Chapter 2

Key provisions of the Bill

2.1 This Chapter sets out—in summary form—the key amendments sought to be brought about by the Bill.

Schedule 1: Maritime powers

2.2 Schedule 1 would—if passed—amend the *Maritime Powers Act* to: (a) broaden maritime enforcement powers; and (b) limit the review and challenge of the exercise of such powers.

2.3 First, Schedule 1 would broaden the maritime powers used to intercept and return vessels carrying asylum seekers by:

- allowing authorities to take a detained vessel and the people on it to any place in the world[1] and to provide that:
  - the destination does not need to be another country;
  - the destination may be 'just outside a country' and may be a vessel;
  - the destination can change repeatedly during the period of detention;
  - it is irrelevant 'whether or not Australia has an agreement or arrangement with any other country relating to the vessel or aircraft (or the persons on it)'; and
  - 'the international obligations or domestic law of any other country' are also irrelevant;[2]
- extending the period of time for which a vessel and the people on it may be detained;[3]
- extending the powers that authorities have to detain, restrain or move people on detained vessels;[4]
- allowing the Minister to expand the scope of the *Maritime Powers Act* by extending the powers that may be exercised over foreign vessels on the high seas by way of determination that is exempt from publication and that is not reviewable under the *Administrative Decisions (Judicial Review) Act*;[5]

---

1 The Bill, Schedule 1, Items 11 & 15.

2 The Bill, Schedule 1, Item 19 (proposed section 75C).

3 The Bill, Schedule 1, Items 12 & 18.

4 The Bill, Schedule 1, Items 15 & 17.

5 The Bill, Schedule 1, Items 19 (proposed section 75D) & 31.

- allowing the Minister to give written directions relating to the exercise of certain maritime powers, including directions that require powers to be exercised in specified circumstances in a specified way. Such directions would likewise be exempt from publication and not reviewable under the *Administrative Decisions (Judicial Review) Act*;[6] and
- providing that certain other maritime laws, including those aimed at promoting the safety of life at sea, do not apply to vessels detained under the *Maritime Powers Act* or to specified vessels that are being used under the *Maritime Powers Act* to detain people.[7]

2.4 Secondly, Schedule 1 would limit the extent to which actions under the *Maritime Powers Act* could be reviewed and challenged, including by preventing the use of maritime powers in certain circumstances from being invalidated on the grounds that they violate international law, the domestic law of another country or the rules of natural justice.[8]

2.5 Schedule 1 would also:

- amend the *Immigration (Guardianship of Children) Act* to provide that the Minister does not have guardianship obligations to children when they are taken to a place outside Australia under the *Maritime Powers Act*, and to provide that the Minister's obligations as the guardian of certain non-citizen children do not limit the Minister's exercise of powers under the *Maritime Powers Act*;[9]
- amend the *Migration Act* to provide that persons on vessels that are taken to another country under the *Maritime Powers Act* may not make valid visa applications or institute legal proceedings against the Commonwealth;[10] and
- amend the *Migration Act* to classify persons brought to Australia as a result of the exercise of maritime powers as 'unauthorised maritime arrivals', thereby rendering them subject to offshore processing and preventing them from making a valid visa application in Australia or from instituting legal proceedings against the Commonwealth.[11]

---

6 The Bill, Schedule 1, Items 19 (proposed section 75F) & 31.

7 The Bill, Schedule 1, Item 19 (proposed section 75H).

8 The Bill, Schedule 1, Items 6 (proposed sections 22A & 22B) & 19 (proposed sections 75A & 75B).

9 The Bill, Schedule 1, Items 32-35.

10 The Bill, Schedule 1, Item 36.

11 The Bill, Schedule 1, Item 37.

2.6 In his second reading speech, the Minister explained these changes as follows:

> The amendments to the Maritime Powers Act strengthen Australia's maritime enforcement framework and the ongoing conduct of border security and maritime enforcement operations. Enforced turn backs are a critical component of the governments [sic] suite of border protection measures that have been so successful to date in stopping the boats. These measures affirm and strengthen the government's ability to continue the success of our maritime operations. This will help ensure that the tap stays off, that it will never return and that we will never go back to the cost, chaos and tragedy that was present under the previous government and was created under the arrangements put in place by that government.
>
> The amendments in schedule 1 of this bill reinforce the government's powers and support for our officers conducting maritime operations to stop people-smuggling ventures at sea. They provide additional clarity and consistency in the powers to detain and move vessels and persons. They further clarify the relationship between the Maritime Powers Act and other laws and clearly state that ministers can give directions in respect of the exercise of maritime powers. Finally, as was parliament's original intent, the amendments support our Navy and Customs personnel to continue to do their difficult jobs efficiently, effectively and safely on the water.[12]

