



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

No. 128, 2001



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An Act to make consequential provision for dealing with unauthorised arrivals in places excised from the migration zone under the *Migration Act 1958* for purposes related to unauthorised arrivals, and for related purposes

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An Act to make consequential provision for dealing with unauthorised arrivals in places excised from the migration zone under the *Migration Act 1958* for purposes related to unauthorised arrivals, and for related purposes

[Assented to 27 September 2001]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001*.

2 Commencement

This Act commences, or is taken to have commenced, at the same time as the *Migration Amendment (Excision from Migration Zone) Act 2001*.

3 Schedule(s)

- (1) Each Act, and each set of regulations, that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.
- (2) The amendment of any regulation under subsection (1) does not prevent the regulation, as so amended, from being amended or repealed by the Governor-General.
- (3) To avoid doubt, regulations amended under subsection (1) are taken to still be regulations.

4 Application of amendments

The amendment made by item 7 of Schedule 1 applies to:

- (a) the institution of proceedings on or after the day on which this Act receives the Royal Assent; and
- (b) the continuation, after the day on which this Act receives the Royal Assent, of proceedings that were instituted before that day, being proceedings instituted after the excision time for the excised offshore place concerned.

Example: Proceedings of the kind mentioned in section 494AA of the Migration Act are instituted, before the day on which this Act receives the Royal Assent, in relation to a person who became an offshore entry person by entering Australia at Christmas Island. Those proceedings cannot be continued after the day on which this Act receives the Royal Assent.

Schedule 1—Amendment of the Migration Act 1958

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

Add:

Note: See also section 198A, which provides that being dealt with under that section does not amount to *immigration detention*.

2 Subsection 189(1)

After “migration zone”, insert “(other than an excised offshore place)”.

3 Paragraph 189(2)(a)

After “migration zone”, insert “(other than an excised offshore place)”.

4 At the end of section 189

Add:

- (3) If an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer may detain the person.
- (4) If an officer reasonably suspects that a person in Australia but outside the migration zone:
 - (a) is seeking to enter an excised offshore place; and
 - (b) would, if in the migration zone, be an unlawful non-citizen;the officer may detain the person.
- (5) In subsections (3) and (4) and any other provisions of this Act that relate to those subsections, *officer* means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

5 At the end of paragraph 193(1)(c)

Add “, (3) or (4)”.

6 After section 198

Insert:

198A Offshore entry person may be taken to a declared country

- (1) An officer may take an offshore entry person from Australia to a country in respect of which a declaration is in force under subsection (3).
- (2) The power under subsection (1) includes the power to do any of the following things within or outside Australia:
 - (a) place the person on a vehicle or vessel;
 - (b) restrain the person on a vehicle or vessel;
 - (c) remove the person from a vehicle or vessel;
 - (d) use such force as is necessary and reasonable.
- (3) The Minister may:
 - (a) declare in writing that a specified country:
 - (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and
 - (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and
 - (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
 - (iv) meets relevant human rights standards in providing that protection; and
 - (b) in writing, revoke a declaration made under paragraph (a).
- (4) An offshore entry person who is being dealt with under this section is taken not to be in *immigration detention* (as defined in subsection 5(1)).
- (5) In this section, *officer* means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

7 After section 494

Insert:

494AA Bar on certain legal proceedings relating to offshore entry persons

- (1) The following proceedings against the Commonwealth may not be instituted or continued in any court:
 - (a) proceedings relating to an offshore entry by an offshore entry person;
 - (b) proceedings relating to the status of an offshore entry person as an unlawful non-citizen during any part of the ineligibility period;
 - (c) proceedings relating to the lawfulness of the detention of an offshore entry person during the ineligibility period, being a detention based on the status of the person as an unlawful non-citizen;
 - (d) proceedings relating to the exercise of powers under section 198A.
- (2) This section has effect despite anything else in this Act or any other law.
- (3) Nothing in this section is intended to affect the jurisdiction of the High Court under section 75 of the Constitution.
- (4) In this section:

Commonwealth includes:

- (a) an officer of the Commonwealth; and
- (b) any other person acting on behalf of the Commonwealth.

ineligibility period means the period from the time of the offshore entry until the time when the person next ceases to be an unlawful non-citizen.

offshore entry means an entry into Australia that occurs:

- (a) at an excised offshore place; and
- (b) after the excision time for the offshore place concerned.

Schedule 2—Amendment of the Migration Regulations 1994

[1] Schedule 1, item 1127

omit

[2] Schedule 1, Part 4, heading

substitute

Part 4 Protection, Refugee and Humanitarian visas

[3] Schedule 1, after item 1401

insert

1402. Refugee and Humanitarian (Class XB)

(1) Form: 842.

