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Migration Legislation Amendment (Further Border
Protection Measures) 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. 176 2001–02

Migration Legislation Amendment (Further Border
Protection Measures) Bill 2002

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25 June 2002

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Migration Legislation Amendment (Further Border Protection Measures) Bill 2002

Date Introduced: 20 June 2002

House: House of Representatives

Portfolio: Immigration and Multicultural Affairs

Commencement: Royal Assent.

**** The Concluding Comments section of this Digest were amended on 01/10/02****

Purpose

To amend the *Migration Act 1958* to extend the 'excision of the migration zone' to include islands across the North of Western Australia, Northern Territory and Queensland.

Background

The Minister for Immigration and Multicultural and Indigenous Affairs, in his Second Reading Speech, stated that the Bill 'is just the latest of an integrated set of legislative and administrative measures the Government has [taken] over the past three years to combat [the] growing trade of people smuggling'.¹ A discussion of various measures appears in:

• <i>Refugee Law—Recent Legislative Developments</i>	Current Issues Brief No.5 2001-02
• <i>Border Protection Legislation Amendment Act 1999</i>	Bills Digest No.70 1999-00
• <i>Border Protection (Validation and Enforcement Powers) Act 2001</i>	Bills Digest No.62 2001-02
• <i>Migration Amendment (Excision from Migration Zone) Act 2001</i>	Bills Digest No.69 2001-02
• <i>Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001</i>	Bills Digest No.70 2001-02
• <i>Migration Legislation Amendment (Transitional Movement) Act 2002</i>	Bills Digest No.113 2001-02

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First Round of Excisions

On 8 September 2001 the Prime Minister announced legislation 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'. 'Technically,' he said, they would become 'like Norfolk Island which has its own migration regime but ... is still a territory of Australia'. But, 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'.²

The announcement was endorsed by the Minister for Immigration and Multicultural and Indigenous Affairs who stated that '[s]imply arriving at Christmas Island or Ashmore Reef will no longer be an automatic entree into Australia' and that '[p]eople who come to either [territory] from now on will be processed in accordance with the same criteria that would be used if they were on Nauru, if they were in Indonesia, if they presented their claims in Malaysia, if their claims were dealt with by the UNHCR in Pakistan and Iran'.³

On 18 September the Government introduced the Migration Amendment (Excision from Migration Zone) Bill 2001 and Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001. Ostensibly these Bills implemented the intention to excise Christmas Island and Ashmore Reef from the migration zone. However, they also went further, excising the Cocos (Keeling) Islands and providing for the excision of other offshore territories by regulation. Moreover, they created a new protection, humanitarian and refugee visa regime applying both to onshore and offshore asylum applications.

These bills were passed on 26 September 2001 and commenced on 27 September 2001.

In detail

The *Migration Amendment (Excision from Migration Zone) Act 2001* (the Excision Act) created a separate visa application regime applying to persons who arrive irregularly at certain places that are excised from Australian territory for the purposes of the *Migration Act 1958*. The Act itself excised Christmas Island, Ashmore Reef and the Cocos (Keeling) Islands. It also provided for the excision of other islands by regulation (see below).

Contrary to popular perception, press releases, the second reading speech and even its title, the Excision Act did *not* excise these territories from the migration zone. It provided that an 'offshore entry person' (a person who enters the migration zone via an 'excised offshore place') may not make a valid visa application while they are in Australia and while they remain an 'unlawful non-citizen' (a non-citizen in the migration zone without a visa). Significantly, it did *not* prevent a non-citizen from making a valid application if they do not enter the migration zone but stay offshore within the territorial sea (for example).

Moreover, the Excision Act only affected the right to make visa applications under the *Migration Act 1958*. It had no effect on any other law or existing legal rights. For example, it did not affect the operation of any other customs, quarantine, fishing laws.

