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No. 113 2001–02

Migration Legislation Amendment (Transitional
Movement) Bill 2002

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 113 2001–02

Migration Legislation Amendment (Transitional Movement)
Bill 2002

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Law and Bills Digest Group
19 March 2002

Contents

Purpose	1
Background	1
Main Provisions	3
Definition of 'transitory person'	3
Power to bring 'transitory persons' to Australia for a temporary purpose.	4
Exemption from requirement for visa to travel to Australia	6
Prohibition on visa applications by transitory persons	6
Privative clause.	7
Endnotes.	8

Migration Legislation Amendment (Transitional Movement) Bill 2002

Date Introduced: 13 March 2002

House: House of Representatives

Portfolio: Immigration and Multicultural and Indigenous Affairs

Commencement: On a day to be fixed by Proclamation, or six months after Royal Assent, whichever is the earlier.

Purpose

To amend the *Migration Act 1958* to allow for certain non-citizens to be brought to Australia temporarily.

Background

The *Migration Legislation Amendment (Transitional Movement) Bill 2002* ('the Bill') is introduced against the general backdrop of the Government's border protection policy.

That policy has been controversial, both within and outside Australia, most especially since the *Tampa* incident in late August and early September 2001 and the subsequent implementation of the so-called 'Pacific solution'.

The Minister for Immigration and Multicultural and Indigenous Affairs summarises the relationship of this Bill to the Government's border protection policy, in his second reading speech on the Bill on 13 March 2002, as follows:¹

In September 2001, the Parliament passed amendments to the *Migration Act* to provide a stronger statutory basis for the Government's strategy to stop persons seeking to enter Australia unlawfully by boat.

The Government's actions and those amendments were in response to an increase in people smuggling activities, which led to larger numbers of persons using vessels to seek to enter Australia unlawfully.

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That legislation gave support to the Government's intention that unauthorised boat arrivals should not be allowed to reach the Australian mainland. The amendments provided power for unauthorised boat arrivals to be taken to 'declared countries', where their claims, if any, to asylum could be assessed.

The Government's strategy is starting to have results. There have been no boats attempting to breach our immigration controls for several months. Recent media reports indicate that people smuggling activity appears to have declined. The Government is also working with other countries to discourage people smuggling. The recent conference in Bali is a strong positive indication of the commitment of countries in our region to tackle people smuggling.

While continuing to be vigilant, the Government recognises there are some situations where it may be necessary to bring to Australia some persons who have been taken to a declared country.

This Bill proposes amendments which will allow such a person, called a 'transitory person', to be brought to Australia from one of the declared countries in exceptional circumstances.

The Opposition's view, of both this Bill and the overarching policy framework in which it sits, is perhaps best summarised by the following proposed amendment to the motion for second reading, moved by the Leader of the Opposition on 14 March 2002.² The proposed amendment was defeated. A subsequent Government amendment passed the House. The Minister for Immigration and Multicultural and Indigenous Affairs made the following relevant comments in relation to both suggested amendments:³

The shadow minister wrote to me and I am aware of the amendment that is proposed today. In relation to that amendment, the first point that was made on which some assurance was sought, and it came up during the course of the debate, was in relation to refugees – whether refugees would be transferred to Australia under these arrangements. Let me make it very clear: legislation that has already been enacted enables us to resettle, from offshore, refugees. A specific visa class has been created. It is in the legislation. We are seeking for countries to be under effective international burden sharing arrangements and there is some indication that we are going to get that from a number of countries which have volunteered to participate in resettling some of the people off *Tampa* and some of the other people. We have said we would do our fair share. That means some people will be coming to Australia. That was always clear ...

I do propose an amendment which is quite clear in its terms. It will specifically exclude a person who has been assessed as a refugee for the purposes of the refugee convention from the definition of 'transitory person'. That definition is being amended in that way to put it beyond doubt. I do not think it needs to be put beyond doubt but my view was that as the question had been raised we ought to deal with it and deal with it in a way which was explicit, and the legislation will do that ...

