Migration Amendment Bill 2013

Moira Coombs
Law and Bills Digest Section

Contents

Purpose of the Bill ................................................................. 3
Structure of the Bill ............................................................. 3
Committee consideration ...................................................... 3
Senate Standing Committee on Legal and Constitutional Affairs 3
Senate Standing Committee for the Scrutiny of Bills .............. 3
Parliamentary Joint Committee on Human Rights ................. 3
Statement of Compatibility with Human Rights ................... 3
Schedule 1—when decisions are made and finally determined 4
Background ........................................................................... 4
Minister for Immigration and Citizenship v SZQOY .......... 4
Minister for Immigration, Multicultural Affairs and Citizenship v SZRNY ................................................................. 5
Key provisions ........................................................................ 5
When written and oral decisions are finally determined..... 5
How and when grants and refusals of visas are made ....... 6
How and when decisions to cancel and revoke cancellation of visas are made ......................................................... 6
Financial implications .......................................................... 7
Schedule 2—bar on further applications for protection visas 7
Background ........................................................................... 7
Key provisions ........................................................................ 8
Key issues ................................................................................ 9
Financial implications .......................................................... 10
Schedule 3—security assessments ...................................... 10
Background ........................................................................... 10
Key provisions ........................................................................ 11
Key issues ................................................................................ 12

Date introduced: 12 December 2013
House: House of Representatives
Portfolio: Immigration and Border Protection
Commencement: Various dates as set out in the table in section 2 of the Bill.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/
Indefinite detention ......................................................... 12
Removal of review rights .................................................. 13
Financial implications ....................................................... 14
Purpose of the Bill
The purpose of the Migration Amendment Bill 2013 (the Bill) is to amend the Migration Act 1958 to:

- resolve questions about the day and time at which certain decisions of the Minister (or his, or her delegate) are taken to be finally made and at which decisions of the Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT) are made and become final
- ensure that, once an application for a protection visa has been refused, or a protection visa has been cancelled, a person cannot apply for a protection visa on any other ground while in the migration zone
- make it a criterion for the grant of a protection visa in section 36 of the Migration Act that the applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security within the meaning of the Australian Security Intelligence Organisation Act 1979 (ASIO Act).

Structure of the Bill
The Bill contains three Schedules:

- Schedule 1 of the Bill amends the Migration Act to clarify the day and time at which:
  - decisions of the Minister (or his, or her delegate) on an application for a visa, cancellation of a visa, or revocation of the cancellation of a visa are taken to be finally made and
  - decisions of the MRT and RRT are made and become final
- Schedule 2 of the Bill amends section 48A of the Migration Act to prevent a non-citizen who has been refused a protection visa from applying for a further protection visa whilst the person is still within the migration zone and
- Schedule 3 of the Bill inserts a criterion for the grant of a protection visa, including a permanent protection visa, that the applicant is assessed by the Australian Security Intelligence Agency (ASIO) as not being a risk to security, either directly or indirectly.

Committee consideration

Senate Standing Committee on Legal and Constitutional Affairs
On 12 December 2013, the Bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs (Legal and Constitutional Affairs Committee) for inquiry and report by 12 February 2014. At the time of writing this Bills Digest 11 submissions had been received. Matters raised by the submitters are addressed under the Key issues and Key provisions headings below.

Senate Standing Committee for the Scrutiny of Bills
The Standing Committee for the Scrutiny of Bills had not commented on the Bill at the time of writing this Bills Digest.

Parliamentary Joint Committee on Human Rights
At the time of writing this Bills Digest, the Parliamentary Joint Committee had not commented on the Bill.

Statement of Compatibility with Human Rights
As required in Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instrument listed in section 3 of the Act.

The Government considers the Bill is compatible with human rights. Relevant comments are addressed under the Key issues and Key provisions headings below.

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2. The terms of reference, submissions to the Legal and Constitutional Affairs Committee and the final report (when published) is on the inquiry homepage, accessed 7 February 2014.
3. The Statement of Compatibility with Human Rights can be found at Attachment A of the Explanatory Memorandum to the Bill.
Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.

Migration Amendment Bill 2013

Schedule 1—when decisions are made and finally determined

Background

Two recent Federal Court decisions have raised issues about provisions of the Migration Act concerning the time at which a decision is made or finally determined by a merits review Tribunal. The relevant decisions are the Minister for Immigration and Citizenship v SZQOY4 (the SZQOY case) in 2012 and Minister for Immigration and Citizenship v SZRNY in 2013.5 The provisions in Schedule 1 of the Bill set out when a decision is considered to be finally determined.

