Migration Amendment (Excision from Migration Zone) Bill 2001
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Migration Amendment (Excision from Migration Zone) Bill 2001

Date Introduced: 18 September 2001
House: House of Representatives
Portfolio: Immigration and Multicultural Affairs
Commencement: Royal Assent.

Purpose

To amend the Migration Act 1958 to create a separate visa application regime applying to persons who arrive unlawfully at certain places that are excised from Australian territory for the purposes of the Migration Act 1958.

Background

Related Bills

This Bill is one of a package of three Bills to deal with unauthorised boat arrivals and potential asylum seekers, and related issues such as border protection and people smuggling. This Bill addresses the excision of certain external territories from the ordinary visa application and processing regime under the Migration Act 1958. The second is a bill which deals with powers and obligations relating to detention of persons and amends the Migration Regulations 1994. The third deals with the validation of actions in relation to vessels such as the Tampa and the Aceng and the clarification and expansion of border protection powers under the Migration Act 1958 and the Customs Act 1901.

The Tampa

On 26 August 2001, a routine surveillance flight by Coastwatch revealed the presence of a fishing boat approximately 80 nautical miles northwest of Christmas Island. The vessel was carrying 433 potential asylum seekers en route to Australia before it broke down. The following day Australian Search and Rescue (AusSAR) broadcast a call to any merchant ships in the vicinity to render assistance to the stricken vessel. A Norwegian freighter, the Tampa, responded to the call, intercepting the vessel and bringing its passengers aboard.

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The master of the *Tampa*, Captain Arne Rinnan, had intended to take the rescuees to a port in Indonesia but was requested by the passengers to proceed to Christmas Island. Before the *Tampa* reached Australia's territorial waters it was instructed to remain in the contiguous zone. On 28 August the *Tampa* issued a distress signal based on the fact that assistance had not been provided within 48 hours. On 29 August it proceeded into the territorial waters surrounding Christmas Island and was interdicted by 45 SAS members. The same day the Government introduced border protection legislation into Parliament which would have expressly validated these actions. The Bill did not pass the Senate.

On 30 August 2001 the Norwegian Ambassador went on board the *Tampa* and was handed a letter signed ‘Afghan refugees now off the coast of Christmas Island'. On Friday 31 August 2001 two applications were filed in the Federal Court of Australia, which commenced the proceedings in *Victorian Council for Civil Liberties Incorporated v The Minister for Immigration and Multicultural Affairs*¹ and *Ruddock v Vadarlis*.² These applications sought to prevent the Minister for Immigration and Multicultural Affairs from allowing the removal of the rescuees from territorial sea off Christmas Island.

On 3 September the rescuees were transhipped from the Tampa to the HMAS *Manoora*.

On 7 September the HMAS *Warramunga* intercepted a second vessel bound for Ashmore Reef. It was boarded ‘as a stateless vessel without a flag' and warned to turn around. Subsequently, the vessel was identified as an Indonesian fishing vessel, the *Aceng*. It was repeatedly boarded and the potential asylum seekers were transhipped to the *Manoora*.³

On 23 September the Minister for Immigration and Multicultural Affairs confirmed plans to build a refugee processing centre on Christmas Island.⁴

For a background of developments surrounding all these issues the reader is referred to *Current Issues Brief No.5 2001-02 Refugee Law – Recent Legislative Developments*.⁵

**Proposed Legislation**

On 8 September the Prime Minister announced proposed legislation to be introduced in the Spring Sittings that would excise Christmas Island and Ashmore Reef from the 'migration zone'. He said that the effect would be that 'any arrivals at Christmas Island or Ashmore Islands ... will not be sufficient grounds for application for status under the Migration Act'. He stated, from a legal point of view, that the territories would 'technically become like Norfolk Island which has its own migration regime but … is still a territory of Australia'. However, he indicated that '[t]here will still of course be our obligations under the refugee convention and those obligations continue to be fully met by Australia'.⁶

The Government has also stated that it would excise the territory of the Cocos (Keeling) Islands from the migration zone with effect from noon 17 September 2001.