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The *Migration Amendment (Excision from Migration Zone) (Consequential Amendments) Act 2001* (the Excision Consequential Act) complemented the Excision Act. It provided a power to take offshore entry persons to declared countries.⁴ (Nauru and Manus Island in Papua New Guinea were subsequently declared and offshore processing facilities were established on those islands on 19 September 2001 and 21 October 2001 respectively.⁵) It also amended the Migration Regulations 1994 to create a new protection, humanitarian and refugee visa regime applying to both onshore and offshore asylum applications.

In his second reading speech the Minister 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]'.⁶ Moreover, '[u]nauthorised arrivals and those who leave their countries of first asylum will be able to be granted only temporary visas for Australia'.⁷ In addition, as the Minister indicated, 'their period of stay ... will be limited to [between three and five] years, after which their situation will be reassessed'.⁸ 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.

Transitional Movement

On 13 March 2002 the Minister introduced legislation to complement the excision regime by providing statutory authority for the offshore movement of 'offshore entry persons'. The *Migration Legislation Amendment (Transitional Movement) Act 2002* allowed an 'offshore entry person', or any other person who has been lawfully removed from a ship detained at sea, to be brought from a declared country to Australia for a 'temporary purpose'.⁹ While the expression 'temporary purpose' was undefined, the Minister indicated that the power was intended to be used 'in exceptional circumstances' which he stated would include special medical treatment; transit through Australia for return to a country of residence or to a third country; and transfer to Australia for participation in legal proceedings.¹⁰

Second Round of Excisions

On 7 June 2002, the Governor-General signed the Migration Amendment Regulations 2002 (No. 4). These effectively extend the range of 'excised offshore places' to include:

- Coral Sea Islands Territory, Queensland islands north of latitude 12 degrees south,
- Western Australian islands north of latitude 23 degrees south, and
- Northern Territory islands north of latitude 16 degrees south.

The Minister has indicated that the Regulations were made 'following receipt of advice from the ... people smuggling taskforce'. The taskforce was 'concerned that people smugglers were intending to attempt to send boatloads of unauthorised arrivals either to Australia or to other countries such as New Zealand via waters off Northern Australia'.¹¹

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The Explanatory Statement that accompanied the Regulations confirmed the effect of these regulations in accordance with the discussion above, in particular the fact that 'Australian[s] and other persons with lawful authority ... to be in Australia continue to be able to move about freely in these areas and make any applications permitted by the Act'.

The Regulations commenced on gazettal (7 June 2002). However, as Regulations, they were disallowable instruments under the *Acts Interpretation Act 1901*. As readers will be aware, the Regulations were disallowed in the Senate on 19 June 2002. One effect of disallowance is that, subject to certain exceptions, the Government cannot make a new Regulation which is the same in substance as the disallowed Regulation for a period of 6 months after disallowance. Any regulation made in contravention of this prohibition has no effect.

On 20 June 2002, evidently in response to the disallowance, the present Bill was introduced.

Main Provisions

The provisions in the Bill almost exactly replicate the terms of the disallowed Migration Amendment Regulations 2002 (No. 4). The only real addition is section 4 which clarifies the operation of section 46A in relation to the commencement of the new excisions.¹²

Schedule 1, item 1 adds the following places to the definition of 'excised offshore place':

- Coral Sea Islands Territory,
- Queensland islands north of latitude 12 degrees south,
- Western Australian islands north of latitude 23 degrees south, and
- Northern Territory islands north of latitude 16 degrees south.

Schedule 1, item 2 applies for these places an 'excision time' of 2pm on 19 June 2002.

As indicated above, the Migration Amendment Regulations 2002 (No. 4) commenced on 7 June 2002 and were disallowed on 19 June 2002. So, the extension of the excision regime was effective for the period 7 June – 19 June. The focus of attention for these provisions is therefore the period commencing on 19 June 2002. Given that, the provisions in **Schedule 1** would not commence until Royal Assent, it is necessary to amend the definition of 'excision time' to allow the extensions to commence from this date. This is done by **item 2**.

