Bills Digest
No. 21 2002–03

Migration Legislation Amendment Bill (No. 1) 2002

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INFORMATION AND RESEARCH SERVICES

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Migration Legislation Amendment Bill (No. 1) 2002

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Contents

Migration Legislation Amendment Bill (No. 1) 2002

Date Introduced: 13 March 2002

House: House of Representatives

Portfolio: Immigration and Multicultural and Indigenous Affairs

Commencement: On Royal Assent. Schedules 1, 2 and 3 and items 1 and 2 of Schedule 6 commence on Proclamation or 6 months after Royal Assent. Item 6 of Schedule 6 commences immediately before the *Border Protection (Validation and Enforcement Powers) Act 2001*.

Purpose

The Migration Legislation Amendment Bill (No.1) 2002 ('the Bill') is an omnibus bill that amends the *Migration Act 1958* ('the Act'). The Bill purports to:

- change aspects of the Australian legal regime in relation to visas;
- create a Deputy Principal Member position for the Migration Review Tribunal;
- harmonise the *Criminal Code* and relevant offences under the Act; and
- make a minor technical amendment.

Background

Relevant background to the amendments is included in the Main Provisions below.

Main Provisions

Schedule 1 – Immigration clearance status of non-citizen children born in Australia

Immigration clearance on 'birth entry'

Item 1 of Schedule 1 deals with 'birth entry' and immigration clearance status.

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Australian migration legislation draws a distinction between entry and immigration clearance, and between lawful non-citizens and immigration cleared non-citizens. A person 'enters Australia' if they 'enter the migration zone' (section 5). A person is 'immigration cleared' if they 'enter Australia' at a port or prescribed place, provide evidence of their identity and visa, and leave with permission of a clearance officer (except to be in immigration detention) (paragraphs 172(1)(a) and (b)). A person is also immigration cleared if they are initially refused or bypass immigration clearance, *but* are subsequently granted a 'substantive visa'[1] (paragraph 172(1)(c)). Similarly, a lawful non-citizen is a non-citizen in the migration zone who *holds a valid visa* (section 13). And an immigration cleared non-citizen is a non-citizen in the migration zone who has been *immigration cleared* (subsection 172(1)).

A non-citizen child who is born in the 'migration zone' is taken to have 'entered Australia' when s/he was born (section 10). These children are taken to hold a visa on a similar basis as their parents (section 78). However, there is currently no provision clarifying the immigration clearance status of non-citizen children who were born in Australia.

Immigration clearance is one of the various circumstances which affect a non-citizen's access to visas under the *Migration Regulations 1994* (see section 40 of the Act). In his Second Reading Speech, the Minister of Immigration and Multicultural and Indigenous Affairs noted that immigration clearance status of non-citizens 'has significant implications for a person's entitlements under the Act'.[2] For example, he said, it affects access to *bridging visas*.

Immigration clearance also affects immigration detention. An unlawful non-citizen, that is a non-citizen in the 'migration zone' without a visa, must be detained (section 189). A lawful non-citizen may be detained if they hold a visa that may be cancelled (subsection 192(1)). An immigration cleared non-citizen may only be detained if they are likely to attempt to evade or otherwise not cooperate with immigration officers (subsection 192(2)).

Immigration clearance also affects access to visas in relation to safe third country rules. If a non-citizen is covered by an agreement between Australia and a 'safe third country', including the CPA,[3] their access to visas will be substantially diminished (Part 2, Division 3, Subdivision AI). If they have been immigration cleared, they are prevented from applying for protection visas. If they have not been cleared they may not apply for any visa at all (section 91E). Similar restrictions on access to visas apply if a non-citizen is a national of two or more countries or has a right of entry into a declared safe third country (section 91P).

Immigration clearance also affects cancellation of visas. The general power to cancel visas - for example, because of non-compliance with visa conditions - does not apply to permanent visas if the visa holder is in the migration zone and has been immigration cleared (subsection 117(2)).

Significantly, immigration clearance also affects review rights. Generally, the Migration Review Tribunal (MRT) may not review a decision to refuse to grant or to cancel an

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onshore visa if that decision was made before the person was immigration cleared (subsections 338(2) and (3)).

Item 1 inserts **proposed paragraph 172(1)(ba)**, which provides that a non-citizen child who is born in Australia is immigration cleared if, at the time of his or her birth, at least one of the child's parents was immigration cleared on their last entry into Australia.

