

**11 September 2001 – A Comparative Study of the Effect of the Continuing Terrorism Threat on International Immigration Policies**

by  
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**A. Introduction**

This paper is additional to that prepared by Dr Etienne Hugo and presented at the IBA Conference held in Durban, South Africa in September 2002 which is annexed.. At that time, strict measures had been taken by the Australian Government to tighten up its borders to prevent the entry of terrorists or other unwanted people from Australian borders.

It can be said that the "Fortress Australia" policy implemented by the current Liberal Government has been successful in terms of keeping unwanted boat arrivals from Australian shores. There has been only one boat arrival in the last 12 months which nearly reached Australia's western coastline, but was eventually prevented from arriving onshore. The Vietnamese occupants were removed to the new Detention Centre on Christmas Island for processing. Under earlier legislation, this Australian territory was "excised" from Australia for the purposes of the Migration Act.

Since September last year, we have seen further international action against the so-called 'war on terrorism'. It is difficult to say whether the outcome of the war in Iraq has resulted in any policy changes in Australian immigration law. The instability of the international community, however, has increased the Government's resolve to keep Australians safe and to improve their capability to screen entrance to Australia.

**B. Changes**

1. A good example of this is the Migration Legislation Amendment (Identification and Authentication) Bill 2003. This bill was introduced to the House of Representatives in June this year. This bill seeks to amend the Migration Act to insert provisions to provide for a legislative framework for the collection of personal identifiers from non-citizens. The Bill will enable specified personal identifiers to be collected from visa applicants and persons entering Australia, as well as non-citizens within Australia whilst checking compliance with visa conditions. Non-citizens detained in terms of the Migration Act and placed in immigration detention can also be subjected to these measures. The following types of personal identifiers are proposed:

1. Fingerprints and handprints.

2. Photographs or other images of the face and shoulders.
3. Weight and height measurements.
4. Audio and video recordings.
5. Signatures.
6. Iris scans; and
7. Any other personal identifiers as prescribed in the Regulations.

The new identification bill will provide some protection to non-citizens subjected to these measures. For example, a personal identifier that involves the use of an intimate forensic procedure (such as blood tests or hair samples) will be prohibited from being prescribed.

In relation to the introduction of personal identifiers, there are obvious concerns raised in relation to the enforcement of such procedures. Although it is recognised that identity fraud is a huge problem for many Western countries, it does raise concerns such as:

1. What are the safeguards that would apply to the procedures?
2. Can a personal identifier be taken without consent?
3. What are the consequences of failure to comply with identification requirements?
4. Can identifiers be taken from children or people with mental illness?

There are many privacy issues of concern about this Bill, such as: What measures are taken in relation to the destruction of the personal identifiers, the treatment of minors, data base projection etc.

2. The primary reporting system for aircraft passengers has also been improved. These changes took effect in a Gazettal Notice dated 13 August 2003. The new system is intended to improve the reporting of international passengers.
3. The Australian Government has foreshadowed new legislation and administrative measures to protect sensitive information disclosed during court cases involving classified or security sensitive material. The range of new measures that has been designed to overcome the procedural and evidentiary problems associated with prosecuting criminal offences involving sensitive material include:
  1. Enabling closed hearings on the use, the relevance or admissibility of such material before it becomes an issue in open court.
  2. Enabling the court to allow summaries or stipulations as to the facts to be substituted.

3. Requiring all persons to obey, under threat of criminal penalty, any court order or direction relating to handling and disclosure of information.
4. Requiring legal representatives who require access to the information to be security cleared at an appropriate level.

The Government has advised that these measures have been drawn from legislative regimes in other countries such as the United States, the United Kingdom and Canada.