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...I make the final point in relation to the last matter raised by the shadow minister's amendment, and I have confirmed this in a letter to the shadow minister, and that is that I will arrange for amendments to the bill to take into account her concerns regarding the provision of access for transitory persons to a review mechanism through the Refugee Review Tribunal in the circumstances that were outlined in her address. Those circumstances are that they have been in Australia for a period of at least six months following their transfer and it is evident that they have been cooperating throughout that period with authorities involved in their return process. ... I am happy to give the assurance that will happen in the Senate next week.

On the same day the Democrat's immigration spokesman, Senator Andrew Bartlett led an objection which prevented a Selection of Bills Committee report from being tabled before the Senate. The report would have recommended that the Bill be referred to a Senate committee for consideration and report by 19 March 2002. He indicated that he would be seeking an amendment that would extend the reporting date for the committee reference.⁴

Main Provisions

Definition of 'transitory person'

Item 1 of Schedule 1 introduces a definition of *transitory person* into subsection 5(1) of the *Migration Act 1958*. That definition embraces three categories of people:

- Anyone who entered Australia at any of the 'excised offshore places'⁵ after the specified 'excision time',⁶ who lacked a visa to enter Australia and who accordingly became an 'offshore entry person' (and is therefore excluded⁷ from entitlement to apply for a visa to remain in Australia)⁸ and who has been taken to another country.⁹ Put more clearly, this category apparently includes any asylum-seeker who, in their attempt to seek protection in Australia, enters Australia at what is at the time of their entry an excised offshore place (such as Christmas Island or Ashmore Reef from 8 September 2001, or Cocos Island from 17 September 2001), and is then deported to another country (such as Nauru or Papua New Guinea¹⁰).
- Anyone who has been subject to the power in the *Migration Act 1958* to detain foreign ships located within Australia's 'territorial sea' or 'contiguous zone', or (in more limited circumstances) in the 'exclusive economic zone' or on the 'high seas',¹¹ and bring about the removal of the people on board to a place outside Australia.¹² Put more clearly, this category apparently includes anyone on any ship carrying asylum-seekers to Australia, which has not landed in Australia, and who is removed from that ship in accordance with the terms of the *Migration Act 1958*, to a place such as a 'Pacific Solution' detention facility on Nauru or Papua New Guinea.¹³

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- Anyone who, while a non-citizen and between 27 August and 6 October 2001, was transferred to the ship *HMAS Manoora* from the ship *Aceng* or the ship *MV Tampa*, was then taken by the *Manoora* to another country, and disembarked in that country, and also (pursuant to a Government amendment to the Bill)¹⁴ who has not been assessed to be a refugee according to the terms of the Refugees Convention as amended by the Refugees Protocol. Put more clearly, unlike the first two categories which are prospective and numerically open-ended in application, this third category is confined to the finite class of people who were asylum seekers heading for Australia on the *Tampa* and *Aceng*, who were removed to the 'Pacific Solution' detention facilities on Nauru and Papua New Guinea, and who have not yet been found to be refugees.

In sum, the definition of 'transitory person' apparently encompass all asylum seekers who currently are detained in another country (*ie* Nauru or Papua New Guinea) as part of the 'Pacific Solution', except those who already have been found to be refugees. The definition also apparently encompass all asylum seekers who may be in the future detained in another country as part of the 'Pacific Solution' or some similar policy.

Power to bring 'transitory persons' to Australia for a temporary purpose

Item 5 of Schedule 1 inserts **proposed section 198B** into the *Migration Act 1958*. It empowers an 'officer' to bring a transitory person to Australia from a country or place outside Australia, for a 'temporary purpose' (**proposed subsection 198B(1)**). That power includes the power to do any of the following things, within or outside Australia: place the person on a vehicle or vessel; restrain the person on a vehicle or vessel; remove the person from a vehicle or vessel; and use such force as is 'necessary and reasonable' (**proposed subsection 198B(2)**).