There are two limitations to this change. As the Minister noted in his Second Reading Speech, the proposed change only applies to non-citizen children *on their birth entry to Australia*, and 'does not provide immigration clearance for any subsequent entry to Australia'.[4]

Second, the exemption only applies to children who are born to parents *who have been immigration cleared*. In its submission to the Senate Legal and Constitutional Legislation Committee, the International Commission of Jurists (Australian Section) raised the issue of children who are born to parents who become immigration cleared at a later date:

> We suggest that there needs to be an … amendment following 172(c). This would provide immigration clearance for children who were born … to parents who bypassed … clearance who were subsequently granted a substantive visa. Under the current legislation, a child born to a person who arrived as a stowaway, or on a false document, and was later granted a substantive visa, is not immigration cleared. The child is not covered by the visa if he/she was born prior to the date of the visa.[5]

Item 2 of Schedule 1 states that the amendment made by **item 1**, discussed above, applies only to a non-citizen child who was born in Australia on or after 1 September 1994. The Explanatory Memorandum states that this date 'corresponds with the introduction of the concept of "immigration clearance" into the Act by the *Migration Reform Act 1992*.'[6]

Children born in Australia protected by parents' visa(s)

Item 4 of Schedule 1 introduces **proposed subsection 173(2)** into the Act.

This item addresses an anomaly between the notion of birth entry and the requirement to enter via a port.

As noted above, a non-citizen child who is born in Australia is taken to hold a visa on a similar basis as his or her parents (section 78). However, strictly speaking, a visa holder must usually enter Australia at a port or on a pre-cleared flight (section 43). Entry which fails to comply with these requirements invalidates the visa (section 174). In other words, 'birth entry' of a non-citizen child technically seems to be an entry that offends section 43 of the Act.

Proposed subsection 173(2) states that these non-citizen children are not to be taken, by virtue of that birth, to have entered Australia in a way that contravenes section 43.

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Item 5 of Schedule 1 states that the amendment made by **Item 4**, discussed above, applies only to a non-citizen child who was born in Australia on or after 1 September 1994, and who is taken to have been granted a visa or visas under section 78 of the Act. The Explanatory Memorandum states that this date 'corresponds with the introduction of the concept of "immigration clearance" into the Act by the *Migration Reform Act 1992*.'[7]

Immigration clearance if in a prescribed class of persons

Item 3 of Schedule 1 introduces **proposed paragraph 172(1)(d)** into the Act. It creates a new category of circumstances in which a non-citizen is deemed to be immigration cleared – namely, if that person is in a 'prescribed class of persons.'

It is not clear why this provision has been included in **Schedule 1**, which otherwise seems broadly designed to clarify apparent anomalies in the immigration clearance status of non-citizen children born in Australia. The Bill's Second Reading Speech does not refer to this item. The Explanatory Memorandum does, and says the following:

> The purpose of new paragraph 172 (1)(d) is to provide flexibility to prescribe in the *Migration Regulation 1994* ("the Regulations"), where necessary in the future, further classes of persons who are immigration cleared for the purposes of section 172.[8]

No further clarification has been offered of the kind of situations in which it is envisaged this new power may be exercised.

Schedule 2 – The taking of securities

Generally, an authorized officer may take securities to ensure a person's compliance with any condition imposed in pursuance of the Act or Regulations (subsection 269(1)). If a person fails to comply with a condition of a security, the full amount may be recovered in a court against any and all of the parties or subscribers to the security (subsection 269(4)).

While it is implied in section 269, the provision is not specific as to the taking of securities for visa applications. In particular, the provision is not specific as to the taking of securities *before* visa applications are determined. The issue arose in *Tutugri v. Minister for Immigration and Multicultural Affairs* [1999] FCA 1785, specifically, over the power of the MRT to take securities in respect of a decision under review.

Lee J took the view that the power to take securities was specific, flowing from a power to impose conditions in the granting of a visa. The MRT's power to impose conditions was not prospective: '[t]he Tribunal was not empowered to require the applicant to provide a deposit of cash in advance of the grant of a visa and, therefore, before any condition had been imposed on the visa granted'. Neither was it retrospective: '[i]f the Tribunal made a decision to grant a visa its power would then be spent [ie, it would be *functus officio*]'.[9]

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Lee J's reasoning on the first question was that '[p]ersons providing security must know the terms of the condition that is being secured and, therefore, what act, or conduct, will amount to a failure to comply with the condition and make the security liable to forfeiture'.

