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

Dy Spooner and Nathan Hancock
Law and Bills Digest Group
26 September 2001
Contents

Purpose ............................................................. 1

Background .......................................................... 1

Main Provisions ....................................................... 1

    Schedule 1 ........................................................ 1

    Mandatory Detention ............................................. 2

    Overseas Processing ............................................ 2

    Privative Clause ................................................. 2

    Schedule 2 ........................................................ 3

    Privative Clause ................................................. 4

Concluding Comments .................................................. 5

    Declaring Countries ............................................. 5

    A New Refugee and Humanitarian Regime ...................... 5

Endnotes. ............................................................. 6
Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001

Date Introduced: 18 September 2001
House: House of Representatives
Portfolio: Immigration and Multicultural Affairs
Commencement: With the Migration Amendment (Excision from Migration Zone) Act 2001.

Purpose

To

- amend the Migration Act 1958 to clarify the powers and obligations relating to detention and movement of persons who arrive unlawfully at certain places that are excised from Australian territory for the purposes of the Migration Act 1958.
- amend the Migration Regulations 1994 to create a new class of refugee and humanitarian visa for dealing with temporary movements of persons seeking asylum.

Background

A background to the measures contained in this Bill appears in the Digest of the Migration Amendment (Excision from Migration Zone) Bill 2001, Bills Digest No. 69, 2001–02.

Main Provisions

Schedule 1

The measures in Schedule 1 of this Bill complement those in the Migration Amendment (Excision from Migration Zone) Bill 2001 (the Excision Bill) and the Border Protection (Validation and Enforcement Powers) Bill 2001 (the Validation Bill) in a number of ways.
Mandatory Detention

Firstly, 'offshore entry persons' are exempted from the mandatory detention provisions in section 189 of the *Migration Act 1958*. However, if an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, then the officer may detain that person (new subsection 189(3)). An officer may detain a person if s/he reasonably suspects that the person is a non-citizen who is 'in Australia but outside the migration zone' and is seeking to enter an excised offshore place without a visa (new subsection 189(4)). This power overlaps with the powers relating to the detention of ships and the detention of persons aboard detained ships within the territorial sea. As with the Validation Bill, the powers are extended to officers of the Australian Defence Force.

An 'offshore entry person' is a person who entered an excised offshore place (for example, Christmas Island or Ashmore and Cartier Islands) after the excision time for that place (8 September 2001 for these places) and became an unlawful non-citizen (a person who is present within the 'migration zone' but does not have a visa) because of that entry.

Overseas Processing

Secondly, an offshore entry person can be taken from Australia to a declared country (new section 198A). The power to remove includes the power to place, restrain or remove the person from a vehicle or vessel, with such force as is necessary and reasonable, and can be exercised in or outside Australia. A declared country is one which the Minister declares:

- provides access to effective procedures for assessing the refugee status of persons
- provides protection to these persons pending determination of their refugee status
- provides protection to refugees pending voluntary return to their country of origin or resettlement in another country, and
- meets relevant human rights standards in providing that protection.

It seems to be solely up to the Minister to determine whether a country meets these criteria. It is not clear whether such decisions will be reviewable by the courts.

Any detention under this provision is deemed not to be 'immigration detention' for the purposes of the *Migration Act 1958* (new subsection 198A(4)). Thus, no argument could be made, as was attempted by Mr Vadarlis in *Victorian Council for Civil Liberties Incorporated v the Minister for Immigration and Multicultural Affairs*, that the persons who are detained are eligible to receive visa application forms, legal advice, etc.

Privative Clause

Thirdly, offshore entry persons are prevented from continuing or instituting certain proceedings against the Commonwealth in any court, excluding the original jurisdiction of the High Court of Australia under section 75 of the Constitution (new section 494AA).
Schedule 2

Background

Visas come in two broad categories: permanent and temporary. The key permanent visas under the refugee and humanitarian program fall within the *Refugee and Humanitarian (Migrant) (Class BA)*. Class BA visas are set out in Schedule 1, item 1127 of the Migration Regulations 1994. A person may apply offshore for a range of subclasses of visa, based broadly on the criteria in the following table.

<table>
<thead>
<tr>
<th>Visa Category</th>
<th>Criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>200 (Refugee)</td>
<td>Applicant subject to persecution, is outside their country of origin and can establish a compelling case, based on circumstances including the degree of persecution</td>
</tr>
<tr>
<td>201 (In-country special humanitarian)</td>
<td>Applicant subject to persecution and is within their country of origin</td>
</tr>
<tr>
<td>202 (Global special humanitarian)</td>
<td>Applicant subject to persecution and is outside their country of origin</td>
</tr>
<tr>
<td>203 (Emergency Rescue)</td>
<td>Applicant subject to persecution, is either inside or outside their country of origin and is in a life-threatening situation or would be deported or imprisoned pending deportation</td>
</tr>
<tr>
<td>204 (Woman at Risk)</td>
<td>Applicant is a woman subject to persecution and is outside her country of origin</td>
</tr>
</tbody>
</table>

A person subject to persecution and inside Australia may apply onshore for a Protection Visa (Class XA). There are two subclasses, temporary (785) and permanent (866). Class XA visas are set out in Schedule 1, Part 4 (item 1401) of those Regulations.

Schedule 2, item 1 of this Bill deletes item 1127 from the Regulations.