'Officer' is defined in **proposed subsection 198B(3)** to mean any of the following:

- an officer of the Department of Immigration and Multicultural and Indigenous Affairs;
- a person who is an officer for the purposes of the *Customs Act 1901*;
- a person who is a protective services officer for the purposes of the *Australian Protective Service Act 1987*;
- a member of the Australian Federal Police;
- a member of the police force of a State, an internal Territory or an external Territory;
- a person authorised in writing by the Minister, personally or as part of a class of people, to be an officer for the purposes of the *Migration Act 1958*; or
- a member of the Australian Defence Force.

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The level or nature of force that may amount to 'necessary and reasonable' force in the context of an officer exercising his or her powers under proposed section 198B is not defined in the Bill. The *Explanatory Memorandum* does not specifically address this question, stating only that proposed section 198B 'provides statutory authority for the exercise of the powers necessary to affect [*sic*] the transitional movement of such persons'.¹⁵

'Temporary purpose' is also not defined in the Bill. In his second reading speech on this Bill, the Minister indicated the power to bring 'transitory persons' to Australia would only be exercised in 'exceptional circumstances' which he stated would include:¹⁶

- situations where a person has a medical condition which cannot be adequately treated in the place where the person has been taken;
- transit through Australia for, either return to their country of residence, or to a third country for resettlement; and
- transfers to Australia in order to give evidence as a witness in a criminal trial, such as people smuggling prosecutions.

Whilst this explanation apparently elucidates the kinds of situations in which the power is expected to be exercised, it does not indicate the length of time envisaged as 'temporary' for these purposes. Taking the most obvious example, if a person is brought to Australia from a place such as Nauru or Papua New Guinea, to receive treatment for a chronic health condition that can be medically managed but neither cured nor improved sufficiently to enable them to be returned and receive 'adequate treatment', would 'temporary' in this context include weeks, months or even years?

This last question is in part answered by the Minister's statement that, '[i]n order to maintain the integrity of Australia's border controls it is necessary to ensure that the transitory person's presence in Australia is as short as possible and that action cannot be taken to delay that person's removal from Australia'.¹⁷

Proposed subsection 198(1), introduced by **Item 4 of Schedule 1**, may be of relevance. It provides that - in the case of a 'transitory person' brought to Australia under section 198B for a 'temporary purpose' - an officer 'must remove the person as soon as reasonably practicable after the person no longer needs to be in Australia for that purpose (whether or not the purpose has been achieved)'. This gives legal force to the statement by the Minister that 'transitory persons' brought to Australia for a 'temporary purpose' will be in this country for as short a time as possible. Returning to the hypothetical question of the likely fate of a chronically ill person brought to Australia for medical care, however, the combined effect in that situation of the phrases 'the person no longer needs to be in Australia for that purpose' and 'whether or not the purpose has been achieved' in proposed subsection 198(1) is unclear. Would this oblige, or justify, removal of a chronically ill person who has been in Australia for some weeks, months or years and who came because

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of the (presumably continuing) inadequacy of medical care in the nation in which s/he was being detained? If so, under what circumstances?

Exemption from requirement for visa to travel to Australia

Item 2 of Schedule 1 introduces **proposed paragraph 42(2A)(ca)** into the *Migration Act 1958*. This new provision will have the effect of exempting any 'transitory person' brought to Australia, pursuant to proposed section 198B, from the prohibition imposed by section 42 of the *Migration Act 1958* on a non-citizen travelling to Australia without a visa that is in effect.

Once the 'transitory person' has entered Australia pursuant to proposed section 198B, s/he will be subject to the mandatory detention requirement imposed by section 189 of the *Migration Act 1958*.¹⁸ Presumably detention for these purposes could include, but would not require, detention in any of Australia's onshore immigration detention facilities. Presumably it could also include confinement of a 'transitory person' within a medical facility or part thereof, by an 'officer'.¹⁹

Prohibition on visa applications by transitory persons

Proposed subsection 46B (1), inserted by **Item 3 of Schedule 1**, bars a 'transitory person' in Australia from making a valid application for a visa.

