



# **Migration Legislation Amendment (Judicial Review) Act 2001**

No. 134, 2001

**An Act to amend the *Migration Act 1958*, and for  
related purposes**



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# Migration Legislation Amendment (Judicial Review) Act 2001

No. 134, 2001

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## An Act to amend the *Migration Act 1958*, and for related purposes

[Assented to 27 September 2001]

The Parliament of Australia enacts:

### 1 Short title

This Act may be cited as the *Migration Legislation Amendment  
(Judicial Review) Act 2001*.

### 2 Commencement

- (1) Subject to this section, this Act commences on the day on which it receives the Royal Assent.
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- (2) Subject to subsection (3), Schedule 1 commences on a day to be fixed by Proclamation.
  - (3) If Schedule 1 does not commence under subsection (2) within the period of 6 months beginning on the day on which this Act receives the Royal Assent, it commences on the first day after the end of that period.

### **3 Schedule(s)**

Subject to section 2, each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

## **Schedule 1—Judicial review**

### **Part 1—Amendments**

#### *Administrative Decisions (Judicial Review) Act 1977*

##### **1 Paragraph (da) of Schedule 1**

Repeal the paragraph, substitute:

(da) a privative clause decision within the meaning of subsection 474(2) of the *Migration Act 1958*;

#### *Migration Act 1958*

##### **2 Subsection 5(1) (definition of *judicially-reviewable decision*)**

Repeal the definition.

##### **3 Subsection 5(1)**

Insert:

*privative clause decision* has the meaning given by subsection 474(2).

##### **4 Subsection 32(2)**

After “that” (first occurring), insert “the Minister is satisfied”.

##### **5 Subsection 36(2)**

After “whom”, insert “the Minister is satisfied”.

##### **6 Section 73**

Omit all the words before “a bridging visa” (second occurring), substitute “If the Minister is satisfied that an eligible non-citizen satisfies the criteria for a bridging visa as prescribed under subsection 31(3), the Minister may grant”.

##### **7 Part 8**

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Repeal the Part, substitute:

## **Part 8—Judicial review**

### **Division 1—Privative clause**

#### **474 Decisions under Act are final**

- (1) A privative clause decision:
  - (a) is final and conclusive; and
  - (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
  - (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

- (2) In this section:

*privative clause decision* means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5).

- (3) A reference in this section to a decision includes a reference to the following:
  - (a) granting, making, suspending, cancelling, revoking or refusing to make an order or determination;
  - (b) granting, giving, suspending, cancelling, revoking or refusing to give a certificate, direction, approval, consent or permission (including a visa);
  - (c) granting, issuing, suspending, cancelling, revoking or refusing to issue an authority or other instrument;
  - (d) imposing, or refusing to remove, a condition or restriction;
  - (e) making or revoking, or refusing to make or revoke, a declaration, demand or requirement;
  - (f) retaining, or refusing to deliver up, an article;
  - (g) doing or refusing to do any other act or thing;

- (h) conduct preparatory to the making of a decision, including the taking of evidence or the holding of an inquiry or investigation;
- (i) a decision on review of a decision, irrespective of whether the decision on review is taken under this Act or a regulation or other instrument under this Act, or under another Act;
- (j) a failure or refusal to make a decision.
- (4) For the purposes of subsection (2), a decision under a provision, or under a regulation or other instrument made under a provision, set out in the following table is not a privative clause decision:

<b>Decisions that are not privative clause decisions</b>		
<b>Item</b>	<b>Provision</b>	<b>Subject matter of provision</b>
1	section 213	Liability for the costs of detention, removal or deportation
2	section 217	Conveyance of removees
3	section 218	Conveyance of deportees etc.
4	section 222	Orders restraining non-citizens from disposing of property
5	section 223	Valuables of detained non-citizens
6	section 224	Dealing with seized valuables
7	section 252	Searches of persons
8	section 259	Detention of vessels for search
9	section 260	Detention of vessels/dealing with detained vessels
10	section 261	Disposal of certain vessels
11	Division 14 of Part 2	Recovery of costs
12	section 269	Taking of securities
13	section 272	Migrant centres
14	section 273	Detention centres
15	Part 3	Migration agents registration scheme
16	Part 4	Court orders about reparation
17	section 353A	Directions by Principal Member
18	section 354	Constitution of Migration Review Tribunal

**Schedule 1** Judicial review  
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<b>Decisions that are not privative clause decisions</b>		
<b>Item</b>	<b>Provision</b>	<b>Subject matter of provision</b>
19	section 355	Reconstitution of Migration Review Tribunal
20	section 355A	Reconstitution of Migration Review Tribunal for efficient conduct of review
21	section 356	Exercise of powers of Migration Review Tribunal
22	section 357	Presiding member
23	Division 7 of Part 5	Offences
24	Part 6	Establishment and membership of Migration Review Tribunal
25	section 421	Constitution of Refugee Review Tribunal
26	section 422	Reconstitution of Refugee Review Tribunal
27	section 422A	Reconstitution of Refugee Review Tribunal for efficient conduct of review
28	Division 6 of Part 7	Offences
29	Division 9 of Part 7	Establishment and membership of Refugee Review Tribunal
30	Division 10 of Part 7	Registry and officers
31	regulation 5.35	Medical treatment of persons in detention

- (5) The regulations may specify that a decision, or a decision included in a class of decisions, under this Act, or under regulations or another instrument under this Act, is not a privative clause decision.

