

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
HOUSE OF REPRESENTATIVES

MIGRATION LEGISLATION AMENDMENT BILL (No.5) 1994

EXPLANATORY MEMORANDUM

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

MIGRATION LEGISLATION AMENDMENT BILL (No.5) 1994

OUTLINE

1 The Migration Legislation Amendment Bill (No.5) 1994 ("the Bill") proposes amendments to the *Migration Act 1958* to:

- . give effect to some recommendations of the Committee for the Review of the System for Review of Migration Decisions (CROSROMD) to enhance the non-adversarial nature of the Immigration Review Tribunal (IRT). These are primarily to provide the applicant with additional entitlements in relation to the presentation of, and access to, material before the Tribunal.
- . create the positions of a Deputy Principal Member and Senior Members of the Refugee Review Tribunal (RRT). These amendments are designed to enhance the effectiveness of the RRT.
- . provide for the Remuneration Tribunal to determine the remuneration of members of the IRT and the RRT. This will bring both Tribunals into line with other Tribunals such as the Administrative Appeals Tribunal, the Social Security Appeals Tribunal and the Veterans' Review Board; and
- . implement Government decisions accepting recommendations of the Business Skills Advisory Panel in relation to the cancellation of business skills visas. These amendments are consequential upon the creation of new subclasses of business skills visas and are required to maintain the integrity of the cancellation regime established by the *Migration Act 1958*;

2 A discrete amendment is also proposed to provide for the indexation of fees imposed under the *Immigration (Education) Act 1971*. This amendment is one part of a package of amendments proposed to implement the Government's decision to provide for the increases in portfolio fees, charges and levies in line with the impact of price movements on Commonwealth government running costs outlays without the need to periodically amend primary legislation. The other proposed indexation amendments are contained in separate Bills as follows:

- . Immigration (Education) Charge Amendment Bill 1994;
- . Migration Agents Registration (Application) Levy Amendment Bill 1994;
- . Migration Agents Registration (Renewal) Levy Amendment Bill 1994.

FINANCIAL IMPACT STATEMENT

3 The amendments to the *Migration Act 1958*, including the creation of further positions in the Refugee Review Tribunal, will have no financial impact. These measures will be met within existing forward estimates. The amendments to the *Immigration (Education) Act 1971* will maintain, in real terms, revenue generated under the Act.

MIGRATION LEGISLATION AMENDMENT BILL (No.5) 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.5) 1994*.

Clause 2 Commencement

2 This clause details when the various provisions of the Bill are to commence. The clause provides that the amendments commence on Royal Assent with the exception of Part 3 and the amendments effected by Schedule 1 (other than Items 1 to 11 and Item 14) and Schedule 2 (fee indexation in the *Immigration (Education) Act 1971*) which commence on 1 July 1995.

PART 2 THE SCHEDULE OF AMENDMENTS

Clause 3 Schedule 1 - Amendments of the *Migration Act 1958*

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

Clause 4 Schedule 2 - Amendments of the *Immigration (Education) Act 1971*

4 This clause provides that the *Immigration (Education) Act 1971* is amended as set out in the Schedule.

PART 3 TRANSITIONAL AND APPLICATION PROVISIONS

5 This Part does not amend the Act but provides for transitional and application provisions which have effect according to their terms.

Clause 5 Application of certain amendments relating to Immigration Review Tribunal

6 This clause provides that amendments made by Items 16 to 30 (inclusive) and Items 32 and 33 of Schedule 1 apply to applications for review of decisions received by the IRT on or after 1 July 1995.

Clause 6 Remuneration of members of the IRT affected by amendments not to be reduced below current rates

7 This clause ensures that the existing remuneration levels for current Senior Members and other Members of the IRT (whether full-time or part-time) will not be reduced upon the transfer of the power to determine remuneration levels to the Remuneration Tribunal. In effect, the Remuneration Tribunal will be unable to determine a remuneration level that is less than that which members are entitled to before the commencement of these provisions. This restriction applies only to current members and not to members appointed after 1 July 1995 or to members appointed after the commencement of these provisions. Furthermore, until the Remuneration Tribunal makes a determination, a member's remuneration will be as prescribed.