Proposed subsection 46B (2), also inserted by **Item 3 of Schedule 1**, empowers the Minister to make an exception to this general rule. The Minister may, if he thinks that it is in the public interest to do so, give written notice to a 'transitory person' that the prohibition in proposed subsection 46B(1) does not apply to that person. That notice must specify the class of visa for which the 'transitory person' is entitled to apply. This power may only be exercised by the Minister personally (**proposed subsection 46B(3)**), and the Minister is under no obligation in any circumstances to consider whether to exercise this power (**proposed subsection 46B(7)**).

'Public interest' is not defined for these purposes. The *Explanatory Memorandum* states, however, that this power 'may be used in situations of emergency, hardship or overwhelming humanitarian need'.²⁰ In addition, **proposed subsection 46B(4)** requires the Minister to lay before each House of the Parliament a statement in relation to any exemption he grants to the prohibition on visa applications.²¹ That statement must include the reasons for his decision, 'referring in particular to the Minister's reasons for thinking that the Minister's actions are in the public interest' (**proposed paragraph 46B(4)(b)**). **Proposed subsection 46B(5)** is designed to protect the anonymity of any 'transitory person' who is the subject of an exemption.

This exception to the proposed rule prohibiting visa applications by 'transitory persons' in Australia perhaps is most likely to be exercised in one of two situations. First, a situation

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of emergency, hardship or overwhelming humanitarian need due to the unusual individual circumstances of the 'transitory person' – for example grave illness, family circumstances and so on - in which the Minister considers granting an exemption to that individual is in the 'public interest,' on grounds that are essentially compassionate but particular to that individual. Second, a situation of emergency, hardship or overwhelming humanitarian need due to a deterioration in the situation in, or Australia's relations with, the country to which it is was intended that the 'transitory person' be returned (*i.e.* a country in which the person was detained, such as Nauru or Papua New Guinea; or that person's country of origin, such as Afghanistan or Iraq) or transported (*i.e.* for resettlement, such as New Zealand). In this latter situation, granting the individual an exemption from the prohibition on visa applications would also be on grounds that are essentially compassionate, but they would not be particular to that individual and would embrace a wider notion of 'public interest'.

This second situation could conceivably involve a scenario where an agreement between Australia and a nation such as Nauru or Papua New Guinea, which has agreed to detain Australian-bound asylum seekers for processing purposes as part of the so-called 'Pacific Solution,' breaks down and other arrangements for accommodating the asylum seekers need to be made quickly. Under that scenario, of course, it would not only be 'transitory persons' in Australia who would be affected by the changed offshore circumstances, but the wider class of asylum-seekers detained offshore.

This raises larger legal and policy questions that are beyond the technical scope of this Bill (the focus of which appears to be strictly on the fate of 'transitory persons'). One such question involves the legal mechanism by which that wider class of asylum-seekers detained could be brought to Australia very quickly should the need arise. A mechanism for doing this might be under an arrangement similar to that which was put in place pursuant to the Kosovo crisis in 1999, to enable people from Kosovo to come to Australia temporarily under a 'temporary safe haven' visa.²² Another might be for the Minister to make a declaration that this class of people is eligible for 'special purpose visas'.²³ In respect of the latter mechanism, query the relevance of proposed changes to the provision of the *Migration Act 1958* which relate to this class of visa, proposed in Schedule 3 of Migration Legislation Amendment Bill (No 1) 2002 (which was presented in the House of Representatives on the same day as this Bill).²⁴

Privative clause

Item 6 of Schedule 1 introduces **proposed section 494AB**, which prevents certain proceedings against the Commonwealth from being instituted or continued. The original jurisdiction of the High Court is not affected.

The proceedings covered by **proposed section 494AB** are those which relate to:

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- The exercise of the power to bring transitory persons to Australia under proposed section 198B (**proposed paragraph 494AC (1)(a)**).
- The status of a transitory person as an unlawful non-citizen during any part of the 'ineligibility period' (**proposed paragraph 494AC (1)(b)**). The 'ineligibility period' is defined in **proposed subsection 494AC(4)** as 'the period from the time when the transitory person was brought to Australia under section 198B until the time when the person next ceases to be an unlawful non-citizen'.
- The detention of a transitory person who is brought to Australia under proposed section 199B, being a detention based on the status of the person as an unlawful non-citizen (**proposed paragraph 494AC (1)(c)**).
- The removal of a transitory person from Australia (**proposed paragraph 494AC (1)(d)**).