(2) Visa application charge: Nil.

(3) Other:

(a) Application must be made outside Australia.

(b) Applicant must be outside Australia.

(c) Application by a person claiming to be a member of the family unit of a person who is an applicant for a Refugee and Humanitarian (Class XB) visa may be made at the same time and place as, and combined with, the application by that person.

(4) Subclasses:

200 (Refugee)

201 (In-country Special Humanitarian)

- 202 (Global Special Humanitarian)
- 203 (Emergency Rescue)
- 204 (Woman at Risk)
- 447 (Secondary Movement Offshore Entry
(Temporary))
- 451 (Secondary Movement Relocation
(Temporary))

[4] Schedule 2, after clause 200.211

insert

- 200.212 (1) The applicant, since leaving his or her home country, has not ever resided, for a continuous period of at least 7 days, in a country in which the applicant could have sought and obtained effective protection:
- (a) of the country; or
 - (b) through the offices of the United Nations High Commissioner for Refugees located in that country.
- (2) The Minister may waive the requirement under subclause (1) if the Minister is satisfied that it is in the public interest to do so.

[5] Schedule 2, after clause 202.211

insert

- 202.212 (1) The applicant, since leaving his or her home country, has not ever resided, for a continuous period of at least 7 days, in a country in which the applicant could have sought and obtained effective protection:
- (a) of the country; or
 - (b) through the offices of the United Nations High Commissioner for Refugees located in that country.

(2) The Minister may waive the requirement under subclause (1) if the Minister is satisfied that it is in the public interest to do so.

[6] Schedule 2, after clause 204.212

insert

204.213 (1) The applicant, since leaving his or her home country, has not ever resided, for a continuous period of at least 7 days, in a country in which the applicant could have sought and obtained effective protection:

- (a) of the country; or
- (b) through the offices of the United Nations High Commissioner for Refugees located in that country.

(2) The Minister may waive the requirement under subclause (1) if the Minister is satisfied that it is in the public interest to do so.

[7] Schedule 2, after Part 446

insert

Subclass 447 Secondary Movement Offshore Entry (Temporary)

447.1 Interpretation

Note *member of the family unit* is defined in regulation 1.03.

No interpretation provisions specific to this Part.

447.2 Primary criteria

Note The primary criteria must be satisfied by at least 1 member of a family unit. Other members of the family unit who are applicants for a visa of this subclass need satisfy only the secondary criteria.

447.21 Criteria to be satisfied at time of application

447.211 The applicant:

- (a) is either:
 - (i) subject to persecution in the applicant's home country; or
 - (ii) subject to substantial discrimination, amounting to gross violation of human rights, in the applicant's home country; or
 - (iii) a female person who is subject to persecution or is registered as being of concern to the United Nations High Commissioner for Refugees; and
- (b) is an offshore entry person.

447.22 Criteria to be satisfied at time of decision

447.221 The applicant continues to satisfy the criterion in clause 447.211.

447.222 The Minister is satisfied that there are compelling reasons for giving special consideration to granting the applicant a temporary visa, having regard to:

- (a) the extent of the applicant's connection with Australia; and
 - (b) if the applicant continues to meet the requirement in subparagraph 447.211 (a) (i) — the degree of persecution to which the applicant is subject in the applicant's home country; and
 - (c) if the applicant continues to meet the requirement in subparagraph 447.211 (a) (ii) — the degree of discrimination to which the applicant is subject in the applicant's home country; and
 - (d) if the applicant continues to meet the requirement in subparagraph 447.211 (a) (iii) — whether the applicant has the protection of a male relative and is in danger of victimisation, harassment or serious abuse because of her sex; and
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- (e) whether there is any suitable country available, other than Australia, that can provide for the applicant's stay and protection from persecution, discrimination, victimisation, harassment or serious abuse; and
 - (f) the capacity of the Australian community to provide for the temporary stay of persons such as the applicant in Australia.
 - 447.223 The Minister is satisfied that temporary stay in Australia would not be contrary to the interests of Australia.
 - 447.224 Grant of the visa would not result in either:
 - (a) the number of Subclass 447 visas granted in a financial year exceeding the maximum number of Subclass 447 visas, as determined by Gazette Notice, that may be granted in that financial year; or
 - (b) the number of visas of particular classes (including Refugee and Humanitarian (Class XB) visa) granted in a financial year exceeding the maximum number of visas of those classes, as determined by Gazette Notice, that may be granted in that financial year.
 - 447.225 The applicant satisfies public interest criteria 4001, 4002, 4003, 4004 and 4007.
 - 447.226 If the applicant has previously been in Australia, the applicant satisfies special return criterion 5001.
 - 447.227 (1) In relation to the family unit of the applicant, each member of the family unit who is an applicant for a Subclass 447 visa is a person who:
 - (a) satisfies public interest criteria 4001, 4002, 4003, 4004 and 4007; and
 - (b) if he or she has previously been in Australia — satisfies special return criterion 5001.(2) In relation to the family unit of the applicant, each member of the family unit who is not an applicant for a Subclass 447 visa is a person who:
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- (a) satisfies public interest criteria 4001, 4002, 4003 and 4004; and
- (b) satisfies public interest criterion 4007, unless the Minister is satisfied that it would be unreasonable to require the person to undergo assessment in relation to that criterion.