4. The Australian Government is maintaining its focus on the screening of applicants from certain "risk factor" countries. The risk factor list consists of those countries where a high level of non-compliance with Australian visa conditions is recorded. Applications from these countries receive a high degree of scrutiny, with applicants needing to provide a high level of proof that their intended visit to Australia is a genuine visit. The facts that will be considered are whether visitors overstay their visas, the percentage of visitors caught breaching their conditions, such as working illegally and the number of visitors applying for protection visas while on visitor visas. Any country with more than 50 protection visa applicants in a program year will automatically be included on the list. Any country with more than 1,000 visitor arrivals and a modified visitor non-return rate or compliance location rate more than 3 times the global average will be included on the list.
5. At airports there are also increased customs security arrangements.
6. An important legislative change directly linked to anti-terrorism is the introduction of Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003. The Australian Security Intelligence Organisation (ASIO) Legislation Act was introduced to enhance the capacity of Australian security organisations to combat terrorism. It grants ASIO powers to collect intelligence that may substantially assist in the investigation of terrorism offences. The Act provides ASIO with the ability to seek a warrant to detain and question people for the purposes of investigating terrorism offences. The Act provides for the development of a written statement of procedures or protocol to be followed in the exercise of authority to take persons into custody, to detain persons and conduct questioning under warrants issued under the Act. The Act also provides that no action can be taken under the warrant until the protocol has been followed.

The protocol has been developed in accordance with the requirements of the Act and developed by the Director General of Security in consultation with the Australian Federal Police, the Inspector General of Intelligence and Security and the Attorney General's Department. The protocol sets out the basic standards that will apply in the questioning and detention of persons under a warrant. It clarifies concepts used in the Act and addresses issues such as:

1. Transportation of a person under warrant.
2. Treatment of a person being questioned, for example, the conditions applicable during questioning such as access to drinking water and toilet and other facilities at all times during questioning.

3. Supervision of detention under warrant and the conduct of any searches undertaken pursuant to a warrant.
4. Health and welfare of a person subject to a warrant, such as accommodation facilities and food and sleep requirements.
5. The video recording of procedures.
6. Contact with other persons and a complaint mechanism; and finally
7. Arrangement for liaison with other persons such as the Inspector General of Intelligence and Security and the Commissioner of the relevant police service.

In summary, ASIO will now get powers to detain and question people believed to have information about terrorist attacks. In a media statement by the Australian Government, it was said: "The Australian community demands that our counter-terrorism laws are strong and effective. The Howard Government has repeatedly and consistently demonstrated the seriousness with which we take our responsibility to protect Australians and Australian interests from terrorism."

**Obtaining and issuing warrants under the ASIO Bill:** In obtaining a warrant, the Director General of ASIO must obtain the consent of the Attorney General before seeking a warrant from an issuing authority. Before consenting, the Attorney General must be satisfied that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence and that relying on other methods of collecting that intelligence would be ineffective. If the warrant being sought requires a person to be taken into custody immediately and detained, the Attorney General must also be satisfied that the person may alert another person involved in a terrorism offence of the investigation, or the person may fail to appear before the prescribed authority, or the person may alter or destroy a record or thing that he may be requested to produce. If the warrant concerns a person between the ages of 16 and 18, the Attorney General must also be satisfied on reasonable grounds that the person will commit, is committing or has committed a terrorism offence. An issuing authority will be either a Federal magistrate, a Federal judge or another authority set out in the regulations. An issuing authority may only issue a warrant if it has been requested in accordance with the proper procedure and it is satisfied that there are reasonable grounds for believing that the warrant will substantially assist in the collection of intelligence that is important to a terrorist offence.

A few procedures under the warrant involves that if a person is taken into custody immediately and detained, this will be the responsibility of the police, normally the Australian Federal Police. A warrant can allow up to a total of 24 hours of questioning in 8-hour blocks over a maximum period of 7 days, subject to the protocol governing the questioning process. The person will have access to a lawyer of choice, with safeguards to protect security sensitive information and increased penalties for security offences. A security provision places a ban on the legal adviser communicating any unauthorised information while the subject is detained under warrant. The penalty for breaching this provision is up to 5 years imprisonment.

