

The 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

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RECOMMENDATIONS

Recommendation 1:

The Committee recommends that the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 not proceed.

Recommendation 2:

The Committee recommends that initial assessments of claims for refugee status by offshore entry persons should be reviewed by an external body such as the federal magistracy or Refugee Review Tribunal.

Recommendation 3:

The Committee recommends that the use of declared countries for holding and assessing claims for refugee status by those who have entered Australian territory at an excised offshore place should be abandoned.

Recommendation 4:

In the event that the Government continues to use declared countries for holding and assessing claims for refugee status by offshore entry persons, the *Migration Act 1958* should be amended to incorporate similar requirements as those that apply to safe third countries under section 91D.

Recommendation 5:

The Committee recommends that there be statutory recognition of the standards to be applied in processing claims by offshore entry people, either by way of amendment to the Migration Act or regulations.

Recommendation 6:

In the event that the Government chooses not to adopt the recommendation to abandon the use of declared countries (Recommendation 3), the Committee further recommends that reference to the relevant standards should also be incorporated in Australia's agreements with those countries.

Recommendation 7:

The Committee recommends that the Government review the operation of section 46A of the Migration Act:

- (i) to ensure there is no possibility that offshore entry persons in Australian territory may be left in a 'legal limbo', and

- (ii) to ensure that those asylum seekers coming directly from a place of persecution are not penalised by virtue of their place of entry into Australia.

Recommendation 8:

The Committee recommends that the Government, in consultation with community representatives, investigate methods of expanding opportunities for island Indigenous communities to undertake aspects of border protection duties.

Recommendation 9:

The Committee further recommends that the Government provide funding for training and employment of Indigenous people in this role.

Recommendation 10:

The Committee recommends that if the Bill proceeds, its application should not be retrospective.

ABBREVIATIONS

<i>A Sanctuary Under Review</i>	Senate Legal and Constitutional References Committee, <i>A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes</i> , June 2000
ABS	Australian Bureau of Statistics
CPA	Comprehensive Plan of Action
DFAT	Department of Foreign Affairs and Trade
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
Excision Act	<i>Migration Amendment (Excision from Migration Zone) Act 2001</i> (Cwlth)
Excision Consequential Provisions Act	<i>Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001</i> (Cwlth)
ICCPR	International Covenant on Civil and Political Rights
IOM	International Organisation for Migration
Migration Act	<i>Migration Act 1958</i> (Cwlth)
PNG	Papua New Guinea
Refugee Convention	Convention Relating to the Status of Refugees
RILC	Refugee & Immigration Legal Centre Inc
Torres Strait Treaty	Treaty between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the area between the Two Countries, Including the Area Known as the Torres Strait, and Related Matters
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

GLOSSARY

refoulement

return (of refugees)

CHAPTER 1

INTRODUCTION

Background

1.1 On 20 June 2002, the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 was introduced into the Senate. On 25 June 2002, the Senate referred the following matters to the Senate Legal and Constitutional References Committee for inquiry and report by 29 August 2002:

- a) the implications of excision for border security;
- b) the effect of excision on affected communities, including Indigenous communities;
- c) the financial impact on the Commonwealth;
- d) the nature of consultation with affected communities in relation to the Governments' excision proposals;
- e) the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002; and
- f) whether the legislation is consistent with Australia's international obligations.

1.2 On 27 August 2002, the Senate agreed to extend the time for reporting to 26 September 2002. On 25 September, the Senate agreed to extend the time further to 21 October 2002.

Conduct of the inquiry

1.3 The Committee advertised the inquiry in *The Australian* newspaper of 3 July 2002 and wrote to over one hundred and sixty organisations and individuals, inviting submissions by 26 July 2002. The Committee received submissions from 45 organisations and individuals, and these are listed at Appendix 1. Submissions were placed on the Committee's website for ease of access by the public.