The intention of the legislation is, as stated in the Second Reading Speech by the Minister for Immigration and Multicultural Affairs, to ensure that the territories 'will become

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¹ *Victorian Council for Civil Liberties Incorporated v The Minister for Immigration and Multicultural Affairs*
² *Ruddock v Vadarlis*
³ *Aceng*
⁴ *Manoora*
⁵ *Current Issues Brief No.5 2001-02 Refugee Law – Recent Legislative Developments*
⁶ *The Minister for Immigration and Multicultural Affairs*
'excised offshore places' which will mean that simply arriving unlawfully at one of them will not be enough to allow visa applications to be made'. The effects of the Bill 'will be limited only to those who arrive without lawful authority'.7 The Second Reading Speech also reiterates that Australia will continue to honour international obligations.

**Australia's Refugee Obligations**

Australia is a party to both the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 (the *Refugees Convention*) and the Protocol relating to the Status of Refugees done at New York on 31 January 1967 (the *Refugees Protocol*). The Refugees Convention, read together with the Refugees Protocol, defines 'refugee' relevantly as:

Any person who ... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Under the Refugees Convention, a person is not within the definition of 'refugee' in a number of circumstances, including:

- where a person has voluntarily returned to his or her country of nationality or residence, or has acquired a new nationality, or where the circumstances constituting persecution have ceased to exist,8
- where a person is currently receiving protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees,9
- where a person has a right of residence in a third country, which gives him or her rights and obligations equivalent to citizens of that country,10 or
- where 'there are serious reasons for considering that' the person has either:11
  
  (a) committed a crime against peace, a war crime, or a crime against humanity;
  
  (b) committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; or
  
  (c) been guilty of acts contrary to the purposes and principles of the United Nations.

This definition has been incorporated into Australian law. Section 36 of the *Migration Act 1958* creates a class of visas, called 'protection visas', which a person is entitled to apply for if he or she is 'a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol'.12 Thus, it falls to
the Department, and on review the Refugee Review Tribunal and the Federal and High Courts, to consider the definition of 'refugee' given above, together with the exclusions.

Asylum

Traditionally, international law viewed asylum as an act of grace by states. It recognised diplomatic asylum, involving a permission by the protecting state to shelter a refugee in its diplomatic premises. It also recognised territorial asylum, involving a refusal by the protecting state to extradite or deport a refugee from its territory. Both these forms of asylum were voluntary and neither derogated from a state's territorial sovereignty.

The Refugees Convention does not contain a right of asylum for persons who satisfy the definition of 'refugees'. Refugees have no direct right to gain entry to a country of refuge. This has been accepted by the courts in a number of countries. Indeed, this fact was a significant aspect of the decision of the Full Federal Court in Ruddock v Vadarlis.

The most relevant obligation contained in the Refugee Convention is to guarantee non-refoulement or non-return of refugees to the place of persecution. Article 33 provides:

(1) No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

(2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

That is, once refugees are in Australia, there is an obligation not to return them to the place of persecution. This means in effect that Australia needs to have a system for determining whether a person who claims to be a 'refugee' in fact satisfies the definition.

Main Provisions

Principal Bill

Item 1 inserts into section 5 of the Migration Act a new definition of 'excised offshore place'. Such places will include Christmas Island, Ashmore and Cartier Islands, Cocos (Keeling) Islands and Australian sea and resources installations. They will also include any other external territories, or State or Territory islands, prescribed by regulations.

The Bill operates retrospectively by providing in item 2 definitions of 'excision time'. For Christmas, Ashmore and Cartier Islands this will be 2 p.m. on 8 September 2001. The
relevant time for Cocos (Keeling) Islands will be 12 noon on 17 September 2001. The relevant time for Australian sea and resources installations will be the date of Royal Assent. As indicated above, the *Tampa* entered Australian waters on 29 August 2001.

**Item 3** inserts into section 5 a related definition of an 'offshore entry person' which will be a person who entered an excised offshore place after the excision time for that place and became an unlawful non-citizen because of that entry.