In the Government's view this raises an issue in relation to the primary decision maker:

> In *Tutugri v. MIMIA* [1999] FCA 1785, the Federal Court raised significant doubts about the power of an authorised officer to request and take security for compliance with conditions to be imposed on a visa before the visa is granted. This is because a condition on a visa does not bind the applicant until the visa is granted and a condition cannot be said to have been "imposed" prior to grant.[10]

Proposed subsection 269(1A) clarifies this matter. It provides that an authorised officer may require and take securities before a visa is granted if it is for compliance with conditions 'that will be imposed on the visa' and s/he 'has indicated those conditions to the applicant'.

It is worth noting that the prospective/retrospective argument was not the only concern raised by Lee J *Tutugri v. MIMIA*. He also noted the MRT's limited role, drawing on a basic distinction between the status of a primary decision maker and a merits review body:

> The function of the Tribunal is to determine whether the decision under review was the correct or preferable decision. In carrying out that function the Tribunal may exercise the powers and discretions conferred on the person who made the decision, *limited, however, to the purpose of the review*. That is not an authority to make a new and separate decision … [Its task] was to "address the same question that was before the decision-maker" and not a distinct and separate question and [it] *was not able to make any decision an officer may have been authorised to make under the Act*.[11]

Taken together, these arguments suggest that it is not appropriate for a tribunal vis-à-vis an officer to impose conditions or sanctions to ensure compliance with the visa regime. Views may differ as to whether a tribunal *can* impose sanctions that were not originally imposed by the original decision maker. But, there is a policy question as to whether a tribunal *should* be able to do so. The amendments do not seem to answer the question.

Schedule 3 – Special purpose visas

Special purpose visas (SPVs) are a discrete category of visa which enable prescribed persons or classes of persons to enter Australia. They are distinguished from the ordinary set of visas as they do not require individual visa applications or determinations. In a sense, they are not so much visas as an open permission for a specified category of persons to enter Australia for a given purpose. The classes of prescribed persons to date have included, for example, members of the royal party, military personnel, commercial or government ship crew members and airline crew members.[12]

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SPVs were introduced in 1994 to 'clarify the status of persons currently exempt from the requirement to hold an entry permit to enter and remain in Australia'. They were intended to 'provide lawful status for non-citizens who are presently exempt non-citizens' to be 'held when, and for as long as, a non-citizen continues to be present in Australia for a specified purpose'.[13]

The 'openness' of these visas may have the potential to create compliance problems. For example, given that an SPV is available to any person that falls within a particular prescribed class, it may be difficult to control access to the privileges conferred by the visa on individuals that fall within that class.

The legal solution has been a post-entry power to exclude certain persons or classes of person from access to SPVs. Subsection 33(9) of the Act allows the Minister to make a determination that it is 'undesirable' that a person or persons within a class enter or remain in Australia.[14]

Item 1 of Schedule 3 introduces **proposed subsection 33(5)**, to provide that the ministerial determination in subsection 33(9) has immediate effect. Currently, a special purpose visa expires at the end of the day that the ministerial determination is made.[15] Under this change, a special purpose visa will expire when the ministerial determination takes effect. This will be a time specified in the determination or, if not specified, the end of the day when the determination is made.

Item 2 of Schedule 3 introduces **proposed subsection 33(11)**, which provides that the rules of natural justice do not apply to the decision to make a ministerial determination in subsection 33(9). That is, while a person affected may have the ability to challenge the determination in a judicial review court, the decision cannot be overturned on the basis that s/he was not given an adequate hearing, for example, because s/he was not given an opportunity to hear or respond to adverse information that formed the basis of the assessment that it was undesirable that the person or relevant class of persons enter or remain in Australia. Moreover, s/he may be prevented from alleging other breaches of the natural justice ground of judicial review, such as apprehended bias.

Although the exclusion of natural justice is not without precedent in the Act, such exclusion has not been uncontroversial in the migration context.[16]

In its June 2002 report on this Bill, the Senate Legal and Constitutional Legislation Committee ('the SLCL Committee'), chaired by Liberal Party Senator Marise Payne, stated:[17]

> 2.9 ….The NSW Council for Civil Liberties suggested that, rather than abrogate the rules of natural justice, the Minister should not make a declaration until he or she had made reasonable efforts in the circumstances to contact the person who would be affected by the declaration. The Victorian Bar particularly objected to the Minister's use of adverse intelligence reports without first giving the person who would be affected an opportunity to answer them. It pointed out that adverse intelligence reports (mentioned in