1.4 The Committee held hearings in Canberra on 6, 19 and 21 August and 17 September 2002, in Sydney on 7 August 2002 and in the Northern Territory in Darwin, Elcho Island and Goulburn Island on 11 September 2002. Proof transcripts of these hearings were placed on the Hansard website as they became available.

1.5 A list of witnesses who appeared at these hearings is at Appendix 2.

Scope of the report

1.6 Chapter 2 discusses the background to the Bill. Because the Bill extends the definition of 'excised offshore place' that was inserted by amendments to the *Migration Act 1958* in September 2001, the chapter outlines the relevant provisions and how the legislative scheme operates. It also explains the proposed operation of the Bill and provides maps of the affected areas.

1.7 Chapter 3 considers the stated purpose of the Bill and its implications for border security.

1.8 Chapter 4 considers whether the legislation is consistent with Australia's international obligations, particularly the obligation of non-refoulement of refugees. This was the issue on which most submissions focussed.

1.9 Chapter 5 considers other international obligations, including the obligations not to impose penalties on refugees, not to restrict the movements of those refugees lawfully in Australia and to respect family unity.

1.10 Chapter 6 considers a range of other issues, including the remaining terms of reference such as the Bill's effect on affected communities, and its proposed retrospective application.

1.11 Chapter 7 presents the Committee's conclusions and recommendations.

Acknowledgements

1.12 The Committee thanks all those organisations and individuals who made submissions and gave evidence at public hearings.

1.13 The Committee also thanks Mr David Robertson and other staff of the National Mapping Division, Geoscience Australia, for their assistance in preparing the maps featured in this report.

Note on references

1.14 References in this report are to individual submissions as received by the Committee, not to a bound volume. References to the Hansard transcript are to the proof Hansard. Page numbers may vary between the proof and the official Hansard transcript.

CHAPTER 2

BACKGROUND TO THE BILL

2.1 The Bill, which seeks to extend the definition of 'excised offshore place' under the *Migration Act 1958*, was introduced on 20 June 2002, following disallowance by the Senate of regulations that sought to achieve the same result. This chapter discusses the background to the proposed changes and explains how the proposed provisions will operate.

Background to the Bill

2.2 On 26 September 2001 two Acts that amended the *Migration Act 1958* were passed:

- the Migration Amendment (Excision from Migration Zone) Act 2001 ('the Excision Act'); and
- the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 ('the Excision Consequential Provisions Act').

2.3 The amendments excised Christmas Island, Ashmore Reef and the Cocos (Keeling) Islands from Australian territory for the purposes of visa applications under the *Migration Act 1958* by declaring them to be 'excised offshore places'.¹ They also allowed for the excision of further offshore places by regulation, with the 'excision time' to apply from the time the regulations were made. A new protection, humanitarian and refugee visa regime for asylum applications was also created. The Acts commenced on 27 September 2001.

2.4 More detail on those amendments is provided below.

The Excision Act

2.5 The first Act inserted a new section 46A to the Migration Act to provide 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 he or she

- is in Australia; and
- remains an 'unlawful non-citizen' (a non-citizen in the migration zone without a visa),

¹ Australian sea installations and Australian resource installations were also included in the definition of excised offshore places (*Migration Act 1958*, s. 5).

unless the Minister for Immigration determines that it is in the public interest to allow an application. In such a case, the Minister must lay a statement before Parliament within 15 sitting days, setting out the reasons for the determination.

2.6 The 'migration zone' is defined as the 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 and Territory limits but not within a port.²

2.7 The Act does not prevent non-citizens from making valid applications if they do not enter the migration zone but stay offshore. Moreover, the Act only affected the right to make visa applications: it has no effect on customs, quarantine or fishing laws. However, the interaction of the provisions of the *Immigration (Guardianship of Children) Act 1946* with the excision provisions was raised during this inquiry. That issue is discussed in Chapter 5.