## **Division 2—Provisions relating to privative clause decisions**

### **475 This Division not to limit section 474**

This Division is not to be taken to limit the scope or operation of section 474.

**475A Section 476 not to affect the jurisdiction of the Federal Court in certain cases**

Section 476 does not affect the jurisdiction of the Federal Court under section 39B or 44 of the *Judiciary Act 1903* in relation to:

- (a) a privative clause decision that is a decision made on a review by a Tribunal under Part 5 or 7 or section 500; or
- (b) any other decision in respect of which the Court's jurisdiction is not excluded by section 476.

**476 Federal Court does not have any other jurisdiction in relation to certain privative clause decisions**

- (1) Despite any other law, including sections 39B and 44 of the *Judiciary Act 1903*, the Federal Court does not have any jurisdiction in relation to a primary decision.
- (2) Despite any other law, including sections 39B and 44 of the *Judiciary Act 1903*, the Federal Court does not have any jurisdiction in respect of a decision of the Minister not to exercise, or not to consider the exercise, of the Minister's power under subsection 37A(2) or (3), section 48B, paragraph 72(1)(c), section 91F, 91L, 91Q, 345, 351, 391, 417 or 454.
- (2A) Despite any other law, including sections 39B and 44 of the *Judiciary Act 1903*, the Federal Court does not have any jurisdiction in respect of:
  - (a) a decision of the Principal Member of the Migration Review Tribunal or of the Principal Member of the Refugee Review Tribunal to refer a matter to the Administrative Appeals Tribunal; or
  - (b) a decision of the President of the Administrative Appeals Tribunal to accept, or not to accept, the referral of a decision under section 382 or 444.
- (2B) Despite any other law, including sections 39B and 44 of the *Judiciary Act 1903*, the Federal Court does not have any jurisdiction in respect of a decision of the Minister under Division 13A of Part 2 to order that a thing is not to be condemned as forfeited.

- (4) Despite section 44 of the *Judiciary Act 1903*, the High Court must not remit a matter to the Federal Court if it relates to a decision or matter in respect of which the Federal Court would not have jurisdiction because of this section.
- (5) The reference in subsection (2) to section 345 is a reference to section 345 of this Act as in force before the commencement of Schedule 1 to the *Migration Legislation Amendment Act (No. 1) 1998*.
- (6) In this section:
  - primary decision** means a privative clause decision:
    - (a) that is reviewable, or has been reviewed, under Part 5 or 7 or section 500; or
    - (b) that would have been so reviewable if an application for such review had been made within a specified period.

#### **477 Time limits on applications for judicial review**

- (1) An application to the Federal Court under section 39B of the *Judiciary Act 1903* for:
  - (a) a writ of mandamus, prohibition or certiorari; or
  - (b) an injunction or a declaration;in respect of a privative clause decision in relation to which the jurisdiction of the Federal Court is not excluded by section 476 must be made to the Federal Court within 28 days of the notification of the decision.
- (2) The Federal Court must not make an order allowing, or which has the effect of allowing, an applicant to lodge an application referred to in subsection (1) outside the period specified in that subsection.
- (3) The regulations may prescribe the way of notifying a person of a decision for the purposes of this section.

#### **478 Persons who may make application**

An application referred to in subsection 477(1) may only be made by the Minister and:

- (a) if the privative clause decision concerned was reviewable under Part 5 or 7 or section 500 of this Act and a decision on such a review has been made—the applicant in the review by the relevant Tribunal; or
- (b) in any other case—the person who is the subject of the decision; or
- (c) in any case—a person prescribed by the regulations.

#### **479 Parties to review**

The parties to a review of a privative clause decision resulting from an application referred to in subsection 477(1) are the Minister and:

- (a) if the privative clause decision concerned was reviewable under Part 5 or 7 or section 500 of this Act and a decision on such a review has been made—the applicant in the review by the relevant Tribunal; or
- (b) in any other case—the person who is the subject of the decision; or
- (c) in any case—a person prescribed by the regulations.

#### **480 Intervention by Attorney-General**

- (1) The Attorney-General may, on behalf of the Commonwealth, intervene in a proceeding resulting from an application referred to in subsection 477(1).
- (2) If the Attorney-General intervenes in such a proceeding, the Federal Court may make such orders as to costs against the Commonwealth as the court thinks fit.
- (3) If the Attorney-General intervenes in such a proceeding, he or she is taken to be a party to the proceeding.

