

1995

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

MIGRATION LEGISLATION AMENDMENT BILL (No. 2) 1995

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister
for Immigration and Ethnic Affairs,
Senator the Hon. Nick Bolkus)



MIGRATION LEGISLATION AMENDMENT BILL (No. 2) 1995**OUTLINE**

1 The Migration Legislation Amendment Bill (No. 2) 1995 ("the Bill") seeks to amend the existing Safe Third Country ("STC") provisions in subdivision AI of the *Migration Act 1958* ("the Act"). The Bill provides that where subdivision AI applies to a non-citizen, it will invalidate certain visa applications which have not been finally determined. The visa applications will be invalidated although they were made before subdivision AI of the Act applied to the non-citizen.

2 The existing STC provisions apply to non-citizens who are covered by the Comprehensive Plan of Action ("CPA") or an agreement between Australia and an STC. An STC for a particular non-citizen will be a country that is prescribed by the regulations (referred to as "STC regulation"), and with which the non-citizen has a prescribed connection. The STC regulation has the effect of invalidating certain visa applications subsequently lodged by persons covered by the regulation.

3 Amending the Act so that visa applications cease to be valid prior to (as well as after) the STC regulation takes effect gives proper expression to the concept of a safe third country. By definition, an STC is a country that has afforded (or was able to afford) effective protection to an individual before that person's arrival in Australia. An agreement between Australia and the STC merely recognises this situation. Therefore, the Bill seeks to invalidate visa applications lodged prior to the making of the STC regulation because effective protection has already been available to the individuals concerned.

4 In relation to the recent unauthorised boat arrivals in northern Australia, the Government believes that subdivision AI of the Act should be amended to ensure specific coverage of the Vietnamese refugees (including their close relatives and dependents) who have settled in the People's Republic of China ("the PRC"). These persons have been settled in the PRC. The Government of the PRC has provided them with housing, land and access to other facilities and the United Nations High Commissioner for Refugees has been closely involved in the settlement process, which it regards as having been very successful.

5 In relation to these Vietnamese refugees, the Bill provides that certain visa applications will cease to be valid if made between 30 December 1994 and before Statutory Rule No.3 of 1995 (which prescribes the PRC as a safe third country) takes effect. This is consistent with the Minister's media statement of 30 December 1994. This will not apply to persons who have already been granted a substantive visa or to whom it has been determined are owed protection obligations by Australia. Further, the Minister has the non-compellable discretion to allow a person's applications to remain valid.

6 In relation to future STC regulations, the Bill provides that certain visa applications will cease to be valid if made during a transitional period before the STC regulation takes effect. The transitional period may begin on a day specified by the Minister in the Gazette or a maximum of 6 months before the STC regulation takes effect. This will not apply to persons who have already been granted a substantive visa or to whom it has been determined are owed protection obligations by Australia. Further, the Minister has the non-compellable discretion to allow a person's applications to remain valid.

FINANCIAL IMPACT STATEMENT

7 The amendments proposed in the Bill will result in some savings in onshore refugee determination processing costs, given that a number of unauthorised arrivals already in Australia will not be able to access or continue to access Australia's refugee assessment system. These savings flow from the promotion of burden sharing in refugee processing and protection amongst countries within the region and further afield. It is not possible to quantify the full extent of such savings in view of the unpredictable nature of future arrivals in Australia of persons covered by an STC regulation, and of the timing and coverage of any bilateral or multilateral agreements supporting the return of asylum seekers to other countries for protection or refugee assessment.

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NOTES ON INDIVIDUAL CLAUSES

Clause 1 Short Title

1 This clause provides that the Act may be cited as the *Migration Legislation Amendment Act (No. 2) 1995*.

Clause 2 Commencement

2 This clause provides that the amendments commence on Royal Assent.

Clause 3 Schedule

3 This clause provides that the *Migration Act 1958* ("the Act") is amended as set out in the applicable items in the Schedule.

Clause 4 Applications made before People's Republic of China prescribed as a safe third country in relation to certain non-citizens

4 This clause applies to certain visa applications made during the "transitional period" before Statutory Rule No.3 of 1995 (which prescribes the People's Republic of China as a safe third country in relation to certain non-citizens) takes effect. The "transitional period" begins on 30 December 1994 and ends immediately before Statutory Rule No.3 of 1995 takes effect.

5 Subclause 1 provides that certain visa applications made during the transitional period cease to be valid applications ("the PRC ceasing provisions"). The PRC ceasing provisions apply to:

- all visa applications made by a non-citizen who has not been immigration cleared; and
- all protection visa applications made by a non-citizen who has been immigration cleared.

6 Subclause 2 removes any doubt that the PRC ceasing provisions apply to applications which are the subject of a review by or an appeal to the Immigration Review Tribunal, the Refugee Review Tribunal, the Administrative Appeals Tribunal, a Federal Court or any other body or court. No visa may be granted as a direct or indirect result of such an application.

7 Subclause 3 provides that the PRC ceasing provisions do not apply to a non-citizen if it has been determined this person is owed protection obligations by Australia or if he or she has been granted a substantive visa.

8 Subclause 4 provides that the Minister has the power to exercise a non-compellable discretion in favour of a non-citizen thereby allowing his or her application or applications to remain valid. In addition, paragraph 4(b) makes a technical and consequential change to the operation of the obligation to remove under section 198 in relation to such people.

Schedule Amendment of the *Migration Act 1958*

Item 1 Subsection 91F(1)

9 Section 91F of the Act is amended to give the Minister the power to exercise a non-compellable discretion in favour of non-citizens who made applications during the "transitional period" as well as after an STC regulation takes effect. The exercise of this discretion would have the effect that the applications lodged by those non-citizens would remain valid.

Item 2 After section 91F Applications made before regulations take effect

10 Proposed new section 91G applies to certain visa applications made during the "transitional period" before an STC regulation takes effect. The "transitional period" begins on a "cut off day" (see proposed new subsection 91G(4) below) and ends immediately before the STC regulation takes effect.

11 Subsection 91G(1) provides that certain visa applications made during the transitional period cease to be valid applications("the ceasing provisions"). The ceasing provisions apply to:

- all visa applications made by a non-citizen who has not been immigration cleared;
and
- all protection visa applications made by a non-citizen who has been immigration cleared.

12 Subsection 91G(2) removes any doubt that the ceasing provisions apply to applications which are the subject of a review by or an appeal to the Immigration Review Tribunal, the Refugee Review Tribunal, the Administrative Appeals Tribunal, a Federal Court or any other body or court. No visa may be granted as a direct or indirect result of such an application.

13 Subsection 91G(3) provides that the ceasing provisions do not apply to a non-citizen if it has been determined that this person is owed protection obligations by Australia or if he or she has been granted a substantive visa.

14 Subsection 91G(4) provides that the cut-off day must not be before the day on which the Minister announces his or her intention in the Gazette to make an STC regulation. Alternatively, the cut-off day cannot be more than 6 months before the STC regulation takes effect.

Item 3 Subparagraph 198(7)(d)(i):

15 This amendment to section 198 ensures that the obligation to remove a non-citizen is subject to a favourable exercise of the Minister's power under proposed subsection 91F(1)(a).

Item 4 Subparagraph 198(7)(d)(ii):

16 This amendment makes a minor and technical amendment to reflect the restructuring of subsection 91F(1).