2.8 In his Second Reading Speech the Minister stated that the package of Bills³:

... will significantly reduce incentives for people to make hazardous voyages to Australia territories. It will help ensure that life is made as difficult as possible for those criminals engaged in the people smuggling trade. Most of all, it will ensure that the integrity of our maritime borders and our refugee program is maintained.⁴

The Excision Consequential Provisions Act

2.9 The second Act complemented the Excision Act by providing a power to take offshore entry persons to 'declared countries'.⁵ The Minister may declare that a specified country:

- provides access for asylum-seekers to effective procedures for assessing their need for protection;
- provides protection for them pending determination of their refugee status;
- provides protection to those given refugee status pending their voluntary repatriation to their country of origin or resettlement in another country; and
- meets relevant human rights standards in providing that protection.⁶

2 *Migration Act 1958*, s. 5.

3 The two Acts discussed here, plus the Border Protection (Validation and Enforcement Powers) Bill 2001 which Parliament also passed.

4 *House of Representatives Hansard*, 18 September 2001, p. 30871.

5 *Migration Act 1958*, s. 198A(1).

6 *Migration Act 1958*, s. 198A(3).

2.10 Nauru and Papua New Guinea (PNG) have been declared, and offshore processing facilities were established on Nauru and Manus Island in PNG in September/October 2001.

2.11 The amendments also barred certain legal proceedings relating to offshore entry persons. They are proceedings relating to an offshore entry, the status of an offshore entry person during the ineligibility period, the lawfulness of detention based on the person's status as an unlawful non-citizen and proceedings relating to the taking of the person to a declared country.⁷

2.12 The Act also amended the Migration Regulations to create new visa conditions and subclasses for protection, humanitarian and refugee visas. A key change was that a person who flees a country to avoid persecution, but lives for a week in a country where he or she could have obtained protection, may not apply for standard visas under Australia's protection, humanitarian and refugee program. However, he or she may apply for a temporary Refugee and Humanitarian (Class XB) visa which allows a single opportunity to enter Australia.⁸

2.13 Two types of temporary visas are available under the new scheme: a three-year temporary visa for offshore entry persons (Subclass 447) and a five-year temporary visa for other people applying from outside Australia (Subclass 451).⁹ If there is a continuing protection need, a holder of the Subclass 447 visa will not be entitled to permanent residence, but will be eligible for successive temporary protection visas. By contrast, a holder of a Subclass 451 visa will be able to gain access to a permanent protection visa after four and a half years where there is a continuing need for protection.¹⁰ Appendix 3 sets out the various visas that may be granted to those who arrive in Australia without prior authority, depending on their point of entry. The table also shows the consequences that flow from that entry, such as the person's access to judicial review.

2.14 For both categories of visa, the person must be assessed as being subject to persecution or gross violation of human rights in his or her home country or, in the case of a female, be subject to persecution or a registered person of concern to the

7 *Migration Act 1958*, s. 494AA. The provision recognises that the jurisdiction of the High Court under section 75 of the Constitution is not affected (s. 494AA(3)).

8 Class XB includes the following permanent entry categories: Refugee (Subclass 200); In-Country Special Humanitarian (Subclass 201); Global Special Humanitarian (Subclass 202); Emergency Rescue (Subclass 203); and Woman at Risk (Subclass 204); plus the two new 'Secondary Movement' subclasses which allow for temporary entry only.

9 Migration Regulations 1994, Schedule 2, Subclass 447 Secondary Movement Offshore Entry (Temporary) for offshore entry persons; Subclass 451 Secondary Movement Relocation (Temporary) for those who are not offshore entry persons.

10 DIMIA *Fact Sheet 65: New Humanitarian Visa System*, accessed at <http://www.dimia.gov.au/facts/65humanitarian.htm>. Those people in Australia who have not come by way of an excised offshore place are able to apply for a Subclass 785 Temporary Protection Visa, which applies for a period of three years.

