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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MIGRATION LEGISLATION AMENDMENT (OFFSHORE PROCESSING AND OTHER MEASURES) BILL 2011

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Immigration and Citizenship,
the Hon. Chris Bowen MP)

MIGRATION LEGISLATION AMENDMENT (OFFSHORE PROCESSING AND OTHER MEASURES) BILL 2011

OUTLINE

The Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011 ('the Bill') amends the *Migration Act 1958* ('the Migration Act') and the *Immigration (Guardianship of Children) Act 1946* ('the IGOC Act') to:

- replace the existing framework in the Migration Act for taking offshore entry persons to another country for assessment of their claims to be refugees as defined by the *1951 Convention Relating to the Status of Refugees* ('Refugees Convention') as amended by the *1967 Protocol Relating to the Status of Refugees* ('Refugees Protocol'); and

- clarify that provisions of the IGOC Act do not affect the operation of the Migration Act, particularly in relation to the making and implementation of any decision to remove, deport or take a non-citizen child from Australia.

On 31 August 2011, the High Court of Australia delivered judgment in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 in which it held by majority that the sole source of power under the Migration Act to take asylum seekers from Australia to another country for determination of their refugee status is that conferred by section 198A of the Migration Act and that the declaration that Malaysia is a specified country for the purposes of section 198A was made without power.

The purpose of the amendments in this Bill is to address the issues arising from the High Court of Australia's decision on 31 August 2011 in order to allow for offshore processing of the protection claims of offshore entry persons. The amendments will ensure that the Government has sufficient power to implement offshore processing arrangements. The amendments will ensure that the government of the day can determine the border protection policy that it believes is in the national interest.

The term 'national interest' has a broad meaning and refers to matters which relate to Australia's standing, security and interests. For example, these matters may include governmental concerns related to such matters as public safety, border protection, national security, defence, Australia's economic interests, Australia's international obligations and its relations with other countries. Measures for effective border management and migration controls are in the national interest.

The amendments will also ensure appropriate public accountability from the Minister for any transfer arrangements that are entered into with an offshore processing country.

In particular, the Bill amends the Migration Act to:

- insert a new statement that, to advance its object, this Act provides for the taking of offshore entry persons from Australia to an offshore processing country;
- affirm that offshore entry persons, including offshore entry persons in respect of whom Australia has or may have protection obligations, should be able to be taken to any country designated to be an offshore processing country, and the designation of a country to be an offshore processing country need not be limited by reference to the international obligations or domestic law of that country;
- impose a duty on an officer to detain, subject to a limited exemption, any offshore entry person who enters Australia;

- provide that the Minister may personally, in writing, designate that a country is an offshore processing country. If the Minister designates a country, he or she must cause a copy of the designation and a statement of reasons relating to the designation, a copy of any agreement and a statement regarding consultations with UNHCR to be laid before each House of Parliament;
- provide that, subject to certain limitations, an offshore entry person detained under section 189 must, as soon as reasonably practicable, be taken from Australia to an offshore processing country;
- provide that where there is a choice of offshore processing countries, the Minister must direct to which country a person or class of persons is to be taken;
- allow the Minister to personally determine, in writing, that an offshore entry person is not to be taken to an offshore processing country, if the Minister thinks that it is in the public interest to do so;
- provide that if an officer considers it necessary, an offshore entry person who is in the course of being taken to an offshore processing country, can be returned to Australia; and
- provide that if an offshore entry person has been brought to Australia from an offshore processing country for a temporary purpose pursuant to section 198B and they no longer need to be in Australia for that purpose, they must as soon as reasonably practicable, subject to certain limitations, be taken from Australia to an offshore processing country.

The Bill also amends the IGOC Act to:

- provide that, without limiting the meaning of the expression, a child ***leaves Australia permanently*** if the child is removed from Australia, or is taken from Australia to an offshore processing country, or is deported, or is taken to a place outside Australia, under the Migration Act;
- provide that nothing in this Act affects the operation of the migration law; or affects the performance or exercise, or the purported performance or exercise, of any function, duty or power under the migration law as defined in the Bill; or imposes any obligation on the Minister to exercise, or to consider exercising, any power conferred on the Minister by or under the migration law; and
- clarify that nothing in this Act affects the performance or exercise, or the purported performance or exercise, of any function, duty or power relating to the removal of a non-citizen child from Australia, the taking of a non-citizen child from Australia to an offshore processing country, the deportation of a non-citizen child, or the taking of a non-citizen child to a place outside Australia, under the Migration Act.

