



Excising Australia: Are we really shrinking?

On 22 July 2005, the *Migration Amendment Regulations 2005 (No. 6) SLI 171* came into force. They prescribe the following islands as *excised offshore places*: the Coral Sea Islands Territory, Queensland islands north of latitude 21 degrees south; Western Australian islands north of latitude 23 degrees south and Northern Territory islands north of latitude 16 degrees south. These regulations re-introduce the excised places previously introduced by the *Migration Amendment Regulations 2003 (No. 8) No. 283* which were subsequently disallowed on 24 November 2003. The regulations excise all islands just north of Mackay in Queensland from the migration zone as well as all islands on the West Australian coast approximately 'half way between Exmouth and Carnarvon,'¹ and all islands north of 16 degrees south in the Northern Territory with the exception of Mornington Island. See map overleaf.

The effect of excision does not affect Australians or Australian territory, but prevents aliens² arriving in Australian waters from accessing the visa application process (including review) of the *Migration Act 1958* (the Act) and they are also subject to being removed to a declared country.³

Meaning of excision

The migration zone in the Act is defined as 'an area consisting of land that is part of the states and territories at mean low water, Australian resource installations and sea installations, sea within a port and piers or similar structures, but not including sea that is within the State or Territory limits but not within a port.'⁴ The effect of these provisions is restricted to their operation within the *Migration Act 1958* and only affects the rights of aliens arriving at excised offshore places. An alien arriving within the migration zone without a valid visa is designated as an unlawful non-citizen and must be detained. An alien arriving unlawfully at an excised offshore place is also an *offshore entry person* and is prevented from making a valid visa application and can be removed to a declared country. The Minister, however may determine in the public interest to grant a visa.

'Excised offshore places' continue to fall within the definition of the 'migration zone'. However, a person who becomes an unlawful non-citizen by entering Australia at an 'excised offshore place' is now labelled an 'offshore entry person.' Section 46A of the Act invalidates a purported visa application made by an offshore entry person who is an unlawful non-citizen in Australia ... Non-citizens, who make contact with these places, become persons to whom normal rules do not apply- at least as far as domestic law is concerned.⁵

Excising territory for the purposes of the operation of the *Migration Act* does not have the effect of removing areas from Australia's sovereign territory. Such excisions have no

legal effect upon any other activities such as customs, quarantine or fishing laws.

Rights of persons resident in excised places

According to the Senate Legal and Constitutional Committee report, there are about 4891 islands that are affected ranging from a sandbar to an island.⁶ These figures were based on the Queensland latitude being 12 degrees south. The regulations now take the boundary to 21 degrees south, thereby increasing the number of islands affected.

Some of the Queensland islands now included as 'excised offshore places' are the Whitsunday island group, Hamilton Island and Magnetic Island to name a few.

Although the Committee found that there was some uncertainty and anxiety in Indigenous communities of the Torres Strait concerning the excision of the islands and what it would mean for those communities, it concluded that much of that unease came about as a result of lack of consultation prior to the excision proposal in 2002. Generally the communities were positive about the laws because of their fear of possible disease and intrusions onto their lands.⁷

There is no direct impact on the residents of 'excised offshore places' in relation to their movements in those places and they are not impeded from practising any traditional activities that involve residents moving between islands. The explanatory memorandum to the Migration Bill in 2002⁸ states that residents of these communities will be unaffected by the excision of their islands from the migration zone which remain an integral part of Australia.

The explanatory statement to the current regulations again emphasises that:

Australian citizens and other persons with lawful authority under the Act to be in Australia will continue to be able to move about freely in these areas and make any applications permitted by the Act. In particular, in respect of the Torres Strait Islands, the Act allows inhabitants of the Protected Zone (as established by the Torres Strait Treaty) to move freely in connection with the performance of their traditional activities. These provisions will continue to apply and traditional inhabitants of the Torres Strait will not be affected by the inclusion of the Torres Strait Islands in the definition of 'excised offshore place'.