Schedule 2, items 2 and 3 reincorporate the *Refugee and Humanitarian (Migrant) (Class BA)* criteria as *Refugee and Humanitarian (Class XB)* (new item 1402) in Part 4 under the new heading 'Protection, Refugee and Humanitarian Visas'. A criterion is added to the 200 (Refugee), 202 (Global special humanitarian) and 204 (Woman at Risk) subclasses. An applicant cannot, since fleeing persecution, have lived for a week in a country in which he or she could have obtained protection either through its refugee assessment procedures or through an office of the United Nations High Commissioner for Refugees in that country. (new clauses 200.212; 202.212 and 204.212). In effect, if a person flees their country of origin to avoid persecution and there is any protection regime in their country of first asylum, whether domestic or international, they are prevented from applying for any of the

---

**Warning:**
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.
This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
key protection, refugee and humanitarian visas under the amended Migration Regulations 1994.

In addition to these amendments, two new visa subclasses are added:

<table>
<thead>
<tr>
<th>Visa Subclass</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>447 (Secondary Movement Offshore Entry (Temporary))</td>
<td>Applicant subject to persecution, discrimination amounting to gross violation of human rights or is a woman at risk and is an 'offshore entry person'</td>
</tr>
<tr>
<td>451 (Secondary Movement Relocation (Temporary))</td>
<td>Applicant subject to persecution, discrimination amounting to gross violation of human rights or is a woman at risk and is not an 'offshore entry person'</td>
</tr>
</tbody>
</table>

'Offshore entry person' is a status created by the Migration Amendment (Excision from Migration Zone) Bill 2001. It is 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.

The visas permit the holder to travel to and enter Australia on 1 occasion (as specified by the Minister) and remain in Australia for 3 years (Subclass 447) or 5 years (Subclass 451) or, if the holder applies for a visa in this period, until an application is finally determined.

In effect,

- a person who has fled their country of origin to avoid persecution, but has been prevented from applying for a visa by virtue of the measures in Schedule 2, items 2 and 3, or
- a person who has arrived in an offshore excision place and has been prevented from applying for a visa by virtue of the Excision Bill (at the particular discretion of the Minister pursuant to a notice issued under proposed section 46A(2)).

may apply for a secondary movement visa to enter Australia once and for a limited period.

**Privative Clause**

**New section 494AA** will prevent certain proceedings against the Commonwealth from being instituted or continued. The original jurisdiction of the High Court is not affected.

The proceedings covered by **new section 494AA** include proceedings relating to the offshore entry, the status or the detention of an offshore entry person, during any part of the ineligibility period. The 'ineligibility period' is defined to be the period from the time of the offshore entry until when the person next ceases to be an unlawful non-citizen. For the purposes of this provision, an 'offshore entry' is an entry into an excised offshore place (eg Christmas Island) after the excision time for that place (8 September 2001).

**Warning:**

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
Concluding Comments

Declaring Countries

New section 198A refers to ‘persons seeking asylum’ and ‘persons who are given refugee status’ in describing the ministerial power to declare countries for the overseas processing of offshore entry persons. Significantly, the Minister does not have to be satisfied that certain factors are present before he or she declares a country. The declaration will simply declare that the factors exist. One factor that is not required is that a country is a signatory of the Refugees Convention and therefore under the obligation not to *refoule*.

A New Refugee and Humanitarian Regime

It seems clear that the amendments proposed to the Migration Regulations 1994 seek to establish a new regime for conducting the refugee and humanitarian program. In his Second Reading Speech the Minister for Immigration and Multicultural Affairs stated that the new visa conditions and subclasses were intended to ‘implement a visa regime aimed at deterring further movement from, or the bypassing of, other safe countries’ by ‘creating further disincentives to unauthorised arrival in Australia [by boat]’. Moreover, ‘[u]nauthorised arrivals and those who leave their countries of first asylum will be able to be granted only temporary visas for Australia’.

The amendments will operate in this way:

- a person who flees their country of origin to avoid persecution, but who lives for a week in a country in which he or she could have obtained protection, and

- a person who enters Australia by boat via Christmas Island, Ashmore and Cartier Islands, or Cocos (Keeling) Islands (at the discretion of the Minister).

will only be permitted to apply for a temporary visa and, like the other applicants in the (offshore) humanitarian and refugee program, will need to demonstrate a compelling case, etc. In addition, as the Minister has indicated, ‘their period of stay … will be limited to [between three and five] years, after which their situation will be reassessed’. Within this time a visa application ought to be finally determined. At the same time, conceivably, the circumstances giving rise to their persecution may have materially changed.
Endnotes

1 Under the Acts Interpretation Act 1901 'Australia' includes the territorial sea. Thus, presence in the territorial sea amounts to presence in Australia for the purposes of Australian law. On this basis, the powers in this Bill overlap with the powers to detain aboard ships in the territorial sea.

2 The Migration Regulations describe a permanent visa as 'a visa which gives the visa holder permission to remain in Australia indefinitely. This permission may also carry with it a permission to travel to and enter Australia. If it does, the permission to remain in Australia is subject to the requirement that the person be in Australia at the time of the grant of the visa or have entered Australia within the period allowed for travel and entry'.

3 The Migration Regulations describe a temporary visa as 'a visa which may be granted subject to various conditions and gives permission to remain in Australia for a limited period of time. This visa may also give permission to travel to and enter Australia during a particular period and to remain for a specified period only if entry is made within the period allowed for travel and entry'.


5 Ibid.

6 Ibid.