7. In NSW, the most populous state in Australia, specific anti-terrorism powers have been given to the police in controversial legislation passed earlier this year. Extended powers to hold and detain persons on general suspicion have been enacted.
8. In relation to Australia's international obligations to provide protection to asylum seekers, concerns have been expressed whether the procedures for dealing with onshore asylum seekers have adequate safeguards in place to ensure that persons suspected of being a danger to the security of Australia are not removed in breach of Australia's Refugee Convention obligations. Australia has a screening process in place for unauthorised arrivals. Asylum seekers who therefore manage to arrive in Australia without authorisation have to undergo an individual screening interview conducted by DIMIA. On the basis of a written summary of this interview, a senior DIMIA officer in Canberra (the capital) determines whether the person has made claims which prima facie may engage Australia's protection obligations under the Refugee Convention. If the answer is no, the person is removed from Australia as soon as practicable. If the answer is yes, the person is allowed to remain and make a protection visa application.
9. Australia has also extended in late August the system of temporary protection visas to all refugee applicants, not just those who apply after arriving with false or no documentation. This new system has been criticised as keeping asylum seekers in uncertain territory, as the protection visa is only granted for 3 years. If the circumstances in the country of origin improve within that time frame, a subsequent temporary protection visa is therefore likely to be refused. It may be that this Regulation change will be struck out by Parliament.
10. A further significant development since September 2002 was the handing down of the landmark decision of *Plaintiff S157/2002 v Commonwealth of Australia* (2003). This case was heard by the Full Court of the High Court of Australia and was handed down on 4 February 2003. This court case was fundamentally a challenge of the use of privative clauses in Australia's immigration law which excluded applicants from applying for judicial review after a Tribunal has completed a merits review. By many, these steps taken by the Government were seen as an attempt to increase the Executive's power to deal unilaterally and unchecked with non-citizens by restricting their right to have decisions made by Commonwealth officers reviewed. On 4 February 2003, a unanimous decision was made by the High Court of Australia that found: where a jurisdiction error exists in a Tribunal decision, no actual decision has been made, and accordingly the privative clause would not be applicable. The end result of this decision is that applicants once again have the right to access the court system to have legal errors scrutinised by the courts. This, at least, is a positive development in that the rule of law has been protected, ensuring that Commonwealth officers do not exceed their executive power.
11. On the other hand, there has been a general tightening of immigration processes for all visa classes, especially students, and merchant marine officers on visiting ships, to ensure the integrity and bona fides of visa applicants, with significant financial resources allocated to this aspect of the Immigration Department's activities.

### **C. Conclusion**

In summary, it can be said that as the world has changed over the last two years, all countries realise that their borders are not safe against attacks by terrorists. It is submitted that reasonable measures taken against such terrorist attacks are only sensible and should be encouraged. There is always the danger, however, that excessive force may be used by governments thereby infringing upon personal and human rights.

**DAVID BITEL**

## **BIO-DATA DAVID BITEL**

Born in Sydney, David Bitel has a BA(Hons) in History and an LL B from Sydney University. He has been a practising attorney since 1976 and is a senior partner of the Sydney law firm Parish Patience established in 1888. He specializes in all aspects of immigration and administrative law. He is a registered migration agent and an accredited immigration law specialist by NSW Law Society.

His professional associations include:

- Judicial Member of the Equal Opportunity Tribunal of New South Wales since 1990 presiding over complaints under the Anti-Discrimination Act.
- Secretary General of the Australian Section of the International Commission of Jurists since 1986.
- Current President of the Refugee Council of Australia, Convenor the Board of Trustees of the Australian Refugee Foundation and executive member of the Refugee Council of Australia since 1985.
- Founding Secretary of the Australian Legal Resources International, a lawyers NGO which provides legal assistance to countries in need.
- Member of the migration law sub-committees of the Law Society of NSW, Law Council of Australia and the International Bar Association.
- Consultant author of Butterworth's Australian Immigration Law Service.
- Member of NSW Jewish Board of Deputies. Elected as Chairman of Social Justice Committee of the Board and as a member of the Executive Committee (1999 to date).

He is an honorary solicitor to a number of organizations in the Bangladesh, Egyptian, Filipino and Indonesian communities and writes regular feature articles for these community newspapers. His articles can also be found on the home page for Parish Patience Immigration ([www.parishpatience.com.au](http://www.parishpatience.com.au)).

