delay the execution of (in particular) mandatory deportation orders.

Section 11ZF

77 This section replaces the former section 9 of the Act to provide for the cessation of the effect of an entry permit once the non-citizen holder departs Australia. This clears up an anomaly in the former section 9, whereby an entry permit had no force or effect, only upon or after the holder's re-entry into Australia.

Section 11ZG

78 This section excludes the operation of Division 1B in relation to the grant of entry permits to statutory visitors except for those provisions listed in section 11ZL. Statutory visitors, because of their nature, are covered by a number of separate provisions.

Division 1C - Statutory Visitors

Section 11ZH

79 This section reflects the former section 11AB in relation to the grant of visas to statutory visitors.

Section 11ZJ

80 This provision allows for regulations to be made in relation to entry permits granted to statutory visitors. Those regulations include provision for entry permits to be granted subject to conditions or to a limitation as to time and for the existence of classes of entry permits.

Section 11ZK

81 This section merely replaces the former section 6B dealing with the grant of an entry permit to a statutory visitor after entry. The strict limitation on the power to grant such entry permits is retained.

Section 11ZL

82 This provision provides that sections 11R, 11V, 11ZC and 11ZF apply to and in relation to entry permits granted to statutory visitors.

Clause 7 - Repeal of section 16

83 This has been replaced primarily by section 11A and section 6 of this Act.

Clause 8 - Repeal of section 18 and insertion of new sections

84 This clause inserts new section 17A which allows for the mandatory deportation of certain illegal entrants. Subsection 17A(1) provides that an illegal entrant is liable to deportation if the period of grace (as defined in section 5J) for the illegal entrant has expired.

85 Where an illegal entrant is liable to deportation the Minister, upon being satisfied of this, is required to order the deportation of the person.

86 A section 17A deportation order may not be revoked and such an order operates to automatically revoke any pre-existing section 18 discretionary deportation order which may have been signed in relation to the person.

87 Section 18 of the Principal Act is repealed. New subsection 18(1) basically repeats the old subsection (1) subject to changing 'prohibited non-citizen' to 'illegal entrant'. New subsection (2) provides that a discretionary deportation order made under section 18 cannot be executed while the period of grace in respect of the person has not expired.

Clause 9 - Statutory visitors whose certificates are cancelled

88 This clause merely amends section 18A of the Principal Act to bring it into line with other provisions of the Act.

Clause 10 - Dependants of deportee

89 This clause repeals section 19 and inserts new section 19 into the Act to remedy an anomaly which previously existed in respect of the section - in the case of a deportee with dependent children, but no spouse, such dependent children could not be deported with the deportee at the deportee's request.

Clause 11 - Duty of master, etc., of vessel or installation which brought deportee to Australia to provide passage

90 This clause amends section 21 of the Act by providing that the powers given under the section are exercisable only by the Minister and providing an offence provision for non-compliance with a requirement under subsection (3A). This clause also redrafts subsections (1), (3) and (3A) as a consequence of other amendments.

Clause 12 - Costs of deporting and keeping deportees in custody. Orders restraining deportees from disposing etc of property, and Secretary may give direction about deportee's valuables

91 Clause 12 inserts a new section 21A which is substantially a redraft of current section 21A of the Act (subject to some amendment) and also inserts new sections 21B, 21C, 21D and 21E into the Act.

Section 21A

92 The amendments will assist the Commonwealth in recovering costs incurred in the deportation of a person or persons from Australia. This has been achieved by the inclusion of new subsections 21A(2) and (3) which provide that in the case of a person or persons deported under section 19 of the Act, both the deportee and his or her deportee spouse are jointly and severally liable to pay the amount of debt owing to the Commonwealth. This also applies in relation to deportee children so that deportee parents are jointly and severally liable for any debt to the Commonwealth.

Section 21B

93 New section 21B is inserted into the Act. This provision substantially replaces current subsection 21A(7) except that it also covers detention costs incurred before the person was ordered deported ie when the person was held in section 38 custody. The section also includes provisions similar to those contained in new section 21A in respect of liability for detention costs of an accompanying deportee spouse and children of a deportee. The provision again renders the deportee and his or her accompanying spouse jointly and severally liable for the detention costs.

Section 21C

94 This section allows the Secretary to apply to a court for an order in respect of a deportee's or illegal entrant's property (eg. real estate, car etc.) including any interest in the property. The order operates to restrain any dealing with the property specified in the order.

95 The court in which the application is heard is required to ascertain whether the person is liable or may, on deportation, become liable to pay the Commonwealth an amount under section 21A or 21B, and whether, if the order is not granted, there is a risk that the Commonwealth will not be able to recover the whole or part of that amount.

96 The order which the Secretary may apply for may relate to any of the deportee's or illegal entrant's property in Australia or for specified items of property in Australia.

97 The court is also given powers to grant an interim order pending determination of the application and to rescind, vary, discharge and suspend the operation of an order. The Court may also allow the illegal entrant/deportee reasonable living expenses for him/herself and his/her dependants and for reasonable legal expenses for him/herself in relation to matters arising pursuant to the Migration Act.

Section 21 D

98 Section 21 D empowers the Secretary - on apprehension of an illegal entrant or deportee (the arrested person) - to serve a notice on the person and then take possession of the person's 'valuables' located either on their person or in their control. It also allows the Secretary to freeze bank accounts which are either in the arrested person's name solely or in joint names. The Secretary is also empowered to issue search warrants for the purposes of the section. The power to issue search warrants may be delegated in accordance with new subsection 66DA(2).