Under the *Migration Act 1958* an 'unlawful non-citizen' is a person who is present within the 'migration zone' but does not have a visa. The 'migration zone' is basically the physical territory of Australia and seas within a State or Territory port.

**Item 4** inserts new section 46A into the *Migration Act 1958*. This new provision provides that an application for a visa by an offshore entry person will not be valid if that person is in Australia and is an unlawful non-citizen (new subsection 46A(1)). As it draws on the definition of 'offshore entry person' this provision applies only to applications from persons arriving unlawfully to an excised offshore place after the relevant excision time.

New section 46A also deals with exemptions from new subsection 46A(1). The Minister will have a personal and discretionary power to determine that subclause 46A(1) will not apply to an application by a particular offshore entry person for a particular class of visa if the Minister thinks that it is in the public interest to do so. If the Minister does make such a determination, he or she must lay before each House of Parliament a statement setting out that determination and the reasons, 'referring in particular to the Minister's reasons for thinking that the Minister's actions are in the public interest' (new subsections 46A(2), (3), and (4)). The statement must be laid before the Houses within 15 sitting days after 1 July in a year, or 1 January in the following year, depending on when the determination is made. There is provision to protect the identity of the offshore entry person in the statement to Parliament and the Minister has a discretion not to name other persons.

Special provision is made in new subsection 46A(7) that the Minister does not have a duty to consider whether to exercise the power whether he or she is requested to do so by the offshore entry person, any other person, or in any other circumstances.

**Consequential Bill**

The Migration Amendment (Excision from the Migration Zone) (Consequential Provisions) Bill 2001 introduced on the same day as this Bill makes further provisions relevant to offshore entry persons and potential asylum seekers. The key provisions are:

- a privative clause, preventing proceedings relating to offshore entry persons except proceedings brought in the original jurisdiction of the High Court; and
- a power to declare for the overseas processing of offshore entry persons, without any express requirement that those countries be signatories to the *Refugee Convention*.

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Concluding Comments

Time of excision

Excision time for Christmas Island, Ashmore and Cartier Islands is to be from 2 p.m. 8 September 2001. Neither the Explanatory Memorandum nor the Second Reading Speech mention the reasons for this time and date. It is however the date of the Prime Minister's doorstep interview at Sydney airport. After this point of time offshore entry persons become unlawful non-citizens under the proposed legislation.

The status of persons on board the *Tampa* from 29 August to 3 September 2001 will not be 'offshore entry persons'. Nor will they be 'unlawful non-citizens' as the Migration Act applies this term only to persons in the migration zone which does not include the territorial sea. The status of these arrivals therefore remains as 'rescuees' potential asylum seekers and potential unlawful non-citizens.

The proposed provisions so far as they refer to offshore entry persons will have no application in the period prior to 8 September. The Border Protection (Validation and Enforcement Powers) Bill 2001 (the Validation and Enforcement Bill) validates the actions of the Commonwealth from 27 August 2001 until the commencement of the Bill and prevents the institution or continuation of any proceedings in respect of such actions. The Validation and Enforcement Bill also preserves the original jurisdiction of the High Court. But it does not deal with the status or otherwise of the arrivals in Australian waters.

Under the obligations of the Refugees Convention, Australia is not to *refoule* refugees. This applies to persons found to be refugees within the meaning of the Convention pursuant to whatever processes are used to determine that status. Goodwin-Gill, a respected author on refugee law, states:

> Likewise, it is fruitless to pay too much attention to moments of entry or presence, legal or physical. As a matter of fact, anyone presenting themselves at a frontier post, port, or airport will be already be within State territory and jurisdiction; for this reason, and the better to retain sovereign control, States have devised a fiction to keep even the physically present alien technically, legally, unadmitted.19

Migration zone, 'in Australia' and 'excised offshore place'

The proposed amendments do not alter the definition of 'migration zone' in the *Migration Act 1958* or the general criteria for protection visas. They simply create a particular status of applicant which is subject to a special visa regime. The effect of new section 46A is that an application made by an offshore entry person in Australia will not be valid. With one minor exception, for applications made within the territorial sea (see below), this effectively prevents an offshore entry person from ever validly applying for a visa whilst in Australia. Whether or not such a person is in an 'excised offshore place' is immaterial.