Minister for Immigration and Citizenship v SZQOY

In the SZQOY case, the respondent had sought a review of the decision to refuse an application for a protection visa in the RRT. The respondent was represented at the RRT hearing on 15 June 2011, at which point her solicitor was invited to provide further written submissions. Lengthy written submissions were duly provided—along with a request to make further submissions at an additional hearing or interview.6

On the morning of 27 July 2011 an officer, acting on behalf the RRT notified the respondent’s solicitor that it was not proposed to hold another hearing but that the Member would consider further written submissions up until the decision was made. The Member electronically transmitted his decision to the RRT Registry at 2:34pm on 27 July 2011. Approximately two hours later, the respondent’s solicitor sent the RRT two additional documents.7 Those documents were sent to the Member but, as the decision had been transmitted earlier that day, the Member considered that the RRT was functus officio8 and therefore had no power to take further action on the review.9

The issue for the Full Court of the Federal Court was to determine when the duty of the RRT to deliver its decision had been discharged.

Buchanan J noted:

I am not saying that the RRT is bound to receive new material up to the date of a decision, or that it should reasonably have done so in this case. However, I reject the idea that the RRT has no legal authority to do so in an appropriate case. The period in which the RRT retained its legal authority to do so in the present case did not end upon the occasion, or at the time, of an internal communication it its own Registry.10

Buchanan J made particular reference to a passage in the decision of Semunigus v Minister for Immigration and Multicultural Affairs,11 in which Madgwick J stated:

In a case of the kinds dealt with by the RRT, a decision is no decision, in my opinion, until it has been communicated to the applicant or irrevocable steps have been taken to have that done. I speak of communication to the applicant because, before the RRT, the applicant is the only party. There is no need to regard a decision as irrevocable before it must be considered to have passed into the public domain.12

The Court concluded that:

The Tribunal is not functus officio until its decision on a review has been communicated irrevocably and externally to interested parties, including at least the applicant to the review.

7. Ibid., paragraph 10.
8. Functus officio means having discharged one’s duty; having completed one’s term of office; having ceased to hold some public appointment; having performed the authorised act and being unable to go back to it a second time. One who is functus officio is precluded from again considering the matter even if new arguments or evidence are presented—Encyclopaedic Australian Legal Dictionary, LexisNexis.
The Tribunal will commit jurisdictional error if it declines to consider material on the incorrect view that it is *functus officio* at the time it receives the material. The Tribunal may or may not be under a further obligation to consider the material received. [emphasis added]

**Minister for Immigration, Multicultural Affairs and Citizenship v SZRNY**

The *SZRNY case* involved a review of a visa application. [emphasis added] The issue for the Full Court of the Federal Court was when the review was ‘finally determined’ by the RRT. The Court concluded that:

... notification of a review decision by the Refugee Review Tribunal forms part of the “core function of review”, and that until both the review applicant and the Secretary of the Department of Immigration and Border Protection are notified of the review decision according to law, the decision on the relevant application remains subject to review and is not “finally determined” within the meaning of subsection 5(9) of the Migration Act. Subsection 5(9) provides that an application is not “finally determined” until it is “no longer subject to any form of review under Part 5 or Part 7” of the Migration Act. [emphasis added]

**Key provisions**

Schedule 1 of the Bill contains amendments to the *Migration Act* which set out:

- when review tribunals become *functus officio* and
- when certain decisions are considered ‘finally determined’.

**When written and oral decisions are finally determined**

Sections 368, 368D, 430(2) and 430D of the *Migration Act* deal with the time that decisions both oral and written are *finally determined* by the MRT and the RRT.

**Item 3** of Schedule 1 of the Bill inserts *proposed subsections S(9A) and S(9B)* into the *Migration Act* so that applications are considered *finally determined* under Part 5 (review of decisions by the MRT) and Part 7 (review of protection visa decisions by the RRT) when they have been made in accordance with amended subsection 368(2), 368D(1), 430(2) or 430D (1), as detailed below.

**Migration Review Tribunal—written decisions**

Section 368 of the *Migration Act* sets out the requirement that the MRT record its decisions as written statements. **Item 16** inserts *proposed paragraphs 368(1)(e) and (f)* to require the written statement to include the day and time it is made (for decisions not given orally) or the date and time on which the decision was given orally. Under current subsection 368(2) the decision on a review (other than an oral decision) is taken to have been made on the date of the written statement. **Item 17** repeals and substitutes subsection 368(2). *Proposed subsection 368(2)* provides that a decision (other than an oral decision) is taken to have been made by the making of the written statement under subsection 368(1), on the day and at the time when the statement is made. **Proposed subsection 368(2A)** provides that the MRT has no power to change or revoke a decision after the day and time that the written statement is made, even where the written statement fails to record, as required by proposed paragraphs 368(1)(e) and (f), the date and time it is made: *proposed subsection 368(4)* at **item 19**.

