

# CHAPTER 2

## OVERVIEW OF THE BILL

2.1 This chapter briefly outlines the main provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.

### **Background to the Bill**

2.2 The Bill extends previous legislative amendments to the Migration Act made by:

- the *Migration Amendment (Excision from Migration Zone) Act 2001* (passed 26 September 2001);
- the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (passed 26 September 2001);
- the *Migration Legislation Amendment (Transitional Movement) Act 2002* (passed 4 April 2002).

2.3 The committee also notes the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 which was negated by the Senate on 9 December 2002 and on 16 June 2003. That bill would have amended the Migration Act to extend the 'excision of the migration zone' to include islands across the north of Western Australia, Northern Territory and Queensland.<sup>1</sup>

2.4 The Republic of Nauru (Nauru) and Manus Island in Papua New Guinea (PNG) were designated 'declared' countries under section 198A of the Migration Act and offshore processing facilities were established on those islands on 19 September 2001 and 21 October 2001 respectively.<sup>2</sup>

2.5 Persons whose refugee status determinations are processed offshore are treated differently to those processed onshore in a number of different areas, including forced removal to a third country such as Nauru or PNG, and different offshore visa categories.<sup>3</sup>

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1 The provisions of the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 were the subject of a Senate Legal and Constitutional References Committee inquiry which tabled its report in October 2002.

2 A comprehensive background to, and discussion of, the Bill is provided in S Harris Rimmer, 'Migration Amendment (Designated Unauthorised Arrivals) Bill 2006', Parliamentary Library Bills Digest No. 138, 22 May 2006 (Bills Digest).

3 See further Bills Digest, p. 3.

## Main Provisions<sup>4</sup>

### *Schedule 1 – Amendments to the Migration Act 1958*

#### *Definitions*

2.6 Item 1 inserts a definition of *designated unauthorised arrival* in subsection 5(1) in Part 1 of the Migration Act which refers to new section 5F.

2.7 Item 5 amends the definition of *transitory person* by the insertion of subsection 5(1) new paragraphs (d) to (g) into the definition. The new paragraphs provide events upon which a person who has been a transitory person will cease to hold that status. A person ceases to be a transitory person if they have:

- been assessed to be a refugee;
- become the holder of a substantive visa;
- left Australia other than as result of being removed under subsection 198(1A) or taken under subsection 198A(1) from Australia to a country in respect of which a declaration is in force under subsection 198A(3); or
- left a country in respect of which a declaration is in force under subsection 198A(3), to travel to a country other than Australia.

2.8 Item 8 inserts new section 5F, which defines *designated unauthorised arrival*. The EM states that:

The definition includes those persons who formerly came within the definition of *offshore entry person* ie a person who became an unlawful non-citizen because the person entered Australia at an *excised offshore place* after the excision time for that place (i.e. before the commencement of this Bill). Excised offshore place and excision time are defined at subsection 5(1). The definition will also cover such persons who enter at an excised offshore place after commencement of the Bill where the place is excised at time of commencement. In addition it will cover such persons who enter excised offshore places that may be prescribed after the commencement of the Bill pursuant to paragraph (e) of the definition of excised offshore place.<sup>5</sup>

2.9 The definition also includes persons who enter Australia at a place other than an excised offshore place by sea on or after 13 April 2006 and become an unlawful non-citizen because of that entry.

2.10 New subsection 5F(8) provides for circumstances in which a person is taken to have entered Australia by sea.

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4 The following section is taken directly from the Bills Digest.

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2.11 Item 6 inserts new subsections 5(4B) and 5(4C) into existing section 5. New subsection 5(4B) provides that a person is taken not to have left Australia if they have been removed under section 198 to another country but refused entry by that country and returned to Australia as a result of that refusal.

2.12 New subsection 5(4C) provides that a person is taken not to have left a country if they have left the country to travel to one or more other countries, been refused entry by each of those other countries and returned to the first country as a result of the refusal or refusals. It also provides that a person is taken not to have left a country if they have left the country for medical treatment in another country or countries and have returned to the first country after having received medical treatment.

2.13 A *transitory person* who is taken not to have left Australia or not to have left a declared country in these circumstances will continue to come within the definition of transitory person.

#### *Exemptions*

2.14 Certain persons are excluded from the definition of designated unauthorised arrival. Paragraph 5F(1)(a) excludes a person who is an exempt person under subsection 5F(2).