UNHCR. The Minister must also be satisfied that there are 'compelling reasons for giving special consideration' to granting the applicant a visa, having regard to such factors as the person's connection with Australia, the capacity of the Australian community to provide for the person's temporary stay and whether there is any other suitable country that can provide protection.¹¹

2.15 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. It does this by creating further disincentives to unauthorised arrival in Australia by those who seek to use people smugglers to achieve a resettlement place they may well not need - a place taken from refugees with no other options available to them.¹²

Outcome of processing of offshore entry persons

2.16 During this inquiry, the Committee asked how many offshore entry people had been taken to declared countries to date and what the outcome of their applications had been.

2.17 At the public hearing on 17 September 2002, the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) advised the Committee of the following:

- 1515 people had been transferred to Nauru and Manus Island. Of those, 931 remained in Nauru and 191 on Manus Island as at 16 September 2002, including 7 people brought to Australia for medical purposes.
- 1495 people in Nauru and Manus Island had sought asylum and all had received the outcome of their initial refugee status assessments. 520 were initially assessed as refugees and 975 were not. All those who were not assessed as refugees asked for review and 858 reviews had been finalised. (DIMIA stated that the remaining assessments were to be finalised within the following ten days, except where the applicant had been brought to Australia for medical or other reasons.)

2.18 The processing outcomes following the reviews as at 16 September 2002 are listed below.

11 These factors do not apply to a temporary protection visa for onshore applicants (Subclass 785).

12 *House of Representatives Hansard*, 18 September 2001, p. 30872.

Table 1 Outcome of processing of offshore entry persons as at 16 September 2002

	Number of persons
Refugee	701
- Iraq	(524)
- Afghanistan	(133)
- Other nationality	(44)
Not refugee	678
- Iraq	(90)
- Afghanistan	(569)
- Other nationality	(19)
Otherwise finalised	35
Awaiting outcome	81
TOTAL	1495

2.19 As DIMIA noted, these results show that almost half (47 per cent) of the offshore entry persons who claimed asylum were found to be refugees.

2.20 In terms of resettlement of those people who had been assessed as refugees, DIMIA informed the Committee that 152 people had been granted temporary protection in Australia: 60 on subclass 447 visas (secondary movement offshore entry temporary); 85 on subclass 451 visas (secondary movement relocation temporary); 2 on subclass 785 (temporary protection) and 5 on subclass 449 (humanitarian stay temporary).

2.21 Another 202 had been accepted by other countries: 179 were resettled in New Zealand, 8 were resettled in Sweden; and another 15 were accepted in New Zealand prior to final determination of their refugee status. DIMIA noted that the Government and UNHCR were 'in discussions with other possible countries of resettlement' in relation to the remaining refugees.

2.22 In relation to those persons who were not assessed as refugees, of the 1515 people originally transferred to Nauru and Manus, 1122 remained on those islands as at 16 September 2002. Over 470 persons have agreed to leave voluntarily and are awaiting documentation and transportation arrangements to be made. While a range of nationalities are involved, the majority (approximately 450) are Afghans.¹³

2.23 The Committee notes that the Memoranda of Understanding between the Governments of Australia, PNG and Nauru require Australia to ensure that all persons

13 Based on email advice from DIMIA, 16 October 2002.

processed in those countries depart within six months or in as short a time as is reasonably necessary. The Committee understands that the Australian Government funds the costs of all removals, voluntary and involuntary and also provides reintegration assistance of \$2000 per person (up to \$10,000 per family) for those who agree to return within 28 days of their status being determined.

Regulations disallowed by the Senate

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

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

2.25 The Explanatory Statement for the Regulations stated that the Regulations 'addressed indications that people smugglers are likely to change the focus of their operations to target landing on islands closer to the Australian mainland'.

2.26 The Senate disallowed the Regulations on 19 June 2002.

Main provisions of the Bill

2.27 The Bill's provisions are almost identical to the disallowed Regulations, except that there is an added provision (clause 4), which clarifies that the new regime under section 46A applies to visa applications made after the 'excision time' (defined below) for the new excised areas.