99 'Valuables' is defined to include gold, jewellery, negotiable instruments, travellers cheques, cash and documentary evidence of debts owed to the person eg bank books.

100 The Secretary may take possession of the valuables or freeze the accounts at any time after serving a notice on the arrested person, any relevant financial institutions, or any other person. The Secretary may sign the notice if he/she is satisfied that the person is an illegal entrant or deportee, that the person is likely to incur section 21A or 21B debts and that if the notice is not given there would be a risk that the Commonwealth would not be able to recover the whole or a part of the debt.

101 In order to enter and search premises, vehicles etc to seize valuables the Secretary may issue a search warrant to an officer. Any officer who, either on behalf of or as a delegate of the Secretary, acts in good faith in the performance of the taking of the valuables, is not liable to any civil or criminal action in respect of the detention of the valuables.

102 Any bank or financial institution served with a copy of the notice may not, without the Secretary's written consent, deal in any way with the arrested person's account or accounts.

103 Where the notice is served on a person who owes the arrested person a debt, that person is restrained from making payment to the arrested person without the Secretary's written consent.

104 The amendments also impose a penalty on any bank, financial institution or other person served with a subsection (2) notice who breaches section 21D.

105 The Secretary must apply to a court within 3 working days for confirmation of the notice or the notice ceases to be in force. The court may only consider the factors set out in subsection 21D(11) and if satisfied the court is required to confirm the order. Such an order is valid for a maximum period of 12 months. Where a court refuses to confirm the direction, the direction ceases to be in force. Similarly to section 21C the court may allow the illegal entrant/deportee reasonable living and legal expenses.

Section 21E

106 The Secretary is empowered under this section to make certain arrangements for dealing with the valuables which he/she has taken possession of pursuant to subsection 21D(5). Where the valuables are held under this section and the person (from whom the valuables are taken) either is or becomes liable to pay the amount to the Commonwealth under sections 21A or 21B, the Secretary shall sell the valuables and use the proceeds of the sale towards the discharge of that liability. Any surplus shall be returned to the person.

107 This section also provides the circumstances in which the valuables are to be returned to the person.

Clause 13 - Carriage of persons to Australia without documentation

108 This clause reflects in substance section 11C of the Principal Act and makes it an offence for the master, owner, agent, charterer or operator of a vessel to bring a non-citizen to Australia who is not in possession of a valid visa or who is not an 'exempt non-citizen'. There are certain defences to prosecution under this section.

Clause 14 - Offences in relation to entering into or remaining in Australia

109 This clause while making consequential amendments to section 27 of the Principal Act relating to terminology and certain changes in drafting style, also makes it clear that 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).

Clause 15 - Minister may require illegal entrant to leave Australia

110 This clause amends section 31A of the Principal Act to delete the reference to an authorised officer, to change the term 'prohibited non-citizen' to 'illegal entrant' and to increase the penalty for breaching the section.

Clause 16 - Offences in relation to work

111 The amendment to section 31B occurs as a consequence of other amendments to the Act, also to implement amendments to change the penalty provisions, and replace 'authorised officer' with 'Secretary'.

Clause 17 - Custody of illegal entrant during stay of vessel in port

112 This clause makes consequential amendments to the terminology of section 36, substitutes subsection 36(4), omits subsection 36(5) of the Act, and makes amendments to provide that persons held in custody under section 36 who arrive by ship can be removed from Australia by aircraft as well as by ship. Without this provision, persons could be forced to return to sea in unseaworthy vessels or required to remain in Australia until passage on an alternative sea vessel could be arranged as passage by air would not be available.

113 In addition, the insertion of the new subsection (1B) 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 (eg 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.

114 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.

115 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.

Clause 18 - Searches of Persons

116 This clause inserts section 37A into the Act which empowers an authorised officer to, in certain circumstances, search a person's clothing and any property (like bags, coats etc) under the immediate control of the person. This may occur prior to entry or where a person has been arrested under the Act. There is currently no power which enables the search of a person or his/her accompanying property. Without such a provision, the personal safety of an arresting officer can be at risk as a person may, for example, conceal a weapon or implement which may be used in an attack on an officer or to escape from custody.

117 An authorised officer is also presently hindered in his or her ability to ascertain whether a person would become an illegal entrant on entering Australia or would be likely to breach a condition of their entry on or after entry, by not being able to search a person and his/her accompanying property. This provision does not empower an authorised officer to conduct a 'body search' or to require the person to remove their clothing, and requires an authorised officer to be of the same sex as the person being searched. If such an officer is not available the authorised officer may request another person, of the same sex as the person to be searched, to undertake the search and if that person agrees the search shall be conducted by him/her.

Clause 19 - Arrest of Illegal Entrant

118 This clause amends section 38 of the Act to take account of the new mandatory deportation regime and the new review system. Accordingly subsection 38(3) has been amended to remove the concept of a person being held in custody in order to determine if the person is a prohibited non-citizen (now an illegal entrant) and to consider whether a deportation order should be signed in respect of him/her. The provision allows the person to be kept in section 38 custody until such time as the person leaves voluntarily where that person proposes to leave voluntarily or in other cases to determine whether the person is an illegal entrant and whether he/she should be allowed to remain in Australia. However in either case, there is a maximum period of 7 days unless the person consents to a longer period.

