

2010-2011

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

**Migration Legislation Amendment
(Offshore Processing and Other
Measures) Bill 2011**

No. , 2011

(Immigration and Citizenship)

**A Bill for an Act to amend the law relating to
migration, and for other purposes**

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A Bill for an Act to amend the law relating to migration, and for other purposes

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Migration Legislation Amendment (Offshore Processing and Other Measures) Act 2011*.

2 Commencement

This Act commences on the day after this Act receives the Royal Assent.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

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Schedule 1—Offshore processing

4

Migration Act 1958

5

1 At the end of section 4

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Add:

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(5) To advance its object, this Act provides for the taking of offshore entry persons from Australia to an offshore processing country.

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9

2 Subsection 5(1) (note 1 at the end of the definition of *immigration detention*)

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11

Repeal the note, substitute:

12

Note 1: Subsection @198AD(11) provides that being dealt with under subsection @198AD(3) does not amount to *immigration detention*.

13

14

3 Subsection 5(1) (paragraph (a) of the definition of *offshore entry person*)

15

16

Before “entered”, insert “has, at any time,”.

17

4 Subsection 5(1)

18

Insert:

19

offshore processing country means a country designated by the Minister under subsection @198AB(1) as an offshore processing country.

20

21

22

5 Subsection 5(1) (paragraph (a) of the definition of *transitory person*)

23

24

Before “section”, insert “repealed”.

25

6 Subsection 5(1) (after paragraph (a) of the definition of *transitory person*)

26

27

Insert:

28

(aa) an offshore entry person who was taken to an offshore processing country under section @198AD; or

29

30

7 Paragraph 36(2)(a)

1 Omit “to whom”, substitute “in respect of whom”.

2 **8 Subsection 36(3)**

3 Omit “obligations to”, substitute “obligations in respect of”.

4 **9 Subsection 48A(2) (paragraph (aa) of the definition of**
5 ***application for a protection visa***

6 Omit “to whom”, substitute “in respect of whom”.

7 **10 Subsection 48A(2) (subparagraph (ab)(i) of the definition**
8 ***of application for a protection visa***

9 Omit “to whom”, substitute “in respect of whom”.

10 **11 Subsection 189(3)**

11 After “a person”, insert “(other than a person referred to in
12 subsection (3A))”.

13 **12 Subsection 189(3)**

14 Omit “may detain”, substitute “must detain”.

15 **13 After subsection 189(3)**

16 Insert:

17 (3A) If an officer knows or reasonably suspects that a person in a
18 protected area:

19 (a) is an allowed inhabitant of the Protected Zone; and

20 (b) is an unlawful non-citizen;

21 the officer may detain the person.

22 **14 Subsection 189(5)**

23 After “subsections (3)”, insert “, (3A)”.

24 **15 Paragraph 193(1)(c)**

25 Before “or (4)”, insert “, (3A)”.

26 **16 Subsection 196(1)**

27 Omit “he or she is”.

1 **17 Paragraph 196(1)(a)**

2 Before “removed”, insert “he or she is”.

3 **18 After paragraph 196(1)(a)**

4 Insert:

5 (aa) an officer begins to deal with the non-citizen under
6 subsection @198AD(3); or

7 **19 Paragraph 196(1)(b)**

8 Before “deported”, insert “he or she is”.

9 **20 Paragraph 196(1)(c)**

10 Before “granted”, insert “he or she is”.

11 **21 Subsection 196(3)**

12 Omit “for removal or deportation”, substitute “as referred to in
13 paragraph (1)(a), (aa) or (b)”.

14 **22 Division 8 of Part 2 (heading)**

15 Repeal the heading, substitute:

16 **Division 8—Removal of unlawful non-citizens etc.**

17 **23 Before section 198**

18 Insert:

19 **Subdivision A—Removal**

20 **24 At the end of section 198**

21 Add:

22 (11) This section does not apply to an offshore entry person to whom
23 section @198AD applies.

24 **25 Section 198A**

25 Repeal the section, substitute:

Subdivision B—Offshore processing**@198AA Reason for Subdivision**

This Subdivision is enacted because the Parliament considers that:

- (a) people smuggling, and its undesirable consequences including the resulting loss of life at sea, are major regional problems that need to be addressed; and
- (b) offshore entry persons, including offshore entry persons in respect of whom Australia has or may have protection obligations under the Refugees Convention as amended by the Refugees Protocol, should be able to be taken to any country designated to be an offshore processing country; and
- (c) it is a matter for the Minister to decide which countries should be designated as offshore processing countries; and
- (d) the designation of a country to be an offshore processing country need not be determined by reference to the international obligations or domestic law of that country.

