

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

MIGRATION LEGISLATION AMENDMENT BILL (No.4) 1994

EXPLANATORY MEMORANDUM

(Circulated by authority of the Acting
Minister for Immigration and Ethnic Affairs,
Senator the Hon. John Faulkner)

MIGRATION LEGISLATION AMENDMENT BILL (No.4) 1994

OUTLINE

1 The Migration Legislation Amendment Bill (No.4) 1994 ("the Bill") seeks to ensure that asylum seekers who have had access to protection in another country should not have access to Australia's system of protection, other than in exceptional circumstances.

2 The need to amend the *Migration Act 1958* ("the Act") to this effect has been demonstrated by the recent unauthorised arrival of boat people from the Galang Processing Centre in Indonesia. These people are covered by the Comprehensive Plan of Action ("CPA") for Vietnamese and Lao refugees and have already had their claims fully considered in a process approved by the United Nations High Commissioner for Refugees ("UNHCR").

3 The CPA was the response of the international community to the outflow of Vietnamese and Lao asylum seekers during the 1970s and 1980s. It was adopted in Geneva on 14 June 1989 by:

- the governments of countries from where asylum seekers originated (Vietnam and Laos), countries or a territory which offered first asylum to boat people (Indonesia, Malaysia, the Philippines, Thailand and Hong Kong) and countries offering resettlement of refugees (including Australia); and
- UNHCR.

4 The CPA is specifically covered in the Bill because it is the major agreement on refugee status determination in our region.

5 The Bill provides for a new Subdivision AI ("the Subdivision"), including an objects provision, to be inserted into Division 3 of Part 2 of the Act. Consequential amendments are made to the section 198 obligation to remove certain unlawful non-citizens from Australia.

6 The proposed new Subdivision will apply to non-citizens who are covered by the CPA or an agreement between Australia and a safe third country ("STC") for that non-citizen (no agreements have yet been made). A STC for a particular non-citizen will be a country that is prescribed by the regulations, and with which the non-citizen has a prescribed connection.

7 If the proposed Subdivision applies to a person, certain visa applications made by the person will not be valid. However, regulations may exclude a non-citizen or a class of non-citizens from the application of the Subdivision.

8 For non-citizens to whom the proposed Subdivision applies, no visa application will be valid if they have not been immigration cleared. For such non-citizens who have been immigration cleared, only protection visa applications will not be valid. If the

Minister thinks that it is in the public interest to do so, he or she will have the non-compellable discretion to allow a valid application to be made by a particular non-citizen within 7 working days.

9 Unlawful non-citizens covered by the proposed Subdivision will be subject to mandatory removal from Australia under new subsection 198(7) or under one of the existing removal powers in section 198, unless the Minister has determined that the bar be lifted and a valid visa application has been made within the time limit.

10 A transitional provision in the Bill applies to those non-citizens who would be covered by the Subdivision on commencement but who have applied for a protection visa on or after 1 September 1994 and before commencement. This gives effect to a statement by the Minister on 29 August 1994 that the scheme would apply to any such persons.

FINANCIAL IMPACT STATEMENT

11 The amendments proposed in the Bill are likely to result in some savings in onshore refugee determination processing costs, flowing from the promotion of burden sharing in refugee processing and protection amongst countries within the region and further afield. In view of the unpredictable nature of arrivals in Australia of persons found not to be refugees under the CPA, 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, it is not possible to quantify the extent of such savings.

MIGRATION LEGISLATION AMENDMENT BILL (No.4) 1994

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.4) 1994*.

Clause 2 Commencement

2 This clause provides that the amendments commence on Royal Assent. Item 3 of the Schedule, discussed below, deals with the effect of the amendments on visa applications made on or after 1 September 1994 and before commencement.

Clause 3 Schedule

3 This clause provides that the *Migration Act 1958* ("the Act") is amended as set out in items 1 and 2 of the Schedule. Item 3 does not amend the Act but is a transitional provision which has effect according to its terms.

Schedule Amendment of the *Migration Act 1958*

Item 1 Insertion of new Subdivision AI of Division 3 of Part 2 Certain non-citizens unable to apply for certain visas

4 A new Subdivision AI (sections 91A-91F) is inserted in Division 3 of Part 2 after Subdivision AH.

New section 91A Reason for Subdivision

5 Proposed new section 91A sets out the reason for the amendments. That reason is that the Parliament considers that certain non-citizens who have had access to protection in another country should not have access to Australia's system of protection. Accordingly, certain non-citizens who are covered by the Comprehensive Plan of Action for Vietnamese and Lao refugees ("CPA", discussed below) or an agreement between Australia and a safe third country ("STC", discussed below), will not be able to apply for a protection visa or, in some cases, any other visa. Such non-citizens who are unlawful non-citizens will be subject to removal under Division 8 of Part 2 of the Act.

New section 91BInterpretation

6 Proposed new subsection 91B(1) defines the terms "agreement" and "CPA" which are used in the Subdivision. Subsection 91B(2) clarifies the meaning of "country", which includes colonies, territories and protectorates which are not fully sovereign.

New section 91CNon-citizens covered by Subdivision

7 This section describes the non-citizens to whom the Subdivision applies. They are non-citizens in Australia who are covered by:

- . the CPA; or
- . an agreement, relating to asylum seekers, between Australia and a country which is a STC for the non-citizens;

provided the persons are not excluded by regulation from the application of the Subdivision.