With over twenty years of experience providing legal advice on immigration matters, David Bitel is an acknowledged leader in the field and he has a large team of specialist lawyers working with him.

## The effect of 11 September 2001 on international immigration policies, from an Australian perspective

Paper by Dr Etienne de Villiers Hugo<sup>1</sup>

### A brave new world?

The events of 11 Sept 2001 remain in our thoughts. Probably no other single day in history has impacted the international community, as did the attacks on America on that day. Probable reasons for its immense international impact are:

- As our world increasingly becomes a global village, any major incident has the potential to have significant international consequences.
- Many countries<sup>2</sup> lost citizens in these attacks, including Australia.
- Many countries have been directly involved in the ensuing ‘war on terrorism’, including Australia.
- Most countries feel more vulnerable to terrorist attacks in the aftermath of these horrible events. This fact has been dreadfully evidenced by the recent terrorist attacks in the Indonesian island of Bali, where over 180 people lost their lives, many of whom were Australian.

In an attempt to protect itself from possible terrorist attacks, Australia has followed suit with other nations in taking drastic measures to prevent such catastrophes from occurring locally. Successful control over the movement of people is a key issue in combating terrorism. The prevention of terrorists entering one’s borders and containment of terrorist operations have been identified as important concerns in effective protection. Steps that have been taken by Australia in this regard include:

- Stricter monitoring of people movement into Australia, with a renewed focus on illegal entrants, character issues in immigration law and the so-called ‘boat people’ phenomenon.
- The enactment of far-reaching legislation directed at improving the nation’s security and ability to respond to direct threats, as well as taking preventative measures to prevent similar attacks. The Australian government has in the aftermath of the Bali attacks ordered a further review of the country’s recently strengthened domestic terrorism legislation, as well as national security and counter-terrorism arrangements. Recently laws have been passed creating new terrorist offences and imposing 25-year jail terms for terrorist acts.
- The increased use of ‘privative clauses’ in Australian legislation, increasing the power of the executive and reciprocally restricting judicial review of actions/ decisions by government officials.

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<sup>2</sup> Citizens from 83 countries lost their lives, making these attacks a truly international disaster. More than 3000 people lost their lives as a result of the September 11 attacks.

## **The 'Fortress Australia' viewpoint**

Australians have now been the direct target of terrorist attacks in Indonesia. To date, there have been no such onslaughts within our borders and the focus of the Australian government therefore seems to be to take pro-active steps to implement hard-line preventative measures. Because of its relative geographic isolation, Australia has historically escaped enemy attacks within its borders to a greater extent than most other countries. International terrorism, however, is not bound to the restrictions of conventional warfare and does not leave any country invulnerable. The Australian government, in an attempt to protect the country's borders, seems intent on obtaining sweeping executive powers to take concise and unchallengeable action in dealing with immigration law matters.

It is interesting to note that Australia had initiated stricter border protection measures even before the terrorist attacks in America. The Border Protection Legislation Act 1999 was introduced to give immigration officers greater powers in dealing with illegal non-citizens.<sup>3</sup> In this legislation, the executive was authorized to pursue and board foreign ships, to search such ships, to move and destroy hazardous ships, and to seize and/ or dispose of things used in the commission of an immigration offence.

It is helpful to look at a number of Australia's pressing immigration questions to properly understand the significance of recent changes in policy relating to the movement of people to Australia. Arguably the most significant event resulting in these changes other than September 11 is the so-called 'Tampa crisis' that unfolded in August 2001. This widely reported real-life drama evidenced Australia's commitment towards guarding its borders from uninvited guests. The Bali terrorist attacks will doubtlessly reinforce the Government's resolve in protecting Australians and increasing security.