@198AB *Offshore processing country*

- (1) The Minister may, in writing, designate that a country is an *offshore processing country*.
- (2) The only condition for the exercise of the power under subsection (1) is that the Minister thinks that it is in the national interest to designate the country to be an offshore processing country.
- (3) In considering the national interest for the purposes of subsection (2), the Minister:
 - (a) must have regard to whether or not the country has given Australia any assurances to the effect that:
 - (i) the country will not expel or return a person taken to the country under section @198AD to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; and

- 1 (ii) the country will make an assessment, or permit an
2 assessment to be made, of whether or not a person taken
3 to the country under that section is covered by the
4 definition of *refugee* in Article 1A of the Refugees
5 Convention as amended by the Refugees Protocol; and
6 (b) may have regard to any other matter which, in the opinion of
7 the Minister, relates to the national interest.
- 8 (4) The assurances referred to in paragraph (3)(a) need not be legally
9 binding.
- 10 (5) The power under subsection (1) may only be exercised by the
11 Minister personally.
- 12 (6) If the Minister designates a country under subsection (1), the
13 Minister may, in writing, revoke the designation.
- 14 (7) The rules of natural justice do not apply to the exercise of the
15 power under subsection (1) or (6).
- 16 (8) A designation under subsection (1), or a revocation under
17 subsection (6), is not a legislative instrument.
- 18 (9) In this section, *country* includes:
19 (a) a colony, overseas territory or protectorate of a foreign
20 country; and
21 (b) an overseas territory for the international relations of which a
22 foreign country is responsible.

23 **@198AC Documents to be laid before Parliament**

- 24 (1) This section applies if the Minister designates a country to be an
25 offshore processing country under subsection @198AB(1).
- 26 (2) The Minister must cause to be laid before each House of the
27 Parliament:
28 (a) a copy of the designation; and
29 (b) a statement of the Minister's reasons for thinking it is in the
30 national interest to designate the country to be an offshore
31 processing country, referring in particular to any assurances
32 of a kind referred to in paragraph @198AB(3)(a) that have
33 been given by the country; and

- 1 (c) a copy of any written agreement between Australia and the
2 country relating to the taking of persons to the country; and
3 (d) a summary of any consultations with the Office of the United
4 Nations High Commissioner for Refugees about any such
5 agreement; and
6 (e) a statement about any arrangements that are in place, or are
7 to be put in place, in the country for the treatment of persons
8 taken to the country.
- 9 (3) The Minister must comply with subsection (2) within 2 sitting days
10 of each House of the Parliament after the day on which the
11 designation is made.
- 12 (4) The sole purpose of laying the documents referred to in
13 subsection (2) before the Parliament is to inform the Parliament of
14 the matters referred to in the documents and nothing in the
15 documents affects the validity of the designation. Similarly, the
16 fact that some or all of those documents do not exist does not affect
17 the validity of the designation.
- 18 (5) A failure to comply with this section does not affect the validity of
19 the designation.
- 20 (6) In this section, *agreement* includes an agreement, arrangement or
21 understanding:
22 (a) whether or not it is legally binding; and
23 (b) whether it is made before, on or after the commencement of
24 this section.

25 **@198AD Taking offshore entry persons to an offshore processing**
26 **country**

- 27 (1) Subject to sections @198AE, @198AF and @198AG, this section
28 applies to an offshore entry person who is detained under
29 section 189.
- 30 Note: For when this section applies to a transitory person, see section
31 @198AH.
- 32 (2) An officer must, as soon as reasonably practicable, take an offshore
33 entry person to whom this section applies from Australia to an
34 offshore processing country.
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Powers of an officer

- (3) For the purposes of subsection (2) and without limiting that subsection, an officer may do any or all of the following things within or outside Australia:
 - (a) place the offshore entry person on a vehicle or vessel;
 - (b) restrain the offshore entry person on a vehicle or vessel;
 - (c) remove the offshore entry person from:
 - (i) the place at which the person is detained; or
 - (ii) a vehicle or vessel;
 - (d) use such force as is necessary and reasonable.
- (4) If, in the course of taking an offshore entry person to an offshore processing country, an officer considers that it is necessary to return the person to Australia:
 - (a) subsection (3) applies until the person is returned to Australia; and
 - (b) section 42 does not apply in relation to the person's return to Australia.