119 The clause also inserts new subsections into section 38 specifically allowing persons arrested pursuant to the section, to be released on conditions and re-arrested for breach of any of those conditions. On re-arrest the person is again subject to the provisions of section 38.

120 The clause also inserts a new subsection to provide that a person who is held in custody under section 38 will be taken to be arrested under section 39 on the person being informed that a deportation order is in force in relation him/her. This enables a person to be transferred from one custody to another by operation of law.

Clause 20 - Arrest of deportee

Operation of section 39 in relation to deportees held in other custody

121 Similarly to the amendment to section 38, section 39 is amended to allow the release of a deportee from custody on conditions. The deportee may again be re-arrested for breach of any conditions imposed and is again subject to the provisions of section 39.

Clause 21 - Operation of section 39 in relation to deportees held in other custody

122 Section 39A has been inserted into the Act to clarify procedures in relation to persons who are the subject of a deportation order who are already held in custody other than pursuant to the Act eg in State custody for the commission of a criminal offence.

123 Section 39A allows the deportee to be given notice that a deportation order has been made in respect of him/her and that when the person is released from their current custody he/she will be kept in custody under the Act. The provisions of the current section 39, allowing the person to dispute the fact that he/she is the person in respect of whom the deportation order is in force, will be available when the person's custody changes to section 39 custody.

Clause 22 - Division 6 - Regulation of conduct of third parties in connection with the making of decisions

124 The current provisions dealing with migration agents are an anachronism and they do not deal adequately with present day circumstances. The whole of the Division is repealed and new provisions inserted which create the following offences and obligations on a person providing services in relation to migration matters:

- (i) new section 46 makes it an offence to make a false or misleading statement regarding the ability of a person or another person to induce or influence the making of a decision,
- (ii) new section 47 makes it an offence to enter into an arrangement, to offer to enter into an arrangement or to invite another person to offer to enter into an arrangement to undertake for payment that a decision under the Act to a particular effect will be made,
- (iii) new section 48 provides that if the agent has contravened either section 46 or 47, the agent is not entitled to be paid for the service performed, and the person who has paid the agent may recover the amount paid in a court of competent jurisdiction,
- (iv) new section 49 requires persons providing services in connection with the Act to provide a detailed statement of services and the amounts charged in respect of each service performed. Provision has been made for the person to seek to recover any amounts paid for which no statement has been provided, and
- (v) new section 50 provides that a person who has suffered loss as the result of the actions of an agent, and the agent concerned has been convicted of an offence against the Act, may seek a reparation order from the court to compensate for any loss they have suffered.

125 The above provisions are intended to provide effective controls over persons providing services in relation to the Act by making them accountable to their clients, and giving the clients effective rights in respect of their dealings with such persons. While there will still be the deterrent of prosecution in the Act, the more effective control rests in the provisions regarding the rights of the client to seek damages and to recover fees paid.

Clause 23 - Exemptions

126 Clause 23 inserts section 53A which specifically empowers the Minister to exempt a person or class of persons from the requirement(s) to hold a visa with respect to travel to Australia and/or an entry permit with respect to entry into Australia. These instruments must be published in the Gazette.

127 Section 53A extends the powers previously given to the Minister in the former paragraphs 8(1)(e) and 11C(1)(b). Those provisions exempted persons from particular divisions of the Act; however, the exemptions were essentially from the requirement to hold an entry permit at entry and a visa with respect to travel to Australia. These powers are included in new section 53A in that persons may be exempted from subsection 6(1) or section 26A.

128 The provision also allows for a subsection 53A(2) instrument to specify that a person who enters Australia exempt from subsection 6(1) (ie holding an entry permit at entry) shall not be granted an entry permit while remaining in Australia.

Clause 24 - Proof of certain matters.

129 To assist in the prosecution of offences instituted under the Act, section 57 of the Act is to be amended. These amendments are necessary to overcome difficulties in prosecuting offences where the holder of the original document, eg. a passport (containing a visa or entry permit), has departed Australia.

Clause 25 - Detention Centres

Secretary may issue documents concerning certain persons

Section 59

130 Section 59 is inserted into the Act to enable the Minister to establish and maintain detention centres for the custody of persons detained under the Act. Currently, detainees are held either in administratively established detention centres or in gaols. It is desired to establish, under the Act, detention centres that can be subject to regulations dealing with the conduct and supervision of detainees, and the powers of persons supervising detainees. This would establish the rights, responsibilities and obligations of all concerned with the detention of persons under the Act.

Section 60

131 There currently exists a problem when a person without valid documentation, or without any documentation, is either refused entry to Australia or is to be deported from Australia, in that often their identity is unknown. An airline may not wish to carry the person from Australia, as another country may be reluctant to allow the person to enter. To assist in the passage of such persons, section 60 of the Act will empower the Secretary to issue a document, which will largely be consistent with Annex 9 to the Convention on International Civil Aviation. This will provide the person with some documentation which may facilitate the making of arrangements to remove the person from Australia by air.

Clause 26 - Review of Decisions

132 This clause inserts a new Part III which incorporates a regime for reviewing certain prescribed decisions pursuant to the Act.