FINANCIAL IMPACT STATEMENT

The financial impact of these amendments is low. Any costs will be met from within existing resources of the Department of Immigration and Citizenship. The Office of Best Practice Regulation has been consulted and has advised that a regulatory impact statement is not required. The advice reference is 13057.

MIGRATION LEGISLATION AMENDMENT (OFFSHORE PROCESSING AND OTHER MEASURES) BILL 2011

NOTES ON INDIVIDUAL CLAUSES

Clause 1 Short title

1. Clause 1 provides that the short title by which this Act may be cited is the *Migration Legislation Amendment (Offshore Processing and Other Measures) Act 2011*.

Clause 2 Commencement

2. Clause 2 provides that this Act commences on the day after this Act receives the Royal Assent.

Clause 3 Schedule(s)

3. Clause 3 provides that 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.

SCHEDULE 1 – Offshore processing

Migration Act 1958

Item 1 At the end of section 4

1. This item amends section 4 of the *Migration Act 1958* ('the Migration Act').

2. Section 4 sets out the object of the Migration Act. Relevantly, subsection 4(1) provides that the object of the Migration Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.

3. This amendment inserts a new subsection (5) after subsection 4(4). New subsection 4(5) provides that, to advance its object, the Migration Act provides for the taking of offshore entry persons from Australia to an offshore processing country.

4. The purpose of this amendment is to affirm Parliament's intention that one way to advance the object of the Migration Act is to provide for offshore entry persons to be taken to an offshore processing country.

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

5. This item amends the note to the definition of ***immigration detention*** in subsection 5(1) of the Migration Act.

6. ***Immigration detention*** is defined in subsection 5(1) and means:

(a) being in the company of, and restrained by:

(i) an officer; or

(ii) in relation to a particular detainee—another person directed by the Secretary to accompany and restrain the detainee; or

(b) being held by, or on behalf of, an officer:

(i) in a detention centre established under this Act; or

(ii) in a prison or remand centre of the Commonwealth, a State or a Territory; or

(iii) in a police station or watch house; or

(iv) in relation to a non-citizen who is prevented, under section 249, from leaving a vessel—on that vessel; or

(v) in another place approved by the Minister in writing;

but does not include being restrained as described in subsection 245F(8A), or being dealt with under paragraph 245F(9)(b).

Note 1: See also section 198A, which provides that being dealt with under that section does not amount to *immigration detention*.

Note 2: This definition extends to persons covered by residence determinations (see section 197AC).

7. This amendment repeals the content of Note 1 to the definition of ***immigration detention*** and substitutes it with 'Subsection 198AD(11) provides that being dealt with under subsection 198AD(3) does not amount to ***immigration detention***.'

8. The purpose of this amendment is to update Note 1, relating to existing section 198A which is repealed by item 25 of Schedule 1. Relevantly, new subsection 198AD(3) sets out the actions that may be taken by an officer for the purposes of taking an offshore entry person to an offshore processing country under new subsection 198AD(2). New subsection 198AD(11)

provides that an offshore entry person who is being dealt with under new subsection 198AD(3) is taken not to be in immigration detention.

9. This item is a consequential amendment as a result of item 25 of Schedule 1.

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

10. This item amends the definition of ***offshore entry person*** in subsection 5(1) of the Migration Act.

11. ***Offshore entry person*** is defined in subsection 5(1) to mean a person who:

(a) entered Australia at an excised offshore place after the excision time for that offshore place; and

(b) became an unlawful non-citizen because of that entry.

12. ***Excised offshore place*** is defined in subsection 5(1) of the Migration Act as any of the following:

(a) the Territory of Christmas Island;

(b) the Territory of Ashmore and Cartier Islands;

(c) the Territory of Cocos (Keeling) Islands;

(d) any other external Territory that is prescribed by the regulations for the purposes of this paragraph;

(e) any island that forms part of a State or Territory and is prescribed for the purposes of this paragraph;

(f) an Australian sea installation;

(g) an Australian resources installation.