447.3 Secondary criteria

Note These criteria must be satisfied by applicants who are members of the family unit of a person who satisfies the primary criteria.

447.31 Criteria to be satisfied at time of application

447.311 The applicant:

- (a) is a member of the family unit of a person who satisfies, or has satisfied, the criterion in clause 447.211; and
- (b) is in the same country as that person.

447.32 Criteria to be satisfied at time of decision

447.321 The applicant continues to be a member of the family unit of a person who, having satisfied the primary criteria, is the holder of a Subclass 447 visa.

447.322 If the applicant has not turned 18, public interest criteria 4017 and 4018 are satisfied in relation to the applicant.

447.323 The applicant:

- (a) satisfies public interest criteria 4001, 4002, 4003, 4004 and 4007; and
- (b) if he or she has previously been in Australia, satisfies special return criterion 5001.

447.4 Circumstances applicable to grant

447.411 The applicant must be outside Australia at the time of grant.

447.5 When visa is in effect

- 447.511 Temporary visa permitting the holder:
- (a) to travel to and enter Australia on 1 occasion, as specified by the Minister; and
 - (b) to remain in Australia until:
 - (i) if the holder applies for a visa after the temporary visa is granted and before the end of 36 months from the grant — the day on which the application is finally determined; and
 - (ii) in any other case — the end of the 36 months.

447.6 Conditions

- 447.611 The holder cannot be granted a substantive visa other than a protection visa.
- 447.612 Entry must be made before the date specified by the Minister for the purpose.
- 447.613 Condition 8502 may be imposed.

447.7 Way of giving evidence

- 447.711 Visa label affixed to a Convention travel document or valid passport.

[8] Schedule 2, after Part 450

insert

Subclass 451 Secondary Movement Relocation (Temporary)

451.1 Interpretation

Note *member of the family unit* is defined in regulation 1.03.

No interpretation provisions specific to this Part.

451.2 Primary criteria

Note The primary criteria must be satisfied by at least 1 member of a family unit. Other members of the family unit who are applicants for a visa of this subclass need satisfy only the secondary criteria.

451.21 Criteria to be satisfied at time of application

451.211 The applicant:

- (a) is either:
 - (i) subject to persecution in the applicant's home country; or
 - (ii) subject to substantial discrimination, amounting to gross violation of human rights, in the applicant's home country; or
 - (iii) a female person who is subject to persecution or is registered as being of concern to the United Nations High Commissioner for Refugees; and
- (b) is outside his or her home country and is not an offshore entry person.

451.22 Criteria to be satisfied at time of decision

451.221 The applicant continues to satisfy the criterion in clause 451.211.

451.222 The Minister is satisfied that there are compelling reasons for giving special consideration to granting the applicant a temporary visa, having regard to:

- (a) the extent of the applicant's connection with Australia; and
- (b) if the applicant continues to meet the requirement in subparagraph 451.211 (a) (i) — the degree of persecution to which the applicant is subject in the applicant's home country; and
- (c) if the applicant continues to meet the requirement in subparagraph 451.211 (a) (ii) — the degree of discrimination to which the

- applicant is subject in the applicant's home country; and
- (d) if the applicant continues to meet the requirement in subparagraph 451.211 (a) (iii) — whether the applicant has the protection of a male relative and is in danger of victimisation, harassment or serious abuse because of her sex; and
 - (e) whether there is any suitable country available, other than Australia, that can provide for the applicant's stay and protection from persecution, discrimination, victimisation, harassment or serious abuse; and
 - (f) the capacity of the Australian community to provide for the temporary stay of persons such as the applicant in Australia.
- 451.223 The Minister is satisfied that temporary stay in Australia would not be contrary to the interests of Australia.
- 451.224 Grant of the visa would not result in either:
- (a) the number of Subclass 451 visas granted in a financial year exceeding the maximum number of Subclass 451 visas, as determined by Gazette Notice, that may be granted in that financial year; or
 - (b) the number of visas of particular classes (including Refugee and Humanitarian (Class XB) visa) granted in a financial year exceeding the maximum number of visas of those classes, as determined by Gazette Notice, that may be granted in that financial year.
- 451.225 The applicant satisfies public interest criteria 4001, 4002, 4003, 4004 and 4007.
- 451.226 If the applicant has previously been in Australia, the applicant satisfies special return criterion 5001.