Schedules 2 & 3: Visas

2.7 Schedule 2 would—if passed—amend the *Migration Act* and the Migration Regulations to make provision for the reintroduction of temporary protection visas, including by:

- providing for three classes of protection visa, namely permanent protection visas, temporary protection visas and safe haven enterprise visas;[13]
- amending the criteria for permanent protection visas so that they will no longer be available to, *inter alia*, unauthorised maritime arrivals, people who did not hold a visa on their last entry into Australia and people who have ever held another specified humanitarian visa;[14]
- establishing temporary protection visas, which will last for up to three years[15] and the criteria for which will include that:
  - temporary protection visas will only be available to people in Australia who have previously held a temporary protection visa or who are unable to apply for a permanent protection visa because they are an unauthorised maritime arrival, did not hold a visa on

12 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 25 September 2014, p. 10546.

13 The Bill, Schedule 2, Items 5 & 16.

14 The Bill, Schedule 2, Item 29.

15 The Bill, Schedule 2, Item 31.

their last entry into Australia or have previously held another specified humanitarian visa;[16]

- the holder of a temporary protection visa will not be entitled to be granted any visa other than specified temporary visas;[17]

- allowing for the establishment of safe haven enterprise visas (but not actually establishing them or detailing their key features);[18] and
- establishing a mechanism whereby persons who have already validly applied for a permanent protection visa will be deemed to have applied for a temporary protection visa.[19]

2.8 Schedule 3 would—if passed—amend the *Migration Act* and the Migration Regulations to provide that:

- although the regulations may prescribe criteria for a specified class of visa, there is no requirement for them to do so;[20] and
- if the regulations do not prescribe criteria for a specified class of visa, a valid application for that class of visa cannot be made.[21]

2.9 Because the Bill does not specify criteria for the safe haven enterprise visa, the effect of Schedule 3 is that no valid application for such a visa would be able to be made until the criteria for this class of visa are inserted into the Migration Regulations.

2.10 In his second reading speech, the Minister explained these changes as follows:

> It has been a clear policy of this government to ensure that those who flagrantly disregard our laws and arrive illegally in Australia are not rewarded with a permanent protection visa. The reintroduction of temporary protection visas…in schedule 2 of this bill is fundamental to the government's key objectives to process the current backlog of [illegal maritime arrival] protection claims. The government is not resiling from providing protection but, rather, is providing temporary protection to those [illegal maritime arrivals] who are found to engage Australia's protection obligations. [Temporary protection visas] will be granted for a maximum of three years and will provide access to Medicare, social security benefits and work rights, as occurred under the Howard government. [Temporary protection visas] will provide refugees with stability and a chance to get on with their lives while at the same time guaranteeing that people smugglers

16 The Bill, Schedule 2, Item 30.

17 The Bill, Schedule 2, Item 31.

18 The Bill, Schedule 2, Item 16.

19 The Bill, Schedule 2, Items 20 & 38.

20 The Bill, Schedule 3, Item 1.

21 The Bill, Schedule 3, Item 7.

do not have a 'permanent protection visa product' to sell to those who are thinking of travelling illegally to Australia.[22]

Schedule 4: Fast track assessments

2.11 Schedule 4 would—if passed—amend the *Migration Act* to create a new 'fast track review process' for reviewing refused applications for protection visas. The proposed régime has the following key features:

- *fast track applicants* would be unauthorised maritime arrivals who: (a) entered Australia on or after 13 August 2012; (b) have been given written permission by the Minister to apply for a protection visa; and (c) have made a valid application for a protection visa. The Minister would be able to specify further classes of 'fast track applicant' by non-disallowable legislative instrument;[23]
- a *fast track decision* would be a decision to refuse an application for a protection visa made by a fast track applicant except on security and character grounds.[24] Fast track decisions would not be reviewable by the Migration Review Tribunal or the Refugee Review Tribunal;[25]
- *excluded fast track review applicants* would be fast track applicants who, in the opinion of the Minister:
  - make 'a manifestly unfounded claim for protection';[26]
  - present a 'bogus document' in support of their application without reasonable explanation;[27]
  - is considered to have effective protection in a country other than Australia; and
  - fall into such classes of person as are specified by the Minister by non-disallowable legislative instrument;[28]

---

22 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 25 September 2014, p. 10546.

23 The Bill, Schedule 4, Item 1; *Legislative Instruments Act 2003*, subsection 44(2) (Item 26); Explanatory Memorandum, p. 114.

24 The Bill, Schedule 4, Item 1

25 The Bill, Schedule 4, Items 16 & 17.

26 The phrase 'manifestly unfounded claim' is not defined.

27 Section 97 provides the following definition of 'bogus document' which only applies to Subdivision C of Division 3 of Part 2 of the *Migration Act* and, therefore, does not apply to the definition of 'excluded fast track review applicant':

> "***bogus document***", in relation to a person, means a document that the Minister reasonably suspects is a document that:
>
> (a) purports to have been, but was not, issued in respect of the person; or
>
> (b) is counterfeit or has been altered by a person who does not have authority to do so; or
>
> (c) was obtained because of a false or misleading statement, whether or not made knowingly.

- if an excluded fast track review applicant was refused a protection visa, they would not have access to any form of merits review;
- the fast track review process would apply to fast track decisions to refuse a protection visa to a fast track applicant (except for excluded fast track review applicants).[29] Such decisions would not be able to be reviewed by the Migration Review Tribunal or the Refugee Review Tribunal. Furthermore, the Minister would be empowered to issue a conclusive certificate—which would exclude all forms of review—on the grounds that that it would be contrary to the national interest for the decision to be changed, or for the decision to be reviewed;[30]
- the fast track review process would be conducted by the Immigration Assessment Authority, which would be established within the Refugee Review Tribunal and which would be mandated 'to pursue the objective of providing a mechanism of limited review that is efficient and quick';[31] and
- the fact track review process would have the following key features:
  - aside from the matters specifically provided for in the legislative scheme, the review would not be subject to the rules of natural justice;[32]
  - reviews would be conducted 'on the papers' by the Authority considering the material provided to it by the Secretary of the Department of Immigration.[33] Except in 'exceptional circumstances', the Authority would not be able to accept or request further information, nor would it be able to interview the applicant;[34]
  - the Authority would be able to affirm the decision to refuse the application, or to remit it for reconsideration, but would not be able to vary the decision or set it aside and substitute a new decision;[35] and

28 The Bill, Schedule 4, Items 1 & 2; *Legislative Instruments Act 2003*, subsection 44(2) (Item 26); Explanatory Memorandum, p. 114.

29 The Bill, Schedule 4, Item 21 (proposed section 473CA).

30 The Bill, Schedule 4, Item 21 (proposed section 473BD).

31 The Bill, Schedule 4, Item 21 (proposed section 473FA).

32 The Bill, Schedule 4, Item 21 (proposed section 473DA).

33 The Bill, Schedule 4, Item 21 (proposed section 473DB).

34 The Bill, Schedule 4, Item 21 (proposed sections 473DB-DD).

35 The Bill, Schedule 4, Item 21 (proposed section 473CC).

- decisions that have been or might be subject to fast track review are excluded from the jurisdiction of the Federal Circuit Court.[36]