Note: The effect of this definition is to excise the listed places and installations from the migration zone for the purposes of limiting the ability of offshore entry persons to make valid visa applications.

13. An ***unlawful non-citizen*** is defined in subsection 14(1) of the Migration Act as a non-citizen in the migration zone who is not a lawful non-citizen. Subsection 13(1) of the Migration Act relevantly provides that a lawful non-citizen is a non-citizen in the migration zone who holds a visa that is in effect.

14. ***Migration zone*** relevantly means the area consisting of the States, the Territories, Australian resource installations and Australian sea installations and, to avoid doubt, includes:

(a) land that is part of a State or Territory at mean low water; and

(b) sea within the limits of both a State or a Territory and a port; and

(c) piers, or similar structures, any part of which is connected to such land or to ground under such sea;

but does not include sea within the limits of a State or Territory but not in a port.

15. This item inserts ‘has, at any time,’ before ‘entered’ in paragraph (a) of the definition of ***offshore entry person***.

16. The effect of this amendment is that a person is an offshore entry person and will retain the status of an offshore entry person, if the person *has, at any time* entered Australia at an excised offshore place after the excision time for that offshore place and became an unlawful non-citizen because of that entry.

17. This item ensures that an offshore entry person retains that status whenever they are in Australia unlawfully. This includes whether the offshore entry person is also a transitory person or whether or not their most recent entry to Australia was at an excised offshore place.

Item 4 Subsection 5(1)

18. This item amends subsection 5(1) of the Migration Act.

19. This amendment inserts a definition of ***offshore processing country*** into subsection 5(1). This new definition of ***offshore processing country*** means a country designated by the Minister under new subsection 198AB(1) as an offshore processing country.

20. This item is a consequential amendment as a result of item 25 of Schedule 1.

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

21. This item amends the definition of ***transitory person*** in subsection 5(1) the Migration Act.

22. This amendment inserts 'repealed' before 'section' in paragraph (a) of the definition of ***transitory person***.

23. ***Transitory person*** is defined in subsection 5(1) to mean:

(a) an offshore entry person who was taken to another country under section 198A; or

(b) a person who was taken to a place outside Australia under paragraph 245F(9)(b); or

(c) a person who, while a non-citizen and during the period from 27 August 2001 to 6 October 2001:

(i) was transferred to the ship *HMAS Manoora* from the ship *Aceng* or the ship *MV Tampa*; and

(ii) was then taken by *HMAS Manoora* to another country; and

(iii) disembarked in that other country;

but does not include a person who has been assessed to be a refugee for the purposes of the Refugees Convention as amended by the Refugees Protocol.

24. Paragraph (a) of the definition of ***transitory person*** currently provides that a transitory person means an offshore entry person who was taken to another country under section 198A of the Migration Act.

25. Section 198A relevantly provides that an offshore entry person may be taken to a declared country.

26. The effect of this amendment is ensure that an offshore entry person who was taken to another country under existing section 198A, which is repealed by item 25 of Schedule 1, continues to be covered by the definition of ***transitory person***.

27. This is a consequential amendment as a result of item 25 of Schedule 1.

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

28. This item amends the definition of ***transitory person*** in subsection 5(1) of the Migration Act.

29. This amendment inserts a new paragraph (aa) after paragraph (a) of the definition of ***transitory person*** in subsection 5(1) to provide that 'an offshore entry person who was taken to an offshore processing country under section 198AD' is a transitory person.

30. The purpose of this amendment is to provide that an offshore entry person who was taken to an offshore processing country under new section 198AD is a transitory person for the purposes of the Migration Act.

31. This is a consequential amendment as a result of item 25 of Schedule 1.

Item 7 Paragraph 36(2)(a)

32. This item amends paragraph 36(2)(a) in Division 3 of Part 2 of the Migration Act.

33. Section 36 deals with protection visas. Paragraph 36(2)(a) relevantly provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

34. This amendment omits 'to whom' and substitutes 'in respect of whom' in paragraph 36(2)(a).

35. The purpose of this amendment is to clarify that Australia's obligations under the Refugees Convention as amended by the Refugees Protocol are owed to Contracting States.