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> the Explanatory Memorandum) could come from countries that regularly commit human rights violations and could hardly be regarded as reliable.
>
> 2.10 The Explanatory Memorandum states that the purpose of the new provision is to ensure that, as originally intended, quick action can be taken to prevent the use of a special purpose visa by a person whose entry or stay in Australia is not in Australia's interest. The Explanatory Memorandum also states that the exclusion of the rules of natural justice also avoids the operational difficulties associated with an obligation to afford natural justice in particular circumstances, *e.g.* the difficulty or impossibility of contacting a seafarer who has deserted his vessel. Adverse intelligence reports or time constraints might also prevent the declaration being put to the person.
>
> 2.11 DIMIA points out that as a matter of policy, the Minister may revoke a declaration made under s 33(9) in order to allow a person to be the holder of a special purpose visa again and that this could occur where it was found that the adverse information provided by a country was incorrect.
>
> 2.12 The Committee considers that the argument about the need for quick action is confirmed by Item 1 which … changes the time for operation of the Minister's declaration from the end of the day to immediate. Even the current time for operation of the Minister's declaration, namely, the end of the day, is inconsistent with the operation of the rules of natural justice. The Committee is not convinced that there should be room for the application of the rules of natural justice to a declaration by the Minister under s 33(9). However, it is not sure that DIMIA has adequately answered the objection by the Law Institute of Victoria and suggests that the matter be examined more closely.

In a previous Bills Digest it was suggested that these special purpose visa amendments might have some relevance to the processing of offshore entry persons on Nauru or Manos Island in Papua New Guinea, pursuant to the so-called 'Pacific Solution.'[18] In summary, it was suggested that a ministerial determination might allow these persons to be brought to Australia for the limited purpose of receiving medical care, for example, in combination with another amendment preventing access to the visa regime. The other amendment related to creation of a class of 'transitory persons', being offshore entry persons who would not have access to substantive visas under Australia's migration legislation.

Schedule 4 – Membership of the Migration Review Tribunal

Schedule 4 basically expands the administrative layers of the Migration Review Tribunal. It creates the office of 'Deputy Principal Member' interposed between the Principal Member and the Senior Members of the Tribunal. The Explanatory Memorandum states that the effect is to 'align the executive structure of the MRT with the existing structure of

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the Refugee Review Tribunal'.[19] Conceivably, this might be an administrative step towards the merger of the MRT and RRT into the Immigration and Refugee Division of the ART (Administrative Review Tribunal) proposed in the Administrative Tribunal Bill 2000.[20]

Schedule 5 – Criminal Code Harmonisation

The Second Reading Speech states that **Schedule 5** 'ensures that certain offence provisions in the Act operate as they did prior to the commencement of the Commonwealth Criminal Code.'[21]

People smuggling offences in ss 229(1), 232 and 232 A – reversed onus of proof

The Act contains various offences relating to the 'unlawful' entry of non-citizens into Australia. Whilst it is *not* an offence for a non-citizen to arrive in Australia without a visa, it *is* an offence for a person to be involved in bringing such non-citizens to Australia.

There is currently some lack of clarity in relation to the evidential burden in relation to exemptions to some of these offences.

Subsection 229(1) of the Act makes it an offence for the carriers of such people – defined as the master, owner, agent, charterer and operator of a vessel - to bring a non-citizen into Australia, *unless* any one of the circumstances in paragraphs 229(1)(a)-(e) applies. In sum, these circumstances are: the non-citizen holds a valid visa, is eligible for a special purpose or special category visa, or is covered by an exemption (set out in subsections 42(2), (2A) and (3)) from the requirement to hold a visa. The offence is one of *absolute liability*,[22] subject to defences established in subsection 229(5), which describe circumstances that overlap considerably with the circumstances set out in paragraphs 229(1)(a)-(e). The onus of proof is on the defendant in respect of establishing these defences (subsection 229(6)).

The stated issue in relation to this offence is 'whether the matters in paragraphs 229(1)(a) to (e) constitute matters of exception or elements of the offence in subsection 229(1).'[23] As noted, guilt is imposed '*unless*' various circumstances exist. This can be interpreted as imposing guilt on a defendant '*unless*' s/he puts in evidence regarding those circumstances. This evidential burden overlaps with the defences in section 229. The Explanatory Memorandum states that this overlap, and the very wide potential operation of the offence, are unintended consequences.

Items 1 and 2 of Schedule 5 clarify that the matters in paragraphs 229(1)(a)-(e) are matters of the offence. Thus guilt is imposed '*if*' the various circumstances in paragraphs 229(1)(a)-(e) do not exist. This removes the unintended consequences described above.