**Migration Review Tribunal—oral decisions**

Under section 368D of the *Migration Act*, if the MRT gives an oral decision on an application for review, it must give both the applicant and the Secretary a copy of the record of its decision (in the form of the written statement required under subsection 368(1)) within 14 days after the decision is made. The applicant is taken to be notified of the decision on the day the decision is made. **Item 20** of Schedule 1 of the Bill repeals and replaces section 368D. *Proposed subsection 368D(1)* provides that a decision given orally by the MRT is taken to have been made and notified to the applicant on the day and time that the decision was given orally. The MRT cannot vary or revoke the decision once given: *proposed subsection 368D(2)*. Under *proposed subsection 368D(3)*,

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MRT must give a copy of the statement setting out the decision (in the form of the written statement required under subsection 368(1)) to the applicant and the Secretary within 14 days after the decision is delivered orally. However, failure to do so does not affect the validity of the decision or allow the Tribunal to vary or revoke the decision: **proposed subsection 368D(4).**

**Refugee Review Tribunal—written decisions**

Section 430 of the *Migration Act* requires the RRT to record its decisions as written statements. **Item 25** inserts **proposed paragraphs 430(1)(e) and (f)** to require the written statement to include the day and time it is made (for decisions not given orally) or the date and time on which the decision was given orally. Subsection 430(2) currently provides that a decision on a review (other than an oral decision) is to be taken to have been made on the date of the written statement. **Item 26** repeals subsection 430(2) and substitutes **proposed subsections 430(2) and (2A).** Under **proposed subsection 430(2),** a written decision is taken to have been made by the making of the written statement under subsection 430(1), on the day and at the time the written statement is made. **Proposed subsection 430(2A) provides** that the RRT has no power to vary or revoke a decision after the date and time the written statement is made. Importantly, a failure to record the date and time the written statement is made (as required by **proposed paragraphs 430(1)(e) and (f)),** does not affect the validity of the decision or allow the Tribunal to vary or revoke the decision: **proposed subsection 430(4) (at item 28).**

**Refugee Review Tribunal—oral decisions**

Section 430D provides that if the RRT gives an oral decision, it must give a copy of the written statement setting out the decision (in the form of the written statement under subsection 430(1)) to the applicant and the Secretary within 14 days after the decision is made. The applicant is taken to have been notified of the decision on the day on which the decision is made. **Item 29** repeals and replaces section 430D. **Proposed subsection 430D(1) provides** that an oral decision of the RRT is taken to have been made and notified to the applicant on the day and at the time the written decision is given orally. After the decision is given, the RRT has no power to vary or revoke the decision: **proposed subsection 430D(2).** **Proposed subsection 430D(3) provides** that the RRT must give a copy of the statement to the applicant and the Secretary within 14 days after the decision is given. Failure to comply with **proposed subsection 430D(3) does not affect the validity of the decision or allow the Tribunal to vary or revoke the decision: proposed subsection 430D(4).**

**Proposed paragraph 5(9B)(a),** at **item 3,** provides that **proposed subsection 5(9A) does not apply to a decision of the MRT or the RRT to remit a matter to the decision maker (that is, the Minister or delegate) for reconsideration, under paragraph 349(2)(c) or 415(2)(c) of the *Migration Act.* It would not be appropriate in such circumstances for the Tribunal’s decision to be regarded as finally determining an application, as the decision to remit requires the Minister or delegate to further consider the application.

**How and when grants and refusals of visas are made**

**Item 4** repeals and replaces section 67 of the *Migration Act.* Currently section 67 provides that a visa is granted by the Minister causing a record of it to be made. **Proposed subsection 67(1) provides** that the Minister’s decision to grant a visa or to refuse to grant a visa, is taken to be made when a record of the decision is made. **Proposed subsection 67(2) provides** that the record must state the day and time when it is made. The decision is taken to have been made on the day and time the record is made: **proposed subsection 67(3).** Under **proposed subsection 67(4) the Minister has no power to vary or revoke the decision after the record is made.** This is the case even when the record does not state the day and time of the decision, as required by subsection 67(2): **proposed subsection 67(5).**

**How and when decisions to cancel and revoke cancellation of visas are made**

**Item 9** repeals and replaces section 138 of the *Migration Act* which relates to the way a visa is cancelled or a cancellation of a visa is revoked. Existing section 138 provides that a visa is cancelled by the Minister causing a record of the cancellation to be made. 16 The cancellation of a visa can be revoked if the Minister makes a record

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16. Current subsection 138(1) does not apply to non-complying students under section 137I of the *Migration Act.* (Under section 137I, visas are cancelled 28 days after notice, except if certain actions, not currently relevant here, occur in the interim.) **Proposed section 138 does not mention section 137I.**
of the revocation under section 131. **Proposed subsection 138(1)** sets out the decisions that are taken to be made by the Minister causing a record to be made, that is:

- a decision to cancel or not cancel a visa and
- a decision to revoke a cancellation of a visa or not to revoke.