Item 8 Subsection 36(3)

36. This item amends subsection 36(3) in Division 3 of Part 2 of the Migration Act.

37. Subsection 36(3) currently provides that Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

38. This amendment omits 'obligations to' and substitutes 'obligations in respect of' in subsection 36(3).

39. The purpose of this amendment is to clarify that Australia's obligations under the Refugees Convention as amended by the Refugees Protocol are owed to Contracting States.

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

40. This item amends paragraph (aa) of the definition of ***application for a protection visa*** in subsection 48A(2) in Division 3 of Part 2 of the Migration Act.

41. Section 48A provides that a non-citizen refused a protection visa may not make a further application for a protection visa. Relevantly, paragraph 48A(2)(aa) currently provides that an ***application for a protection visa*** includes an application for a visa, a criterion for which is that the applicant is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

42. This amendment omits 'to whom' and substitutes 'in respect of whom' in paragraph 48A(2)(aa).

43. The purpose of this amendment is to clarify that Australia's obligations under the Refugees Convention as amended by the Refugees Protocol are owed to Contracting States.

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

44. This item amends subparagraph (ab)(i) of the definition of ***application for a protection visa*** in subsection 48A(2) in Division 3 of Part 2 of the Migration Act.

45. Subparagraph (ab)(i) of that definition currently provides that an ***application for a protection visa*** includes an application for a visa, a criterion for which is that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

46. This amendment omits 'to whom' and substitutes 'in respect of whom' in subparagraph 48A(2)(ab)(i).

47. The purpose of this amendment is to clarify that Australia's obligations under the Refugees Convention as amended by the Refugees Protocol are owed to Contracting States.

Item 11 Subsection 189(3)

48. This item amends subsection 189(3) in Division 7 of Part 2 of the Migration Act.

49. This item inserts '(other than a person referred to in subsection (3A))' after a 'person' in subsection 189(3).

50. Section 189 deals with the detention of unlawful non-citizens. Subsection 189(3) currently provides that 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.

51. Subsection 14(2) of the Migration Act provides that an unlawful non-citizen is a non-citizen in the migration zone that does not hold a visa that is in effect.

52. ***Detain*** is defined in subsection 5(1) as meaning take into immigration detention; or keep, or cause to be kept, in immigration detention. For the purposes of this amendment, the relevant part of the definition of ***immigration detention***, which is also defined in subsection 5(1), is being held by, or on behalf of, an officer:

(i) in a detention centre established under the Migration Act; or

(ii) in a prison or remand centre of the Commonwealth, a State or a Territory; or

(iii) in a police station or watch house; or

(iv) in relation to a non-citizen who is prevented, under section 249, from leaving a vessel – on that vessel; or

(v) in another place approved by the Minister in writing.

53. ***Officer*** is defined in subsection 5(1) of the Migration Act as:

(a) an officer of the Department, other than an officer specified by the Minister in writing for the purposes of this paragraph; or

(b) a person who is an officer for the purposes of the *Customs Act 1901*, other than such an officer specified by the Minister in writing for the purposes of this paragraph; or

(c) a person who is a protective service officer for the purposes of the *Australian Federal Police Act 1979*, other than such a person specified by the Minister in writing for the purposes of this paragraph; or

(d) a member of the Australian Federal Police or of the police force of a State or an internal Territory; or

(e) a member of the police force of an external Territory; or

(f) a person who is authorised in writing by the Minister to be an officer for the purposes of this Act; or

(g) any person who is included in a class of persons authorised in writing by the Minister to be officers for the purposes of this Act, including a person who becomes a member of the class after the authorisation is given.

54. The purpose of this amendment is to provide an officer with a discretion, as opposed to a mandatory duty, to detain a person if the officer knows or reasonably suspects a person in a protected area (defined in the Torres Strait Treaty) who is an allowed inhabitant of the Protected Zone (in the Torres Strait) is an unlawful non-citizen.

55. This is a consequential amendment as a result of item 13 of Schedule 1.

Item 12 Subsection 189(3)

56. This item amends subsection 189(3) in Division 7 of Part 2 of the Migration Act.

57. This amendment omits 'may detain' and substitutes it with 'must detain' in subsection 189(3).

58. The effect of this amendment is that an officer must detain a person if the officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen (other than a person in a protected area who is an allowed inhabitant of the Protected Zone and who is an unlawful non-citizen).