2.12 The Minister explained these amendments as follows in his second reading speech:

> The government is of the view that a 'one size fits all' approach to responding to the spectrum of asylum claims made under Australia's protection framework is inconsistent with a robust protection system that promotes efficiency and integrity. It limits the government's capacity to address and remove those found to have unmeritorious claims quickly while diverting resources away from those individuals with more complex claims. The government has no truck with people who want to game the system. A new approach is warranted in the Australian context. The fast-track assessment process introduced by schedule 4 of this bill will efficiently and effectively respond to unmeritorious claims for asylum and will replace access to the Refugee Review Tribunal with access to a new model of review, the Immigration Assessment Authority…These measures are specifically aimed at addressing the backlog of [illegal maritime arrivals]—some 30,000—and will ensure their cases progress towards timely immigration outcomes, either positive or negative.
>
> …
>
> This new approach to review will discourage asylum seekers who attempt to exploit the current review process by presenting manufactured claims or evidence to bolster their original unsuccessful claims only after they learn why they were found not to be refugees by the department. This behaviour has on numerous occasions led to considerable delay while new claims are explored.
>
> These measures will support a robust and timely process, better prioritise and assess claims and afford a differentiated approach depending on the characteristics of the claims.
>
> Effective tools must be available to ensure that those who do not engage our protection obligations can be removed from Australia. Prompt removal of failed asylum seekers from Australia supports the integrity of our protection program and reduces the likelihood of applicants frustrating and delaying removal plans.[37]

Schedule 5: Australia's obligations under international law

2.13 'Non-refoulement' is a principle of public international law that prohibits States from returning people to territories where they would face persecution, torture or other serious human rights violations. The obligation is contained in numerous human rights treaties, including the Refugees Convention, the International Covenant

36 The Bill, Schedule 4, Item 22.

37 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 25 September 2014, pp. 10547, 10548.

on Civil and Political Rights and the Convention against Torture. It is also a principle of customary international law.[38]

2.14 Schedule 5 would—if passed—make two key amendments to the *Migration Act*. First, it would explicitly provide that Australia's non-refoulement obligations are irrelevant to the removal of unlawful non-citizens under section 198.[39] As the Minister explained in his second reading speech:

> This change is in response to a series of court decisions which have found that the Migration Act as a whole is designed to address Australia's non-refoulement obligations, which has had the effect of limiting the availability of the removal powers. Asylum seekers will not be removed in breach of any non-refoulement obligations identified in any earlier processes. The government is not seeking to avoid these obligations and will not avoid these obligations, rather it seeks to be able to effect removals in a timely manner once the assessment of the applicant's protection claims has been concluded.[40]

2.15 Secondly, Schedule 5 would remove references to the *Convention relating to the Status of Refugees* and the *Protocol relating to the Status of Refugees* from the *Migration Act* and replace them with references to a new statutory definition of 'refugee'.[41]

2.16 In his second reading speech, the Minister explained these amendments as follows:

> The new statutory framework will enable parliament to legislate its understanding of these obligations within certain sections of the Migration Act without referring directly to the refugees convention and therefore not being subject to the interpretations of foreign courts or judicial bodies which seek to expand the scope of the refugees convention well beyond what was ever intended by this country or this parliament. This parliament should decide what our obligations are under these conventions—not those who seek to direct us otherwise from places outside this country. The new framework clearly sets out the criteria to be satisfied in order to meet the new statutory definition of a 'refugee' and the circumstances required for a person to be found to have a 'well-founded fear of persecution', including where they could take reasonable steps to modify their behaviour to avoid the persecution.
>
> Let me be clear, the government is not changing the risk threshold required for assessing whether a person has a well-founded fear of persecution.

---

38 See Sir Elihu Lauterpacht QC & Daniel Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion' in E Feller, V Turk & F Nicholson (Eds), *Refugee protection in international law: UNHCR's global consultations on international protection* (Cambridge University Press, 2003), pp. 87-177.

39 The Bill, Schedule 5, Item 2.

40 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 25 September 2014, pp. 10548-10549.

