New Zealand Association for Migration and Investment

A Roadmap for the Immigration Act 2009

1. Scope of Seminar

The Immigration Act 2009 is a large piece of legislation. It contains 478 sections organised into 13 Parts. It may perhaps be unfair to compare this to the 1987 Act which nominally runs to 151 sections, as the older Act has undergone the interposition of many additions which incorporate every letter in the alphabet. Nevertheless, there is no doubt that the 2009 Act represents a formidable piece of law.

It is therefore necessary to limit this paper to an overview of the Act's structure along with comments on some of the most significant new features, and a few of the key sections. The writer has chosen not to go into detail about:

- The appeals system under the Immigration and Protection Tribunal;
- Deportation and detention; and
- The refugee and protection jurisdiction.

This is because these are significant topics in themselves and may form the content of a future seminar.

In announcing the passage of the Act in October 2009, the Minister of Immigration declared that

> [t]he previous legislation is now completely out of date. The new Immigration Act will modernise and future-proof New Zealand's immigration legislation.[1]

It is significant however that many concepts from the 1987 Act have made their way into the 2009 Act. It is important to look out for these, one reason being that when the Act is litigated upon the Courts will certainly look for guidance to the case law pertaining to the 1987 Act.

2. Useful Reference Resources

The writer has found the following texts of assistance in navigating through the new Act:

- *Butterworths Immigration Legislation* (LexisNexis, 2009) consolidates the 1987 and 2009 Acts plus some associated legislation including the Citizenship Act 1977 and the Immigration Advisers' Licensing Act 2007. One of its most useful features is a comparative table aligning the sections of the 2009 Act with their 1987 counterparts. Unfortunately the table is not entirely complete or accurate and practitioners would do well to annotate any additions that they find in their travels;

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[1] Hon. Dr Jonathan Coleman, "Immigration Act passes third reading," (Press Release, 29 October 2009)

- Tennent, D, *Immigration and Refugee Law* (LexisNexis 2010) is the first New Zealand textbook on immigration law. Its scope is broader than just the 2009 Act and is therefore helpful for those who wish to put the new law into its broader context.

Although access to online statutes through Brookers, LexisNexis etc. is valuable, experience has shown that the size and complexity of the legislation does justify investing in hard-copy resources such as the above. Furthermore, as the Act has not yet been tested in the Courts (and is not in force at the time of writing) no case citations yet exist for the various sections.

3. Structure of the Immigration Act 2009

An attempt has been made in Appendix 1 to compare the layout of the new Act with the structure of the 1987 Act. This is by no means comprehensive and should not be relied upon as demonstrating an exact correspondence between the Parts in the two Acts. It does however suggest a rough method of navigation.

Out of this analysis some key features may be noted:

- Part 4A of the old Act about the issue of a Security Risk Certificate (the *Zaoui* provisions) has been subsumed into Part 2 of the 2009 Act in a set of generic sections describing the use of classified information or "CI" (see next section). The elevation of rules about the use of CI to the status of "Core Provisions" is demonstrative of the focus on the "national interest, as determined by the Crown" as balanced against the rights of individuals (s 3 2009 Act).
- A comprehensive new Part 3 devoted specifically to Visas has gathered together the somewhat disjointed collection of sections on visas and permits in Part 1 of the 1987 Act.
- Elements of the 1987 Act in respect of removal (Part 2), deportation of those threatening national security (Part 3) and deportation of criminal offenders have all been gathered into Part 6 of the new Act under the term Deportation (see next section).
- In the 1987 Act refugee determination by the Refugee Status Branch and appeals to the Refugee Status Appeals Authority was treated consecutively in ss 129A – 129ZB. Under the 2009 Act the wider jurisdiction of "refugee and protection" status begins. First instance decisionmaking is described in Part 5, while appeals to the IPT are incorporated into Part 7 alongside other rights of appeal and review.
- The mechanisms relating to appeals to immigration tribunals, judicial review and even reconsideration of visa decisions have all been gathered into Part 7 of the new Act.
- A handful of sections of the 1987 Act in respect of collection of information, entry, search and seizure, mostly inserted by way of amendment over the last 10 years, have developed into a new Part 8 (Compliance and Information). In particular, a suite of provisions covers information matching and disclosure of information to other agencies.