Clause 7 Remuneration of members of RRT affected by amendments not to be reduced below current rates

8 This clause has the same effect in respect of the remuneration of RRT members as proposed clause 6 above has in respect of the remuneration of IRT members.

Clause 8 Prescribed number of members of Refugee Review Tribunal

9 This clause provides that regulations prescribing the maximum number of members of the RRT for the purposes of paragraph 458(b) of the Act will have effect, after commencement of these provisions, as if the number were prescribed for the purposes of new subsection 458(2).

Clause 9 Application of amendments of the *Immigration (Education) Act 1971*

10 This clause provides that the amendments of the *Immigration (Education) Act 1971* made by Schedule 2 of the Bill will apply to enrolments made on or after 1 July 1995.

SCHEDULE 1 AMENDMENTS OF THE *MIGRATION ACT 1958*

Item 1 Subsection 134(1)

11 This item amends subsection 134(1) to ensure that the Minister's general power to cancel a business visa does not apply to an established business in Australia visa, an investment-linked visa or a family member's visa.

12 The established business in Australia visa is not to be subject to cancellation under this subdivision. Rather, it is subject to the provision of information provision in section 137 and will be subject to cancellation under the general cancellation powers contained in the *Migration Act 1958*.

13 The investment-linked visa is to be subject to a discrete cancellation power in the new subsection 134(3A).

14 In addition, this item, by excluding a family member's visa from the reference to business visa, ensures that the cancellation of visas held by family unit members occurs under subsection 134(4).

Item 2 After subsection 134(3)

15 This item inserts a new and discrete cancellation power, subsection 134(3A), in relation to investment-linked visas. The new subsection provides the Minister with a discretion to cancel an investment-linked visa (other than a family member's visa) where the Minister is satisfied that the person(s) who held the designated investment relevant to the grant of the visa has or have ceased, for any reason, to hold that investment within three years of the investment being made. This discretion is subject to the notification provisions in section 135. Cancellation of a family member's visa is provided for by subsection 134(4).

Item 3 Paragraph 134(4)(a)

16 This item amends paragraph 134(4)(a) to insert a reference to the new cancellation power in subsection 134(3A). Subsection 134(4) provides for the cancellation of a family unit member's visa. Thus, where an investment-linked visa is cancelled under the new subsection 134(3A), the Minister must, unless subsection 134(5) or section 135 applies, cancel any business visas held by family unit members who had been granted the visas on the basis that they were members of the family unit of the holder of an investment-linked visa. Subsection 134(5) provides that a family unit member's visa must not be cancelled if the cancellation of that visa would result in extreme hardship to the person. Section 135 provides that written notice of an intention to cancel must be given to the visa holder and that the visa holder has a right to make representations to the Minister.

Item 4 Subsection 134(9)

17 This item amends paragraph 134(9) to insert a reference to the new cancellation power in subsection 134(3A). Subsection 134(9) prevents the Minister from cancelling a business visa unless a notice under section 135 is given to the holder within a specified three year period. Thus, the Minister must not cancel an investment-linked visa unless a notice under section 135, informing the holder that the Minister intends to cancel the visa and inviting the holder to make representations, has been given to the holder within 3 years of the day on when the visa was granted (if the person was already in Australia), or the day the person entered Australia (if the visa was granted overseas). This subsection also applies to an investment-linked visa held by members of the family unit.

Item 5 Subsection 134(10) (paragraphs (a) and (b) of the definition of "business visa")

18 This item amends the definition of "business visa" in subsection 134(10) by omitting paragraphs (a) and (b) and substituting new paragraphs. This amendment brings investment-linked visas and established business in Australia visas within the definition of "business visa" for the purpose of the operation of the subdivision. In addition, it ensures that the definition of business visa will also apply to:

- (i) all visas which have "Business Skills" within the title and which have been prescribed as business visas; and
- (ii) visas/entry permits which have been prescribed as business visas and which, because of the Migration Reform (Transitional Provisions) Regulations, have effect on or after 1 September 1994 as transitional (permanent) visas.

Item 6 Subsection 134(10) (paragraph (c) of the definition of "business visa")

19 This item omits the last occurring term "or" from paragraph 134(10)(c) and is consequential upon the deletion of paragraph 134(10)(d) by Item 7 below.