Item 13 After subsection 189(3)

59. This item amends section 189 in Division 7 of Part 2 of the Migration Act.

60. This amendment inserts a new subsection 189(3A) after subsection 189(3). New subsection 189(3A) provides that, if an officer knows or reasonably suspects that a person in a protected area is an allowed inhabitant of the Protected Zone, and that the person is an unlawful non-citizen, the officer may detain the person.

61. The protected area means an area that is part of the migration zone, and in, or in an area in the vicinity of, the Protected Zone.

62. The Protected Zone means the zone established under Article 10 of the Torres Strait Treaty, being the area bounded by the line described in Annex 9 to that treaty.

63. The purpose of this amendment is to allow for discretionary immigration detention of a person in a protected area (defined in the Torres Strait Treaty), who is an allowed inhabitant of the Protected Zone (in the Torres Strait), and who is an unlawful non-citizen.

64. This amendment recognises the unique operational environment and history of the Torres Strait. It effectively preserves the position as it exists currently under existing subsection 189(3) in relation to such persons and ensures that the way such protected persons are dealt with under the Migration Act at present will not be impacted by the amendments made by item 12 of Schedule 1.

Item 14 Subsection 189(5)

65. This item amends subsection 189(5) in Division 7 of Part 2 of the Migration Act.

66. This amendment inserts ',(3A)' after 'subsections (3)' in subsection 189(5).

67. The purpose of this item is to ensure that the term officer, for the purposes of new subsection 189(3A) and any other provision of the Migration Act that relate to new subsection 189(3A), means an ***officer*** within the meaning of section 5 of the Migration Act and includes a member of the Australian Defence Force.

68. This is a consequential amendment as a result of item 13 of Schedule 1.

Item 15 Paragraph 193(1)(c)

69. This item amends paragraph 193(1)(c) in Division 7 of Part 2 of the Migration Act.

70. Section 193 deals with the application of the law to certain non-citizens while they remain in immigration detention. Relevantly, paragraph 193(1)(c) provides that sections 194 and 195 do not apply to a person detained under subsection 189(2), (3) or (4).

71. Sections 194 and 195 provide that a detainee is to be told of the consequences of detention and that they may apply for a visa.

72. This amendment inserts ‘,(3A)’ before ‘or (4)’ so that sections 194 and 195 will not apply to persons detained under new subsection 189(3A).

73. This is a consequential amendment as a result of item 13 of Schedule 1.

Item 16 Subsection 196(1)

74. This item amends subsection 196(1) in Division 7 of Part 2 of the Migration Act.

75. Section 196 deals with the duration of immigration detention. Subsection 196(1) relevantly provides that an unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:

(a) removed from Australia under section 198 or 199; or

(b) deported under section 200; or

(c) granted a visa.

76. Relevantly, subsection 14(1) of the Migration Act provides that an unlawful non-citizen is a non-citizen in the migration zone who does not hold a visa that is in effect.

77. This amendment omits ‘he or she is’ in subsection 196(1).

78. This is a consequential amendment as a result of item 18 of Schedule 1.

Item 17 Paragraph 196(1)(a)

79. This item amends paragraph 196(1)(a) in Division 7 of Part 2 of the Migration Act.

80. This amendment inserts ‘he or she is’ before ‘removed’ in paragraph 196(1)(a).

81. This is a consequential amendment as a result of item 18 of Schedule 1.

Item 18 After paragraph 196(1)(a)

82. This item amends subsection 196(1) in Division 7 of Part 2 of the Migration Act.

83. This amendment inserts a new paragraph 196(1)(aa) after paragraph 196(1)(a). New paragraph 196(1)(aa) refers to when an officer begins to deal with the non-citizen under subsection 198AD(3). This means that once an officer begins to deal with a person by taking any of the actions under subsection 198AD(3), immigration detention comes to an end.

84. New subsection 198AD(3) sets out the actions that may be taken by an officer in respect of offshore entry person to whom new subsection 198AD(2) applies, such as place or restrain the offshore entry person on a vehicle or vessel. Subsection 198AD(3) does not limit the actions that might be taken under subsection 198AD(2).

