Chapter Six
Immigration Policy and the Separation of Powers

Hon Philip Ruddock, MHR

I would like to thank The Samuel Griffith Society for the invitation to present this address, and I offer my congratulations to the Society for providing forums such as this one to facilitate discussion of constitutional issues, as I share its view that the Australian Constitution has served this nation well, and that we should strive to ensure that it continues to do so.

I am pleased to have this opportunity to present – in the context of the constitutional doctrine of the separation of powers – some of the major challenges that Australia is facing in relation to immigration issues, particularly with respect to the significant numbers of asylum seekers and unauthorised arrivals who have sought residence in Australia.

To set the context for my address, I will start by outlining Australia's migration and humanitarian policies and the factors that are putting pressure on these programs.

I will then move on to discuss how the legislature and the Executive have responded to these pressures by taking practical steps to strengthen the integrity of Australia's migration program and to allow Australia to continue to provide protection to people who are at greatest risk. In this regard, I will concentrate on the reforms that are of greatest interest to this forum, namely the legislative changes made in early October, 2001 to contain abuse of judicial review processes by unsuccessful visa applicants.

Finally, I will discuss the role of the judiciary in giving effect to the Parliament's response and its legislative intentions.

1. Managing migration

As we all know, Australia has a long tradition of immigration. Indeed, the nation has been built on settlement from other countries. In many ways, this has determined the very nature of our contemporary society:

- Almost one in four Australians today were born overseas.
- Around 40 per cent of Australians were either born overseas or have at least one parent who was born overseas.
- In recent years, people from around 185 different countries have made Australia their home.

Australia's immigration policies are implemented under legislation enacted primarily under the "immigration and emigration" and "naturalization and aliens" heads of power in s.51 of the Commonwealth Constitution.

We are one of only a few countries in the world that have operated a planned immigration program for over 50 years. In fact, the management of Australia's migration program is hailed as a model for other countries.

In a radio interview last month, Professor John Salt, a Professor of Geography at University College, London, and a consultant on migration to the European Union, the Council of Europe, and the OECD, commented that:

> "Australia has probably gone further than any other country in developing a comprehensive management policy which is transparent, which is highly organised, [and] which lays out clearly the rules and regulations under which migration will occur . . . [it] involves discussion amongst the various interested groups and has a research base to look at how successful [it is]".[1]

Next financial year, the Australian migration program will be the largest and most highly skilled in over a decade, with a planning level set in the range of 100,000 to 110,000 places.

Over the years, we have learned that sound immigration policy must be underpinned by some essential core values. For Australia, the first of these is that our approach to migrant selection must be strictly non-discriminatory as far as matters such as race, religion, colour or ethnicity are concerned.

The second is that our immigration policies must enable Australians with non-Australian partners or dependent children to be re-united in Australia as permanent residents and, in time, Australian citizens.

The third core value is that the overall immigration intake must be demonstrably in the national economic interest. If this were not the case, Australia's standard of living would deteriorate, community support for immigration would rapidly diminish, and Australia's capacity to provide a humanitarian program would be reduced.

The fourth core value is that Australia must contribute its fair share to the resettlement of those most in need – the principle of burden-sharing. In resettling refugees, the Australian government devotes very considerable resources to ensuring that these people have the support they need to fully participate as members of our community.

And last, but by no means least, we must have the capacity to manage the movement of people across our borders in an orderly and efficient manner. Without this critical capacity, the idea of a managed immigration policy rapidly becomes meaningless.

Since coming to power in March, 1996, the Liberal/National Coalition government has progressively implemented a considerable number of measures to enhance the integrity of Australia's immigration program. These measures have included adjustments to restore the Australian community's confidence in the program, by refocusing it to contribute to Australia's development and future prosperity, and other measures to meet changing situations challenging Australia's border integrity. All these measures contribute to Australia continuing to have the economic and social capacity to give practical effect to the nation's commitment to assist those at greatest risk.

Australia's humanitarian program

Australia has a proud tradition of providing safety for genuine refugees. Our humanitarian program is based on our obligations under various international human rights treaties, but Australia's commitment goes far beyond those obligations, particularly through our offshore humanitarian resettlement program.

Since World War II, Australia has resettled 600,000 refugees. The Australian government's humanitarian program currently provides, each year, around 12,000 refugees and others who are in humanitarian need with residence in Australia.

- Australia is one of only nine countries that operate a dedicated resettlement program each year.
- On a per capita basis, Australia's offshore refugee intake is one of the highest in the world.

The Office of the United Nations High Commissioner for Refugees (UNHCR) estimates that there are approximately 19 million persons of concern around the world. Against this context, Australia resettles, through its humanitarian program, those persons in the very greatest need – those who are at risk if they remain where they are, and who have no means of escape other than resettlement in a third country.

Offshore humanitarian entrants to Australia have access to some of the most comprehensive and generous services in the world to assist them to become fully participating members of the Australian community. The assistance provided is tailored to the individual's

needs, in recognition of the fact that refugees are particularly vulnerable. Each 1,000 refugees resettled under these schemes costs more than $30 million to the Australian Budget.