Item 7 Subsection 134(10) (paragraph (d) of the definition of "business visa")

20 This omits paragraph (d) from the definition of "business visa" in subsection 134(10). Paragraph (d) is no longer necessary because such visas which could have been prescribed here are now to be prescribed in the new paragraph 134(10)(a).

Item 8 Subsection 134(10) (definition of "member of the family unit")

21 This item amends the definition of "member of the family unit" provided for within the definition of "business visa" at subsection 134(10). The term is comprehensively defined in regulations 1.03 and 1.12 of the Migration Regulations. This amendment ensures consistency between the use of the terms in the Act and the Regulations.

Item 9 Subsection 134(10)

22 This item inserts a number of new definitions in subsection 134(10). The new definitions are descriptive and include:

- (i) "designated investment" - which will have the meaning given in the Migration Regulations. This will allow the regulations to prescribe what is meant by the term, and use of the term in the Act will directly link into that term.
- (ii) "established business in Australia visa" - which means a business visa, a criterion for the grant of which relates to the applicant having an established business in Australia, or to being a member of the family unit of the holder of such a visa.
- (iii) "family member's visa" - which means a business visa held by a person who is or was a member of the family unit of a person who holds a business visa, and who would not have held a business visa except for having been a member of that family unit.
- (iv) "investment-linked visa" - which means a business visa, a criterion for the grant of which relates to the holding of a designated investment (as defined by reference to the regulations) or where the criterion relates to being a member of the family unit of the holder of such a visa.
- (v) "relevant designated investment" - which, in relation to an investment-linked visa (other than a family member's visa), means the designated investment that satisfied the criterion referred to in paragraph (a) of the definition of "investment-linked visa".

Item 10 Subsection 135(1)

23 This item makes a technical amendment to subsection 135(1) to ensure that, before the new cancellation power for investment-linked visas in subsection 134(3A) is exercised, the Minister must give the holder of the business visa written notice of the intention to cancel and consequentially, an invitation to the holder to make representations about the proposed cancellation.

Item 11 Section 136

24 This item amends section 136 to ensure that a decision to cancel a business visa under proposed new subsection 134(3A) is reviewable by the Administrative Appeals Tribunal (AAT).

Item 12 Subsection 289(3)

25 This item makes a consequential amendment to subsection 289(3) to reflect amendments made to the *Migration Agents Registration (Application) Levy Act 1992* by the Migration Agents Registration (Application) Levy Amendment Bill 1994.

Item 13 Subsection 301(2)

26 This item makes a consequential amendment to subsection 301(2) to reflect amendments made to the *Migration Agents Registration (Renewal) Levy Act 1992* by the Migration Agents Registration (Renewal) Levy Amendment Bill 1994.

Item 14 Section 337 (subparagraph (b)(iii) of the definition of "Part 5 reviewable decision")

27 This item amends the definition of "Part 5 reviewable decision" in section 337 to ensure that the decision to cancel a business visa under the new subsection 134(3A) is not reviewable either internally or by the IRT. Such decisions will be reviewable by the AAT under Section 136.

Item 15 After section 353

New section 353A Principal Member may give directions

28 This item inserts new section 353A which empowers the Principal Member of the IRT to give directions, not inconsistent with the Act or Regulations, about the operation of the IRT and the conduct of reviews by the IRT.

29 This complements the existing powers of the Principal Member under subsections 354(2) and (3) to give written directions and guidelines about who is to constitute the IRT for a particular review, and under subsection 396(3) to lay down written guidelines for the allocation of work of the IRT.

Item 16 Paragraph 358(1)(a)

30 This item amends paragraph 358(1)(a) by replacing "statutory declaration" with "written statement". This will broaden the range of material which the applicant may put before the IRT, for example, a trade certificate.

Item 17 Paragraph 360(1)(a)

31 This item omits paragraph 360(1)(a) and substitutes a new paragraph. The proposed new paragraph provides applicants with the opportunity to give evidence before the IRT and to present arguments which relate to the decision under review. Previously the IRT was required only to give an applicant the opportunity to appear before it to give evidence.