- 451.227 (1) In relation to the family unit of the applicant, each member of the family unit who is an applicant for a Subclass 451 visa is a person who:
- (a) satisfies public interest criteria 4001, 4002, 4003, 4004 and 4007; and
 - (b) if he or she has previously been in Australia — satisfies special return criterion 5001.
- (2) In relation to the family unit of the applicant, each member of the family unit who is not an applicant for a Subclass 451 visa is a person who:
- (a) satisfies public interest criteria 4001, 4002, 4003 and 4004; and
 - (b) satisfies public interest criterion 4007, unless the Minister is satisfied that it would be unreasonable to require the person to undergo assessment in relation to that criterion.

451.3 Secondary criteria

Note These criteria must be satisfied by applicants who are members of the family unit of a person who satisfies the primary criteria.

451.31 Criteria to be satisfied at time of application

451.311 The applicant:

- (a) is a member of the family unit of a person who satisfies, or has satisfied, the criterion in clause 451.211; and
- (b) is in the same country as that person.

451.32 Criteria to be satisfied at time of decision

451.321 The applicant continues to be a member of the family unit of a person who, having satisfied the primary criteria, is the holder of a Subclass 451 visa.

451.322 If the applicant has not turned 18, public interest criteria 4017 and 4018 are satisfied in relation to the applicant.

- 451.323 The applicant:
- (a) satisfies public interest criteria 4001, 4002, 4003, 4004 and 4007; and
 - (b) if he or she has previously been in Australia, satisfies special return criterion 5001.

451.4 Circumstances applicable to grant

- 451.411 The applicant must be outside Australia at the time of grant.

451.5 When visa is in effect

- 451.511 Temporary visa permitting the holder:
- (a) to travel to and enter Australia on 1 occasion, as specified by the Minister; and
 - (b) to remain in Australia until:
 - (i) if the holder applies for a visa after the temporary visa is granted and before the end of 60 months from the grant — the day on which the application is finally determined; and
 - (ii) in any other case — the end of the 60 months.

451.6 Conditions

- 451.611 The holder cannot be granted a substantive visa other than a protection visa.
- 451.612 Entry must be made before the date specified by the Minister for the purpose.
- 451.613 Condition 8502 may be imposed.

451.7 Way of giving evidence

- 451.711 Visa label affixed to a Convention travel document or valid passport.

[9] Schedule 2, after 866.213

insert

- 866.214 (1) The applicant has not held a Subclass 447 (Secondary Movement Offshore Entry (Temporary)) visa since last entering Australia.
- (2) The Minister may waive the requirement under subclause (1) if the Minister is satisfied that it is in the public interest to do so.
- 866.215 (1) If the applicant has held a Subclass 785 (Temporary Protection) visa since last entering Australia, the applicant, since leaving his or her home country, has not ever resided, for a continuous period of at least 7 days, in a country in which the applicant could have sought and obtained effective protection:
- (a) of the country; or
- (b) through the offices of the United Nations High Commissioner for Refugees located in that country.
- (2) The Minister may waive the requirement under subclause (1) if the Minister is satisfied that it is in the public interest to do so.

[10] Schedule 2, after 866.228

- 866.228A If the applicant holds a Subclass 451 (Secondary Movement Relocation (Temporary)) visa, the applicant has held that visa for the lesser of:
- (a) a continuous period of 54 months; and
- (b) a shorter period specified in writing by the Minister in relation to the applicant.

[11] Transitional

- (1) The amendments made by items [1] to [10] apply to an application for a visa made after the commencement of this Act.

- (2) Despite anything in items [1] to [10], item 1127 and Parts 200, 201, 202, 203 and 204 of the *Migration Regulations 1994* as they read immediately before the commencement of this Act continue to apply in relation to:
- (a) applications for Subclass 200 (Refugee), 201 (In-country Special Humanitarian), 202 (Global Special Humanitarian), 203 (Emergency Rescue) or 204 (Woman at Risk) visas made, but not finally determined within the meaning of subsection 5(9) of the *Migration Act 1958*, before the commencement of this Act; and
 - (b) Subclass 200, 201, 202, 203 or 204 visas in effect on that date.
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[*Minister's second reading speech made in—
House of Representatives on 18 September 2001
Senate on 20 September 2001*]

(183/01)