Australia has a long spanning immigration history and its community comprises of a rich mixture of cultural and ethnic backgrounds. Australia has also been a longstanding member state (being the sixth country to accept responsibilities towards refugees) of the United Nation Convention on Refugees (1951). Despite the fact that many Australians come from migrant or refugee families, or are migrants themselves<sup>4</sup>, there is a very strong public sentiment against the intake of the so called 'boatpeople' who are predominantly asylum seekers requesting protection from Australia under its UN refugee obligations.

A significant portion of the Australian community's view on asylum seekers is that of suspicion and intolerance. It is notable to refer to opinion polls<sup>5</sup> that were taken on 2 September 2001 (at the height of the Tampa crisis) regarding boats carrying asylum seekers: 50% of participants felt that all boats should be turned back and 38% was of the opinion that only some boats should be allowed to enter Australia depending on the circumstances – a mere 9% thought that all boats carrying asylum seekers should be permitted to enter for assessment as refugees. Not surprisingly, public sentiment grew less tolerant after the 11<sup>th</sup> of September and the following statistics were recorded from a poll taken in October 2001: 56% for no asylum seeking boats, 33% depending on the circumstances and 8% accepting the boat arrivals.

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<sup>3</sup> Australian immigration law only recognizes three classes of people, i.e. citizens, legal non-citizens (people with visas) and illegal non-citizens.

<sup>4</sup> Approximately one in every four Australians is a first generation migrant.

<sup>5</sup> 'No change of view: turn back the boats'. Dennis Shanahan, The Australian, 5 September 2002.

## **Confusing the issues?**

There is a danger in confusing issues of national security with the plight of asylum seekers/refugees and other immigrants in the aftermath of September 11. Public opinion is easily swayed by media attention to selective material and anti-refugee views are exacerbated by the ever-increasing influx of illegal immigrants and people smuggling worldwide.

It is true that a country cannot effectively protect its borders without strong and effective control of the movement of people entering and leaving. One should however distinguish between seemingly connected but quite separate issues such as terrorism and illegal people smuggling on the one hand and the legitimate plight of asylum seekers on the other hand.

Possible reasons why Australians confuse these issues are:

- The fact that many of Australia's refugees have in recent years come from Afghanistan. After the September 11 events Australian opinion has made an apparent link between what happened in America and what could happen in Australia if illegal immigrants from Afghanistan were to be allowed into the country.
- Allied military action against the Taliban regime in Afghanistan.
- Afghanistan and many of its neighbors have been identified as key countries in the so-called 'axis of evil'. As a result many Australians associate people from these countries as would-be terrorists that should not be allowed onshore.<sup>6</sup>
- Heightened awareness of the Muslim religion in world politics and its perceived threats to world peace. The fact that the recent terrorist attack on predominantly Western citizens took place in Indonesia, the largest Muslim country in the world, would certainly strengthen this viewpoint.
- Increased media focus on boat people and the major international concern of people smuggling across the globe in recent times.

The United Nations High Commissioner for Refugees expressed a number of concerns related to the issues raised above in a press release dated 24 October 2001. It is concerned about the increasing public perception of refugees and asylum seekers as criminals and other attempts to create unwarranted links between refugees and terrorism. The following concerns are mentioned: racism and xenophobia, admission and access to refugee status determination, exclusion of asylum seekers, the worsening treatment of asylum seekers, increased withdrawal of refugee status, increased deportation, increased extradition and an over emphasis on resettlement to third countries. It was further stated that care must be taken in the implementation of the United Nations Security Council Resolution 1373, which calls for the cooperation of countries against terrorism, not to unfairly prejudice bona fide asylum seekers.

By taking too strict a view on these matters and giving excessive powers to the executive for border protection and immigration regulation, it is submitted that the essential principles of liberty, democracy and rule of law could be jeopardized.

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<sup>6</sup> I refer to statistics and opinion poll on boat people above.

## Policy changes

The Australian government has moved quickly since September last year to introduce vast and far-reaching security and immigration legislation aiming at better protecting Australia's borders. Even though many of the newly enacted statutes are helpful in making Australians safer, a number of critics are of the opinion that the government has used high profile events such as the Tampa crisis, the September 11 attacks and the subsequent 'war on terrorism' as an excuse to obtain disproportionate executive power. It is also suggested by some that the government has used fear tactics to implement its own immigration policies, including a hard-handed approach towards asylum seekers and mandatory detention of illegal non-citizens that has arguably jeopardized Australia's human rights standing in the global community.