Endnotes

- 1 The Hon. Philip Ruddock MP, Migration Legislation Amendment (Transitional Movement) Bill 2002, [Second Reading Speech](#), House of Representatives, *Debates*, 13 March 2002, p. 1017.
- 2 Mr Crean, [Leader of the Opposition](#), House of Representatives, *Debates*, 14 March 2002, pp. 1166-7.
- 3 Mr Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs, House of Representatives, *Debates*, 14 March 2002, p. 1218.
- 4 See generally, Senate, *Debates*, 14 March 2002, pp. 574-577.
- 5 'Excised offshore place' is defined in subsection 5(1) of the *Migration Act 1958*. This definition was introduced by the *Migration Amendment (Excision from Migration Zone) Act 2001*. The definition includes Christmas Island, Ashmore and Cartier Islands, Cocos (Keeling) Island, Australian sea and resources installations, and other external territories, or State or Territory islands, prescribed by regulations.
- 6 'Excision time' for these purposes is defined in subsection 5(1) of the *Migration Act 1958*. This definition was introduced by the *Migration Amendment (Excision from Migration Zone) Act 2001*. The excision time for Christmas Island, Ashmore and Cartier Islands was 2 pm (ACT time) on 8 September 2001; for Cocos (Keeling) Islands it was 12 noon on 17 September 2001; for Australian sea and resources installations it was 27 September 2001.
- 7 Pursuant to section 46A of the *Migration Act 1958*, introduced by the *Migration Amendment (Excision from Migration Zone) Act 2001*.
- 8 See further Dy Spooner and Nathan Hancock, Migration Amendment (Excision from Migration Zone) Bill 2001, [Bills Digest No 69 of 2000-01](#).

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- 9 Pursuant to the legal obligation imposed on relevant officers by section 198 of the *Migration Act 1958* to remove an 'unlawful non-citizen'. This means anyone in the migration zone of Australia who does not hold a visa to that effect; this definition includes 'offshore entry persons'. The migration zone of Australia includes land above the low watermark and sea within the limits of a port in a State or Territory, but does not include the sea within a State or Territory or the 'territorial sea' (sea within 12 nautical miles of the 'territorial baseline', which in general is the low-water line along the coast) of Australia; this zone includes Christmas Island and Ashmore Reef.
- 10 'Two offshore processing facilities have been established with the cooperation of the Governments of Nauru and Papua New Guinea. The processing facility in Nauru was established on 19 September 2001, with the arrival of people from the *MV Tampa* and another group of unauthorised arrivals found later at Ashmore Island. The processing centre in PNG at the Lombrum Naval Base on Manus Island was established on 21 October 2001': *Fact Sheet 76L Offshore Processing Arrangements*, DIMIA, 2 January 2002.
- 11 For a discussion of the powers in these various zones see further Nathan Hancock, 'Refugee Law - Recent Legislative Developments', [Current Issues Brief No. 5 2001-2002](#).
- 12 Under paragraph 245F(9)(b) of the *Migration Act 1958*, which forms part of Division 12A of that Act, introduced by the *Border Protection Legislation Amendment Act 1999*. For discussion of the powers under Division 12A, see Nathan Hancock, Border Protection Bill 2001, [Bills Digest No. 41 of 2001-02](#), pp. 10-11 and Nathan Hancock, 'Refugee Law - Recent Legislative Developments', loc. cit.
- 13 It is worth noting that, while relevant statutory powers existed prior to the *Tampa* incident (by virtue of amendments made by the *Border Protection Legislation Amendment Act 1999*), they were not called upon to support the actions of the defence forces or the *Manoora*. As the resulting litigation indicated, support was sought on the basis of a more general and somewhat unexplored executive power to control entry of aliens (*Victorian Council for Civil Liberties Incorporated v the Minister for Immigration and Multicultural Affairs* [2001] FCA 1297; *Ruddock v Vadarlis* [2001] FCA 1329). The need to rely on this alternative authority seemed to be based on a view, argued by the applicant in the first case, that the statutory power to detain vessels offshore and remove asylum seekers carried with it an obligation to bring those persons to Australia. This would have had the effect (in August 2001) of enabling those persons to make valid applications for protection visas under the *Migration Act 1958*.
- 14 This last qualification, excluding people assessed to be refugees, was introduced during debate on the Bill in the House of Representatives on 14 March 2001.
- 15 *Explanatory Memorandum*, p. 7.
- 16 Second Reading Speech.
- 17 Ibid.
- 18 See *Migration Act 1958*, ss 42(4) and 189.
- 19 For the purposes of section 189 of the *Migration Act 1958*, 'officer' is defined in the same way as in **proposed subsection 198B(3)**.
- 20 *Explanatory Memorandum*, p. 6.

