

1992

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

MIGRATION LAWS AMENDMENT BILL 1992

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister
for Immigration, Local Government and Ethnic Affairs
the Honourable Gerry Hand MP)

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



MIGRATION LAWS AMENDMENT BILL 1992

OUTLINE

This Bill establishes a legislative scheme to enhance the delivery of annual migration programs, and corrects a minor technical error in the Migration Amendment Act (No.2) 1991.

Part 2 of the Bill establishes a scheme which will provide the Minister with a flexible power to publish in the Gazette an upper limit or cap on the number of visas in a specified class or classes that may be granted in a particular financial year. The Act will provide that certain visa classes in the Preferential Family category will not be affected.

The Minister will not be able to grant visas in the capped classes in excess of the number set by the cap until the cap is lifted or varied. However, processing of applications up to the point of grant will continue and applicants not satisfying the eligibility criteria will be refused. This feature distinguishes the capping scheme from the scheme provided in s.28 of the Act which empowers the Minister to suspend processing of applications for specified classes of visa until a specified date.

The scheme will also provide for an orderly granting of visas up to the capped number to ensure that no visas are inadvertently granted in excess of the gazetted number. Once the cap is lifted there will be an ordered release of applications that have been processed up to the point of grant but whose grant was prevented while the cap remained in place.

Part 3 of the Bill corrects a technical error in the Migration Amendment Act (No.2) 1991.

FINANCIAL IMPACT STATEMENT

The amendments will have no financial impact.

MIGRATION LAWS AMENDMENT BILL 1992

NOTES ON INDIVIDUAL CLAUSES

Clause 1 Short Title

1 This clause provides that the Act may be cited as the Migration Laws Amendment Act 1992.

Clause 2 Commencement

2 Sub-clause (1) provides for commencement of the Act, subject to sub-clause (2), on the day it receives the Royal Assent. Sub-clause (2) provides that Part 3, which makes a technical correction to the Migration Amendment Act (No.2) 1991, is deemed to have commenced immediately after the commencement of that Act and thus Part 3 will have retrospective operation.

PART 2 Amendments to the Migration Act 1958

Clause 3 Interpretation

3 This clause provides that in Part 2, the term "Principal Act" refers to the Migration Act 1958.

Clause 4 Amendment of Regulation-making Power

4 This clause amends sub-paragraph (2)(b) of section 23 of the Migration Act 1958 to replace the reference to section 28 with a reference to sections 28 and 28B. The amended section 23(2)(b) confers the power to make regulations creating an entitlement, which is to be subject to sections 28 and 28B, for an applicant to be granted a visa if he or she satisfies the relevant prescribed criteria.

Clause 5 Amendment of the Power to Grant Visas

5 This clause amends paragraphs (3)(b) and (6)(a) of section 24 of the Migration Act 1958 which confers the power to grant a visa on the Minister. The amended section 24 will require the Minister, subject to certain other provisions in section 24 and sections 28 and 28B, to grant a visa where it appears to the Minister that the applicant is entitled to be granted a visa of the relevant class.

Clause 5A Amendments to s.28

6 This clause amends s.28(3) to correspond with the terminology used in proposed s.28C(1) to describe Australian permanent residents and replaces the word "child" with the term "dependent child". A new subsection 28(4A) containing the same definition of "dependent child" as used in proposed s.28C(2) is inserted, and the definition of "child" currently found in subsection 28(5) is omitted.

Clause 6 Insertion of Subdivision AA

7 This clause inserts new Subdivision AA into the Migration Act. Subdivision AA establishes a capping scheme to assist in the delivery of the annual migration program.

8 The following clause notes relate to the sections of new Subdivision AA.

Section 28A Limit on Visas

9 This section gives the Minister the power to establish a cap on the annual migration program. The cap is set by publishing a notice in the Gazette specifying the maximum number of visas in a nominated class, or nominated classes, that can be granted in a particular financial year.

Section 28B Effect of Limit

10 This section limits the Minister's power to grant visas by prohibiting further grants of visas in those classes where a cap has been published and the maximum number of visas set by the cap for that financial year has been granted.

Section 28C Limit does not affect certain persons

11 This section provides that applications for visas made on the basis of one or more of the specified relationships between the applicant and an Australian citizen or permanent resident are not affected by caps. Section 28B will not prevent the grant of a visa to such applicants. The relationships specified are those which form the basis of applications for certain visa classes in the Preferential Family category.

Section 28D Processing may continue

12 This section distinguishes the capping scheme from the suspension scheme established by section 28. The lodgement, processing and rejection of visa applications in the capped classes may continue while section 28B applies to that class. Actions to finalise applications, such as visa issue and recording in the databases, may continue in respect of visas granted before section 28B applied to that class or those classes.

Section 28E No failure to make a decision

13 This section provides that the fact that the Minister has not decided an application for a capped class of visa is not to be regarded as a failure to exercise the power to grant a visa. The section addresses the ground of judicial review that the Minister has failed to exercise a power or perform a

duty, and prevents an order by a Court compelling the Minister to make a decision while the cap is in place.

Section 28F No unreasonable delay

14 This section will remove any doubts about the order in which applications are to be processed by providing that the consideration and disposal of applications in other than chronological order will not constitute unreasonable delay. The section will permit decisions to refuse applications to be made in respect of later applications notwithstanding the fact that the grant of a visa in respect of an earlier application has been delayed by the cap.

Section 28G Order of dealing with applications

15 This section permits the finalisation of applications in whichever order the Minister considers appropriate. As with section 28F, it allows the Minister to consider and decide applications in other than chronological order where to do so enhances the delivery of the migration program.

16 The section will also enable the Minister to implement arrangements to ensure that excessive visas are not granted. For example, these arrangements may include the allocation of numbers between posts, such as allocation proportional to prior approvals or the number of outstanding applications at the posts. It is possible that an allocation may result in later applications at one post being finalised before earlier applications from another post. However, the ability to allocate numbers between posts overcomes the practical difficulty in ascertaining when the total number of grants of visas set by the cap has been granted. The grant of a visa in excess of the cap is a grant without legal authority and would be grounds for cancelling the visa; in practice it would be difficult to establish which visas should be cancelled, and the cancellation of a visa in circumstances of doubt may result in injustice.

Clause 6A Amendments to s.40

17 Section 40(3) is amended to correspond with the terminology used in proposed s.28C(1) to describe Australian permanent residents and replaces the word "child" with the term "dependent child". A new subsection 40(4A) containing the same definition of "dependent child" as used in proposed s.28C(2) is inserted, and the definition of "child" currently found in subsection 40(5) is omitted.

PART 3 AMENDMENTS TO THE MIGRATION AMENDMENT ACT (NO.2) 1992

Clause 7 Interpretation

18 This clause provides that in Part 3, the term "Principal Act" means the Migration Amendment Act (No.2) 1991.

Clause 8

Amendment to section 8

19 This clause corrects a technical error in section 8 of the Migration Act Amendment Act (No. 2) 1992 by replacing the words "Division 3" with "Division 7". This correction will have retrospective effect by operation of clause 2 of this Bill.