#### **481 Operation etc. of decision**

The making of an application referred to in subsection 477(1) does not:

- (a) affect the operation of the decision; or
- (b) prevent the taking of action to implement the decision; or

- (c) prevent the taking of action in reliance on the making of the decision.

**482 Changing person holding, or performing the duties of, an office**

If:

- (a) a person has, in the performance of the duties of an office, made a privative clause decision; and
- (b) the person no longer holds, or, for whatever reason, is not performing the duties of, that office;

this Part has effect as if the decision had been made by:

- (c) the person for the time being holding or performing the duties of that office; or
- (d) if there is no person for the time being holding or performing the duties of that office or that office no longer exists—such person as the Minister specifies.

**483 Section 44 of the *Administrative Appeals Tribunal Act 1975***

Section 44 of the *Administrative Appeals Tribunal Act 1975* does not apply to a privative clause decision.

**484 Exclusive jurisdiction of Federal Court**

- (1) The jurisdiction of the Federal Court in relation to privative clause decisions is exclusive of the jurisdiction of all other courts, other than the jurisdiction of the High Court under section 75 of the Constitution.
- (2) To avoid doubt, despite section 67C of the *Judiciary Act 1903*, the Supreme Court of the Northern Territory does not have jurisdiction in matters in which a writ of mandamus or prohibition or an injunction is sought against the Commonwealth or an officer of the Commonwealth in relation to privative clause decisions.
- (3) To avoid doubt, jurisdiction in relation to privative clause decisions is not conferred on any court under the *Jurisdiction of Courts (Cross-vesting) Act 1987*.

**7A Subsection 486A(1)**

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Omit “decision covered by subsection 475(1), (2) or (4)”, substitute “privative clause decision”.

## **7B After section 486A**

Insert:

### **486AA Intervention by Attorney-General**

- (1) The Attorney-General may, on behalf of the Commonwealth, intervene in a proceeding resulting from an application referred to in subsection 486A(1).
- (2) If the Attorney-General intervenes in such a proceeding, the High Court may make such orders as to costs against the Commonwealth as the court thinks fit.
- (3) If the Attorney-General intervenes in such a proceeding, he or she is taken to be a party to the proceeding.

### **486AB Operation etc. of decision**

The making of an application referred to in subsection 486A(1) does not:

- (a) affect the operation of the decision; or
- (b) prevent the taking of action to implement the decision; or
- (c) prevent the taking of action in reliance on the making of the decision.

## **7C Subsection 486C(1)**

Omit “(the *relevant issue*)”.

## **7D Subsection 486C(2)**

Repeal the subsection, substitute:

- (2) Those persons are:
  - (a) a party to a review mentioned in section 479; or
  - (b) the Attorney-General of the Commonwealth or of a State or a Territory; or

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- (c) a person who commences or continues the proceeding in performing the person's statutory functions; or
- (d) any other person prescribed by the regulations.

## Part 2—Application provisions

### 8 Application

- (1) If an application for judicial review of a decision under the *Migration Act 1958* is lodged before the commencement of this Schedule, the *Migration Act 1958*, the *Administrative Appeals Tribunal Act 1975* and the *Administrative Decisions (Judicial Review) Act 1977*, as in force immediately before that commencement, apply in respect of the application, and in respect of the review, as if this Schedule had not been enacted.
- (2) The *Migration Act 1958* and the *Administrative Decisions (Judicial Review) Act 1977*, as amended by this Schedule, apply in respect of judicial review of a decision under the *Migration Act 1958* if:
  - (a) the decision was made on or after the commencement of this Schedule; or
  - (b) the decision:
    - (i) was made before the commencement of this Schedule; and
    - (ii) as at that commencement, an application for judicial review of the decision had not been lodged.
- (3) A reference in subitem (1) or (2) to an application for judicial review of a decision is a reference to:
  - (a) an application for review of the decision under:
    - (i) section 44 of the *Administrative Appeals Tribunal Act 1975*; or
    - (ii) Part 8 of the *Migration Act 1958*; or
    - (iii) the *Administrative Decisions (Judicial Review) Act 1977*; or
  - (b) an application for a writ of mandamus, prohibition or certiorari or an injunction or a declaration in respect of the decision under:
    - (i) section 75 of the Constitution; or
    - (ii) section 39B or 67C of the *Judiciary Act 1903*.

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- (4) The amendments made by items 7A and 7B apply to decisions made after the commencement of those items.
  - (5) The amendments made by items 7C and 7D apply in relation to proceedings that are commenced after the commencement of those items.
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*[Minister's second reading speech made in—  
Senate on 2 December 1998  
House of Representatives on 26 September 2001]*

(229/98)