- Part 12, mostly transitional and savings provisions, runs to some 71 sections. This will be explored in more detail later in this seminar.

In respect of existing concepts carried over from the old legislation, there is a pattern of gathering together those relating to the same subject matter under the new groupings. The 1987 Act underwent some 18 amendments in its lifetime, and the 2009 Act has endeavoured to tidy up the resulting clutter. It also introduces some quite new ideas which we shall summarise next.

4. Key Concepts and Definitions

Immigration practitioners are advised to make themselves familiar with terms used in the Act, which are described in:

- the Interpretation section, which is s 4 rather than s 2 where it is commonly found in other legislation;
- specific definitions at ss 7 – 11 of the 2009 Act.

Some of these terms, such as "visa" and "deportation" have a meaning different to that used in the 1987 Act.

Visas and Entry Permissions

The term "permit" will disappear from the immigration vocabulary. All endorsements allowing travel to and entry into New Zealand will henceforth be called visas, which are described (ss 4 and 43) as an entry in INZ records:

- allowing a person who is offshore to travel to this country and apply for an entry permission; or
- allowing a person who is in New Zealand to remain here subject to visa conditions.

The "entry permission" is what is required by anyone not holding New Zealand Citizenship to enter New Zealand (s 4). Its effect is set out at s 107 and contains the critical provision that if entry permission is denied this immediately cancels the visa – resulting in unlawful status and liability for deportation (see below).

Up till now the holder of a visa could be said to convert this into a permit upon arrival – except in the case of multiple entry visas where the visa remains effective for future entries. Under the new system the visa remains in place until its conditions lead to its termination, and the entry permission is effective only during entry.

Resident Visas and Permanent Resident Visas

. . . referred to here as RVs and PRVs, are collectively referred to as "residence class visas". They are successors to the scheme of Residence Visas, Returning Residence Visas (RRVs) and Indefinite RRVs.

Both RVs and PRVs allow for indefinite stay. The distinction between them is that RVs have conditions (like s 18A conditions under the 1987 Act) while PRVs are unconditional. RVs are issued with two year travel conditions and in this way are like

having a RRV. The scheme is set out at ss 71 – 75 of the 2009 Act but must be read with an eye to s 50 (conditions on residence class visas).

One must make a distinct application for a PRV to replace a RV, unlike the present scheme where a Residence Permit holder applies for an Indefinite RRV to stand alongside the Permit.

If someone exceeds the conditions for remaining overseas on an RV, resulting in expiry of the RV, they will be able to apply to get the RV reinstated if they would still have the necessary travel conditions had he or she applied for them.[2]

Interim Visas

. . . are an ostensibly minor but crucial addition to the arsenal of visa categories. Section 80 provides that anyone holding a temporary visa who has applied for another temporary or a resident visa can get an interim visa "for the purpose of maintaining [his or her] lawful status in New Zealand . . . while the application is being considered." The power to grant the interim visa essentially rests with INZ to issue interim visas automatically to people waiting for a decision on their application.

Interestingly, the section does not specify what type of interim visa would be granted – whether a Visitor's, Work or Student temporary visa. It is most likely that people would get an interim visa of the same type as the last one that they had, so that for example a Student Visa holder would be able to continue studying at the same college while waiting for their new full-term Student Visa to be issued.

This system effectively solves the perennial problem of applicants who become unlawfully in New Zealand while waiting for their application to be decided. This in turn would remove the need to file *pro forma* appeals against Removal (now to be Deportation) to protect a client's position pending the grant of the main visa. The impression gained by the writer in speaking to INZ officials is that interim visas would be issued wholesale to applicants for further onshore visas in order to manage their status.

Although presumably someone could file an application for an interim visa on their own initiative, it is likely that such applications would be discouraged and, if INZ does adopt a universal policy to issue them outright, then it would be unnecessary for people to apply on their own. Besides, s 80 makes the grant of interim visas, somewhat like the current s 35A applications, a matter of "absolute discretion" (see below).