Examples of new immigration regulations and screening actions that have been introduced as a direct or indirect response to September 11 are:

- The introduction of form 1190 for all new applicants for permanent residency. This form asks direct questions regarding an applicant's military background and/ or training in weapons. This form has now been incorporated into existing visa application forms.
- The introduction of questions relating to the background of most applicants (be it for temporary or permanent residence) with reference to character issues.  
A further example of the stricter scrutiny placed on character issues in Australian immigration law in the aftermath of September 11 is the introduction of specific visa application forms and the alteration of existing forms to include questions relating to character and military training. Examples of such questions are:
  - Have you, or any other person included in this application, ever:
    - Been convicted of a crime or offence in any country (including any conviction which is now removed from official records)?
    - Been charged with any offence that is currently awaiting legal action?
    - Been acquitted of any criminal offence or other offence on the grounds of mental illness, insanity or unsoundness of mind?
    - Been removed or deported from any country (including Australia)?
    - Left any country to avoid being removed or deported?
    - Been excluded from or asked to leave any country (including Australia)?
    - Committed, or been involved in the commission of war crimes or crimes against humanity or human rights?
    - Been involved in any activities that would represent a risk to Australian national security?
    - Had any outstanding debts to the Australian Government or any public authority in Australia?
    - Been involved in any activity, or been convicted of any offence, relating to the illegal movement of people to any country (including Australia)?
    - Served in a military force or state sponsored/private militia, undergone any military/paramilitary training, or been trained in weapons/explosives use (however described)?
    - Have you/your spouse or any dependent family members (migration with you or not) ever served in the armed forces?

It should be noted that the Migration Act gives the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) the power to cancel a visa holder's visa if an incorrect or untruthful answer has been given to either an immigration officer or on an application form. The provision of bogus documents to the department is another ground for visa cancellation, where a transgressor will be cancelled as 'a person of bad character'. Thus, even though it would be fairly simple to provide DIMIA with an incorrect answer, the consequences of a less than truthful provision of information are very drastic.

- Increased scrutiny with the Police clearances of applicants from overseas jurisdictions. DIMIA, for example, now does its own clearance checks in cooperation with the FBI on applicants migrating from the United States. Immigration regulations that would become effective on 1 November 2002 increase border security by for example requiring airline crewmembers to better identify themselves to clearance officers.
- Increased activity in immigration compliance with hard line programs to locate, detain and deport people who are without visas in Australia or people who are in breach of their visa conditions.
- Increased cancellation of visas because of character issues, as discussed below.
- Greater ASIO scrutiny of all visa applications.
- The exclusion of Australian islands from its 'migration zone'.<sup>7</sup> The reason behind these measures is to prevent unauthorized boat arrivals on Australian territories that are located close to neighboring countries from making valid visa applications or seeking protection as refugees on Australian soil. The advantage of such an application is that an applicant is then entitled to lawfully remain in Australia until the matter has been finalized, which could take months or even years. A visa applicant is then entitled to a review of a decision not to grant the visa sought, which could take an extensive period of time. The vast majority of illegal immigrants arriving in Australia commence their journey from Indonesian shores. Indonesia is geographically close to Australia and has to date been unable to effectively control the influx and exodus of asylum seekers from a variety of countries. By excluding these islands from the Australian migration zone, would be visa applicants are barred from lodging valid onshore visa applications, as they are technically not in Australia for that purpose.

I specifically refer to three further policy and legislative changes to Australia's immigration laws following September 2001.

Firstly, I would like to draw your attention to the introduction of 'privative clauses' into the Australian immigration law sphere.