Border protection and security

The Government's rationale for excising the islands include the following factors:

- there are indications that people smugglers are changing the focus of their operations to target islands closer to the mainland
- preventing people using offshore entry places as a means of achieving migration outcomes

- significantly reducing the incentives for people to make hazardous journeys to Australian territories
- making it harder for people smugglers to escape detection and remove themselves without being caught and prosecuted as they bring their vessels closer to the Australian mainland
- avoiding the situation where people smugglers leave people to an unknown fate on remote islands or reefs⁹

Many of the submissions received by the Committee considered that excising these islands would not deter asylum seekers who were already fleeing dangerous situations in their homelands.¹⁰

Detaining persons in offshore entry places

Section 198A of the Act empowers an officer to remove an offshore entry person to a declared country by placing the person on a vehicle or vessel or restraining the person in a vehicle or vessel or removing a person from a vehicle or vessel and using such force as is considered necessary and reasonable. Section 198A(4) states that a person dealt with under this section is not considered to be in immigration detention as defined in s. 5(1). The Department of Immigration and Multicultural and Indigenous Affairs states that persons taken to **declared countries, currently Nauru and Papua New Guinea**, are not detained and points out that:

The facilities were set up with the cooperation of the Governments of Nauru and Papua New Guinea. Asylum seekers are not detained under Australian law, or the laws of Nauru or Papua New Guinea, but are instead granted Special Purpose visas by those countries to facilitate their stay while they await processing and resettlement or return.¹¹

Under subs. 189(3) and (4) of the Act a person who arrives in an excised offshore place or a person seeking to enter an excised offshore place **may** be detained. This differs from the situation where a person in the migration zone or seeking to enter the migration zone **must** be detained under s. 189.

Merits review is not available to 'offshore entry persons' which means that there is no complete examination of the facts and the law (de novo review) relating to a primary decision in connection with applications for protection visas. There is a bar on certain legal proceedings under s. 494AA of the Act although it is still possible to have recourse to the High Court under s. 75 of the Australian Constitution.

The Government claims that the introduction of excising territory from the migration zone does not affect any arrangements concerning Australia's international obligations under the Refugees Convention¹² although this point is a subject of debate amongst international law commentators.¹³

Conclusion

The main effects of excision are that it:

- affects only the visa application process and usual DIMIA/Refugee Review Tribunal/Courts review processes for offshore entry persons
- allows offshore entry persons to be removed to a declared country but it does not include a power to detain persons in a declared country under the Act
- does not affect Australians or Australian sovereign territory.