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Concluding Comments

The Territorial Sea Argument

In the second reading debate on this Bill, Peter Andren MP raised an issue as to the effect on offshore applications. '[A]ccording to my advice,' he said, 'asylum application can be made from anywhere inside Australia's 12-nautical mile limit, on terra firma or not'. 'Also,' he noted, 'a phone call to a lawyer can get an application lodged under way'.¹³

The argument regarding access to protection visas is complex.

In terms of international law, the argument is based on obligations arising under the 1951 *Convention relating to the Status of Refugees* and the 1967 *Protocol relating to the Status of Refugees* and powers under the 1982 *Convention on the Law of the Sea*. In theory, a state has an obligation to offer sanctuary to persons rescued at sea and a strong obligation not to return refugees to a place in which they may be persecuted. However, a state also has rights to protect its maritime borders from threats to its peace, good order or security.

In terms of domestic law, the argument is based on an apparent inconsistency between the *Migration Act 1958* and the *Migration Regulations 1994*. Under the *Migration Act 1958*, one criterion for a protection visa is that the person is 'in Australia'.¹⁴ Under the *Acts Interpretation Act 1901* 'Australia' includes the territorial sea.¹⁵ Thus, presence in the territorial sea ought to sustain a claim for asylum. However, under the *Migration Regulations 1994*, while presence 'in Australia' is a criterion of protection visas, 'in Australia' is defined for the purposes of the regulations to mean 'in the migration zone'.¹⁶

One key issue is that, under the *Migration Act 1958*, a criterion for a protection visa is that the applicant is 'in Australia'.¹⁷ 'Australia' is not defined. The *Acts Interpretation Act 1901* establishes a presumption that, unless the contrary intention appears, a reference to 'Australia' 'shall be read as including a reference to the coastal sea [read 'territorial sea']¹⁸ of Australia'.¹⁹ Under the *Migration Act 1958*, an 'offshore entry person' is a person who 'entered Australia via an excised offshore entry place'.²⁰ To 'enter Australia' is defined as meaning 'to enter the migration zone'.²¹ The 'migration zone' is basically the physical territory of Australia and seas within a State or Territory port.²² However, the definitions of the terms 'enter Australia' and 'migration zone' *expressly* do not alter the meaning of 'in Australia' or the Act's application to any parts of Australia outside the migration zone.²³

The outcome of these issues is that presence within the territorial sea of Australia would seem to sustain an application for a protection visa because the key criterion is presence 'in Australia' and presence in the territorial sea constitutes presence 'in Australia'.²⁴

Another key issue is that, under the *Migration Act 1958*, the Regulations may prescribe criteria for visas of a specified class, including for protection visas.²⁵ Under the *Migration Regulations 1994*, a criterion for every onshore protection visa is that the applicant is 'in Australia'. Both 'outside Australia' and 'in Australia' are defined in the Regulations. 'In

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Australia' is defined, for the purposes of the regulations, as meaning 'in the migration zone'.²⁶ 'Outside Australia' is defined as meaning 'outside the migration zone'.²⁷

The inconsistency raises the question as to whether the criteria in the Regulations can limit the criterion provided for in the Act. If not, there is a question as to whether a person may apply for a visa based on the Act, even though there is no provision in the Regulations.

It is a rule of statutory construction that delegated legislation cannot be used to interpret primary legislation. Ordinarily, this rule applies in respect of regulations and statutes, subject to an exception in cases where the regulations are expressly authorised by Parliament to amend the Act.²⁸ Significantly, the general power relating to the making of regulations in the *Migration Act 1958* enables the Governor-General to make regulations 'not inconsistent with this Act'. While the criteria in the Regulations may complement or qualify the criterion in the Act, they cannot be inconsistent with the language of the Act.