Privative clauses in essence disallow an appeal of the executive's (immigration) decision-making powers to the courts. Under current legislation certain visa applicants are entitled to have adverse decisions by DIMIA to be reviewed by either the Migration Review Tribunal

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<sup>7</sup> The Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 was introduced into the Senate on 24 June 2002. This bill proposes to expand the definition of 'excised offshore places' to include the Coral Sea Islands Territory and certain islands that form part of Western Australia, Queensland and the Northern Territory.

(MRT), the Refugee Review Tribunal (RRT) or, under specific circumstances, the Administrative Appeals Tribunal (AAT). These tribunals have a quasi-judicial nature, are constituted of members that do not necessarily have legal training and who are appointed by the government. On 2 October 2001 the Australian legislature, in a bid to effectively prevent visa applicants from seeking judicial review in the court system, introduced sections 486A<sup>8</sup> and 474<sup>9</sup> of the Migration Act.

The legislature has attempted for these two sections to practically block all avenues to go to court in immigration law matters. A grave concern that arises from such restriction is the unchallengeable use of executive power. It is accepted by all democratic and free countries that the separation of powers is fundamental to fair and accountable government. Australia's Constitution specifically protects the Judiciary's powers under section 71, while restricting the Government's legislative powers and executive's powers in sections 51 and 61 respectively.

My firm recently initiated a constitutional challenge to this use of privative clauses in Australia's immigration law, which excludes even the jurisdiction of the High Court of Australia to hear such matters. The case remains *sub judice*. A decision from the full court of the High Court in the matter S157 of 2002 is expected in the next couple of months.

It was fundamentally argued by the plaintiff<sup>10</sup> that sections 474 and 486A of the Migration Act 1958 (Cth) are wholly invalid in respect of an application by the plaintiff for relief under s 75(v)<sup>11</sup> of the Constitution because inconsistency with the Constitution results in invalidity.

Secondly, there is a greater focus on visa applicants' character issues.

The traditional method of removing undesirable non-citizens from Australia was by way of deportation, affected by the Minister for Immigration under sections 200-201 of the Migration

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<sup>8</sup> Section 486A Time limit on applications to the High Court for judicial review

- 1) An application to the High Court for a writ of mandamus, prohibition or certiorari or an injunction or a declaration in respect of a privative clause decision must be made to the High Court within 35 days of the actual (as opposed to deemed) notification of the decision.
- 2) The High Court must not make an order allowing, or which has the effect of allowing, an applicant to make an application mentioned in subsection (1) outside that 35 day period.
- 3) The regulations may prescribe the way of notifying a person of a decision for the purposes of this section.

<sup>9</sup> Section 474 - Decisions under Act are final

- 1) A private 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.

<sup>10</sup> The instructing solicitors acting for the plaintiff are Parish Patience Immigration Lawyers – <http://www.paritypatience.com.au/>

<sup>11</sup> Section 75(v) provides that in 'all matters .... In which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth ... the High Court shall have original jurisdiction'.

Section 75(v) has been supplemented by s.38(e) of the Judiciary Act 1903 (Cth):  
'Subject to s.44 [Ch. 14 – Commonwealth], the jurisdiction of the High Court shall be exclusive of the jurisdiction of the several Courts of the States in the following matters:

(e) matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a Federal Court.'

Act. Under these sections a deportee must have been convicted of a criminal offence and served sentence of at least one year. In recent times the government has however made increasing use of its power under section 501<sup>12</sup> of the Migration Act to refuse or cancel a visa on much less stringent character grounds.

In terms of section 501 (6), a person does not pass the character test if the person has a substantial criminal record, or (in the discretion of the minister and/ or his delegate) is not a person of good character having regard to the person's past and present criminal conduct and the person's past and present general conduct (for example providing inaccurate information to DIMIA or breaching visa conditions).

In instances where the minister makes the decision personally the rule of natural justice has been statutorily excluded and does not apply. The minister also has the power to override a decision by the AAT and any decision affording leniency, which power has been reinforced by the so-called 'Tampa amendments'.

Australia, thirdly, gives citizens from certain countries preferential treatment in terms of visa applications and immigration options.