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- 21 **Proposed subsection 46B(6)** requires the Minister to do this within a specified time period.
- 22 The *Migration Legislation Amendment (Temporary Safe Haven Visas) Act 1999* created a new class of visa known as a 'temporary safe haven visa'. On 15 April 2000, the Migration Regulations 1994 were amended to prescribe new visa class UJ and new visa subclass 448-Kosovar Safe Haven (Temporary). Holders of temporary safe haven visas were prohibited from applying for a visa other than a temporary safe haven visa. Holders, or former holders, of temporary safe haven visas additionally were prevented from seeking merits review or judicial review of decisions by the Minister.
- 23 Section 33 of the *Migration Act 1958* establishes a class of visa known as 'special purpose visas'. *Migration Series Instruction 270: Special Purpose Visa (1/5/00)* states:
- 'They are designed to provide lawful status to non-citizens who need to travel to, enter and remain in Australia but to whom Australia's standard visa regime and immigration clearance processes are taken not to apply. The kinds of people to whom special purpose visas apply are, for example: crew members of non-military ships and airlines crew; members of certain military forces; guests of Government; transit passengers from certain countries; members of the Royal Family'.
- Also note the following statement at Senate Estimates by Mr Andrew Metcalfe, Deputy Secretary of the (then) Department of Immigration and Multicultural Affairs, *Hansard – Legal and Constitutional Legislation Committee*, 31 May 200, p. 410:
- 'The special purpose visa is an interesting type of visa because it is not a visa that needs an application. It is a visa that is granted by operation of law for particular categories of people for the duration of that particular purpose of stay in Australia. Perhaps the most colourful example is that members of the royal family, when they come to Australia, do not need to apply for a visa but have a special purpose visa for the purpose of their travel to Australia. Her Majesty, of course, as head of state, does not require a visa at all. Other examples are foreign military forces who are travelling to Australia for exercises in Australia and so on. UN personnel, for example, who might be transiting Australia on their way to East Timor, are another category of special purpose visa. So ships crew are a very longstanding exception to the rule that you have to apply for a visa. Their visa attaches to them as long as they have the purpose of being here with the ship. The point [an officer from the Department of Immigration and Multicultural Affairs] made is that if their purpose for being here with a ship then dissipates and if they are really having a holiday or working or something like that, their visa would cease to exist and they would become an unlawful non-citizen unless they had another visa issued to them'.
- 24 There are two proposed changes in relation to special purpose visas in Schedule 3 of the Migration Legislation Amendment Bill (No. 1) 2002. The first introduces new provisions dealing with the cessation of special purpose visas, allowing the Minister to specify a time when a declaration that it is undesirable for a person to travel to, enter or remain in Australia will take effect. This change is proposed in order to 'provide flexibility and ensure that the status of a non-citizen whose special purpose visa has ceased is clear': *Explanatory Memorandum*, p 8. The second proposed change puts it beyond doubt that the rules of natural justice do not apply to the making of such a declaration by the Minister.

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