Conditions

Sections 47 – 56 of the 2009 describe the operation of conditions on the grant and validity of visas. It is worth getting to know them as some interesting effects flow from the new provisions. For instance, s 52 allows the Minister or an immigration officer to impose conditions on a visa which are not already spelled out in immigration instructions. Furthermore, conditions may be imposed after it has been granted. This discretion is still

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[2] Albury, N, "The New Resident Visa/Permanent Resident Visa System and Related Policies" ((LexisNexis Immigration Law Conference 2009 – PowerPoint presentation). These notes are also useful as a summary of key features of the Residence regime.

available, albeit in a more limited form, to the Minister in respect of Resident Visas (s 51).

Companies, incorporated societies, charitable trusts and Government agencies may now act as sponsors. Presently, the indication is that new immigration instructions will only allow such corporate entities to sponsor for Visitor's Visas and Talent (Arts, Culture and Sport) Work Visas.[3]

A significant new liability arises for sponsored visa holders under the 2009 Act. Section 55 provides firstly that it is a "condition" of the visa that the Sponsor must meet their sponsorship obligations. The corollary of this, also set out in s 55, is that if the Sponsor "fails to comply with the undertaking" then the visa holder is deemed to have breached the conditions of the visa. The fault of the Sponsor will probably be paid for by the visa holder by revocation of the visa.

Note that this risk extends to Resident Visas as well as temporary visas. However, the liability of Sponsors ends when a Resident Visa holder obtains their Permanent Resident Visa.

Sponsorship requirements for Residence were never enshrined in the 1987 Act and were a creature of Government Residence Policy. Under the new regime, sponsorship requirements now have the force of primary legislation. Section 159 of the 2009 Act allows the Minister to order a resident's deportation if "the conditions of his or her visa have not been met." The use of the passive voice is important because it is not necessary for there to be a direct nexus between the breach of conditions and the visa holder. This clearly envisions deportation in a case where the Sponsor has not met a sponsorship obligation.[4]

Protection

The 2009 Act heralds the welcome introduction of claims for protections under the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT). Unlike the Convention Relating to the Status of Refugees, these other Conventions are not incorporated *in toto* into the Act. This is perhaps because the Act only purports to apply Article 3 of the CAT (*non-refoulement* if risk of torture) and Articles 6 and 7 of the ICCPR (arbitrary deprivation of life; torture, cruel inhumane and degrading treatment).

The Refugee Status Branch of INZ, which has traditionally handled refugee claims at first instance, will extend its jurisdiction to consider claims under these Conventions. As a result its Refugee Status Officers (RSOs) will be restyled Refugee and Protection Officers (RPOs). As described in a recent presentation,[5] this will result in "one claim, three decisions". The mechanics of processing for refugee and protection claims will be

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[3] Albury, N, "Sponsorship Policy" ((LexisNexis Immigration Law Conference 2009 – PowerPoint presentation)

[4] See also Laurent, S, "Commentary on Residence and Sponsorship Issues" ((paper delivered at the LexisNexis Immigration Law Conference 2009)

[5] Wright, C, "An Altered Refugee and Protection System: Claims in the First Instance" ((LexisNexis Immigration Law Conference 2009 – PowerPoint presentation)

similar to that of existing refugee claims alone, but eligibility under all three of the Conventions must now be assessed from the same set of facts.

Recognition as a "protected person" under the ICCPR and the CAT is prescribed in ss 130 and 131. Note that the test to be applied in both cases is whether there are "substantial grounds for believing" that the person would suffer torture, deprivation of life or cruel treatment if deported from New Zealand. Contrast this with the "low standard of proof"[6] in refugee claims of whether there is a "real chance" that the claimant will be persecuted.