2.15 New paragraph 5F(1)(c) provides that a person is not a designated unauthorised arrival if the person has, after the entry that made them a designated unauthorised arrival:

- become the holder of a substantive visa;
- left Australia other than as result of being taken under subsection 198A(1) from Australia to a country in respect of which a declaration is in force under subsection 198A(3); or
- left a country in respect of which a declaration is in force under subsection 198A(3), to travel to a country other than Australia.

2.16 New subsections 5F(10) and (11) provide certain circumstances in which a person is taken not to have left Australia or left a country, for the purposes of the definition of designated unauthorised arrival, reflecting the terms of 5(4B) and 5(4C) above.

2.17 Subsection 5F(2) sets out certain classes of person who are exempt from inclusion in the definition of designated unauthorised arrival, including New Zealand citizens, permanent residents of Norfolk Island and persons brought to Australia for *Customs Act 1901* purposes. Paragraph 5F(2)(d) exempts classes of persons declared by the Minister, under subsection 5F(3), to be exempt. Paragraph 5F(2)(e) exempts individual persons declared by the Minister, under subsection 5F(6), to be exempt.

2.18 Subsection 5F(3) also allows the Minister to declare a class of persons to be exempt under paragraph 5F(2)(d). Subsection 5F(4) provides that a class of persons

may be specified in a declaration made under subsection 5F(3) even if ascertaining the membership of the class relies on a discretion being exercised or a particular opinion being held. The EM states that a declaration might describe an exempt class as 'where an officer is satisfied the person would meet the criteria for a particular visa were they able to make a valid application' to assist in ensuring that persons not intended to be subject to the offshore processing regime are not caught.<sup>6</sup>

2.19 Subsection 5F(5) provides that a declaration by the Minister under subsection 5F(3), that declares a class of persons to be exempt under paragraph 5F(2)(d), is a legislative instrument.

2.20 Subsection 5F(6) provides that the Minister may, for the purposes of paragraph (2)(e), declare, in writing, a specified person to be exempt if:

- regulations made for the purposes of the subsection specify criteria that a person must satisfy before the person may be declared to be exempt under this subsection; and
- the Minister is satisfied that the person satisfies those criteria.

2.21 Subsection 5F(7) provides that a declaration by the Minister under subsection 5F(6), that declares a specified person to be exempt, is not a legislative instrument.

#### *Entry by sea*

2.22 New subsection 5F(8) sets out circumstances in which a person is taken to have entered Australia by sea, for the purposes of section 5F.

2.23 Paragraph 5F(8)(a) provides that a person enters Australia by sea if the person travels to Australia by sea and enters the migration zone (whether or not by sea). Migration zone is defined in subsection 5(1) of the Migration Act.

2.24 Paragraph 5F(8)(b) provides that a person enters Australia by sea if the person enters the migration zone by air pursuant to subsection 245F(9) as a result of being found on a ship detained under section 245F. Subsection 5F(9) provides that for the purposes of section 5F a person who enters Australia on an aircraft is taken to have entered the migration zone by air only if that aircraft lands in the migration zone.

2.25 Paragraph 5F(8)(c) provides that a person enters Australia by sea if the person enters the migration zone by air after being rescued at sea.

2.26 Paragraphs 5F(8)(b) and (c) are to ensure that persons airlifted to Australia for the last leg of their journey after having travelled by sea do not avoid becoming a designated unauthorised arrival if they would otherwise meet the definition of such a person.

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*Detention is discretionary*

2.27 Item 9 repeals the note after subsection 42(4) and substitutes a 'more accurate' note. The EM states that:

Before the amendment the note stated that section 189 provides that an unlawful non-citizen in the migration zone must be detained. This did not take account of the fact that for unlawful non-citizens in the migration zone which is also an excised offshore place, detention is discretionary pursuant to subsection 189(3) of the Act.<sup>7</sup>

2.28 Item 17 amends subsection 189(2). Subsection 189(2) applies to persons in Australia but outside the migration zone, where an officer reasonably suspects that the person is seeking to enter the migration zone (other than at an excised offshore place) and would, if in the migration zone, be an unlawful non-citizen. Currently, subsection 189(2) requires an officer to detain such a person. This item amends subsection 189(2) to provide that an officer has a discretion whether or not to detain such a person.