2.28 Schedule 1, item 1 sets out the excised offshore places, as described in the next section.

2.29 Schedule 1, item 2 applies to these places an 'excision time' of 2pm on 19 June 2002, that is, its application is intended to be retrospective. (Since the Regulations commenced when they were made on 7 June and were disallowed on 19 June 2002, the excision was effective for the period 7 June – 19 June 2002.)

2.30 The Committee notes that the Senate Scrutiny of Bills Committee drew attention to the retrospective application of this provision on the basis that it 'may be considered to trespass unduly on personal rights and liberties'.

The area that is affected

2.31 **Figure 1** indicates the affected area in which the islands are located, by highlighting the sea surrounding Australia to the limit of the Exclusive Economic Zone (that is, within 200 nautical miles of the coastline). **Figure 2** gives a more

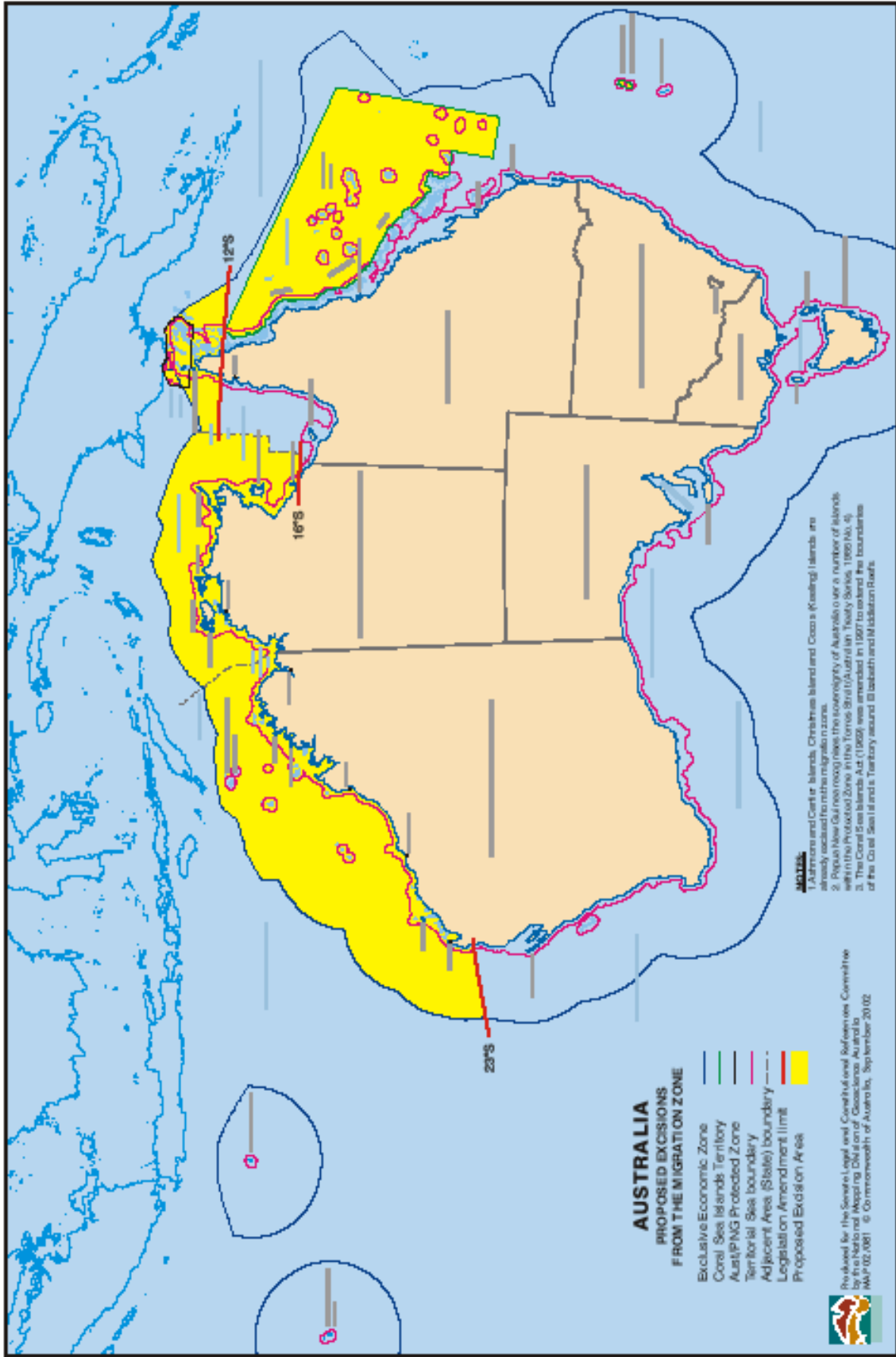


Figure 1

Australia's Maritime Zones in the Torres Strait



Figure 2

- +---+---+ Seabed & Fisheries Jurisdiction Lines
- +---+---+ Seabed Jurisdiction Line
- +---+---+ Fisheries Jurisdiction Line
- +---+---+ Marine Park limits
- +---+---+ Limit of 24 nautical miles
- +---+---+ Limit of 3 nautical miles
- Orange box Australian Territorial Sea
- Blue box Australian Internal Waters

detailed picture of the Torres Strait area, including the Protected Zone (discussed in more detail in Chapter 4).

2.32 More detail on the islands affected is below:

- The Coral Sea Islands comprise many islands spread over a sea area of approximately 780,000 square kilometres to the east and south of the Great Barrier Reef. The islands became a territory of the Commonwealth in 1969. They are uninhabited apart from an occasional meteorologist on Willis Island. There are also some unstaffed weather stations and a lighthouse on other islands. The northern limit of the Coral Sea Island Territory is latitude 12 degrees south.
- Queensland islands north of latitude 12 degrees south (these are mainly the Torres Strait Islands);
- Northern Territory islands north of latitude 16 degrees south (this covers the whole of the Northern Territory's coastline, with the exception of a small area to the east); and