The Australian government had been using a database even before September 11 whereby countries have been classified into 'high' to 'low risk' countries. Various criteria have been used in compiling the relevant reports and classifications, such as statistical tendencies for visa breaches and likelihood of overstaying visas by citizens of certain countries. It would be expected that even stronger reliance would be placed on such classifications in future, so that it would become increasingly difficult for people from certain countries to be granted Australian visas.

It is relevant to note that the Migration (Afghanistan – United Nations Security Council Resolution No 1390) Regulations 2002 No 212 will commence on 1 November 2002. These regulations impose sanctions against 'persons designated' by a Committee of the Security Council to prevent the grant of visas to such persons or to cancel the visa of such persons. So far obvious scoundrels such as Usama bin Laden, members of Al-Qaida, the Taliban and

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<sup>12</sup> '501. Refusal or cancellation of visa on character grounds

Decision of Minister or delegate - natural justice applies

501. (1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

Note: Character test is defined by subsection (6).

(2) The Minister may cancel a visa that has been granted to a person if:

- (a) the Minister reasonably suspects that the person does not pass the character test; and
- (b) the person does not satisfy the Minister that the person passes the character test.

Decision of Minister - natural justice does not apply

(3) The Minister may:

- (a) refuse to grant a visa to a person; or
- (b) cancel a visa that has been granted to a person; if:
- (c) the Minister reasonably suspects that the person does not pass the character test; and
- (d) the Minister is satisfied that the refusal or cancellation is in the national interest.

(4) The power under subsection (3) may only be exercised by the Minister personally.

(5) The rules of natural justice, and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision under subsection (3).'

entities associated with them have been identified. It will be interesting to see how future events and policies will influence this blacklist.

An example of the recognition of 'special relationships' between Australia and other countries is a system whereby citizens from certain countries<sup>13</sup> have access to an Electronic Travel Authority or 'ETA', which basically entitles these passport holders to hassle free access to Australia. There are very few restrictions on these travel authorities and it is also possible to lodge onshore visa applications from such ETA's.

Other visa classes where this classification is most relevant are student visas and also visitors' visas. For students from certain countries it is very hard to secure a student visa for Australia as there are virtually impossible benchmarks set in terms of financial capacity; whereas for applicants from other (mostly rich and developed) countries no or much lower standards are set. There are five risk assessment levels for various study levels. It is notable that the assessment levels for countries such as India, Iran and Pakistan are level 4, whereas citizens from most European countries, Canada and Japan are listed in the most favourable assessment level. Certain of these applicants have the further exclusive privilege of lodging more informal onshore applications via the Internet.

Obtaining a visitor visa for Australia from certain countries is a daunting task. Citizens from 'high risk' countries would simply not be granted a visitor's visa if there is no Australian sponsor who is willing to lodge a substantial security bond to ensure that all visa holders would keep their visa conditions. Strict conditions would then be imposed, including a restriction on further onshore applications, which would usually entitle applicants to remain in Australia until the application has been finally determined.

The Australian government proposes to introduce a new concept of profiling visitor visa applicants from 'high risk' countries. It is suggested that applicants from high risk countries would have to produce financial and employment records before given a tourist visa. It will be interesting to see how immigration policies and regulations are changed in future as the government's assessment of what countries are 'dangerous' or 'high risk' changes. Countries currently on the high risk list include Afghanistan, China, Fiji, Nepal, Pakistan, the Philippines, Sri Lanka, Iran, Iraq, Israel and Yugoslavia.

## **Conclusion**

It is suggested that an open minded and balanced approach should be used in insuring that our countries are safe from terrorists while we remain committed towards protecting fundamental civil liberties, whilst not forgetting the plight of many displaced and persecuted peoples.

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<sup>13</sup> Current ETA eligible countries are: Andorra, Austria, Belgium, Brunei, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong, Iceland, Republic of Ireland, Italy, Japan, Republic of Korea, Liechtenstein, Luxembourg, Malaysia, Malta, Monaco, The Netherlands, Norway, Portugal, Republic of San Marino, Singapore, Spain, Switzerland, Sweden, Taiwan, United Kingdom, United States of America and the Vatican City.