Availability of protection under the ICCPR owing to the unavailability of health or medical care in the home is specifically excluded by s 131(5)(b). This is in line with the approach in Europe and the UK in particular,[7] although even in the UK some flexibility has been demonstrated in application of the Convention as to this issue.[8]

Section 133 introduces a two-stage enquiry not present in the 1987 Act in that, before moving to determine the substantive merits of a claim an RPO can refuse to accept a claim for several reasons. The officer "must decline to accept for consideration" a claim if satisfied that the claimant created the circumstances for the claim in bad faith and for the purpose of generating the claim (s 134(3)). The two-stage approach was forcefully opposed by the Law Society during consultation about the Immigration Bill. The right to appeal to the IPT against a refusal to consider is preserved in s 194 of the Act.

Immigration and Protection Tribunal

The IPT is created by s 217 2009 Act. Its functions, described at s 217(2), encompass the work of the four current immigration tribunals – the Refugee Status Appeals Authority, the Residence Review Board, the Removal Review Authority and the Deportation Review Tribunal. These four are collectively referred to as "appeals bodies" (Interpretation, s A notable new feature is that the Chair of the IPT must be a District Court Judge; and in cases involving classified information all members of the IPT must be DC Judges nominated for the task (s 240(2) 2009 Act).

The IPT is to be administered by the Ministry of Justice rather than the Department of Labour (DoL currently manages the RSAA, the RRB and the RRA). In spite of the fact that the cost of establishing the IPT under Justice would be some 10% greater than keeping it within DoL, Cabinet deemed there to be greater value in the perceived independence of the Tribunal from the Government department whose decisions it was tasked to consider.[9]

Hearings before the IPT may be inquisitorial, adversarial or a mixture of both approaches, at the Tribunal's discretion. Doug Tennent postulates the potential that such

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[6] *Refugee Appeal No. 72668/01* (5 April 2002) at [47], referring to *Refugee Appeal No. 523/92 Re RS* (17 March 1995)

[7] *N v Secretary of State for the Home Department* [2005] 2 AC 269

[8] *D v United Kingdom* [1997] ECHR 25; see detailed discussion in Tennent, D, *Immigration and Refugee Law* (2010, LexisNexis), 244 - 247

[9] Cabinet Paper: Location of the Immigration and Protection Tribunal (2008) http://www.dol.govt.nz/PDFs/tribunal-location.pdf

an election could be reviewable in the right circumstances owing to the nature of the particular case before the IPT.[10]

The structure of the appeals process is a major topic and it is not appropriate to attempt a summary in this seminar. Hopefully a separate seminar will address this topic in some depth.

Biometric Information

. . . called BI in this paper, is delimited by s 4 to a head-and-shoulders image, fingerprints or iris scan of a person. It is a concept newly introduced into the 2009 Act, and was the subject of a lot of submissions during the Select Committee stage of the Bill, including representations by the Privacy Commissioner as to its use.[11] As a result, ss 31 – 32 were inserted to make the Department of Labour accountable in terms of the Privacy Act.

There are some 20 references to BI throughout the 2009 Act, from allowing collection from people entering or leaving New Zealand to empowering the IPT to collect BI in the course of determining an appeal. One of the most widespread impacts will be from s 60 which directs that any visa applicant "must allow" BI to be collected from them. Refusal to allow this can be used as a ground to decline an application. Certain classes of people can be exempted from this obligation by way of Regulations, but at the time of writing no such Regulation has been published.

Classified Information

. . . is defined in s 7 2009 Act as information held by a "relevant agency" (defined in s 4) or about a relevant agency that cannot be disclosed because it might:

- prejudice the security of New Zealand;
- endanger the relationship with the country or organisation which has provided the information;
- prejudice the maintenance of law and order; or
- endanger the safety of any person.[12]

This concept is the successor to that of "classified security information" used to obtain a Security Risk Certificate and only so far employed in the case of Ahmed Zaoui. The difference here is that CI can now be used in a wide range of decisions including the granting of visas. It has become a central tool in administration of the New Zealand migration system. It forms the subject of a significant proportion of the 2009 Act.