Item 18 Subsection 360(2)

32 This item amends subsection 360(2) to ensure that while the IRT is to provide the applicant with the opportunity to present oral argument before it where review "on the papers" under section 359 is not available, the IRT is not required to allow any other person, such as a witness, the opportunity to address it orally on issues relating to the decision under review.

Item 19 Paragraph 361(1)(a)

33 This item omits paragraph 361(1)(a) and substitutes a new paragraph. The proposed paragraph will provide that where review on the papers is not available under section 359, the IRT is to notify the applicant of the entitlement to appear before the IRT to give evidence before it and to present arguments relating to the decision under review. Previously the IRT was required only to give an applicant the opportunity to appear before it to give evidence.

Item 20 Paragraph 361(1)(b)

34 This item amends paragraph 361(1)(b) to include a reference to the new subsection 361(2A) below.

Item 21 After subsection 361(2)

35 This item inserts a new subsection 361(2A) to provide that an applicant may, within 7 days of being notified under subsection 361(1), request in writing that the IRT obtain written evidence from person(s) named in the notice or obtain other written material relevant to the decision under review.

Item 22 Subsection 361(3)

36 This item omits subsection 361(3) and substitutes a new subsection. The proposed subsection will provide that, where an applicant has given written notice to the IRT that the applicant wants the IRT to obtain evidence or other written material relevant to the review pursuant to subsections 361(2) or (2A), the IRT is to have regard to the notice but is not required to comply with the notice.

Item 23 After section 362**New Section 362A Applicant entitled to have access to written material before Tribunal**

37 This item inserts a new section 362A to provide that where there is a hearing before the IRT (as opposed to a review on the papers under section 359) and the applicant has not received a "statement of reasons" under section 368, the applicant and any assistant present (under proposed section 366A), are entitled to have access to any written material given to the IRT for the purposes of the review. This provision is to be subject to the public interest restrictions in the new section 375A and section 376 as amended by the Bill.

Item 24 Subsections 363(6) and (7)

38 This item amends section 363 by omitting subsections (6) and (7). These subsections have been incorporated into the new sections 366A, 366B, 366C and 366D.

Item 25 After section 363**New Section 363A Tribunal does not have power to permit a person to do something he or she is not entitled to do**

39 This item inserts a new section 363A. The new section ensures that the IRT has no discretion to allow a person (including any assistant or representative) to do something where a provision provides that the person is not entitled to do that thing.

Item 26 After section 366

40 This item inserts new provisions relating to an applicant's entitlement to be assisted while appearing before the IRT.

New Section 366A Applicant may be assisted by another person while appearing before Tribunal

41 This section entitles the applicant to assistance from another person when appearing before the IRT in certain circumstances. The assistant is only able to present arguments and address the IRT only if the IRT is satisfied exceptional circumstances warrant it. An example of exceptional circumstances would include, but is not limited to, where an applicant is unable to effectively communicate with the IRT because of a physical or intellectual disability or psychiatric condition.

42 The applicant's entitlement to an assistant does not prevent the applicant from being assisted or represented in an application for review otherwise than in relation to an appearance before the IRT - for example, an applicant may have assistance in the preparation of documents. Further, this proposed amendment is not intended to affect or alter in any way the operation of the Migration Agents Registration Scheme.

New section 366B Other persons not to be assisted or represented while appearing before Tribunal

43 This section prevents any person, other than the applicant, from having another person assist or represent him/her while appearing before the IRT. However, this does not prevent such assistance or representation in relation to matters otherwise than appearing before the IRT - for example, the preparation of a witnesses' documents.

New section 366C Interpreters

44 This section allows a person appearing before the IRT to request an interpreter for the purpose of communicating with the IRT. Where such a request is made, the IRT is to comply with the request unless the IRT considers that the person is sufficiently proficient in English. The section also requires that where no such request has been made, the IRT must appoint an interpreter if the IRT considers the person is not sufficiently proficient in English.

New section 366D Examination and cross-examination not permitted

45 This section provides that a person present while oral evidence is given to the IRT is not entitled to examine or cross-examine any person appearing before the IRT to give evidence.

Item 27 Subsection 368

46 This item amends section 368 to ensure that any document or information released to the IRT by the Secretary under the new section 375A, is not disclosed to any other person other than a member of the IRT as constituted for the purposes of the particular review.