The record is to state the day and time of its making: **proposed subsection 138(2)**. The decision is taken to be made on the day and at the time at which the record is made: **proposed subsection 138(3)**. The Minister cannot vary or revoke the decision after the record is made: **proposed subsection 138(4)**. This is the case even when the record does not state the day and time of the decision, as required by proposed subsection 138(2): **proposed subsection 138(5)**.

**Financial implications**

According to the Explanatory Memorandum, the impact of the amendments in Schedule 1 is low. Costs will be met from existing resources of the Department of Immigration and Border Protection:

Insofar as the amendments that relate to review decisions by the Migration Review Tribunal and the Refugee Review Tribunal, they have estimated the costs associated with the implementation of the amendments to be approximately $132,000.17

**Schedule 2—bar on further applications for protection visas**

**Background**

As with the amendments in Schedule 1 of the Bill, the amendments in Schedule 2 of the Bill are largely driven by a Court decision.

The **Migration Amendment (Complementary Protection) Act 2011**18 (the Complementary Protection Act) established a process where protection visa applicants would have their claims assessed against Refugee Convention criteria, and if not found to be refugees, would then be assessed against complementary protection criteria. Applicants who were unsuccessful against the complementary protection criteria would have equivalent administrative review rights as those seeking protection under the Refugee Convention.19 These provisions came into force in March 2012.

A recent Flagpost outlines the effect of the Complementary Protection Act as follows:

... recent changes to the Migration Act 1958 ... introduced a statutory regime for assessing claims that might engage Australia’s non-refoulement (non-return) obligations under various international human rights treaties such as the Convention Against Torture and the International Covenant on Civil and Political Rights. These obligations are referred to as ‘complementary protection’ in that they are in addition or complementary to the protection obligations for refugees that arise under the 1951 Refugee Convention as amended by the 1967 Protocol. Under these other treaties, Australia can have an obligation to not return people to their country of origin if they would face serious violations of their human rights on return, even if they fail to meet the Refugee Convention’s definition of ‘refugee’.

Prior to 2012, there was no mechanism within the Migration Act enabling the Department of Immigration and Citizenship (DIAC) to assess, at first instance, claims that might engage Australia’s non-refoulement obligations under treaties other than the Refugee Convention. Claims for complementary protection could only be decided by the Minister personally after an applicant had exhausted all avenues for being granted a protection visa as a refugee. The **Migration Amendment (Complementary Protection) Act 2011** established a process by which protection visa applicants would first have their claims considered against the Refugee Convention criteria and then, if not found to be refugees, against new complementary protection criteria. Applicants unsuccessful against

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the complementary protection criteria have equivalent administrative review rights as those seeking protection under the Refugee Convention.\(^\text{20}\)

The amendments made by *Complementary Protection Act* were considered by the Full Court of the Federal Court in *SZGIZ v Minister for Immigration and Citizenship* (the *SZGIZ case*).\(^\text{21}\) This case examined whether the amendments entitled an appellant ‘to apply in the migration zone for a protection visa based on complementary protection grounds in circumstances where an earlier application by him for a protection visa based on the Refugees Convention as amended by the Refugees Protocol had been refused’.\(^\text{22}\)

The Federal Court ordered that the Minister must consider the second application for a protection visa according to the law. The Court found that section 48A of the Act did not prohibit the man’s second application for a protection visa as it was made on the basis of a different criterion from [his earlier application]. Under the Court’s construction of the relevant legislation, the application on the grounds of complementary protection obligations was not a ‘further application’ to that made on the grounds of the Refugee Convention’s protection obligations. Therefore, it was not prohibited under section 48A.\(^\text{23}\)

**Key provisions**

Existing section 48A of the *Migration Act* provides that a non-citizen may not make a further application for a protection visa while in the migration zone if they have already been refused a protection visa (subsection 48A(1)), or had a protection visa cancelled (subsection 48A(1B)).\(^\text{24}\) (The Minister may allow a person to make a further application if he or she considers that it is in the public interest to do so: section 48B.)