Item 3 of Schedule 5 preserves the reversal of the onus of proof relating to the exemptions in subsections 42(2)-(3). Thus the defendant retains the evidential burden in respect of the exemption from the requirement to hold a visa. As the Explanatory Memorandum explains, '[t]his means that the defendant must adduce or point to evidence

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that suggests a reasonable possibility that the matters in subsections 42(2), (2A) or (3) exist'. If this is done, then the prosecution must prove beyond reasonable doubt that these matters do not exist.

Item 4 applies to a similar absolute liability offence established by section 232. This offence applies to the master, owner, agent and charterer of a vessel, where a non-citizen has entered Australia on the vessel without permission to do so conferred by a valid visa, unless s/he is covered by an exemption (set out in subsections 42(2), (2A) and (3)) from the requirement to hold a visa. The offence also applies where a non-citizen has left the vessel in Australia (otherwise than in immigration detention) where s/he has been placed on the vessel for removal or deportation from Australia. **Proposed subsection 232(1B)** makes it clear that the evidential burden is on the defendant in relation to establishing that one of the exemptions contained in subsections 42(2) to (3) applies. The Explanatory Memorandum states that this is 'consistent with subsection 13.3(3) of the *Criminal Code*, which provides that a defendant bears an evidential burden in relation to any matters of exception to an offence.'[24]

Item 5 applies to an offence established by section 232A, which makes it an offence to organise or facilitate bringing a group of five or more non-citizens into Australia if they have no lawful right to come to Australia. This is not an absolute liability offence; the defendant must be reckless as to whether the non-citizens had a lawful right to enter, in order for the offence to be established. Again, the offence does not apply if the non-citizen is covered by an exemption - set out in subsections 42(2), (2A) and (3) - to the requirement to hold a visa. **Proposed subsection 232A(2)** makes it clear that the evidential burden is on the defendant in relation to establishing that one of the exemptions contained in subsections 42(2) to (3) applies. Again, the Explanatory Memorandum states that this is 'consistent with subsection 13.3(3) of the *Criminal Code*, which provides that a defendant bears an evidential burden in relation to any matters of exception to an offence.'[25]

People smuggling offence in s 233(1)(a) – strict liability

Paragraph 233(1)(a) of the Act establishes another people smuggling offence, making it offence to 'take any part' in 'the bringing or coming to Australia of a non-citizen under circumstances from which it might reasonably have been inferred that the non-citizen intended to enter Australia in contravention of this Act.' The penalty for contravening this provision is imprisonment for 10 years or 1000 penalty units, or both.

Item 6 of Schedule 5 inserts **proposed subsection 233(1)**, to make it clear that *strict liability*[26] applies to this offence. The Explanatory Memorandum states that this amendment is necessary to *restore* the application of strict liability to this offence, in the light of the unintended application of the fault element of 'recklessness' in this context, by virtue of the application of the *Criminal Code*.[27] This is further explained in the SLCL Committee's report on this Bill:

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> 2.15 The Law Institute of Victoria argued that it was inappropriate for strict liability to apply to any element of an offence which carried a penalty of 10 years in prison and/or a fine of 1000 penalty units ($110 000).
>
> 2.16 DIMIA responded that the effect of s 233(1)(a) currently was to make it an offence for someone to participate in the bringing or coming of a non-citizen into Australia being reckless as to whether the non-citizen has a lawful right to come to Australia. It said that the Director of Public Prosecutions wrote to it in September 2001 saying that, because of the application of the Criminal Code, the offence in section 233 had been altered. The courts had interpreted the offence in s 233 as being a strict liability offence, and this had not been picked up in the harmonisation exercise that was undertaken the previous year. The amendment would ensure that the provision operated in the way it always had. It was being made a strict liability offence again. …

Commenting on the more general policy question of whether strict liability is appropriate where an offence carries a heavy penalty of this kind,[28] the SLCL Committee's report continued:

> 2.17 DIMIA also referred to a number of provisions in Commonwealth Acts which provided for elements of offences punishable with imprisonment for 10 years or more to be subject to strict (or absolute) liability. However, most of these related to elements which might be seen as subsidiary. For example, it is an offence against Item 71.2 of the Criminal Code to intentionally or recklessly cause the death of a UN or associated person engaged in a UN operation and strict liability applies to the elements that the person is a UN or associated person engaged in a UN operation. Similarly strict liability applies to the element of offences under the Crimes (Aviation) Act that the aircraft against which the offences are committed is a Division 3 aircraft.
>
> 2.18 On the other hand, there are some offences where (as is the case with s 233(1)(a)) the element to which strict or absolute liability applies appears to be fundamental to the criminality. For example, strict liability applies to the offence of being owner or master of a vessel which enters or remains in safety zone contrary to s 119 of the *Petroleum (Submerged Lands) Act 1967*. Again, in relation to the offence of engaging in sexual intercourse outside Australia with a person under 16, absolute liability applies to the elements of where the offence occurs and the age of the other person.
>
> 2.19 It appears that there are very few Commonwealth offences where strict liability applies to a fundamental element. However, as DIMIA pointed out, there is an objective element to the offence, namely, the presence of circumstances from which it might reasonably have been inferred that the non-citizen intended to enter Australia in contravention of the Migration