Section 61

133 This section allows for internal review of decisions. It allows for the regulations to provide for review of specified decisions of the Minister, the persons who will conduct such reviews, the form and manner of the applications for such review and the persons entitled to apply for review. Those regulations may also include the timing provisions for things which may be done or which are required to be done in connection with review of decisions under the regulations.

134 Regulations concerning reviewable decisions may not specify a total period longer than 28 days where the person who is the subject of the decision is 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).

Section 62

135 This section allows for external review by the IRT. It allows the regulations to provide for the decisions which may be reviewed by the IRT, the manner and form of applications for such review and the persons entitled to apply for such review.

136 Section 62 also allows for the regulations to prescribe the time for which things may be done or must be done with respect to review by the IRT and any fees payable in connection with such review.

137 Similarly to section 61 regulations concerning reviewable decisions may not specify a total period longer than 28 days where the person the decision concerns, is 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).

Section 63

138 This section empowers a review authority to determine reviewable decisions unless the Regulations prescribe that the review authority has only recommendatory powers in relation to a class of decision. This limiting of the determinative power is necessary as there may be certain decisions in the future which will be prescribed as reviewable but will only be suitable for the IRT to make recommendations on. (eg criminal deportation)

Section 64

139 Where the review authority's powers are determinative section 64 provides that the review authority:

- a) may exercise all the powers and discretions that are conferred by the Act on the person who made the decision;
- b) may
 - i) affirm the decision,
 - ii) vary the decision,
 - iii) set aside the decision and substitute a new decision;
- c) shall not, notwithstanding anything else in the Act, by doing any of the things referred to in (b), purport to grant an entry permit on humanitarian grounds.

140 Section 64 also provides that a decision of the review authority (to vary or set aside a decision) shall (except for the purpose of applications to the IRT for review of or appeals from decisions of the IRT) be taken to be a decision of the Minister and shall take effect from when it is notified.

Section 64A

141 Where the review authority's powers are recommendatory section 64A provides that the review authority may, in relation to the decision, recommend to the Minister:

- a) that the decision be affirmed;
- b) that the decision be varied; or
- c) that the decision be set aside and another decision substituted.

Section 64B

142 Section 64B specifies the decisions which may not be prescribed in the regulations made under new sections 61 or 62 as reviewable decisions. These decisions are:

- a) where the application for an entry permit on which the decision was based was able to be made only because the person's circumstances had changed since the last application for an entry permit;
- b) to cancel a visa or entry permit;
- c) to order the deportation of a person;
- d) a decision by the Minister whether a person has the status of refugee within the meaning of the Convention relating to the Status of Refugees that was done at Geneva on 28 July 1951 or the Protocol relating to the Status of Refugees that was done in New York on 31 January 1967.

143 These decisions have been specifically excluded from the new review process for the following reasons:

- in (a), to prevent repeated applications for review delaying the removal process,
- in (b), to retain as much as possible of the absolute discretion to cancel entry permits and visas,
- in (c), to ensure that the person's relevant circumstances are reviewed under the Act only once by review of the entry permit decisions, and
- in (d), decisions on refugee status have ramifications in the sphere of international relations and Australia's obligations under international conventions.

144 Section 64B also makes a decision non-reviewable where the Minister has certified that they should not be reviewable because to change the decision would prejudice the security, defence or international relations of Australia, or to review the decision would require consideration of deliberations or decisions of the Cabinet or a committee of the Cabinet. This provision is designed to protect the public interest and it reflects the fact that circumstances may exist where the confidentiality of certain material, which may not be released, makes the decision (based upon that material) inappropriate for review.

Section 64C

145 This provision allows for both levels of review to 'aggregate' decisions. That is, where it appears to the review authority (as defined) that the applicant might have grounds for making an application for an entry permit of the same class as that being reviewed or of another class, the review authority must notify the applicant and adjourn the review to allow those applications to be made and considered. Depending upon whether there are two tiers of review or not in relation to the particular application, and which tier the person may access, there are also prohibitions on making further applications as follows:

- a) where there is only one tier of review (either internal review or review by the IRT) the applicant has 10 days to make the application notified by the review authority, and unless the person has a material change in circumstances after that 10 day period, he/she may not make further entry permit applications while remaining in Australia.
- b) where the decision is reviewable by both tiers and a notice has been given under subsection (2) by the prescribed review officer (internal review), the person may only make further applications for entry permits after the 10 day period where the person has had a prescribed change in circumstances or the IRT has issued a notice pursuant to subsection(2)
- c) where the decision is reviewable by both tiers and the IRT has given a subsection (2) notice, the person may only make a further entry permit application in the circumstances outlined in subsection (2)

Section 64D

146 Section 64D requires the Registrar of the IRT to notify the Secretary in writing where an application for review has been made. The Secretary then has 10 working days to provide:

- (a) a statement of reasons setting out the findings of fact, the evidence on which the findings were based and the reasons for the decision; and
- b) other documents in the Secretary's possession or control considered by the Secretary to be relevant to the review.

Section 64E

147 Section 64E provides that the IRT shall have as its objective the providing of a mechanism of review that is fair, just, economical, informal and quick. The IRT in reviewing a decision is not bound by technicalities, legal forms or rules of evidence and shall act according to substantial justice and the merits of the case - subject to being bound by the decision criteria prescribed in the Regulations for the particular class of decision being reviewed as provided by section 66DC of the Act.