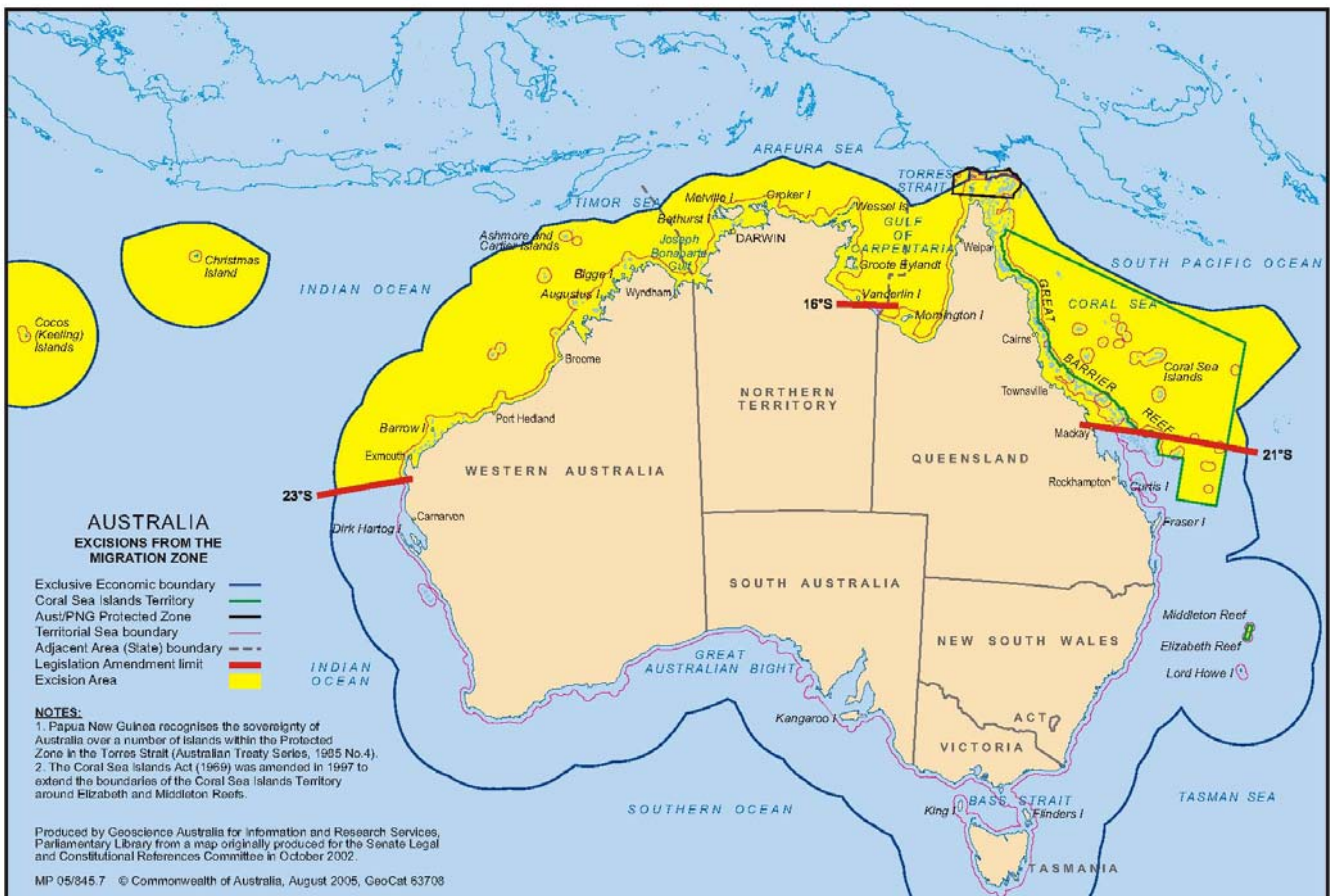


Figure 1

Chronology of changes to date

2001

Migration Amendment (Excision from Migration Zone) Act 2001

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

The amendments excised **Christmas, Ashmore and Cartier Islands and the Cocos (Keeling) Islands** and allowed for the excision of further places by regulation. Areas are designated as 'excised offshore places' and excised from the migration zone to prevent valid visa applications under the Migration Act 1958.

2002

Migration Amendment Regulations 2002 (No. 4) 2002 No. 129, 7 June 2002

Commonwealth of Australia Gazette: 7 June 2002

Disallowed by the Senate 19 June 2002 (Journal No. 16)

Regulations excised:

Coral Sea Islands Territory

- Queensland islands north of latitude 12 degrees south
- WA islands north of latitude 23 degrees south
- NT islands north of latitude 16 degrees south

Migration Legislation Amendment (Further Border Protection Measures) Bill 2002

House of Representatives: introduced 20 June 2002 and passed 20 June 2002; Senate-introduced 24 June 2002 and negatived at second reading 9 December 2002.

Purpose to expand the definition of 'excised offshore place' to include:

- Coral Sea Islands Territory
- Queensland islands north of latitude 12 degrees south
- WA islands north of latitude 23 degrees south
- Northern Territory islands north of latitude 16 degrees south

Excision time was specified as commencing at a specific time, i.e. from the time that the regulations had been disallowed.

