CHAPTER 2

OVERVIEW OF THE BILL

Main Provisions

Schedule 1 - Immigration clearance of child born in Australia to non-citizen parents

2.1 Section 172 of the *Migration Act 1958* (Migration Act) indicates several ways in which a non-citizen can be immigration cleared and be lawfully free to move about in the Australian community. First, he or she enters Australia with a visa at a port, provides any required information to the clearance officer and, not being in immigration detention, leaves with the permission of that officer. Secondly, he or she enters Australia otherwise than at a port but with a visa, provides any required information to the clearance officer at a prescribed place and, not being in immigration detention, leaves with the permission of that officer. Thirdly, he or she is refused, or bypasses, immigration clearance and is subsequently granted a substantive visa.[1]

2.2 Section 10 of the Migration Act provides that a non-citizen child born in the migration zone is taken to have entered Australia when he or she was born. Theoretically, this means that the child should have been immigration cleared at birth if he or she is to be left free in the community. The amendment in item 1 of Schedule 1 inserts a new provision, paragraph 172(1)(ba), which provides that such a child is immigration cleared if a parent was immigration cleared on last entry into Australia.[2]

2.3 Section 173 of the Migration Act provides that if the holder of a visa enters Australia in a way that contravenes section 43 of the Migration Act, the visa ceases to be in effect. Section 43 provides that visa holders must enter at a port or on a pre-cleared flight.[3]

2.4 Under section 78 of the Migration Act, a non-citizen child born in Australia is taken to have been granted a visa if, at the time of his or her birth, at least one of the child's parents holds a visa. This non-citizen child is taken to have been granted the same visa as his or her parents. On a literal interpretation of section 173, a non-citizen child's visa taken to have been granted under section 78 would *appear* to cease when the child enters Australia under section 10 in a way that 'contravenes' section 43 (i.e. by birth).[4]

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1 2002 Report, p. 2.

2 2002 Report, p. 2.

3 EM, p. 5.

4 EM, p. 5.

2.5 Item 5 of Schedule 1 inserts a new subsection 173(2) that puts it beyond doubt that a non-citizen child born in Australia who, under section 78, is taken to have been granted a visa or visas at the time of his or her birth, is not to be taken to have entered Australia in a way that contravenes section 43 of the Migration Act such that the visa taken to have been granted at birth ceases to be in effect at the same time.[5]

2.6 Items 1 and 5 of Schedule 1 apply to non-citizen children born in Australia on or after 1 September 1994 (see items 2 and 6 of Schedule 1). This date corresponds with the amendments to the Migration Act by the *Migration Reform Act 1992*, which introduced:

- the concept of 'immigration clearance' into the Migration Act; and
- the provisions relating to the cessation of visas where the holder fails to enter Australia at a port or on a pre-cleared flight.

Schedule 2 – Criminal Code harmonisation amendments

People smuggling offences in sections 229(1), 232(1B) and 232A(2): a reversed onus of proof

2.7 The Migration 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.[6] Sections 229, 232 and 232A create various offences in relation to people smuggling.

2.8 Currently, subsection 229(1) of the Migration Act makes it an offence for the master, owner, agent, charterer and operator of a vessel to bring a non-citizen into Australia unless the non-citizen, when entering Australia, satisfies paragraphs 229(1)(a), (b), (c), (d) or (e).[7] Defences to the offence are set out in subsection 229(5).

2.9 The current wording of the offence in section 229 makes it unclear as to whether the matters in paragraphs 229(1)(a) to (e) constitute issues of *exception* to the offence or are *elements* of the offence. The Explanatory Memorandum states that there are two reasons why paragraphs 229(1)(a)-(e) should be considered elements of the offence:

> The existence of the defences in subsection 229(5) implies that the matters in paragraphs 229(1)(a) to (e) are not intended to be exceptions to the offence in subsection 229(1). If those matters were exceptions, they would co-exist with the defences in subsection 229(5), for which the defendant would bear a legal burden. If that were the case, it would be unlikely that a

5 EM, p. 5.

6 S. Harris Rimmer, 'Migration Amendment (Visa Integrity) Bill 2006', Parliamentary Library, Bills Digest No. 2, 26 July 2006 (Bills Digest), p. 7.

7 EM, p. 6.

> defendant would raise the matters in subsection 229(5) because they impose a legal burden (rather than an evidential burden) on the defendant.
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> If the matters in paragraphs 229(1)(a) to (e) were matters of exception, the subsection 229(1) absolute liability offence would be a very wide offence. This is not intended to be the case.[8]

2.10 For these reasons, items 1 and 2 of Schedule 2 amend subsection 229(1) to clarify that the matters in paragraphs 229(1)(a) to (e) are *elements* of the offence in subsection 229(1).[9]

2.11 An element of each of the offences set out in sections 229, 232 and 232A is that the non-citizen who is being brought into Australia must be a person to whom subsection 42(1) of the Migration Act applies. Subsection 42(1) provides that a person must not travel to Australia without a visa that is in effect. Exceptions to subsection 42(1) are set out in subsections 42(2), 42(2A) and regulations made under subsection 42(3).