Section 64F

148 Section 64F provides that the IRT may sit in relation to a particular review as a one, two or three member panel according to written directions given by the Principal Member or Senior Member in accordance with guidelines established by the Principal Member.

Section 64G

149 This provision deals with the situation where a member constitutes the IRT for a particular review or is one of the members who constitute the IRT and that member becomes unavailable for whatever reason. Where the member constituted the IRT for that review the Principal Member must reconstitute the IRT. Where the unavailable member was one of the members who constituted the IRT for that review the Principal Member has the discretion to reconstitute the IRT or direct the remaining members to continue the review. The Principal Member in exercising those discretions has to have regard to the objective of the IRT to provide a hearing that is fair, just, economical and quick.

Section 64H

150 Section 64H lays down the framework for resolution of questions before the IRT. Where the IRT is constituted by 3 members, all decisions shall be decided according to the majority. Where the IRT is constituted by 2 members, the decision of the Presiding member will prevail where the members are not of the same opinion.

Section 64J

151 Section 64J creates a 'presiding member' for the purposes of a review. Where the IRT is constituted by 2 or 3 members:

- a) if the Principal Member is one of those members he/she shall preside;

- b) if the Principal Member is not one of those members and there is only one Senior Member he/she shall preside;
- c) if those members include two or more Senior Members or no Senior Member the Principal Member shall designate which Senior Member or member is to preside at that review.

Where the IRT is constituted by one member as a result of the definition of 'presiding member' in section 5 of the Act that member will be the presiding member.

Section 64K

152 Section 64K allows an applicant for review to the IRT to submit to the IRT a statutory declaration in relation to any fact the applicant wishes the IRT to consider and the applicant and the Secretary may submit written argument in relation to the issues relating to the decision under review. This provision allows for the means by which written material may be placed before the IRT in order for it to consider whether it requires oral evidence or whether the written material is sufficient to make a decision.

Section 64L

153 If the IRT is satisfied after considering material before it as a result of documents given to the Registrar pursuant to new sections 64D and 64K, that it will make a decision that is most favourable to the applicant, section 64L allows the IRT to review the decision on the papers. In such a case, the applicant does not have a right to give oral evidence before the IRT.

Section 64M

154 Where the IRT is not so satisfied as mentioned in new section 64L, section 64M provides that the IRT shall obtain such other evidence as it thinks necessary. This is subject to the overriding requirement that the applicant for review has a right to give oral evidence. Where the IRT obtains oral evidence no person has the right to address orally the IRT about the issues arising in relation to the decision under review. The provision is designed to implement the concept that submissions on issues and argument on issues should only be put before the IRT in a written form.

Section 64N

155 This section requires the IRT where it is not satisfied as specified in section 64L, to notify the applicant that it is required to obtain further evidence. The applicant then has 7 days to give written notice of persons the applicant wants the IRT to obtain oral evidence from. While the IRT is required to have regard to the applicant's wishes it is not required to obtain the evidence requested by the applicant. The only person it must take oral evidence from if the applicant desires, is the applicant him or herself.

Section 64P

156 Section 64P sets out the powers of the IRT. These powers include:

- . the taking of evidence on oath or affirmation,
- . adjourning the review from time to time
- . subject to sections 64ZF and 64ZG, the giving of information to the applicant and the Secretary, and
- . requiring the Secretary to arrange for the making of any investigation or any medical examination that the IRT thinks necessary and to give the IRT a report in relation thereto.

157 The section also allows the presiding member in relation to a review to summon a person who is in Australia to appear to give evidence and/or to produce documents, to require a person appearing to give evidence, to take an oath or affirmation and to administer an oath or affirmation that the evidence the person will give will be true.

158 Subsection 64P(6) makes it clear that a person appearing before the IRT to give evidence is not entitled to be represented by any other person before the IRT and is not entitled to examine or cross examine any other person appearing before the IRT to give evidence. This section is designed to implement the intention that the IRT should not operate on an adversarial basis.

159 Subsection 64P(7) gives effect to the common law position in that the IRT has a discretion to allow a person, appearing before it to give evidence, to use an interpreter where he/she is not proficient in English.

Section 64Q

160 This section provides for the presiding member or some other person authorised by the presiding member to take evidence on oath or affirmation inside or outside Australia subject to limitations as are specified by the presiding member.

161 The provision reflects the fact that it will often be necessary for information to be obtained from persons in places where the IRT is not sitting. Where an oath or affirmation is administered by a person other than a member of the Tribunal undertaking the review, that person exercises the powers of the IRT in respect of the giving of oaths or affirmations and is required to provide a written record of the evidence taken to the IRT.

Section 64R

162 Section 64R provides that the IRT shall take oral evidence in public, unless the IRT is satisfied that it would be in the public interest to direct that particular oral evidence or oral evidence for the purposes of a particular review should be taken in private, in which case it may so direct. In such a case the IRT may also give directions as to who may be present when the oral evidence is given. This provision is designed to assist in the protection of confidential information and also to protect persons giving evidence before the IRT.

Section 64S

163 Section 64S provides that upon making a decision the IRT is to provide to the Secretary and the applicant a statement of reasons setting out its decision, the reasons for the decision, the findings on any material questions of fact and referring to the evidence or any other material on which the findings of fact were based. The IRT has 14 days after the making of a decision to give the statement to the applicant and the Secretary.