While our desire to assist these persons is strong, Australia has a finite capacity to give practical effect to this desire. The pressure placed on our resources by those arriving in Australia without authority, and seeking to engage our obligations to provide protection, limits our capacity to assist those at greatest risk.

2. Pressures on Australia's migration and humanitarian programs

Humanitarian program places are being diverted away from our offshore program for people who have been identified by the UNHCR as being in need of resettlement, many of whom have been living in appalling conditions in displaced persons camps for many years.

People smugglers seek to exploit the situation by manipulating those persons who can afford, and are prepared, to pay comparatively large sums of money to enter Australia without authority. People smuggling is a big business. The International Organisation for Migration estimates the worldwide proceeds of people smuggling to be $US10 billion a year. On average, it costs the Australian government $50,000 for every unauthorised arrival by boat from the time of arrival to the time of their departure from Australia.

Some asylum seekers come here from countries where there is little risk of persecution, but which are less prosperous than Australia. They seek to use our refugee determination processes to obtain the right to work in Australia, or to access health services and other support at Australian taxpayer expense while their claims are assessed. In 1997-98, the Australian government spent in the order of $80 million on the enforcement of immigration law. Three years later, in 2000-01, the cost was more than three times as great, at nearly $300 million.

3. Responding to the threats

Australia has addressed these problems by progressively implementing a range of measures to combat people smuggling and to stop abuse of Australia's refugee determination processes.

As outlined earlier, one of the core values underpinning Australia's immigration policy is that we must have the capacity to manage the movement of people across our borders in an orderly and efficient manner. Otherwise, the idea of a managed immigration policy rapidly becomes meaningless.

The Australian government is well aware of its obligation not to *refoule*[2] – we never have, and we never will. We are equally aware, however, that our international obligations do not give people any right to demand residence in Australia. Following the *Tampa* crisis in August and September, 2001 – the details of which are well known – legislative amendments to address the issues were passed by the Parliament. The changes included:

- A bar on visa applications for unauthorised arrivals at certain Australian island territories;
- Powers to move these persons to declared countries;
- Powers to detain vessels and persons; and
- Minimum sentences for people smugglers.

Further legislative amendments were introduced to Parliament in June, 2002 in response to indications that people smugglers were planning to land people at new destinations in the region. To combat the new threats, the amendments provide that additional Australian islands are included in the definition of "excised offshore place". Arrivals at such places are barred from applying for any visa to enter and remain in Australia.

New judicial review scheme for visa-related decisions. One of the important reforms introduced in October, 2001 that I will discuss in detail in this address was the creation of a new judicial

review scheme for visa-related decisions. This measure addresses the Government's long-standing concerns about the increasing cost and incidence of migration litigation.

The Government believes that access to judicial review in migration matters should be restricted in all but exceptional circumstances. This commitment was made in light of the extensive merits review rights in migration legislation and concerns over the misuse of court processes by those who seek to delay their stay and frustrate their removal from Australia.

A previous judicial review regime was implemented by the last Labor government in the early 1990s. It was part of a package of reforms that was intended to reduce Federal Court litigation and to provide greater certainty as to what was required from both decision-makers, and visa applicants and visa holders. These reforms included a significant expansion of independent merits review, including the creation of the Refugee Review Tribunal.

However, that scheme did not reduce the volume of cases before the courts. In fact, the volume increased. In 1994-95, there were less than 400 applications to the Federal and High Courts. In 2000-01, there were 1,340. And the number of applications continues to grow. It is expected that there will have been over 2,000 cases lodged in the courts in 2001-02. Litigation costs for my department soared from $5.8 million in 1995-96, to $15 million five years later in 2000-01.

This trend has occurred despite full and open access by applicants to heavily subsidised independent merits review by the Migration Review Tribunal and the Refugee Review Tribunal. Between one third to one half of applicants withdraw their applications prior to the court hearing. Of the cases that go on to substantive hearings, the merits-based decision is currently upheld in over 90 per cent of cases. It is hard not to conclude that there is a substantial number of applicants who are using the legal process primarily in order to extend their stay in Australia.

Faced with these problems, options were explored for best achieving the Government's policy objective of restricting access to judicial review. In light of the Australian High Court's original jurisdiction to consider challenges to the actions and decisions of Commonwealth officers under s.75(v) of the Constitution, the Government's legal advisers found that a "privative clause" would be the only effective mechanism.

A privative clause operates to give decision-makers wider lawful operation for their decisions and thereby reduces the grounds on which the courts can set aside such decisions as being unlawful. In accordance with High Court case law, namely the *Hickman Case*[3] and subsequent authorities, the wording of the clause in the *Migration Act* has the effect of limiting the grounds for finding a decision to be unlawful. As a result, a court can only overturn a decision where:

- The decision-maker was not acting in good faith in making the decision; or
- The decision was not reasonably capable of reference to the decision-making power given to the decision-maker; or
- The decision did not relate to the subject matter of the legislation; or
- The decision exceeded the limits in the Commonwealth Constitution.

These limited grounds are intended to facilitate faster resolution of court cases, thereby decreasing delays in removal of non-citizens and lowering costs.