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Processing Alternatives

Clearly, the Government has the option of processing offshore entry persons on Christmas Island. It also has the option, using the powers under the Validation and Enforcement Bill, of moving these persons to an overseas processing place such as Nauru or Kiribati. Moreover, it has the option of processing these persons in mainland Australia, ostensibly without any risk that those persons would have access to the general visa regime.

Ultimately, a person seeking asylum in Australia who arrives by boat on Christmas Island, Ashmore and Cartier Islands or the Cocos (Keeling) Islands will be subject to one of two alternatives. They may be moved overseas (to Nauru or Kiribati) or remain in Australia. If they are moved overseas they may apply under Australia's (offshore) humanitarian and refugee program to be processed by the United Nations High Commissioner for Refugees. If they remain, they will be subject to Australia's non-refoulement obligation, but they may not be able to apply under Australia's (onshore) humanitarian and refugee program. The benefit of remaining in Australia would be a limited guarantee of due process under section 75 but an uncertain refugee determination process. The benefit of moving overseas would be a certain refugee determination process but a limited guarantee of due process.

Territorial Sea

Most of the visas in the Migration Act 1958 require that the applicant is either within or outside the migration zone. However the key criteria of protection visas, for present purposes, is the requirement that the applicant be 'in Australia'. This has implications for the operation of these amendments. Under the Acts Interpretation Act 1901 'Australia' means 'the Commonwealth of Australia and, when used in a geographical sense, includes the Territory of Christmas Island'. It also includes the 'coastal sea' of Australia and 'coastal sea' includes the 'territorial sea'. Moreover, the Migration Act 1958 applies to 'prescribed Territories' which means 'the Coral Sea Islands Territory, the Territory of Cocos (Keeling) Islands, the Territory of Christmas Island and the Territory of Ashmore and Cartier Islands'. One of the criteria for a protection visa is that the applicant is 'non-citizen in Australia'. Thus, in theory, a non-citizen who is seeking asylum may apply for a protection visa while within the territorial sea of Christmas Island, etc.

New subsection 46A(1) provides that a person who enters Christmas Island, Ashmore and Cartier Islands, or the Cocos (Keeling) Islands (for example) without a visa may not apply for any visa under the Migration Act 1958 while they are both within Australia and within the migration zone (by virtue of the definition of unlawful non-citizen). Thus, an offshore entry person who remains in Australia but leaves the migration zone (for example, by leaving a port and entering the territorial sea) is therefore not precluded from applying for a protection visa under new subsection 46A(1) (because they are no longer an unlawful non-citizen). Neither is an offshore entry person who enters the territorial sea but does not enter the migration zone as happened in relation to the rescuees aboard the MV Tampa.
It could be argued that, on the basis of the dual requirements in new subsection 46A(1), the measures in this Bill will not address the concerns arising out of the *Tampa* incident. Thus, theoretically, an unlawful entry person may apply for a visa whilst in the territorial sea, provided they do not enter the migration zone or the mainland of Christmas Island.

### Endnotes

2. [2001] FCA 1329.
5. Hancock, N. Refugee Law – Recent Legislative Developments *Current Issues Brief No.5 2001-02*.
7. The Hon P. Ruddock *Second Reading Speech* 18 September 2001
8. Article 1C of the Refugees Convention.
10. Article 1E of the Refugees Convention.
12. If asylum seekers make valid applications for protection visas, and satisfy any health criteria or other criteria prescribed under Australian law, the Minister must grant the visas: section 65 of the *Migration Act 1958*.
16. Australia is also obliged not to expel a refugee *lawfully* in its territory 'save on the grounds of national security or public order' (Article 32(1)), and only in accordance with 'due process of law' (Article 32(2)).
17. Sections 13 and 14.
18 Section 5(1).

20 That is, unless the Minister decides otherwise
21 Section 17.
22 Section 15B(1)(b).
23 Section 15B(4).
24 Subsection 7(1).
25 Subsection 36(2).