Ministerial direction

- (5) If there are 2 or more offshore processing countries, the Minister must, in writing, direct an officer to take an offshore entry person, or a class of offshore entry persons, under subsection (2) to the offshore processing country specified by the Minister in the direction.
- (6) If the Minister gives an officer a direction under subsection (5), the officer must comply with the direction.
- (7) The duty under subsection (5) may only be performed by the Minister personally.
- (8) The only condition for the performance of the duty under subsection (5) is that the Minister thinks that it is in the public interest to direct the officer to take an offshore entry person, or a class of offshore entry persons, under subsection (2) to the offshore processing country specified by the Minister in the direction.
- (9) The rules of natural justice do not apply to the performance of the duty under subsection (5).

1 (10) A direction under subsection (5) is not a legislative instrument.

2 *Not in immigration detention*

3 (11) An offshore entry person who is being dealt with under
4 subsection (3) is taken not to be in *immigration detention* (as
5 defined in subsection 5(1)).

6 *Meaning of officer*

7 (12) In this section, *officer* means an officer within the meaning of
8 section 5, and includes a member of the Australian Defence Force.

9 **@198AE Ministerial determination that section @198AD does not**
10 **apply**

11 (1) If the Minister thinks that it is in the public interest to do so, the
12 Minister may, in writing, determine that section @198AD does not
13 apply to an offshore entry person.

14 Note: For specification by class, see the *Acts Interpretation Act 1901*.

15 (2) The power under subsection (1) may only be exercised by the
16 Minister personally.

17 (3) The rules of natural justice do not apply to an exercise of the power
18 under subsection (1).

19 (4) If the Minister makes a determination under subsection (1), the
20 Minister must cause to be laid before each House of the Parliament
21 a statement that:

22 (a) sets out the determination; and

23 (b) sets out the reasons for the determination, referring in
24 particular to the Minister's reasons for thinking that the
25 Minister's actions are in the public interest.

26 (5) A statement under subsection (4) must not include:

27 (a) the name of the offshore entry person; or

28 (b) any information that may identify the offshore entry person;
29 or

30 (c) if the Minister thinks that it would not be in the public
31 interest to publish the name of another person connected in

1 any way with the matter concerned—the name of that other
2 person or any information that may identify that other person.

3 (6) A statement under subsection (4) must be laid before each House
4 of the Parliament within 15 sitting days of that House after:

5 (a) if the determination is made between 1 January and 30 June
6 (inclusive) in a year—1 July in that year; or

7 (b) if the determination is made between 1 July and
8 31 December (inclusive) in a year—1 January in the
9 following year.

10 (7) The Minister does not have a duty to consider whether to exercise
11 the power under subsection (1) in respect of any offshore entry
12 person, whether the Minister is requested to do so by the offshore
13 entry person or by any other person, or in any other circumstances.

14 (8) A determination under subsection (1) is not a legislative
15 instrument.

16 **@198AF No offshore processing country**

17 Section @198AD does not apply to an offshore entry person if
18 there is no offshore processing country.

19 **@198AG Non-acceptance by offshore processing country**

20 Section @198AD does not apply to an offshore entry person if the
21 offshore processing country, or each offshore processing country
22 (if there is more than one such country), has advised an officer, in
23 writing, that the country will not accept the offshore entry person.

24 Note: For specification by class, see the *Acts Interpretation Act 1901*.

25 **@198AH Application of section @198AD to certain transitory
26 persons**

27 Section @198AD applies, subject to sections @198AE, @198AF
28 and @198AG, to a transitory person if, and only if:

29 (a) the person is an offshore entry person who is brought to
30 Australia under section 198B for a temporary purpose; and

31 (b) the person is detained under section 189; and

- 1 (c) the person no longer needs to be in Australia for the
2 temporary purpose (whether or not the purpose has been
3 achieved); and
4 (d) in the case where the person has not made a request under
5 section 198C—an assessment of whether or not the person is
6 covered by the definition of *refugee* in Article 1A of the
7 Refugees Convention as amended by the Refugees Protocol
8 was not completed while the person was in the offshore
9 processing country; and
10 (e) in the case where the person has made such a request—a
11 certificate is in force under section 198D in relation to the
12 person.

