

Excisions from the Migration Zone—Policy and Practice

Introduction

It appears to be a dilemma for modern states to find ways of controlling their borders to stem increasing flows of people wanting to claim asylum. One of the strategies the Australian Government has put in place since 2001 for dealing with the arrival of unauthorised people by boat is the excision of islands around northern Australia from the migration zone. The Government claims this deters people from making the trip and frustrates the activities of people smugglers, thus protecting and controlling Australia's borders.¹

'Excised Offshore Place'

The effect of excising territory from the migration zone means that certain territory falls outside the operation of subsection 46A(1) of the *Migration Act 1958* (Cwlth) (the Act). Such territory is designated as an 'excised offshore place'. The result is that persons arriving unlawfully are prevented from making valid visa applications. Excising territory for the purposes of the Act does not involve removing areas from Australia's sovereign territory. Moreover:

The excision is relevant only for Australian domestic law, Australia's international obligations are unaffected. Thus Australia's obligations under the Refugees Convention continue to apply in respect of the whole of Australia, irrespective of the status of any part of Australia for the purposes of the migration zone.²

If a person arrives in the migration zone without a valid visa, the person

is an 'unlawful non-citizen'. By arriving at an 'excised offshore place', the person becomes an 'offshore entry person' as well and cannot make a valid visa application. However the Minister for Immigration may determine in the public interest to grant a visa.

Australian territory currently defined in the Act as an 'excised offshore place' includes Christmas, Ashmore and Cartier Islands and offshore installations such as oil rigs etc. The definition also includes other external territories and islands (but not territory on mainland Australia) prescribed in the regulations as 'excised offshore places'.

One commentator considers that the practice of excising islands may create sovereignty problems:

It could well be argued where parts of Australian sovereignty over certain islands is a bit fragile in the sense it could be subject to being tested, this in the long run is not good policy or legal practice. The types of processes we're talking about here just lead to an impression of Australian disinterest in those islands and those territories.³

History

In 2001, Parliament passed the *Migration Amendment (Excision from Migration Zone) Act 2001*. The Government emphasised the need to deal with the increase in unauthorised people arriving by boat and to deter the activities of organised criminal gangs of people smugglers. The Opposition agreed to support the Bill to deal with the 'absolute surge' in illegal migration.⁴ Illegal migration to Australia,

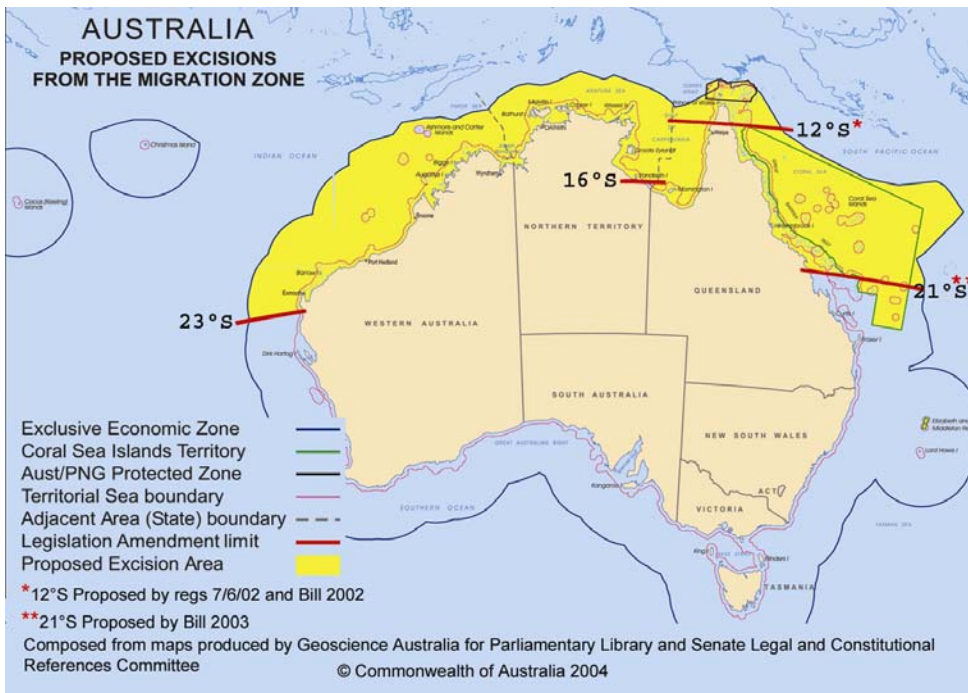
however, is slight compared, for example, to the numbers arriving in Europe. Since 1989, 13 547 people have arrived in Australia illegally by boat. In 2000–01, 4137 arrived without authority on 54 boats. Since 27 September 2001, 118 people have arrived illegally by boat.⁵ In Europe they deal with 400,000 people each year.⁶

On 7 June 2002, the Government gazetted the *Migration Amendment Regulations (No. 4) 2002* (No. 129 of 2002) excising some 4000 islands off Queensland, Western Australia and the Northern Territory (see map). These regulations were subsequently disallowed by the Senate on 19 June 2002.⁷

The Government put forward the excision proposal again in the *Migration Legislation Amendment (Further Border Protection Measures) Bill 2002*.⁸ This Bill was rejected by the Senate on 19 December 2002.