2.29 According to the EM, the amendment brings the detention regime for persons seeking to enter Australia (other than at an excised offshore place) in line with the regime in place for persons seeking to enter at offshore entry places. It will provide officers with the opportunity to detain a person under this section or alternative provisions such as subsection 245F(9) of the Migration Act.<sup>8</sup>

2.30 Item 22 repeals and substitutes a new subsection 198A(4), in relation to the immigration detention of designated unauthorised arrivals being dealt with under section 198A(1). It replaces the reference to an offshore entry person with a reference to a designated unauthorised arrival, consequential to the change made by item 18. Item 22 also adds a provision making clear that the fact a designated unauthorised arrival is in immigration detention (whether pursuant to a mandatory or discretionary power) does not prevent an officer removing the person to a declared country under section 198A.

*Visa applications*

2.31 Item 10 repeals subsection 46A(1) and substitutes a new subsection which provides that an application for a visa is not valid if made by a designated unauthorised arrival who is in Australia.

2.32 As the EM explains:

Section 46A forms part of the offshore processing regime for designated unauthorised arrivals. Prior to amendment, section 46A prohibited applications for visas by offshore entry persons in Australia unlawfully (unless the Minister determines that a particular person may apply for a

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7 p. 13.

8 p. 15.

particular class of visa). The concept of offshore entry person is removed from the Act by this Schedule (item 3) and replaced with the new concept of designated unauthorised arrival. The amendment made by this item provides that the bar on visa applications in section 46A applies to designated unauthorised arrivals. Such persons will be prohibited from applying for any visa while the person is in Australia, unless the Minister determines under subsection 46A(2) that the person may apply for a visa of a class specified in the determination. When such a determination is made, the Minister is required to table a statement in each House of the Parliament as set out in subsections 46A(4) and (5).<sup>9</sup>

### *Offshore processing*

2.33 Item 18 amends subsection 198A(1) to replace the reference to offshore entry person with a reference to designated unauthorised arrival. This subsection is the operative provision for the policy of offshore processing. The EM states that:

Subsection 198A(1) forms part of the offshore processing regime for designated unauthorised arrivals. It allows an officer to take such a person from Australia to a country in respect of which a declaration is in force under subsection 198A(3), for the processing of their refugee claims. In the past, persons taken to declared countries for processing of refugee claims have had these assessed either by the United Nations High Commissioner for Refugees (UNHCR) or by trained Australian officers using a process modelled closely on that used by the UNHCR. Subsection 198A(3) provides that the Minister may declare that a country:

- provides access, for persons seeking asylum, to effective procedures for assessing the person's need for protection;
- provides protection for persons seeking asylum pending determination of their refugee status;
- provides protection to persons who are 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.

This provision ensures that asylum seekers will be dealt with under the offshore processing regime in a manner that meets Australia's international obligations.<sup>10</sup>

### *Disclosure of refugee claims*

2.34 Items 24 to 26 amend existing section 336F to replace references to an offshore entry person with a reference to a designated unauthorised arrival. This section allows the Secretary to authorise officers to disclose identifying information in certain circumstances. Subsection 336F(3) puts certain limitations on the Secretary's

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9 pp 13-14.

10 pp 15-16.

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ability to give such an authorisation. Disclosure cannot be authorised in respect of persons who have made claims to protection under the 1951 *Convention relating to the Status of Refugees*, as amended by the *Protocol Relating to the Status of Refugees* (Refugee Convention), where disclosure would be to a foreign country in respect of which the claim is made, or a body of such a country.

### *Reporting requirements*

2.35 Item 27 inserts a new Part 8D 'Reports relating to designated unauthorised and transitory persons' plus new section 486R.

2.36 New subsection 486R(1) provides that the Secretary must, in regard to each financial year (commencing the year ending 30 June 2007), provide to the Minister a report not later than 30 September in the next financial year.

2.37 A report under section 486R must include information about: arrangements during that financial year for designated unauthorised arrivals and transitory persons seeking asylum (486R(2)). This includes arrangements for:

- assessing any claims for refugee status made by such designated unauthorised arrivals and transitory persons; and
- the accommodation, health care and education of such designated unauthorised arrivals and transitory persons; and
- the number of asylum claims, by designated unauthorised arrivals and transitory persons, that are assessed during that financial year; and
- the number of designated unauthorised arrivals and transitory persons determined, during that financial year, to be refugees.