Item 28 After section 375**New section 375A Certain information only to be disclosed to Tribunal**

47 This item inserts new section 375A into the Act. The new section gives the Minister a wide discretionary power to prevent the disclosure, otherwise than to the IRT, of a document or information where such disclosure would be contrary to the public interest (other than a reason set out in paragraph 375(a) or (b)).

48 The new section ensures that, where the Minister has certified that disclosure would be contrary to the public interest, the document or information is not disclosed to any person other than a member of the IRT as constituted for the purposes of the particular review.

Item 29 Paragraph 376(1)(a)

49 This item omits paragraph 376(1)(a) and substitutes a new paragraph which inserts new subparagraph 376(1)(a)(ii). The purpose of subparagraph 376(1)(a)(ii) is to reinforce the distinction between documents or information covered by section 375A and section 376.

Item 30 Paragraph 376(1)(b)

50 This item amends paragraph 376(1)(b) to include a reference to new section 375A. The proposed amendment will ensure information covered by section 375A will not be disclosed to any person other than a member of the IRT.

Item 31 Paragraph 376(3)(b)

51 This item amends paragraph 376(3)(b) to allow, in addition to the applicant, any person who has given oral or written evidence to the IRT to have access to a document or information covered by section 376.

Item 32 Subsection 381(3)

52 This item amends subsection 381(3) to include a reference to new paragraph 375A(2)(b). The proposed amendment will ensure information covered by section 375A will not be disclosed to any person other than a member of the IRT.

Item 33 Paragraph 388(a)

53 This item amends subsection 388(a) to include a reference to new paragraph 375A(2)(b). The proposed amendment will ensure information covered by section 375A will not be disclosed to any person other than a member of the IRT.

Item 34 Subsection 398(1)

54 This item omits the phrase "The Principal Member shall" from subsection 398(1) and substitutes the phrase "A member is to". The amendment extends the operation of subsection 398(1) so that all members of the IRT, not just the Principal Member, shall be paid such remuneration as is determined by the Remuneration Tribunal and such allowances as are prescribed.

Item 35 Subsection 398(2)

55 This item omits the phrase "the remuneration of the Principal Member" from subsection 398(2) and substitutes the phrase "a member's remuneration". The amendment extends the operation of subsection 398(1) to all members of the IRT.

Item 36 Subsection 398(2)

56 This item omits the phrase "Principal Member shall be" from subsection 398(2) and substitutes the phrase "member is to be". The amendment ensures that if no determination of an IRT member's remuneration by the Remuneration Tribunal is in operation, the member is to be paid such remuneration as is prescribed.

Item 37 Subsection 399

57 This item repeals section 399. This repeal is necessary to give effect to the amendments to subsection 398(2).

Item 38 Section 410

58 This item inserts a new definition of "Deputy Principal Member" into section 410. The "Deputy Principal Member" means the "Deputy Principal Member" of the RRT.

Item 39 Paragraph 458(b)

59 This item omits paragraph 458(b) and substitutes new paragraphs 458(b) and (c). The amendment alters the membership of the RRT by creating the positions of a Deputy Principal Member and a number of Senior Members.

Item 40 Section 458

60 This item inserts new subsection 458(2). The amendment requires that the total number of members appointed to the RRT, other than the Principal Member, must not exceed the prescribed number.

Item 41 Subsection 462(1)

61 This item omits the term "The Principal Member" from subsection 462(1) and substitutes the term "A member". The amendment extends the operation of subsection 462(1) to all members of the RRT.

Item 42 Subsection 462(1)

62 This item omits the term "Principal Member" (last occurring) from subsection 462(1) and substitutes the term "member". The amendment extends the operation of subsection 462(1) to all members of the RRT.

Item 43 Subsection 462(2)

63 This item omits the term "The Principal Member" in subsection 462(2) and substitutes the term "A member". The amendment extends the effect of subsection 462(2) to all members of the RRT.

Item 44 Section 463

64 This item repeals subsection 463. Repeal is necessary to give effect to amendments to section 462.

Item 45 Subsection 469(1)

65 This item inserts new subsection 469(1A). The new subsection enables the Minister to appoint a person to act in the office of Deputy Principal Member. The Minister will have the same power of appointment in relation to the office of Deputy Principal Member as the Minister has under subsection 469(1) in relation to the office of Principal Member.