Migration Amendment Regulations 2002 (No. 8) 2002 No. 323, 14 December 2002

Commonwealth of Australia Gazette: 14 December 2002

Regulation 5.15B inserted which excised Bernier Island, Dorre Island, Dirk Hartog Island and Faure Island.

A boatload of suspected asylum seekers was detected off the West Australian coast and these regulations were made to excise the islands listed above.

Migration Amendment Regulations 2002 (No. 11) 2002 No. 354, 19 December 2002

Commonwealth of Australia Gazette: 20 December 2002

Regulation 5.15B is omitted. This regulation had excised Bernier Island, Dorre Island, Dirk Hartog Island and Faure Island.

The regulations were rescinded and the islands restored to the migration zone when it was found that the boatload of suspected asylum seekers was an illegal Sri Lankan fishing boat which was subsequently detained under the *Fisheries Management Act 1991*.

2003

Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 (No.2)

House of Representatives: Introduced 26 March 2003, passed 14 May 2003

Senate: Introduced 14 May 2003, negatived at second reading 16 June 2003

This Bill reintroduces the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 rejected by the Senate on 9 December 2002. This Bill was a potential double dissolution trigger.

The definition of 'Excised offshore place' remained the same as for the previous bill as well as the definition of excision time.

Migration Amendment Regulations 2003 (No. 8) 2003 No. 283, 4 November 2003

Commonwealth of Australia Gazette: 4 November 2003

Disallowed by the Senate on 24 November 2003

Regulations excise:

- Coral Sea Islands Territory
- Queensland islands north of latitude 21 degrees south
- Western Australian islands north of latitude 23 degrees south
- Northern Territory islands north of latitude 16 degrees south

The definition of 'excised offshore place' was extended in these regulations to excise all Queensland islands north of latitude 21 degrees south. This includes all islands just north of Mackay. Previously the proposed amendment to the Queensland latitude was 12 degrees south.

2004

Press reports concerning possible change to definition of migration zone from mean low water mark to high water mark.¹⁴

2005

Migration Amendment Regulations 2005 (No. 6) No.171 of 2005

Registered on FRLI 22 July 2005

These regulations excise the islands proposed in a previous regulation, Migration Amendment Regulations 2003 (No. 8) 2003 No. 283:

- Coral Sea Islands Territory
- Queensland islands north of latitude 21 degrees south
- Western Australian islands north of latitude 23 degrees south
- Northern Territory islands north of latitude 16 degrees south

Motion to disallow the regulations by Senator Andrew Bartlett on 9 August 2005, Debate adjourned 11 August 2005. Motion to disallow was not agreed to by the Senate on 18 August 2005.

1. Senate, Legal and Constitutional References Committee, [Migration Zone excision: an examination of the Migration Legislation Amendment \(Further Border Protection Measures\) Bill 2002 and related matters](#), October 2002, p. 13.
2. Alien is a person who is not an Australian citizen see 77–5 Persons who are aliens, Halsbury's Laws of Australia.
3. This research note updates the previous publication, 'Excisions from the Migration Zone: Policy and Practice', [Research Note](#), no. 42, Parliamentary Library, Canberra, 2003–04.
4. *ibid.*, p. 4.
5. Savitri Taylor, 'Sovereign power at the border', *Public Law Review*, v. 16(1) March 2005, p. 59.
6. Senate. Legal and Constitutional References Committee, *op. cit.*
7. *ibid.*, p. 70.
8. Explanatory memorandum, Migration Legislation Amendment (Further Border Protection Measures) Bill 2002.
9. Senate, Legal and Constitutional References Committee, *op. cit.*, pp. 17–18.
10. *ibid.*, p. 24.
11. DIMIA Fact sheet no.76, [Offshore Processing Arrangements](#).
12. [Convention relating to the Status of Refugees](#).
13. See [UNHCR submissions](#) to the Senate, Legal and Constitutional References Committee, *op. cit.*
14. Michael Gordon, Asylum zone to shrink, Age, 21 February 2004.

Maira Coombs
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