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> Act. There is no such objective element in the strict/absolute liability offences mentioned in paragraphs 2.17-2.18 above. The presence of this objective element in an offence against s 233(1)(a) means that substituting strict liability for recklessness will not greatly reduce the burden on the prosecution ….
>
> 2.20 The Committee notes concerns in respect of strict liability raised in other reports of this Committee and of the Scrutiny of Bills Committee. However, in this instance, the change from recklessness to strict liability is justified in the current context. Having regard to the above considerations and to the fact that the maximum penalty had already been set at its current level by the *Migration Legislation Amendment Act No 1) 1999* on 22 July 1999 (i.e. before the Application of Criminal Code Act took effect in 2001), the Committee is satisfied that the maximum penalty for the offence is not unacceptably harsh.

A different view on this matter was expressed by (then) Australian Labor Party Senator Barney Cooney, in his comments appended to the SLCL Committee's report:

> The legislation attaches strict liability to elements of offences set out in sections 233 and 241 of the Migration Act 1958. These crimes carry a maximum penalty of 10 years. It is exceptional for strict liability to be assigned to elements of offences as serious as these. However there is now a trend for this to happen with Commonwealth legislation. This is unacceptable and should be rejected. Most serious crime is dealt with by State and Territory Parliaments and Governments and they appear to be able to cope with it without resorting to strict liability. The Federal Bodies seem to lack the same ability.
>
> …
>
> In recent times Australia has experienced, at the Federal level, the shrinking of the rule of law. The asylum seekers Act guillotined through the Senate at the end of September 2001, the anti-terrorist Legislation, and the Bill dealing with the proceeds of crime, now before Parliament contain provisions which reduce the safeguards traditionally available to those facing the accusations of others. The Migration Legislation Amendment Bill (No 1) 2002 continues the current process whereby the Commonwealth is stripping from people more and more of the rights they have traditionally enjoyed. Recent legislation dealing with asylum seekers and terrorists are other examples of the same penchant.
>
> …
>
> There is an unhappy development in Commonwealth activity which prejudices the quality of civil rights in Australia. It is time this trend was reversed.

In his own appended comments, Australian Democrats Senator Andrew Bartlett expressed his support for the conclusions and recommendations contained in the main report of the SLCL Committee, but additionally stated that he retained 'some concerns regarding the

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implications and potential application of the amendments that introduce strict liability … My concern is that the penalty for such offences may in some circumstances far outweigh what may be just and reasonable in the circumstances.'

De facto spouse offence in s 241(1) – strict liability

Subsection 241(1) makes it an offence for a person to make arrangements that make it look as if two people are de facto spouses for the purposes of the regulations, where that person knows or believes on reasonable grounds that they are not de facto spouses. The penalty for contravening this provision is imprisonment for 10 years or $100 000, or both.

Item 7 of Schedule 5 inserts **proposed subsection 233(1)**, to make it clear that strict liability applies to this offence. The Explanatory Memorandum states that the current structure of this offence means that the prosecution must prove that the defendant knew the two people were not de facto spouses *for the purposes of the regulations*, and that 'this may prove an extremely difficult task for the prosecution' given the complexity of the definition of de facto spouse in the regulations.[29] The Explanatory Memorandum also states that the purpose of this amendment is to 'make it clear that the prosecution is required only to prove that the de facto relationship was not genuine, and that the defendant knew, or reasonably believed, that this was the case.'[30]

In its report, the SLCL Committee rejected claims by the Law Institute of Victoria and the Law Council of Australia that the penalty is excessive for an offence involving strict liability.[31] The separate comments of Senators Andrew Bartlett and Barney Cooney, referred to above, indicate they were not satisfied that application of strict liability to an offence carrying such a penalty is appropriate.