- Western Australian islands north of latitude 23 degrees south (which runs approximately half way between Exmouth and Carnarvon).

How many islands and who lives there

2.33 When the Bill was introduced, no information about the number of affected islands was provided. Some media reports at the time had quoted a figure of 3,000 islands.¹⁴

2.34 In response to a question on notice from the Committee, DIMIA stated that advice from Geoscience Australia had revealed that 'approximately 4891' islands were affected.¹⁵ During the public hearings, a Departmental representative noted that 'an island could be anything from a sandbar to what we might think of as an island', and that DIMIA was unaware of how many of the islands were inhabited.¹⁶

2.35 DIMIA subsequently informed the Committee that figures provided by the Australian Bureau of Statistics (ABS) revealed a total in 2001 of 20,629 'usual residents' on the islands proposed for excision.¹⁷ However, the ABS qualified those figures, noting that it was difficult to determine the population on certain islands where the relevant ABS Collection Districts also included parts of the mainland.

14 For example, N Rothwell 'Island wants to keep mainland status' *The Australian*, Friday 28 June 2002, p. 1.

15 DIMIA *Response to Questions on Notice*, 2 August 2002, p. 1.

16 *Hansard*, 6 August 2002, p. 20.

17 The statistics were drawn from the Census of Population and Housing 2001. Of the total number, 19,477 were listed as 'Australian', 393 as 'not Australian' and 759 'not stated'. 'Usual residence' is defined as the address where the person has lived or intends to live for a total of 6 months or more in 2001.

2.36 The Committee notes that fourteen of the Torres Strait islands are inhabited by about 8,000 people.¹⁸ The Committee also received informal advice that few of the islands off the coast of Western Australia are permanently inhabited. By implication, most of the remaining residents are on islands off the Northern Territory coastline.

18 DIMIA 'Commonwealth Presence in the Torres Strait', *Fact Sheet*, 30 November 2001, p. 1.