164 Once that statement is prepared section 64S also requires the IRT to return to the Secretary any document provided for the review and to the Secretary a copy of any other document that contains evidence or material on which the findings of fact were based.

Section 64T

165 Section 64T provides that, subject to section 64ZG, the decisions of the IRT are to be published. Section 64ZG allows certain information not to be published where it is in the public interest not to do so.

Section 64U

166 Section 64U allows the Minister, where he/she thinks it is in the public interest to do so, to set aside a decision of the IRT and substitute a decision which is more favourable to the applicant. Where this occurs the Minister must then cause a statement to be laid before both Houses of Parliament within 15 sitting days after the decision was set aside.

167 The statement must:

- a) set out the decision of the IRT,
- b) set out the decision substituted by the Minister,
- c) set out the Minister's reasons for the decision and in particular the public interest reasons for setting aside the decision, and
- d) not include the name of the applicant or where the Minister thinks this would not be in the public interest, the name of any other person.

168 This provision assists in confirming that the Minister retains ultimate responsibility under the Act. It is anticipated that the circumstances in which this provision would be relied upon would only arise rarely.

Section 64V

169 Section 64V allows for appeals to be made to the Federal Court on a question of law from any decision of the IRT by the applicant for review or the Minister. The Federal Court may make an order affirming or setting aside the decision of the IRT and an order remitting the case to be decided again, with or without the taking of further evidence, in accordance with directions of the Court.

Section 64W

170 This section provides that the institution of an appeal does not prevent action being taken to implement the decision but that the operation of the decision may be stayed by a Judge of the Federal Court.

Section 64X

171 Section 64X provides that the Federal Court has jurisdiction to the exclusion of all other courts other than the High Court.

Section 64Y

172 Section 64Y provides a penalty for persons summoned to appear before the IRT to give evidence and who are given reasonable expenses, for failing without reasonable excuse to attend or appear from day to day unless excused or released from further attendance.

Section 64Z

173 Section 64Z provides a penalty for persons appearing before the IRT to give evidence who refuse or fail to take an oath or affirmation when required, refuse or fail to answer a question that they are required by the presiding member to answer, or they refuse or fail to produce a document they had been summoned to produce.

174 The section also provides a penalty for persons appearing before the IRT to give evidence who knowingly give evidence that is false or misleading in a material particular.

Section 64ZA

175 Section 64ZA imposes a penalty on a person who obstructs or hinders the IRT or a member in the performance of the functions of the IRT, or disrupts the taking of evidence before the IRT.

Section 64ZB

176 Section 64ZB gives the same protection and immunity to members of the IRT as that given to a Justice of the High Court. Persons appearing before the IRT have the same protection and are subject to the same liabilities as a witness in proceedings in the High Court.

Section 64ZC

177 Persons appearing to give evidence before the IRT, other than the applicant, are entitled, by new section 64ZC, to be paid an allowance for expenses fixed by or in accordance with the regulations. These fees and allowances are payable by the Commonwealth except in respect of persons who the applicant has notified the IRT that the IRT should obtain evidence from.

Section 64ZD

178 If a document or information would prejudice the security, defence or international relations, or would disclose Cabinet, or a committee of Cabinet deliberations or decisions, the Minister may certify in writing that the release of such a document or information would be contrary to the public interest. Section 64ZD provides that the Secretary shall not give to the IRT such a document or information.

Section 64ZE

179 Section 64ZE deals with a document or information in relation to which the Minister has issued a certificate on the basis that disclosure would be contrary to the public interest, (on the basis that material in the document or information could form the basis of a claim for Crown privilege, other than for a reason set out in section 64ZD) or the document, or information in the document, or the information, was given in confidence.

180 Where the Secretary gives information or a document to the IRT the Secretary shall notify the IRT in writing that the section applies and may give the IRT written advice that the Secretary thinks relevant about the significance of the document or information.

181 Where the IRT has been so notified it may rely on the document or information and may disclose to the applicant any matter contained in the document or the information where it thinks it appropriate to do so having regard to any advice given by the Secretary.

182 It is intended that the IRT may rely on such documents or information in making its decision without breaching the rules of natural justice if the applicant is not advised of that document or information. It is also intended that if the IRT chooses to release the document or information in full knowledge of the Secretary's advice it should be responsible for the release.

Section 64ZF

183 Section 64ZF applies to past and present members of the IRT, (appointed or acting), and past and present officers of the IRT and to persons providing services to the IRT. It prohibits the use of information or a document obtained in the course of a person performing his/her duties or functions or exercising a power under the Act other than for the purpose of the Act or in the course of performing that duty or function. The section also prevents such a person from being compelled to produce a document or divulge or communicate to any court any information to which the section applies. 'Court' is defined as including any tribunal or authority possessing the power to compel a person to do such things.

184 This section is subject to the Freedom of Information Act 1982 in that a person is entitled to personal information under the Freedom of Information Act.

Section 64ZG

185 Section 64ZG allows the IRT to direct that any evidence given before the IRT or information given to the IRT or the contents of any document produced to the IRT shall not be published, or shall not be published except in the manner specified by the IRT and to particular persons, where it is in the public interest to impose such a restriction. This does not prevent a person who otherwise has knowledge of the matters referred to, from publishing the details thereof.

Section 64ZH

186 Section 64ZH allows the IRT to sit in various places in Australia as are convenient and to sit in different places at the same time.