**Item 2** of Schedule 2 of the Bill inserts proposed subsection 48A(1C) into the *Migration Act* which operates so that the bar on further applications in the circumstances set out at subsections 48A(1) and (1B) applies to non-citizens regardless of the following:

- the grounds on which an application would be made or the criteria that a non-citizen would claim to satisfy
- whether those grounds or criteria existed earlier
- the grounds or criteria on which an earlier application was based
- the grounds on which a cancelled protection visa was granted or the criteria the non-citizen satisfied for the grant of that visa.

Existing subsection 48A(2) provides a definition of the phrase ‘application for a protection visa’. Existing paragraph 48A(2)(aa) refers to criteria for the application of a protection visa in paragraphs 36(2)(a), (aa), (b) and (c). These provisions set out criteria which must be satisfied before a protection visa may be granted. These ‘essential but not exhaustive’ requirements are, basically, that a person meets the requirements of the Refugees Convention as amended by the Refugees Protocol, or is a family member of that person (paragraphs 36(2)(a) and (b)); or that a person meets the complementary protection requirements, or is a family member of that person (paragraphs 36(2)(aa) and (c)). In the *SZGIZ case*, the Court held that the impact of current paragraph 48A(2)(aa) is that the bar on *further* applications provided at subsections 48A(1) and (1B) ‘refers to an application relying upon the *same criterion* as an earlier application’.\(^\text{25}\)

**Item 3** repeals paragraph 48A(2)(aa) and substitutes proposed paragraph 48A(2)(aa), which removes the references to the individual paragraphs of section 36(2) and instead refers generally to an application for a protection visa under the *Migration Act* or regulations as they exist in force at any time.

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20. Ibid.
24. Under section 5 of the *Migration Act*, *migration zone* means the area consisting of the states, the territories, Australian resource installations and Australian sea installations and, to avoid doubt, includes (a) land that is part of a state or territory at mean low water; and (b) sea within the limits of both a state or territory and a port; and (c) piers, or similar structures, any part of which is connected to such land or to ground under such sea; but does not include sea within the limits of a state or territory but not in a port.
25. *SZGIZ v Minister for Immigration and Citizenship*, paragraph 35.
By removing the references to the individual bases upon which a protection visa may be granted, and instead referring generally to an application for a protection visa, the amendment addresses the outcome in the SZGIZ case to:

... reinforce the intention that the statutory bar in section 48A of the Migration Act applies to prevent a non-citizen, while in the migration zone, who has been refused a protection visa, or held a protection visa that was cancelled, from making a subsequent protection visa application in the migration zone regardless of whether the further protection visa application would be made based on a different criterion.\(^{27}\)

**Item 4** is identical to **item 3** except for the addition of a note, which provides that **item 4** will not commence at all if **item 10** of Schedule 1 to the Migration Amendment (Regaining Control over Australia’s Protection Obligations) Bill 2013 (the Regaining Control Bill) commences before or on the same day as **item 3** of Schedule 2.

The Explanatory Memorandum notes:

> The purpose of this amendment is to ensure that if the Regaining Control Act commences after this Act, the amendment in item 4 of this Schedule will supersede the amendment made to the same provision of the Migration Act by the Regaining Control Act. If the Regaining Control Act commences before, or on the same day as, this Act, the amendment in item 4 of this Schedule will not be required because in that case, the amendment in item 3 will be effective.\(^{28}\)

The Regaining Control Bill, which was introduced into the House of Representatives on 4 December 2013, proposes to amend section 36(2) of the *Migration Act* by removing paragraphs 36(2)(aa) and (c). The statutory scheme for assessing complementary protection claims will be replaced with an administrative process. Information on the Regaining Control Bill is set out in the *Bills Digest*.\(^{29}\)

**Key issues**

The Government does not consider that the amendments in Schedule 2 of the Bill substantively alter the rights and interests of persons whom the amendments would affect.\(^{30}\) The rationale is two-fold.

**First**, a person who is being removed from Australia will be assessed for any possible risks that might arise under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*\(^{31}\) and the *International Covenant on Civil and Political Rights (ICCPR)*\(^{32}\) as a consequence of their removal from Australia. Therefore, a failed protection visa applicant who may have claims going to complementary protection would not be denied the opportunity to have their claims assessed simply by virtue of these amendments.\(^{33}\)

**Second**, the Minister has a power under section 48B of the *Migration Act* to intervene to allow a person in the migration zone who has been refused a protection visa, or has had a protection visa cancelled, to make a further protection visa application, in circumstances where it is in the public interest to do so. In addition, the Minister has other powers under the *Migration Act* to grant visas to a non-citizen in the public interest.\(^{34}\)

Despite this assurance, the UNHCR has expressed concern about the amendments in Schedule 2 of the Bill, noting that whilst the Minister has the power to intervene and grant a protection visa under the *Migration Act*:

> ... such powers are non-compellable and non-reviewable thus providing a discretionary rather than a legislative basis for the grant of complementary protection. UNHCR’s view is that it is preferable to provide a legislative basis for ensuring that a person will not be returned to a place where he or she may suffer “significant harm” on the basis of one of the grounds set out in s36(2A) of the Act to provide clarity and predictability. Furthermore, UNHCR is of

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31. Office of the High Commissioner for Human Rights (OHCHR), ‘*Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*’, OHCHR website, accessed 9 February 2014.
34. Ibid.
the view that it is important to afford procedural fairness to the person concerned who is unable to appeal the Minister’s decision. 35

The Refugee Council of Australia expressed its concerns as follows:

In the absence of a robust statutory framework for the assessment of complementary protection claims, this group of asylum seekers are in danger of being returned to situations where their lives may be at risk or they may face torture or other cruel, inhuman or degrading treatment or punishment. Denying these asylum seekers access to an independent, statutory assessment of their claims could thus bring Australia in breach of its obligations under the Convention Against Torture, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.

Given the grievous nature of the human rights violations to which these asylum seekers could potentially be exposed, we believe that the consequences of introducing a statutory visa bar would far outweigh the consequences of processing a few unmeritorious visa applications. 36

Financial implications

The Explanatory Memorandum notes that ‘the impact of the amendments in Schedule 2 is low’ and that any ‘costs will be met from existing resources of the Department of Immigration and Border Protection’. 37

Schedule 3—security assessments

Background

The amendments in Schedule 3 of the Bill are a response to the 2012 High Court decision in Plaintiff M47/2012 v Director-General of Security (the Plaintiff M47 case), 38 the facts of which have been summarised as follows:

The plaintiff, a Tamil in his 30s, was one of 78 Sri Lankan asylum seekers picked up in October 2009 by an Australian customs vessel after their vessel issued a distress call in the Indonesian search and rescue zone. The passengers then refused to disembark in the Indonesian port to which they were returned. On 17 November and with promises from the Australian Government that those recognised as refugees would be resettled within four weeks, they left the rescue ship. The plaintiff was assessed by the UN High Commission for Refugees in Indonesia and found to be a refugee. In December 2009, he was transferred to Christmas Island. Since that time he has been detained.

The plaintiff is a former member of the Liberation Tigers of Tamil Eelam (LTTE) who had participated in counter-intelligence. A delegate of the Minister for Immigration found that he is a person to whom Australia owes “protection obligations”. He was also assessed by ASIO to be directly or indirectly a threat to Australian security. The Australian Government does not propose to refoulle him to Sri Lanka, so he will be held at the Melbourne Immigration Transit Centre until, and if, he can be sent somewhere else. The government has looked, and continues to look for another country to which it might send M47. None has been, or looks likely to be, found. 39

In the Plaintiff M47 case one of the questions to be determined by the High Court was the validity of a provision in the Migration Regulations which imposed a further criterion on the grant of a protection visa, namely that the person not be assessed by ASIO to be a direct or indirect risk to Australia’s security. The High Court held that the provision was invalid as it was inconsistent with the Migration Act. The Court therefore held that the decision to refuse the plaintiff a protection visa on the basis of that regulatory provision had not been made according to law. 40

37. Explanatory Memorandum, op. cit., p. 3.
Key provisions

Schedule 3 of the Bill amends the Migration Act to include, in the primary legislation, a criterion for a protection visa that the applicant is not assessed by ASIO to be directly or indirectly a risk to security.

As discussed in relation to Schedule 2, existing section 36 of the Migration Act deals with protection visas. Item 1 of Schedule 3 inserts proposed subsections 36(1A) and (1B) into the Migration Act. Proposed subsection 36(1A) provides that an applicant for a protection visa must satisfy both:

• the criterion in proposed subsection 36(1B) and
• at least one of the criteria in subsection 36(2).

Proposed subsection 36(1B) requires that an applicant is not assessed by ASIO as a security risk, either directly or indirectly, within the meaning of section 4 of the Australian Security Intelligence Organisation Act 1979 (ASIO Act).41

Subsection 36(2) of the Migration Act sets out criteria, one of which must be satisfied before a protection visa may be granted. Currently these criteria are, basically, that a person meets the requirements of the Refugees Convention as amended by the Refugees Protocol, or is a family member of that person (paragraphs 36(2)(a) and (b)); or that a person meets the complementary protection requirements, or is a family member of that person (paragraphs 36(2)(aa) and (c)). As discussed in relation to Schedule 2, the Regaining Control Bill proposes to amend subsection 36(2) of the Migration Act to remove the complementary protection criteria at paragraphs 36(2)(aa) and (c). Accordingly, if this Bill and the Regaining Control Bill are passed by the Parliament, an applicant for a protection visa will need to either be a refugee, or a family member of a refugee, and not be assessed as a security risk.