2.38 The report will not cover designated unauthorised arrivals and transitory persons who do not seek asylum.

2.39 New subsection 486R(3) provides that because of privacy considerations and provisions under the Refugee Convention concerning the identification of individual asylum seekers, a report made under section 486R must not include:

- the name of any person who is or was a designated unauthorised arrival or a transitory person; or
- any information that may identify such a person; or
- the name of any other person connected in any way with any person covered by the first point above; or
- any information that may identify that other person.

2.40 New subsection 486R(4) provides that a report made under section 486R may include any further information that the Secretary thinks is appropriate.

2.41 New subsection 486R(5) provides that the Minister must table in each House of Parliament a copy of the report provided under section 486R, within 15 sitting days

of that House after the day on which the Minister receives the report from the Secretary.

### *Bar on court proceedings*

2.42 Items 28 to 39 make amendments to sections 494AA and 494AB in respect of prohibitions on instituting, and continuing, certain legal proceedings relating to designated unauthorised arrivals and transitory persons. The term offshore entry persons is now replaced with the concept of designated unauthorised arrivals (see items 3 and 8).

2.43 Item 40 provides that the amendments made by items 28 to 39 apply to the institution of proceedings on or after the day on which item 40 commences. It also provides that these amendments apply to the continuation, after the day on which item 40 commences, of proceedings instituted on or after 13 April 2006 but before the commencement of item 40.

### *Transitional cases*

2.44 Item 41 makes provision for transitional cases affected by the amendments made by this Schedule. Subitem 41(1) provides that a visa application made in certain circumstances is taken, on and after commencement of the item, not to be a valid application for a visa. The circumstances are where a person:

- entered the migration zone (other than at an excised offshore place) during the relevant period;
- made an application for a visa during the relevant period;
- was not granted the visa during the relevant period; and
- is covered by the definition of a designated unauthorised arrival on the commencement on section 5F of the Migration Act (inserted by item 8) because of the entry to the migration zone.

2.45 The relevant period is defined at subitem 40(2) as the period starting on 13 April 2006 and ending immediately before the commencement of this item. The EM states that:

Persons entering unlawfully by sea at a place other than an excised offshore place on or after 13 April 2006 and before commencement will be able to make visa applications until they become subject to the new regime on commencement. Consistent with the Government's decision that such persons should be subject to the offshore processing regime, any application that has not resulted in the grant of a visa will be rendered invalid on commencement of the Bill. This will include cases where a primary decision has been made to refuse the grant of a visa, and the decision is subject to merits review. It will also include cases where a refusal decision has been upheld on merits review, and the matter is subject

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to judicial review. In all such cases, any visa application will be rendered invalid because no visa has been granted before commencement.<sup>11</sup>

2.46 Item 42 is a saving provision, consequential to the amendments made by items 7 and 24 to 26. Those items repeal references to an offshore entry person in paragraphs 5A(3)(j)(ii) and 336F(5)(c) and subparagraphs 336F(3)(a)(ii) and (4)(a)(ii), and substitute references to designated unauthorised arrival. Item 42 provides that any references to offshore entry person in an instrument of authorisation made under section 336D or 336F are taken to be references to designated unauthorised arrivals. It also provides that such an instrument is taken to authorise access to, and disclosure of, identifying information in respect of a designated unauthorised arrival to the extent that it would have authorised access to, or disclosure of, identifying information in relation to an offshore entry person. This ensures such instruments will continue to have effect as intended, on and after commencement of the Bill.

#### *Compensation for acquisition of property*

2.47 Item 43 provides for the payment by the Commonwealth of a 'reasonable amount' of compensation if the operation of the Bill would result in an acquisition of property otherwise than on just terms.

2.48 If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in a court of competent jurisdiction for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines (subitem 43(2)).

2.49 Subitem 43(3) provides that the Consolidated Revenue Fund is appropriated for the purposes of this item.

#### *Regulations*

2.50 Item 44 provides a power for the Governor-General to make regulations under the Bill, prescribing matters required or permitted to be prescribed by the Bill; or necessary or convenient for carrying out or giving effect to the Bill (subitem 44(1)) or regulations for matters of a consequential or transitional nature (subitem 44(2)).