13 **Subdivision C—Transitory persons etc.**

14 **26 Subsection 198D(3) (paragraph (c) of the definition of**
15 ***uncooperative conduct*)**

16 Repeal the paragraph, substitute:

- 17 (c) the detention of the person under section 189;
18 (d) the taking of the person to an offshore processing country
19 under section @198AD;
20 (e) the detention of the person in an offshore processing country.

21 **27 At the end of section 199**

22 Add:

- 23 (4) In paragraphs (1)(a), (2)(a) and (3)(a), a reference to remove
24 includes a reference to take to an offshore processing country.

25 **28 Subparagraph 336E(2)(a)(vi)**

26 After “removed”, insert “, taken”.

27 **29 Subparagraph 336F(5)(c)(ii)**

28 Omit “to whom Australia owes”, substitute “in respect of whom
29 Australia has protection”.

30 **30 Paragraph 474(7)(a)**

31 After “197AD,”, insert “@198AE,”.

1 **31 Subsection 486B(1)**

2 After “deportation,”, insert “taking,”.

3 **32 Paragraph 486C(1)(a)**

4 After “deportation,”, insert “taking,”.

5 **33 Paragraph 494AA(1)(d)**

6 Before “section”, insert “repealed”.

7 **34 At the end of subsection 494AA(1)**

8 Add:

9 ; (e) proceedings relating to the performance or exercise of a
10 function, duty or power under Subdivision B of Division 8 of
11 Part 2 in relation to an offshore entry person.

12 **35 After paragraph 494AB(1)(c)**

13 Insert:

14 (ca) proceedings relating to the performance or exercise of a
15 function, duty or power under Subdivision B of Division 8 of
16 Part 2 in relation to a transitory person;

17 **36 Application—section @198AD of the *Migration Act 1958***

18 Section @198AD of the *Migration Act 1958*, as inserted by this
19 Schedule, applies in relation to an offshore entry person who enters
20 Australia on or after the commencement of this item.

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Schedule 2—Other amendments

Immigration (Guardianship of Children) Act 1946

1 Section 4

6 Insert:

7 *migration law* means any of the following:

- 8 (a) the *Migration Act 1958*;
- 9 (b) regulations made under that Act;
- 10 (c) any instrument made under that Act or those regulations.

2 Section 4

12 Insert:

13 *offshore processing country* has the same meaning as in the
14 *Migration Act 1958*.

3 Section 6

16 Before “The Minister”, insert “(1)”.

4 At the end of section 6

18 Add:

19 (2) Without limiting the meaning of the expression *leaves Australia*
20 *permanently* in subsection (1), a non-citizen child *leaves Australia*
21 *permanently* if:

- 22 (a) the child is removed from Australia under section 198 or 199
23 of the *Migration Act 1958*; or
- 24 (b) the child is taken from Australia to an offshore processing
25 country under section @198AD of that Act; or
- 26 (c) the child is deported under section 200 of that Act; or
- 27 (d) the child is taken to a place outside Australia under paragraph
28 245F(9)(b) of that Act.

5 Subsection 6A(4)

1 Repeal the subsection.

2 **6 Section 8 (heading)**

3 Repeal the heading, substitute:

4 **8 Operation of other laws**

5 **7 Section 8**

6 Before “Except as”, insert “(1)”.

7 **8 At the end of section 8**

8 Add:

9 (2) Nothing in this Act:

- 10 (a) affects the operation of the migration law; or
11 (b) affects the performance or exercise, or the purported
12 performance or exercise, of any function, duty or power
13 under the migration law; or
14 (c) imposes any obligation on the Minister to exercise, or to
15 consider exercising, any power conferred on the Minister by
16 or under the migration law.

17 (3) Without limiting subsection (2), nothing in this Act affects the
18 performance or exercise, or the purported performance or exercise,
19 of any function, duty or power relating to:

- 20 (a) the removal of a non-citizen child from Australia under
21 section 198 or 199 of the *Migration Act 1958*; or
22 (b) the taking of a non-citizen child from Australia to an offshore
23 processing country under section @198AD of that Act; or
24 (c) the deportation of a non-citizen child under section 200 of
25 that Act; or
26 (d) the taking of a non-citizen child to a place outside Australia
27 under paragraph 245F(9)(b) of that Act.