Existing paragraph 411(1)(c) of the Migration Act provides that a decision to refuse to grant a protection visa, other than a decision relying on paragraph 36(2C)(a) or (b), is reviewable by the RRT. Paragraphs 36(2C)(a) and (b) provide that a person is taken not to satisfy the complementary protection requirement at paragraph 36(2)(aa) if, in summary, the Minister considers that the person has committed a serious crime or is a danger to Australia’s security. As they relate to the complementary protection requirement at paragraph 36(2)(aa), which is proposed to be removed by the Regaining Control Bill, paragraphs 36(2C)(a) and (b) will also be repealed by that Bill.42

Item 2 repeals existing paragraph 411(1)(c) and substitutes proposed paragraph 411(1)(c) which provides that a decision to refuse a protection visa is reviewable by the RRT, except for decisions relying on Articles 1F, 32 or 33(2) of the Refugees Convention,43 or subsection 36(1B)44 or paragraph 36(2C)(a) or (b) of the Migration Act.

Item 3 is an alternative amendment of paragraph 411(1)(c), which does not include the reference to paragraphs 36(2C)(a) and (b). These alternative amendments are required as a result of the proposed repeal of paragraphs 36(2C)(a) and (b) by the Regaining Control Bill. Clearly, if the Regaining Control Bill is enacted and commences before this Bill, paragraphs 36(2C)(a) and (b) will no longer exist, so will not need to be referred to at paragraph 411(1)(c).

Existing paragraph 411(1)(d) of the Migration Act provides that a decision cancel a protection visa, other than a decision relying on paragraph 36(2C)(a) or (b), is reviewable by the RRT. Item 4 repeals paragraph 411(1)(d) and substitutes proposed paragraph 411(1)(d) which provides that a decision to cancel a protection visa is reviewable by the RRT except for decisions made because of:

• one or more of Articles 1F, 32 or 33(2) of the Refugees Convention
• an assessment by ASIO that the holder of the visa is a risk to security either directly or indirectly within the meaning of section 4 of the ASIO Act
• paragraph 36(2C)(a) or (b).

42. See item 7 of Schedule 1 to the Regaining Control Bill.
43. Article 1F of the Refugees Convention concerns serious reasons for believing a person has committed crimes; Article 32 concerns expulsion on grounds relating to national security; Article 33(2) concerns where a person is considered a danger to the security of the country.
44. Inserted by item 1 of this Schedule.
Item 5 is an alternative amendment of paragraph 411(1)(d). The alternative amendments are required for the same reason that the alternative amendments of paragraph 411(1)(c) are required – to account for the proposed repeal of paragraphs 36(2C)(a) and (b) by the Regaining Control Act.

Existing section 500 deals with applications made to the AAT for review of decisions. Item 6 inserts proposed subsection 500(4A) which provides that the following decisions are not reviewable under section 500 or under Part 5 or 7 of the Migration Act:

- a decision to refuse to grant a protection visa relying on subsection 36(1B)
- a decision to cancel a protection visa because of an assessment by the ASIO that the holder is a risk to security.

Key issues

Two issues arise from the amendments in Schedule 3 of the Bill. First there is concern that the amendments will have the effect of leaving certain refugees in indefinite detention. Second there is concern about the lack of merits review for decisions based on adverse security assessments.

Indefinite detention

Section 189 of the Migration Act requires unlawful non-citizens to be detained. Subsection 196(1) of the Migration Act requires that an unlawful non-citizen detained under section 189 must be kept in immigration detention until:

- they are removed from Australia under section 198 or 199
- an officer begins to deal with the non-citizen under subsection 198AD(3) (which allows unauthorised maritime arrivals to be taken to a regional processing centre)
- they are deported from Australia under section 200 or
- they are granted a visa.

The Law Council of Australia noted in relation to the amendments concerning national security matters in Schedule 3:

By seeking to circumvent [the Plaintiff M47/2012] decision, the Law Council is concerned that the amendments proposed in the Bill could place men, women and children who have been found to be owed protection by Australia at risk of prolonged or indefinite immigration detention as a result of the issue of an adverse assessment by ASIO. If enacted, the Bill would leave these refugees unable to obtain a protection visa in Australia and unable to return to their country of origin due to a genuine fear of persecution. Under current policy settings, such refugees are also ineligible for release into community detention arrangements or other forms of conditional release.