Item 46 Subsection 469(2)

66 This item omits the term "the office" from subsection 469(2) and substitutes the term "an office". This is a technical amendment necessary due to the insertion of new subsection 469(1A) into section 469.

Item 47 Subsection 469(3)

67 This item omits the term "the office" (first occurring) in subsection 469(3) and substitutes the term "an office". This is a technical amendment necessary due to the insertion of new subsection 469(1A) into section 469.

Item 48 Subsection 469(4)

68 This item inserts the word "concerned" at the end of subsection 469(4). This is a technical amendment necessary due to the insertion of new subsection 469(1A) into section 469.

Item 49 Subsection 469(6)(c)

69 This item inserts the word "concerned" after the phrase "holder of the office" in paragraph 469(6)(c). This is a technical amendment necessary due to the insertion of new subsection 469(1A) into section 469.

Item 50 Subsection 469(9) (paragraph (a) of the definition of "normal terminating event")

70 This item inserts the term "or (1A)(a)" after the term "paragraph (1)(a)" in paragraph (a) of the definition of "normal terminating event" in subsection 469(9). This is a technical amendment necessary due to the insertion of new subsection 469(1A) into section 469.

Item 51 Subsection 469(9) (paragraph (b) of the definition of "normal terminating event")

71 This item inserts the term "or (1A)(b)" after the term "paragraph (1)(b)" in paragraph (b) of the definition of "normal terminating event" in subsection 469(9). This is a technical amendment necessary due to the insertion of new subsection 469(1A) into section 469.

**SCHEDULE 2 AMENDMENTS OF THE IMMIGRATION (EDUCATION)
ACT 1971**

Item 1 Subsection 4A(1)

72 This item amends section 4A of the *Immigration (Education) Act 1971* to enable the maximum fees which may be charged and recovered in relation to English language courses to be indexed at the commencement of each financial year.

73 Subsection 4A(1) of the *Immigration (Education) Act 1971* currently authorises the regulations to provide for the charging and recovery of fees, not exceeding \$250 per year per student, in relation to English language courses. This item changes this ceiling by omitting "\$250" and substituting the "applicable fee limit".

Item 2 After subsection 4A(3)

74 Proposed subsection 4A(3A) sets out the formula for calculating the "applicable fee limit". The "applicable fee limit" is the amount calculated by applying the mathematical indexation formula provided in subsection 4A(3A). The formula is based on the 1994-95 financial year ceiling of \$260 (discussed at paragraph 78 below) and commences in the 1995-96 financial year. The formula automatically indexes the "applicable fee limit" on the first day of each financial year, for courses enrolled in during that financial year.

75 The formula uses the first set of Commonwealth Government Final Consumption Expenditure Implicit Price Deflators issued by the Department of Finance after 1 January in the previous financial year (that is, the financial year before the financial year of indexation). For example, for 1995-96 indexation, the first set of numbers published after 1 January 1995 is used.

76 From this set of numbers, two numbers (the "new CGFCE number" and the "base CGFCE number") are extracted. The "new CGFCE number" is the number for the period ending on 31 December in the previous financial year. For example, for 1995-96 indexation, the "new CGFCE number" is the number for the period ending on 31 December 1994. The "base CGFCE number" is the number for the period ending on 31 December 1993, because indexation is based on the ceiling for the 1993-94 financial year.

77 The formula is the "new CGFCE number" divided by the "base CGFCE number" and multiplied by the base fee of \$260. The base fee of \$260 is the 1993-94 ceiling of \$250 indexed for 1994-95 using the proposed formula. The result of the calculation is the "applicable fee limit".

78 If an amount calculated using the formula in proposed subsection 4A(3A) is not a multiple of \$5, proposed subsection 4A(3B) requires that the amount be rounded up or down to the nearest multiple of \$5. (If the amount is equally close to two \$5 multiples, that is if the amount is also a multiple of \$2.50, it is rounded up). For example, \$265.85 would be rounded down to \$265 whereas both \$277.50 and \$279.25 would be rounded up to \$280.





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