The SLCL Committee did, however, identify another problem with the proposed amendment – namely, that in its current form it 'only adds to the complexity of the existing provision', in respect of the matters that must be proven by the prosecution to establish the offence.[32] The SLCL Committee recommended that:

> Instead of the proposed new subsection being inserted, s 241(1) be amended to provide in effect that it is an offence to make arrangements that would falsely make, or help to make, it appear that two other persons are de facto spouses for the purposes of the regulations with the intention of assisting one of them to get a stay visa by appearing to satisfy a criterion for the visa.
>
> (**Recommendation 1)**

Other offences

Items 8–11 of Schedule 5 make amendments to subsections 268BJ(1) and 268CN(1) and to section 268CM of the Act; more detail is given in the Explanatory Memorandum. These proposed changes do not seem to be contentious.

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Schedule 6 – Minor Amendments

Item 1 of Schedule 6 deals with the relationship between bridging visas and re-entry into Australia. Subsection 48(1) provides that a non-citizen who does not hold a substantive visa and who after last entering Australia was refused a visa may only apply for a prescribed class of visa. The Explanatory Memorandum states that currently a non-citizen who leaves and re-enters Australia on a bridging visa is able to circumvent this bar on subsequent visa applications, because, on re-entering Australia, s/he has not had a visa refused 'after *last entering* Australia.' The Explanatory Memorandum also states that it 'was never intended that these bridging visa holders would not be subject to the section 48 bar.'[33] Item 1 introduces **proposed subsection 48(3)** to address this perceived problem, ensuring that the section 28 bar on further visa applications applies to a non-citizen who leaves and re-enters Australia as the holder of a bridging visa that allows such travel.

In its report on this Bill, the SLCL Committee noted that there had been considerable confusion about the impact of this amendment, based on a misapprehension that the new provision applied to offshore as well as onshore visa applications. The SLCL Committee discussed this in some detail in its report,[34] and made the following recommendation:

> Although the Committee is satisfied that the criticisms of proposed s 48(3) are unfounded, it notes the great amount of confusion caused by its terms. It therefore recommends that it be amended by inclusion of a description of the operation of the section along the following lines:
>
> *For the purposes of this section (which deals only with onshore applications for visas)…*
>
> **(Recommendation 2)**

Items 2 -7 make minor amendments that are explained in detail in the Explanatory Memorandum. These changes do not seem to be contentious.

Concluding Comments

As noted by the SLCL Committee, some of the amendments proposed in this Bill raise 'technical and complex legal issues.' The SLCL Committee recommended that the Bill be passed, but with the two recommended changes noted above.

Before reaching this conclusion, however, the SLCL made reference to two issues that did not arise from the terms of the Bill, but which were raised by the Refugee and Immigration Legal Centre (RILC) in its submissions to the Committee on the basis that it would have expected the Bill to deal with them. Both issues arose out of the fact that the *Migration Amendment (Excision from Migration Zone)(Consequential Provisions) Act 2001* inserted a new visa subclass and amended the criteria for other visa subclasses in the regulations:

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> 2.36 The first matter related to the new s 447 'Secondary Movement Offshore Entry (Temporary)' visa subclass which can not be issued to people who have come directly from, say, Sri Lanka, to the places which have been excised from the migration zone, but only to people who have come by way of a third country. The RILC submitted that the unavailability of this visa subclass to the people who had come direct from their home country was a serious oversight.
>
> 2.37 The second matter related to the insertion of safe third country clauses in the offshore humanitarian visa categories so that people in a third country are not eligible for these visas if they could have sought and obtained effective protection from the country they are in or from the United Nations officers in that country. The RILC submitted: '… these amendments require either further amendment, or better, repeal, given that the bars which they seek to impose on the grant of the visa subclass operate to effectively exclude the very situations in which applicants avail themselves of these visas. In other words, the grant of these visa subclasses is usually the result of an applicant who has been in a third country for some time being identified (or mandated) and referred to Australia by the offices of the United Nations High Commissioner for Refugees in the said country.'

The SLCL Committee was not satisfied that DIMIA's response to these questions in its evidence to the Committee addressed these issues. It suggested that, 'given the importance of these matters', DIMIA confer directly with the RILC 'as a matter of priority.'[35]

Arguably the determination of these issues is not directly relevant to the question of passing this Bill, either in its current form or with the suggested amendments. The nature of the SLCL Committee's response to these issues, however, indicates some recognition of the importance of considering the incremental changes proposed in this Bill against the wider backdrop of Australian migration law and policy.

The SLCL's concluding comment on this Bill should also be noted:

> 2.40 At the conclusion of this inquiry, the Committee finds itself in agreement with the salutary warning in the Australian Council of Social Service submission:
>
> 'In the current political climate surrounding migration and refugee issues, it is imperative that any proposed legislative amendments are transparent and well understood.'