While the Law Council acknowledges the need for Australia to adopt robust protections against any risk to national security, it is concerned that the proposed amendments could result in the arbitrary and potentially indefinite detention of refugees on the basis of an adverse security assessment issued by ASIO. The amendments—which specifically preclude review of a decision not to grant or to cancel a visa on the grounds of an adverse security assessment - also heighten the Law Council’s long standing concerns relating to the absence of a statutory system of review of adverse ASIO security assessments for non-citizens. This leaves refugees who have been issued with such assessments without a clear, statutory process for challenging the basis for their adverse assessment or for presenting new information for consideration. 45

Amnesty International comments in relation to the Schedule 3 amendments concerning security matters:

45. Law Council of Australia, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Migration Amendment Bill 2013 [Provisions], op. cit.
Amnesty International, in line with other human rights groups and the United Nations Human Rights Committee, has consistently raised concerns relating to current Australian policy and practice in this area which are contrary to Australia’s human rights obligations under the International Covenant on Civil and Political Rights.  

The Government’s position is that it relies on the 2004 High Court decision of *Al-Kateb v Godwin & Ors* (the *Al-Kateb case*), in which the majority found that as a matter of construction the immigration detention of an unlawful non-citizen was authorised and required by sections 189, 196 and 198 of the *Migration Act* while officers seek to find a country to which he or she can be removed (even if there is no present prospect of finding such a country).  

**Removal of review rights**

The effect of *proposed paragraph 411(1)(c)* (as amended by *item 2 or 3* of Schedule 3) and *proposed paragraph 411(1)(d)* (as amended by *item 4 or 5* of Schedule 3) is to provide that a decision to refuse to grant a protection visa, or to cancel a protection visa, which is based on an ASIO security assessment is not subject to merits review in the RRT. The effect of *proposed subsection 500(4A)* (inserted by *item 6* of Schedule 3) is to provide that a decision to refuse to grant a protection visa, or to cancel a protection visa, which is based on an ASIO security assessment, is not subject to review by the Administrative Appeals Tribunal, the MRT or the RRT. This means that individuals who are assessed by ASIO as being a ‘direct’ or ‘indirect’ risk to security will be not be able to seek merits review of a visa refusal or cancellation decision based on that assessment.

The Statement of Compatibility with Human Rights states:

> The amendments do not affect the arrangements that are on place for independent review of ASIO’s decision to issue an adverse security assessment.

> The Independent Reviewer of Adverse Security Assessments… role is to review ASIO adverse security assessments given to Department of Immigration and Border Protection in relation to people who remain in immigration detention and have been found by the Department to ‘engage Australia’s protection obligations under international law, and not be eligible for a permanent protection visa, or who have had their permanent protection visa cancelled’…

> In addition, a person who has received an adverse security assessment from ASIO retains the right to seek judicial review of the assessment in the High Court’s original jurisdiction under section 75(v) of the *Constitution* or in the Federal Court’s original jurisdiction under section 398 of the *Judiciary Act 1903*.

Professor Ben Saul from the Sydney Centre of International Law comments that the amendments in Schedule 3 which relate to security assessments violate Australia’s obligations under international human rights law and recommends that the Bill not be enacted in its present form. He also has great concerns about the Statement of Compatibility with Human Rights on the Bill stating that ‘fundamental legal claims made in the Statement are wholly wrong’. He notes further:

> Not only is the security assessment regime illegal, it is procedurally unfair, unprincipled, and unnecessary in policy terms, as I have written elsewhere. It is entirely possible to guarantee national security while ensuring fairness to affected individuals—as already occurs through balanced procedures in Britain, Europe, Canada and New Zealand. It is also possible to protect security without resorting to the extremist measure of indefinite detention without charge. I note that freedom from arbitrary, unlawful detention is a ‘traditional’ common law freedom which the present Government claims to be particularly concerned about.

49. Ibid., p. 12.  
51. Ibid.
The Australian Lawyers Alliance had this to say about the lack of access to merits review for decisions based on ASIO security assessments:

The rule of law is applicable to all persons in Australia, regardless of their citizenship status. To deem an individual unworthy of access to justice as a result of their maritime means of arrival, or their assessment by a government agency as a risk, does not accord with standards of natural justice …

While we appreciate that the procedural mechanisms in place require strong rules in order to operate, a crucial factor in their continuity is the availability of checks and balances to ensure that the legislature or executive does not engage in ultra vires acts.

If an issue is procedurally uncomfortable, it is more likely that it is an area that requires greater scrutiny. 52

Financial implications
The Explanatory Memorandum notes that the impact of the amendments in Schedule 3 ‘is low’ and that any ‘costs will be met from existing resources of the Department of Immigration and Border Protection’. 53


53. Explanatory Memorandum, op. cit., p. 3.