Clause 27 - Immigration Review Tribunal

187 This clause inserts a new Part IIIA which establishes the Immigration Review Tribunal.

Section 64ZJ

188 Section 64ZJ establishes the IRT which consists of a Principal Member, such number of Senior Members and members (not exceeding the prescribed number) as are appointed.

Section 64ZK

189 Section 64ZK provides for the members of the IRT to be appointed by the Governor-General with the Principal and Senior Members being appointed as full time members and other members being able to be appointed as full or part time members.

Section 64ZL

190 Section 64ZL makes the Principal Member responsible for the overall operation and administration of the IRT. The Principal Member is to monitor the IRT's operations and ensure they are as fair, just, economical, informal and quick as practicable, and allocate the work of the IRT in accordance with written guidelines laid down by him or herself. The guidelines are to include giving priority to cases where a person is held in custody.

Section 64ZM

191 Section 64ZM provides that members may be appointed while they remain under the age of 65 years for 5 years, provided that they shall not be appointed for a period that extends beyond the day on which they turn 65.

Section 64ZN

192 This provision merely deals with the payment of remuneration and allowances to the Principal Member.

Section 64ZP

193 This section provides for Senior Members and members to be paid remuneration and allowances at either Senior Executive Service level 2 or 1 respectively.

194 Part time members are to be paid such remuneration and allowances as are determined by the Minister in writing.

Section 64ZQ

195 Section 64ZQ allows the Minister to grant leave of absence to a member on such terms and conditions as the Minister determines in writing.

Section 64ZR

196 Section 64ZR provides that a member holds office on such terms and conditions if not provided for in the Act as the Minister determines in writing.

Section 64ZS

197 Section 64ZS allows a member to resign by writing to the Governor-General.

Section 64ZT

198 Section 64ZT deals with the situation where a member has a conflict of interest in relation to a review by the IRT. A conflict of interest is defined as any interest pecuniary or otherwise that could conflict with the proper performance of the member's functions in relation to that review.

199 The clause requires the Principal Member to disclose such a conflict of interest to the Minister and in any other case for the member to disclose the conflict to the Principal Member. For the member with the conflict of interest to take part in the review or exercise any powers in relation to the review, the consent of the applicant and the Minister (if the member is the Principal Member) or the applicant and the Principal Member (if the member is a Senior member or ordinary member) is required.

Section 64ZU

200 Section 64ZU provides that the Governor-General may remove a member from office on the ground of proved misbehaviour, or physical or mental incapacity. The Governor-General may also remove members from office on a number of other more specific grounds which are listed including the member having a direct or indirect pecuniary interest in an immigration advisory service which is defined to mean a body that provides services in relation to the seeking by non-citizens of permission to enter or remain in Australia.

Section 64ZV

201 Section 64ZV allows the Minister to appoint a person to act in a senior office in certain circumstances. A senior office is defined to mean the office of Principal Member or an office of Senior Member. A person shall not continue to act for longer than twelve months unless the Minister directs that the person shall continue to act in the office after the normal terminating event occurs. The normal terminating event is either where the vacancy in office is filled by an appointment or the holder of the office ceases to be absent or unable to perform the duties.

202 The section also ensures that any act or direction of the IRT when constituted to include a person who is acting, will not be invalidated because there was some irregularity in the appointment. Anything done by or in relation to a member purporting to act under the clause is not invalid merely because of an irregularity in the appointment.

Section 64ZW

203 Section 64ZW allows the Principal Member to delegate any of his/her powers to a Senior Member.

Section 64ZX

204 Section 64ZX requires the Minister to establish such registries of the IRT as he/she thinks fit and to designate one of the registries as the Principal Registry.

Section 64ZY

205 Section 64ZY requires there to be a Registrar, Deputy Registrar and such other officers of the IRT as are required and that they are to be appointed by the Minister. The Registrar, Deputy Registrar and officers shall be appointed or employed under the Public Service Act 1922.

Section 64ZZ

206 Section 64ZZ allows the Minister to appoint persons employed or appointed under the Public Service Act 1922 to act in an IRT office during a vacancy in the office or during a period when the holder of the office is absent from duty.

Clause 28 - Obstructing etc any person exercising powers etc

207 This clause substitutes section 65 to delete reference to the Minister and insert 'person'.

Clause 30 - Repeal of section 66

208 As a result of the fact that the Director of Public Prosecutions ultimately has exclusive control over prosecutions in respect of Commonwealth legislation, section 66 is of little value and is therefore repealed.

Clause 31 - Conduct of directors, servants and agents.
Penalties for offences committed by bodies corporate.

Section 66BA

209 This section is designed to assist in the prosecution of corporations who act through directors, servants or agents. It renders the conduct or state of mind of the director, servant or agent acting within his/her actual or apparent authority to be the conduct or state of mind of the body corporate unless reasonable precautions were taken and due diligence was exercised to avoid the conduct.

210 Similar provisions apply in relation to the conduct or state of mind of a servant or agent of a person other than a body corporate.

Clause 32 - Repeal of Section 66D and Sections inserted.

Section 66D

211 This section enables the Minister to approve in writing a form for the purposes of the Act. This ties in with the definition of 'approved form' in section 5.

Section 66DA

212 This section replaces old section 66D of the Migration Act. It provides that the Minister and Secretary may in writing delegate to 'a person' any of their respective powers under the Act.