In December 2002, a boatload of suspected asylum seekers was detected approaching the Western Australian coast near Carnarvon. Regulations were gazetted excising Bernier, Dorre, Dirk Hartog and Faure Islands, but were rescinded when the intruder was found to be an illegal Sri Lankan fishing boat.⁹ At the time commentators warned of this 'bandaid approach, saying it was "a very messy way of trying to deal with the issue" of boat people'.¹⁰

A second Bill, the *Migration Legislation Amendment (Further Border Protection Measures) Bill 2002* [No.2] was introduced in March 2003 and again rejected by the Senate in June 2003. This Bill is



now a potential double dissolution trigger. In November 2003 a boat carrying Kurds seeking asylum was detected off Melville Island, approximately 70 kilometres north of Darwin. In response, an even larger area around northern Australia was prescribed by the regulations (see map).¹¹ The Kurds involved were towed back to Indonesia. The regulations were disallowed on 24 November 2003. One commentator labelled the removal of islands from the migration zone as 'a mockery of basic principles of territoriality and legal certainty'.¹² However, in terms of deterring people smugglers, the Government can point to the fact that, since 2001, only two boats carrying illegal migrants have reached Australian territory.

What Happens to Unlawful Non-citizens

Under the Act, when a person arrives at an excised offshore place, he or she can be taken to a 'declared country'.¹³ Currently, Nauru and Manus Island (off the coast of Papua New Guinea) have been designated as 'declared countries'.

Persons claiming asylum in these places are assessed by Australia. If they are accepted as refugees they are granted protection by Australia or another country. To this end,

Australia grants temporary protection visas (TPVs) valid for three years. At the end of that period, their refugee status is again assessed and if it is not safe to return to their own countries, their TPVs are renewed.

Persons in Nauru and Manus Island have not been processed under Australia immigration law or the law of Nauru. In one view, they are 'in a legal vacuum, without any avenue of redress in respect of administrative or legal error'.¹⁴ Section 494AA of the Migration Act bars proceedings in an Australian court by an 'offshore entry person'.¹⁵

By contrast, unauthorised arrivals who are not 'offshore entry persons' will have their asylum claims processed in Australia. These people have access to the review/appeal procedures in the Refugee Review Tribunal and the courts. In practice, they cannot gain permanent residence status or be joined by their families.¹⁶

In other words, access to review procedures varies depending on where illegal arrivals first enter Australian territory.

1. This research note does not deal with international maritime, human rights or refugee issues.
2. Ernst Willheim, 'A Lack of Respect for the Rule of Law', *Canberra Times*, 18 November 2003, p. 11.

3. Professor Don Rothwell quoted in Cynthia Banham, 'Excising of islands a dangerous game, legal experts warn', *Sydney Morning Herald*, 19 December 2002.
4. Kim Beazley, 'Second reading speech: Migration Amendment (Excision from Migration Zone) Bill 2001 and cognate bills', House of Representatives, *Debates*, 19 September 2001, pp. 31014 at 31018.
5. Department of Immigration and Multicultural and Indigenous Affairs, Fact Sheets 74 and 74a.
6. Janet Phillips and Adrienne Millbank, 'Protecting Australia's borders', [Research Note](#), no. 22, Parliamentary Library, 2003–04.
7. Australia, Senate, *Journals*, no. 16, 19 June 2002 p.402.
8. The Bill was introduced on 20 June 2002.
9. 'Backflip puts islands back inside border', *West Australian*, 20 December 2002.
10. Cynthia Banham, op. cit.
11. Migration Amendment Regulations 2003 (No.8) No. 283, Australia, Senate, *Journals* no. 116, 24 November 2003, p.2692.
12. Mary Crock, 'A legal system all at sea', *Australian Financial Review*, 14 November 2003.
13. Section 198A.
14. Willheim, op cit., p. 11.
15. Action in the High Court under section 75 of the Constitution is not affected, although in practice this will be beyond the reach of such people.
16. Border Control, DIMIA Fact Sheet No. 70 at p. 3; However a permanent protection visa may be granted if Migration Regs sch.2 clause 866.215 is satisfied or the Minister intervenes.

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