For this reason ss 33 – 42 of the "Core Provisions" of the Act are devoted to the way in which CI is used by all those authorised to handle it. The role of CI in appeals to the IPT is covered in ss 240 – 244; and in appeals to the High Court and superior Courts by ss 252 – 262. Also note that special provisions are invoked during applications for Warrants of Commitment if CI is involved in deportation proceedings (s 325). The use of

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[10] Tennent, D, *Immigration and Refugee Law* (2010, LexisNexis), 291
[11] See discussion in Tennent supra at n 10, 107 - 108
[12] Tennent, D, "Classified Information" [2008] IPB 9

special advocates before the IPT or the Courts is covered in ss 263 – 271. A special advocate must endeavour to represent the person the subject of the CI while at the same time preserving the confidentiality of the CI (s 263).[13]

Unlawfully in New Zealand

This familiar term is defined in s 9 of the 2009 Act, and corresponds to s 4 of the 1987 Act which set out the basic premise that any non-citizen must hold a permit to be here or be exempt from the requirement to hold a permit.

Under the new s 9, a person is unlawful if he or she does not hold a visa OR has not been granted entry permission The disjunctive "or" covers the situations of someone who loses their visa while onshore, as well as those who are refused an entry permission at the airport – and who thus lose their visa anyway at the same time (see above).

Analogous to the refusal to issue a permit under s 128 of the 1987 Act, persons who become unlawfully in New Zealand on arrival are subject to turnaround pursuant to s 115. "Turnaround" has its own definition in s 4, and means removing the person from New Zealand using s 178(2) as if they were subject to a deportation order. Note that they are not automatically served with a deportation order (see s 175 for the instances when such an order may be served) so that they do not face the sorts of prohibitions associated with current Removal Orders, for instance.

Deportation

. . . will now also incorporate "removal" as understood in the 1987 Act, and, as noted above, will be the same mechanism used for removing people facing turnaround at the border.

Provisions in respect of the making of deportation orders and executing deportation, removal and turnaround were scattered throughout the old Act. In the 2009 Act Part 6 (ss 153 – 182) gathers together the deportation rules, while Part 9 (ss 307 – 341) contains the procedures for detention, Warrants of Commitment etc..

Being "deported" is defined at s 10. Note that there is a definition to describe deportation from any country, not just New Zealand. In respect of New Zealand, a person is deported if they could be, or have been served with a deportation order, or face a prohibition on entry under ss 179 – 180 of the Act. A person who is turned around is not "deported".

The detention and appeal provisions surrounding deportation are outside the scope of this seminar and will doubtless for the content of a later presentation.

Absolute Discretion

. . . is given a separate definition at s 11 of the 2009 Act. The terminology is familiar from s 35A of the 1987 Act, including the recital that there is no obligation to consider the matter, and the removal of the usual need to provide reasons for administrative decisions.

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[13] See also Mackey, A, "Understanding the Classified Information Provisions of the 2009 Act." (LexisNexis Immigration Law Conference 2009 – PowerPoint presentation)

There are 30 references to the use of absolute discretion throughout the Act, for example:

- decisions to grant a visa in a special case (s 61 – the equivalent of the old s 35A application);
- discretion of a refugee and protection officer to re-open a refugee or protection claim to pursue cessation or cancellation of recognition (s 138); and
- cancellation of a deportation order (s 177).

It is, according to the context, available both to the Minister and to INZ staff. This may not be much of a departure from the present scheme where Ministerial authority is very often delegated to officers holding a certain level of warrant.

It is important to bear in mind that if the decisionmaker does exercise the discretion to consider a matter to which absolute discretion applies, and gives reasons for the decision (as often happens) the decision is reviewable unless a privative clause in the legislation expressly bars review.[14] In the case of discretion exercised by the Minister directly (as in special directions rather than s 61 applications) the Courts will be loath to intervene unless it is clear that the exercise of the discretion was unlawful in administrative law terms.[15]

5. Some Useful Sections of the Act (or Finding Your Old Friends)

The following represent some sections which in the writer's experience are repeatedly referenced during mundane immigration work.