It is evident from the nature of the *Migration Act 1958* and the Migration Regulations 1994 that visa eligibility is determined primarily by criteria in the Regulations. However, some of the sections in the Act, for example those relating to absorbed persons visas or special category visas, appear to confer eligibility directly. Other sections, for example those relating to bridging visas and criminal justice visas, simply establish a broad category of visa to be articulated in the Regulations. If there is a dichotomy, protection visas would seem to fall in the former category. To adapt a view submitted in the special leave hearing in respect of the *Tampa* litigation, section 36 may '[confer] a statutory basis or criterion for the grant of a protection visa *without reference to the regulations*'.²⁹

The status of this eligibility, given the express visa conditions in the regulations, is unclear. It may be superseded by the regulations. It may survive in spite of the regulations. It may be confined by the terms of the regulations. Moreover, its nature may be academic. There may be no real benefit in the eligibility if it can find no expression in the decision making machinery. Under the *Migration Act 1958*, the Minister is only required to grant a visa following the receipt of a valid visa application.³⁰ Moreover, a visa application is valid if and only if it is taken to have been validly made under the Regulations.³¹

Endnotes

- 1 The Hon. Philip Ruddock MP, Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, [Second Reading Speech](#), House of Representatives, *Debates*, 20 June 2002, p. 3411.
- 2 John Howard, MP, *Transcript of Doorstop Interview, Sydney Airport*, 8 September 2001.
- 3 Philip Ruddock, MP, 'Boats, Christmas Island', *Transcript of Press Conference*, 10 September 2001.
- 4 *Migration Act 1958*, new section 198A.

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- 5 Department of Immigration and Multicultural and Indigenous Affairs, '[Offshore Processing Arrangements](#)', Fact Sheet No. 76, 21 May 2001.
- 6 The Hon. Philip Ruddock, MP, Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001, [Second Reading Speech](#), House of Representatives, *Debates*, 18/09/01, p. 30381.
- 7 *ibid.*
- 8 *ibid.*
- 9 *Migration Act 1958*, new section 198B.
- 10 The Hon. Philip Ruddock MP, Migration Legislation Amendment (Transitional Movement) Bill 2002, [Second Reading Speech](#), House of Representatives, *Debates*, 13 March 2002, p. 1017.
- 11 The Hon. Philip Ruddock MP, Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, [Second Reading Speech](#), House of Representatives, *Debates*, 20 June 2002, p. 3411.
- 12 Section 46A is the formal mechanism by which an 'offshore entry person' is prohibited from making a valid visa application whilst they are in Australia and remain an unlawful non-citizen (a person in the migration zone without a visa).
- 13 Peter Andren MP, House of Representatives, *Debates*, House of Representatives, *Debates*, 20 June 2002, p. 3437.
14. Another criterion is that the applicant is a person to whom Australia owes protection obligations under the 1951 *Convention relating to the Status of Refugees* as amended by the 1967 *Protocol relating to the Status of Refugees*.
15. The *Acts Interpretation Act 1901* establishes a presumption that, unless the contrary intention appears, a reference to 'Australia' 'shall be read as including a reference to the 'coastal sea': paragraph 15B(1)(b). The 'coastal sea' includes the territorial sea of Australia: item 15(4)(a)(i).
- 16 Regulation 1.03, definition of 'in Australia'.
17. Another criterion is that the applicant is a person to whom Australia owes protection obligations under the 1951 *Convention relating to the Status of Refugees* as amended by the 1967 *Protocol relating to the Status of Refugees*.
18. The 'coastal sea' includes the territorial sea of Australia (item 15(4)(a)(i)).
19. *Acts Interpretation Act 1901*, paragraph 15B(1)(b).
- 20 *Migration Act 1958*, section 5.
21. Section 5.
22. Section 5.
23. Section 6.

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24. Note that presence in the territorial sea of Ashmore Reef would not have the same effect, because the Territory of Ashmore and Cartier Islands is not part of Australia for the purposes of the *Acts Interpretation Act 1901*.
25. Subsection 31(3).
26. Regulation 1.03, definition of 'in Australia'.
27. *Ibid*, definition of 'outside Australia'.
28. D F Gifford and Kenneth Gifford, *How to Understand an Act of Parliament*, 8th Edition, Law Book Company, Sydney, 1994, p. 181.
29. *Vadarlis v MIMA & Ors* [M93/2001](#) (27 November 2001) (emphasis added)
30. Section 65.
31. Subsection 46(2).

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