I am aware that the introduction of the privative clause into the *Migration Act* caused concern for some people, and that the concern was based on a separation of powers issue – specifically, that the role of the judiciary was being interfered with in some way.

Anyone who holds such a concern will find comfort in comments that were made recently by the Chief Justice of the High Court of Australia, the Honourable Murray Gleeson, AC – the head of the judicial arm of government. In a speech entitled *Courts and the rule of law*, delivered in November, 2001 as part of Melbourne University's "Rule of Law" series, his Honour made the following statements about the legitimacy of parliamentary use of privative clauses as mechanisms to limit judicial review in particular areas:

"To the extent to which a privative clause, properly construed, lawfully amplifies power or limits jurisdiction, then respect for the rule of law requires courts to give effect to that expression of legislative will. Subject to the Constitution, the Parliament, in the exercise of its legislative power, is not obliged to maximise the area of potential justiciability of disputes between citizen and government".

The Chief Justice also said that:

"Subject to any constitutional limitations on their powers, it is for Parliaments to decide what controversies are justiciable, and to create, and, where appropriate, limit, the facilities for the resolution of justiciable controversies. Parliaments regularly expand and contract the subjects of justiciable controversy. That is what much law-making entails".

Although the new judicial review scheme for immigration matters was designed on the basis of long-standing High Court statutory interpretation of privative clauses in other areas of law, it was inevitable that some litigants would choose to contest the validity of the privative clause in the *Migration Act*. If at some point in the future the scheme is found by the High Court to be invalid in any respect, the Government will, of course, have to look for alternative ways of tackling the abuse of judicial review processes in migration matters. For the reasons to which I have already referred, it would simply be unsustainable and unacceptable to allow the ever-increasing immigration litigation load to grow unchecked.

4. Role of the judiciary in giving effect to the Parliament's legislative intentions

Up to this point I have been discussing actions taken by the Parliament and by the Executive in relation to immigration issues. If there were any doubts about the appropriateness of those actions in a separation of powers sense, I hope they have been dispelled.

I would now like to make some comments about the judiciary's role in relation to immigration matters. I believe that some decisions of the judiciary, particularly in the Federal Court, can rightly be criticised on separation of powers grounds in two respects.

The first is that some members of the judiciary have encroached on the functions of the Executive arm of government, by undertaking merits review under the guise of judicial review. Under established principles of administrative law, judicial review is a consideration of the way in which an administrative decision-maker or tribunal reached the decision made. Judicial review is not an opportunity for a reconsideration of the merits of an otherwise lawful decision.

The second is that there have been numerous instances where individual judges have reflected on the wisdom of the Parliament in passing laws which they personally do not support. These criticisms do not receive the same coverage as comments made by Members of Parliament in relation to judicial decisions.

I note that these issues are also of concern to the Right Honourable Sir Harry Gibbs. In his concluding remarks at this Society's thirteenth Conference in 2001, Sir Harry made the following comments:

"It is disturbing that . . . there is a perception that some federal judges decide according to their ideological biases rather than according to law. It tends to destroy respect for the law in general, and the Federal Court in particular, that perceptions of this kind should exist, and it would indicate a most serious departure from judicial probity if the perceptions are well founded. This should be a matter of concern to those many Federal Court judges whose reputations are beyond reproach".

Those comments were made in relation to judicial handling of matters involving Aboriginal and industrial relations issues, but I am also aware that at previous Conferences of The Samuel Griffith Society, similar criticisms have been made in relation to immigration matters.

For example, some rather forthright comments were made by Dr John Forbes in a paper delivered to the eleventh Conference, in 1999. Dr Forbes accused some Federal Court judges of "ignoring the well-known limits of judicial review and effectively conducting appeals on the

merits". The previous speaker today, Professor John McMillan, has expressed similar views in various presentations and articles.

It goes without saying that nothing in this address is intended to influence or bring pressure upon the courts in relation to any case presently or in the future before them. The reason it goes without saying is that I know, as I am sure virtually all Australians know, that our courts are rightly impervious to anything I, or any other politician, would say.

Conclusion

One of the important messages I hope I have conveyed in this address is that the Australian Government remains committed to having a planned migration program and to meeting its obligations under international law by continuing to provide protection to people most at risk. The recent changes to Australia's immigration laws to which I have referred demonstrate that commitment.

The measures that have been put in place will ensure the efficacy of Australia's planned immigration and offshore humanitarian resettlement programs. By enhancing the protection of Australia's borders from unauthorised entry and preventing abuse of our judicial review processes, the new measures improve Australia's ability to assist those at greatest risk.

Immigration policy issues are complex. There is often a need to balance competing considerations in order to provide an effective and compassionate migration program and protect our borders. In our constitutional system, it is for the legislature to strike that balance in the national interest, and that is exactly what the Parliament did when it introduced the recent changes to our immigration laws. The Executive has been performing its role in implementing that legislation, and the judiciary is duty-bound to apply it in the courts.

Endnotes:

1. Radio National Breakfast Program, 6 May, 2002.

2. The French verb *refouler* means "to drive back", or "to expel [aliens]". [Editor's note].

3. *R v. Hickman; ex parte Fox and Clinton*, (1945) 70 CLR 598.