41 The Bill, Schedule 5, Items 4-17.

> Under the new framework, refugee claims will continue to be assessed against the 'real chance' test, which has been the test adopted by successive governments, in line with the High Court's decision in Chan Yee Kin v Minister for Immigration and Ethnic Affairs [1989] HCA 62.
>
> The bill also clarifies the interpretation of various protection related concepts such as:
>
> - the standard of effective state and non-state protection;
> - the test for assessing whether a person can relocate to another area of the receiving country; and
> - the definition of 'membership of a particular social group'.
>
> The new framework will also clarify those grounds which exclude a person from meeting the definition of a refugee or which, upon a person satisfying the definition of a refugee, render them ineligible for the grant of a protection visa.[42]

Schedule 6: Newborn babies

2.17 At present, a child born in Australia's migration zone who is not an Australian citizen (or an excluded maritime arrival) and who does not have a current visa is deemed to be an 'unauthorised maritime arrival', despite the fact that he or she did not arrive in Australia by boat and regardless of whether his or her parents arrived by boat.[43] He or she is unable to apply for a visa and must be taken 'as soon as reasonably practicable' to a regional processing country.

2.18 Schedule 6 would—if passed—amend the *Migration Act* to seek to ensure that unlawful non-citizen children have the same status and are subject to the same removal power as their parents. Non-citizen children of 'transitory persons' are to be transitory persons themselves; non-citizen children of 'unauthorised maritime arrivals' are to be likewise classified.

---

42 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 25 September 2014, p. 10549.

43 This is because:

(a) by section 10 of the *Migration Act*, a non-citizen child born in Australia is deemed to have entered Australia at the time of birth:

(b) by subsection 5AA(2), a person who enters Australia otherwise than by air is deemed to have 'entered Australia by sea';

(c) by section 14, a non-citizen in Australia without a valid visa is an 'unlawful non-citizen'; and

(d) by subsection 5AA(1), an unlawful non-citizen who entered Australia by sea is an 'unauthorised maritime arrival'.

This analysis is supported by the recent decision of the Federal Circuit Court of Australia in *Plaintiff B9/2014 v Minister for Immigration* [2014] FCCA 2348.

2.19 These changes were explained as follows by the Minister in his second reading speech:

> The amendments contained in schedule 6 reinforce the government's view that the children of [illegal maritime arrivals] who are born in Australia are included within the existing definition of 'unauthorised maritime arrival'…in the Migration Act. This will ensure that, consistent with their parents, these children are subject to offshore processing and are unable to apply for a visa while they remain in Australia, unless I have personally intervened to allow a visa application.
>
> The government will also extend the definition of a [unauthorised maritime arrival] to the children of [illegal maritime arrivals] born in a regional processing country. This amendment supports the government's intention that [illegal maritime arrival] families in regional processing countries should be treated consistently and that children born to an [illegal maritime arrival] ought not be treated separately from their family in the protection assessment process.
>
> Amendments will also be made to the Migration Act to ensure provisions relating to 'transitory persons' operate consistently.[44]

Schedule 7: Caseload management

2.20 Schedule 7 would—if passed—amend the *Migration Act* to:

- remove the 90-day period within which decisions on protection visa applications must be made by the Minister and the Refugee Review Tribunal;[45]
- empower the Minister to impose suspensions and caps on visa processing (including protection visa processing) by non-disallowable legislative instrument;[46] and
- remove provisions that require the Minister to report specified information about applications for protection visas and decisions made concerning such applications to Parliament on a regular basis.[47]

2.21 The Minister explained in his second reading speech that:

> From time to time, successive governments have found it necessary to cap certain classes of either the migration or the humanitarian visa programs in order to ensure that government annual targets are not exceeded. This is a vital program management tool, particularly when exceeding targets may resolve [sic] in budget overspends. As a result of a recent High Court judgement regarding my use of the cap for the onshore component of the

---

44 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 25 September 2014, p. 10549.

45 The Bill, Schedule 7, Items 4 & 14.

46 The Bill, Schedule 7, Items 5-10.

47 The Bill, Schedule 7, Items 13 & 15.

humanitarian program, it has been necessary to make minor amendments to the Migration Act. The amendments in schedule 7 of the bill will put it beyond doubt that I may cap classes of the migration or humanitarian program when necessary.

Schedule 7 will also repeal the 90-day limit for deciding protection visa applications at both the primary and review stages of processing. The associated reporting requirements will also be repealed, as they consume time and resources without adding value to the overall government objectives.[48]

48 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 25 September 2014, p. 10550.