Immigration Act 1987	Immigration Act 2009
s 7 – Persons not eligible for visa or permit	ss 15 – 17, with the notable addition to the classes of ineligible persons of those: • likely to commit an offence punishable by imprisonment; or • poses a risk to public order or "the public interest"
s 18C – Appeals to Residence Review Board	s 187 – largely similar, but with the addition of a privative clause preventing judicial review of: • decline of a residence application for someone outside New Zealand; or • cancellation of a resident visa before the holder first arrives in New Zealand
s 22 – Humanitarian appeal against revocation of Residence	ss 201 and 207 – rights of appeal against deportation are now available both on the facts and/or on humanitarian grounds, depending on the reason for which liability for deportation arose (ss 155 – 156; ss 158 – 160)

[14] *Yan Sun v Minister of Immigration* [2002] NZAR 961

[15] *Singh v Minister of Immigration* (HC Auckland, 18 July 1996 per Robertson J); see discussion at Tennent supra at n 2, 124 - 130

s 35A – Grant of permit in special case	s 61 – including the "absolute discretion" formula.
s 47 – Appeal against Removal	s 207 – but note that no such right exists for failed refugee or protection claimants who have already had their humanitarian circumstances considered by the IPT, or failed to lodge a humanitarian claim with their refugee/protection appeal. This is inserted to stop the "chain of appeals" phenomenon.
s 58 – Cancellation of Removal Order	s 177 – which also carries over the s 58(6) – (8) amendment introduced to counter the effect of the *Ye* decision.[16]
s 104 – Appeal to Deportation Review Tribunal against deportation for criminal offence	s 207 (see above) with the addition in s 207(2) that the IPT must consider any submissions of a victim of the offending.
ss 115, 115A, 117 – High Court Appeals against immigration tribunal decisions on a question of law	s 245 – with the imposition of a requirement to obtain leave to appeal from the High Court. If leave is denied then s 246 allows one to apply for leave to the Court of Appeal. In order to grant leave the Courts must establish if the appeal raises issues of "general or public importance" or "for any other reason" such that the appeal should be brought. The latter provision may allow flexibility in what appears to be a dramatic limitation on the appeal right.
s 129U – Permits for refugee status claimants	s 150
s 130 – Ministerial special directions	s 378 – note the "absolute discretion" given to the Minister
s 142 – Immigration offences	ss 342 – 348. The expansion from one section to six speaks for itself.
s 146 – Notice provisions	s 386, which for some reason is mirrored in s 5 ("Notification")
s 146A – Special provisions for judicial review of immigration decisions	s 247 – with the critical time limitation for bringing proceedings reduced from 3 months to 28 days.

[16] *Ye v Minister of Immigration* [2009] NZSC 76

Appendix 1

Immigration Act 2009 and 1987 - Comparison Table	
Immigration Act 2009	**Immigration Act 1987**
Part 1 - Preliminary Provisions ss 3 - 12	
Part 2 - Core Provisions and Matters in Relation to Decision Making ss 13 - 42	Part 1 - Exemptions, Visas and Permits ss 4 - 44
Part 3 - Visas ss 43 - 95	Part 2 - Persons in New Zealand Unlawfully ss 45 - 71
Part 4 - Arrivals and Departures ss 96 - 123	Part 3 - Deportation of Persons Threatening National Security, and Suspected Terrorists ss 72 - 90
Part 5 - Refugee and Protection Status Determination ss 124 - 152	Part 4 - Deportation of Criminal Offenders ss 91 - 114
Part 6 - Deportation ss 153 - 182	Part 4A - Special Procedures in Cases Involving Security Concerns ss 114A - 114R
Part 7 - Appeals, Reviews and Other Proceedings ss 183 - 271	Part 5 - Appeals ss 115 - 124
Part 8 - Compliance and Information ss 272 - 306	Part 6 - Arrivals and Departures ss 125AA - 129
Part 9 - Detention and Monitoring ss 307 - 341	Part 6A - Refugee Determinations ss 129A - 129ZB
Part 10 - Offences, Penalties and Proceedings ss 342 - 372	Part 7 - Miscellaneous Provisions
Part 11 - Miscellaneous Provisions ss 373 - 403	
Part 12 - Repeals, Transitional Provisions, Saving Provisions and Related Matters ss 404 - 474Pa	
Part 13 - Amendments to Immigration Act 1987 ss 475 - 478	