The Committee does not consider that all aspects of the Bill satisfy these criteria. As has been indicated in the report, some of the provisions in the Bill are quite obscure.

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Endnotes

1 A 'substantive visa' is a visa other than a bridging, criminal justice or enforcement visa (section 5).

2 Philip Ruddock, MP 'Migration Legislation Amendment Bill (No. 1) 2002', Second Reading Speech, House of Representatives, Debates, 13/03/02, p. 1107.

3 Comprehensive Plan of Action approved by the International Conference on Indo-Chinese Refugees, held at Geneva, Switzerland, from 13 to 14 June 1989.

4 Philip Ruddock, MP 'Migration Legislation Amendment Bill (No. 1) 2002', Second Reading Speech, House of Representatives, Debates, 13/03/02, p. 1107.

5 International Commission of Jurists (Australian Section), Submission to Senate Legal and Constitutional Legislation Committee, Inquiry into the provisions of the Migration Legislation Amendment Bill (No 1) 2002, 4 April 2002, p. 3.

6 Explanatory Memorandum, p. 5.

7 Explanatory Memorandum, p .6.

8 Explanatory Memorandum, p. 6.

9 *Tutugri v. Minister for Immigration and Multicultural Affairs* [1999] FCA 1785 per Lee J at [48]-[49].

10 ibid., at [29].

11 ibid., at [46].

12 Migration Regulations 1994, reg. 2.40.

13 See generally Ian Ireland and Sarah O'Brien, Migration Legislation Amendment Bill 1994, Bills Digest No. 36 of 1994.

14 Subsection 33(9).

15 Subparagraphs 33(5)(a)(iii) and 35(b)(v).

16 See further Kirsty Magarey, Migration Legislation Amendment (Procedural Fairness) Bill 2002, Bills Digest No. 169 of 2001–02.

17 Senate Legal and Constitutional Legislation Committee, Consideration of Legislation Referred to the Committee – Provisions of the Migration Legislation Amendment Bill (No 1) 2002, June 2002.

18 See Natasha Cica, Migration Legislation Amendment (Transitional Movement) Bill 2002, Bills Digest No. 113 of 2001–02.

19 Explanatory Memorandum, p. 11.

20 See generally Katrine Del Villar, Administrative Tribunal Bill 2000, Bills Digest No. 40 of 2000–01.

21 Philip Ruddock, MP 'Migration Legislation Amendment Bill (No. 1) 2002', Second Reading Speech, House of Representatives, Debates, 13/03/02, p. 1107.

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22 An offence where liability does not depend on the prosecution having to prove that the defendant put his or her mind to the prohibited conduct; see further section 6.2 of the *Criminal Code.*

23 Explanatory Memorandum, p. 12.

24 Explanatory Memorandum, p. 13.

25 Explanatory Memorandum, p. 14.

26 An offence where liability does not depend on the prosecution having to prove that the defendant put his or her mind to the prohibited conduct, but where the defence of mistake of fact is available; see further sections 6.1 (strict liability) and 9.2 (mistake of fact) of the *Criminal Code.*

27 Explanatory Memorandum, pp. 14–15.

28 'Strict liability is most often used in minor or regulatory offences attracting small penalties where requiring the prosecution to prove a fault element would render the legislation unenforceable because it would inhibit prosecution and make the hearing of cases more complex and lengthy': Jennifer Norberry, Transport and Regional Services Legislation Amendment (Application of Criminal Code) Bill 2002, Bills Digest No 88 of 2001–02, p. 3.

29 Explanatory Memorandum, pp 15-16.

30 Explanatory Memorandum, p 16.

31 Senate Legal and Constitutional Legislation Committee, Consideration of Legislation Referred to the Committee – Provisions of the Migration Legislation Amendment Bill (No 1) 2002, June 2002, para 2.22.

32 See further Senate Legal and Constitutional Legislation Committee, Consideration of Legislation Referred to the Committee – Provisions of the Migration Legislation Amendment Bill (No 1) 2002, June 2002, paras 2.21–2.27.

33 Explanatory Memorandum, p. 19.

34 Senate Legal and Constitutional Legislation Committee, Consideration of Legislation Referred to the Committee – Provisions of the Migration Legislation Amendment Bill (No 1) 2002, June 2002, paras 2.28-2.32.

35 Senate Legal and Constitutional Legislation Committee, Consideration of Legislation Referred to the Committee – Provisions of the Migration Legislation Amendment Bill (No 1) 2002, June 2002, para 2.39.

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