8 The CPA was the response of the international community to the outflow of Vietnamese and Lao asylum seekers during the 1970s and 1980s. It was adopted in Geneva on 14 June 1989 by:

- . the governments of countries from where asylum seekers originated (Vietnam and Laos), countries or a territory which offered first asylum to boat people (Indonesia, Malaysia, the Philippines, Thailand and Hong Kong) and countries offering resettlement of refugees (including Australia); and
- . UNHCR.

9 The CPA is specifically covered in the Bill because it is the major agreement on refugee status determination in our region.

10 The Subdivision will also apply to non-citizens who have access to protection in a STC, where there is an agreement relating to asylum seekers to which at least Australia and that country are party. No such agreements have yet been entered into. There will be a power to prescribe STCs by regulation. This power is discussed in relation to new section 91D below.

11 Proposed new subsection 91C(2) makes it clear that it is not necessary that a country be prescribed as a STC when the agreement referred to in subparagraph 91C(1)(b)(ii) is made.

12 Proposed new paragraph 91C(1)(c) will enable regulations to be made excluding non-citizens from the operation of the Subdivision. It is envisaged that such a regulation would be made where the circumstances of a large group of people make it appropriate for them to be able to make a valid protection visa application. Proposed new section 91F, discussed below, is intended to be used to permit individual non-citizens to make valid visa applications, where their individual circumstances warrant.

New section 91DSafe third countries

13 Proposed new subsection 91D(1) defines a STC for a particular non-citizen as a country:

- prescribed by the regulations as a STC for that non-citizen or for a class of non-citizens which includes that non-citizen; and
- with which the non-citizen has a prescribed connection.

14 Proposed new subsection 91D(2) states that, without limiting the regulation making power in proposed new paragraph 91D(1)(b), the regulations may provide that a person has a prescribed connection with a country if:

- the person is or was present in the relevant country at a particular time or at any time during a particular period;
- the person has a right to enter and reside in the relevant country (however that right arose or is expressed).

15 Proposed new subsection 91D(3) requires the Minister, within 2 days of a regulation made under proposed new paragraph 91D(1)(a) being laid before each House of Parliament, to provide a statement to that House. Such a statement is to cover the country or countries prescribed as a safe third country by the regulation, and is to be about compliance by those countries with international law concerning the protection of asylum seekers and the meeting of relevant human rights standards by those countries for those non-citizens in relation to whom the country is prescribed as a safe third country.

16 Proposed new subsection 91D(4) provides that a regulation establishing a STC will cease to be in force 3 years after it commences.

New section 91ENon-citizens to which this Subdivision applies unable to make valid applications for certain visas

17 Proposed new section 91E operates when a non-citizen who is covered by the Subdivision seeks protection in Australia by applying or purporting to apply for a protection visa. The effect of section 91E is that, despite any other provision of the Act, certain visa applications by such non-citizens are not valid. The section is thus an "operation of law" provision which requires no decision to be made. Once the facts exist, the bar on applications operates, subject only to the Minister's discretion in proposed new section 91F to allow a valid visa application to be made (discussed below).

18 Proposed new paragraph 91E(a) provides that non-citizens to whom the Subdivision applies and who were not been immigration cleared on last entry (unauthorised arrivals) cannot make a valid application for any visa. However, such a result is inappropriate for non-citizens who were immigration cleared on last entry (those who entered Australia with permission). Accordingly, proposed new paragraph 91E(b) provides that such non-citizens are only unable to make a valid protection visa application.

New section 91FMinister may determine that section 91E does not apply to non-citizen

19 There may be exceptional cases where the bar on applications in proposed new section 91E should not apply. Accordingly, proposed new section 91F gives the Minister the discretion, if he or she thinks it is in the public interest to do so, to give a particular non-citizen written notice allowing that non-citizen to make a valid application within 7 working days of receiving the notice. If the Minister determines that a valid application may be made, Parliament must be informed of the reasons for the determination.

20 This provision is analogous to existing provisions elsewhere in the Act. The Minister has no duty to consider the exercise of the discretion in any circumstances (proposed new subsection 91F(2) refers).

Item 2**Section 198**

21 Section 198 is amended by item 2 to provide, in new subsection 198(7), an obligation to remove unlawful non-citizens covered by the Subdivision, unless a non-citizen has made, or is able to make, an application pursuant to section 91F. This amendment operates in addition to the other circumstances where removal of unlawful non-citizens is required by section 198.

Item 3**Transitional**

22 Item 3 applies to those non-citizens who would be covered by Subdivision AI on commencement but who have applied for a protection visa on or after 1 September 1994 and before commencement. The effect of item 3 is that on commencement that application and, in the case of a person who has not been immigration cleared, any other visa application made on or after 1 September 1994 and before commencement, ceases to be valid. Consequently, such a non-citizen no longer has a right to pursue those applications, notwithstanding any merits review or judicial review applications that might be in train at commencement. However, this transitional arrangement will not affect a substantive visa granted before commencement. This gives effect to a statement made by the Minister on 29 August 1994 that the scheme would apply to any such persons.

Printed by Authority by the Commonwealth Government Printer



9 780644 306645