2.12 Items 3, 4 and 6 of Schedule 2 make it clear that, in relation to the offences in sections 229(1), 232 and 232A, the defendant bears the evidential burden if establishing that subsection 42(1) does not apply by virtue of the exemptions in subsections 42(2), 42(2A) or regulations made under subsection 42(3).

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

2.13 Existing paragraph 233(1)(a) of the Migration Act establishes another people smuggling offence, making it an 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.[10]

2.14 Item 7 of Schedule 2 inserts proposed subsection 233(1A), to make it clear that *strict liability* applies to this offence. Strict liability under section 6.1 of the Criminal Code means that (a) there are no fault elements for any of the physical elements of the offence; but (b) the defence of mistake of fact under section 9.2 is available.[11] The Explanatory Memorandum states that this amendment is necessary to *restore* the application of strict liability to this offence:

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8 EM, p. 6. Absolute liability as set out by section 6.2 of the Criminal Code means that (a) there are no fault elements for any of the physical elements of the offence; and (b) the defence of mistake of fact under section 9.2 is unavailable.

9 EM, p. 6.

10 Bills Digest, p. 8.

11 Bills Digest, p. 9.

Prior to the application of the Criminal Code to all offences against the Act, strict liability applied to the physical element of circumstance of the offence.

The physical element (ie: the circumstance element) in this offence is:

- 'the bringing of the non-citizen to Australia *under circumstances* where it might reasonably be inferred that the non-citizen intended to enter in contravention of the Migration Act'.

At the time the Criminal Code was applied to the Act, no provision was made for strict liability to apply to the physical element of circumstance of the offence in paragraph 233(1)(a).

The Criminal Code requires that if an offence is intended to be one of strict liability, it must be expressly stated. This is because there is a strong presumption that proof of fault is required in relation to an offence. As there was no such express statement of strict liability in relation to this aspect of the offence in paragraph 233(1)(a), the default element provisions provided for in subsection 5.6(2) of the Criminal Code were applied. These default provisions applied the fault element of 'recklessness' to the circumstance of the offence. This changes the offence as it had been construed prior to the application of the Criminal Code to the Act.[12]

Schedule 3 – The taking of securities

2.15 Section 269(1) of the Migration Act provides that an authorised officer may require and take security for compliance with the provisions of the Migration Act or the regulations, or any condition imposed in pursuance of, or for the purposes of, the Migration Act or regulations.

2.16 Item 2 of Schedule 3 inserts a new subsection 269(1A) provides that, in certain circumstances, an authorised officer may require and take security under subsection 269(1), in relation to an application for a visa *before* a visa is granted.[13]

2.17 Under new subsection 269(1A), an authorised officer may do this only if:

- the security is for compliance with conditions that will be imposed on the visa in pursuance of, or for the purposes of, this Act or the regulations, if the visa is granted; and
- the officer has indicated those conditions to the visa applicant.[14]

2.18 The purpose of the amendment is intended to clear the uncertainty raised in the Federal Court decision of *Tutugri v Minister for Immigration and Multicultural Affairs* [1999] FCA 1785. In that case, the Federal Court raised significant doubts about the power of an authorised officer to request and take security for compliance

12 EM, pp 9-10.

13 EM, p. 14.

14 EM, p. 14.

with conditions to be imposed on a visa at a time before the visa is actually granted. The court considered that a condition on a visa does not bind the applicant until after the visa is granted. As such, a condition cannot be said to have been 'imposed prior to grant'.[15]

2.19 The decision in *Tutugri* has presented difficulties from a practical point of view in the administration of security arrangements – the reason being, that a security must be able to be required before a visa is granted. Once the visa is granted, the holder can simply refuse to provide the security requested.[16]

Schedule 4 - Restrictions on bridging visa holders

2.20 Section 48 of the Migration Act currently limits the visas that a non-citizen in the migration zone who does not hold a substantive visa, and who was refused a visa after last entering Australia or held a visa that was cancelled, can apply for. The Bill proposes by item 1 of Schedule 4 (headed 'Minor amendments') an amendment to section 48 stating that, for the purposes of the section, a non-citizen who, while holding a bridging visa, leaves and re-enters the migration zone is taken to have been continuously in the migration zone despite that travel.[17]

15 EM, p. 14.

16 EM, p. 14.

17 2002 Report, p. 5.