213 The delegation has been made to a 'person' rather than to an officer to take account of the amendment of the definition of officer which does not now permit 'a person' to be made an 'officer'.

Section 66DB

214 This section provides that in any delegation of the power to grant a visa or entry permit, the delegate, while required to make the decision, is not required to perform personally all other administrative tasks involved.

Section 66DC

215 This section provides that all the powers under the Act including those relating to review must be exercised in accordance with any applicable regulations. The section also makes it clear that persons exercising powers under the Act are entitled to exercise that power on the basis of information contained in the application. The repository of the power may however choose to obtain or have regard to other relevant information. That is, it will be open to decision makers not to take into account changed circumstances but to rely on the information provided in the application only. [This is further qualified by requiring the application to be in the approved form or attached thereto and to be lodged in accordance with the Regulations]

Section 66DD

216 This provision gives the Minister power to issue general policy directions to persons performing functions or exercising powers under the Act. This provision also ensures the Minister retains responsibility for general policy direction.

Clause 33 - Review of Decisions

217 In line with the repeal of Division 6, section 66E needs to be amended to delete reference to decisions under section 48 being reviewable by the Administrative Appeals Tribunal, and this is the effect of this clause.

Clause 34 - Regulations

218 This clause amends the regulation making power to provide the following:

- (i) empowering the Governor-General to make regulations to charge and recover fees in respect of any matter under the Act or Regulations, rather than the narrow provision currently contained in paragraph 67(1)(a) of the Act (which limits fees to applications for entry permit, visas or the undertaking of English language tests). The provision also allows for the charging of fees for review of decisions where such review is other than pursuant to Part III of the Act.
- (ii) Subregulation 67(1)(ab) is amended to allow for passenger cards to be collected from persons travelling in Australia on an international air carrier.
- (iii) inserting a new paragraph (ac) to provide for the making of regulations in relation to the use of the information collected under existing paragraph 67(1)(ab) by person or bodies other than officers of the Department.
- (iv) inserting new paragraph 67(1)(ad) which empowers the Governor-General to make Regulations with respect to the service, lodgement or giving of documents.
- (v) new subsection 67(1A) allows regulations made under paragraph 67(1)(ad) to indicate when documents given to or served upon a person are taken to have been received. This provision is necessary to cover situations such as where persons' whereabouts are unascertainable or where an address has been changed without the Department being notified.
- (vi) repealing sub-sections 67(3) and (4), which are now no longer necessary, and substituting new subsection 67(2A) which provides for Assurances of Support to remain valid regardless of any change in circumstances that may occur during the period of the Assurances' validity. That period will be prescribed in the regulations.

Clause 35 - Amendment of Principal Act by Schedules 1, 2, 3, 4, 5 and 6

Clause 35A - Renumbering and Re-lettering of the Migration Act

219 This provision is inserted in order to effect a renumbering of the Migration Act in total. Although legally the renumbering will be effective immediately the provision is commenced, the practical renumbering of the Act will occur when it is next reprinted.

PART 3 - Amendment of the Migration Amendment Act (No 2) 1980

Clause 36

220 This clause provides that in Part III of the Act 'Principal Act' means the Migration Amendment Act (No 2) 1980.

Clause 37

221 This clause repeals section 11 of the Migration Amendment Act (No 2) 1980 which was the transitional provision for the Regularisation of Status Program. The provision is no longer necessary as it deals with applications lodged prior to 1 January 1981.

Schedule 1 - Amendments relating to penalties

222 Penalties for offences against the Act have been increased to bring them into line with the penalties for offences of a comparable nature currently existing in other Commonwealth legislation.

Schedule 2 - Amendments relating to sexist language

223 In line with the Government's policy regarding sexist language in Commonwealth legislation, the Act has been amended to remove all references which have sexist connotations and to amend sexist provisions such as the current paragraph 21(8)(c).

Schedule 3 - Amendments relating to powers of Secretary

224 This schedule reflects the fact that the concept of authorised officer has been removed from a number of provisions in the Act and replaced with the Secretary. It is intended that the Secretary will use his/her power of delegation instead of 'authorising' persons to exercise powers.

Schedule 4 - Amendments relating to Illegal Entrants

225 This schedule merely changes the term prohibited non-citizen to illegal entrant wherever it appears in the Act and it also inserts consequential transitional provisions.

Schedule 5 - Other consequential amendments to the Migration Act 1958

226 This schedule implements other minor consequential amendments.

Schedule 6 - Consequential amendments to other legislation

227 This schedule makes consequential amendments to the following legislation:

- . Australian Citizenship Act 1948
- . Australian Protective Service Act 1987
- . Departure Tax Collection Act 1978
- . First Homeowners' Act 1983
- . Health Insurance Act 1973
- . Radiocommunications Act 1983
- . Social Security Act 1947
- . Veterans' Entitlements Act 1986

228 In particular, these amendments reflect the changes in terminology from

- . 'prohibited non-citizen' to 'illegal entrant'
- . 'entry permit' to 'valid entry permit'
- . 'visa' to 'valid visa'

229 In addition, a reference to an 'exempt non-citizen' means a person who is an exempt non-citizen as defined for the purposes of the Migration Act 1958 who is not the subject of a declaration pursuant to section 8 of the Migration Act 1958.

230 The Bill generally also includes various transitional provisions.