85. Relevantly, new subsection 198AD(11) inserted by item 25 of Schedule 1 provides that an offshore entry person who is being dealt with under subsection 198AD(3) is taken not to be in ***immigration detention*** (as defined in subsection 5(1)).

Item 19 Paragraph 196(1)(b)

86. This item amends paragraph 196(1)(b) in Division 7 of Part 2 of the Migration Act.

87. This amendment inserts 'he or she is' before 'deported' in paragraph 196(1)(b).

88. This is a consequential amendment as a result of item 18 of Schedule 1.

Item 20 Paragraph 196(1)(c)

89. This item amends paragraph 196(1)(c) in Division 7 of Part 2 of the Migration Act.

90. This amendment inserts 'he or she is' before 'granted' in paragraph 196(1)(c).

91. This is a consequential amendment as a result of item 18 of Schedule 1.

Item 21 Subsection 196(3)

92. This item amends subsection 196(3) in Division 7 of Part 2 of the Migration Act.

93. Subsection 196(3) relevantly provides that subsection 196(1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa.

94. This amendment omits 'for removal or deportation' and substitutes it with 'as referred to in paragraph (1)(a), (aa) or (b)' in subsection 196(3).

95. This is a consequential amendment as a result of item 18 of Schedule 1.

Item 22 Division 8 of Part 2 (heading)

96. Division 8 of Part 2 to the Migration Act deals with the removal from Australia of unlawful non-citizens from Australia.

97. This amendment repeals the heading of Division 8 and substitutes a new heading 'Division 8 - Removal of unlawful non-citizens etc.'

98. This is a consequential amendment as a result of item 25 of Schedule 1, which inserts a new framework for offshore processing in Subdivision B of Division 8 of Part 2 of the Migration Act.

Item 23 Before section 198

99. Division 8 of Part 2 of the Migration Act deals with the removal from Australia of unlawful non-citizens.

100. This amendment inserts a new heading and creates a new Subdivision before section 198. The new Subdivision heading is 'Subdivision A – Removal'.

101. This is a consequential amendment as a result of item 25 of Schedule 1, which inserts a new framework for offshore processing in Subdivision B of Division 8 of Part 2 of the Migration Act.

Item 24 At the end of section 198

102. This item amends section 198 in Division 8 of Part 2 of the Migration Act.

103. Section 198 provides for the removal from Australia of unlawful non-citizens.

104. This amendment adds new subsection 198(11). New subsection 198(11) provides that this section does not apply to an offshore entry person to whom section 198AD applies.

105. The purpose of this amendment is to clarify that the powers to remove an unlawful non-citizen under section 198 of the Migration Act do not apply to an offshore entry person to whom new section 198AD applies.

106. Where an offshore entry person is not a person to whom new section 198AD applies, because of new sections 198AE, 198AF or 198AG, the power to remove under subsection 198(2) of the Migration Act will be available in circumstances where the unlawful non-citizen:

- is relevantly covered by section 193;
- has not subsequently been immigration cleared; and
- who either:
    - has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; or
    - has made a valid application for a substantive visa that can be granted when the applicant is in the migration zone, that has been finally determined.

107. Relevantly, subsection 198(3) provides that the fact that an unlawful non-citizen is eligible to apply for a substantive visa that can be granted when the applicant is in the migration zone but has not done so, does not prevent the application of subsection 198(2) to him or her.

108. This provision would allow for offshore entry persons such as crew who are not making protection claims to be removed from Australia. For those offshore entry persons who are making protection claims but who are not subject to section 198AD, their claims will be considered in Australia.

Item 25 Section 198A

109. This item amends Division 8 in Part 2 of the Migration Act.

110. The amendments in item 25 of Schedule 1 will largely replace the current framework for taking offshore entry persons to another country for assessment of their claims.

111. The amendment repeals section 198A (which provides that an offshore entry person may be taken to a declared country) and substitutes it with a new 'Subdivision B – Offshore processing'.

Section 198AA Reason for Subdivision

112. This amendment inserts section 198AA 'Reason for Subdivision' in new Subdivision B.

113. New section 198AA provides that 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.

114. The purpose of this amendment is to articulate clearly Parliament's intention and reasons for enacting new Subdivision B of Division 8 of Part 2 to the Migration Act.

Section 198AB Offshore processing country

115. This amendment inserts a new section 198AB 'Offshore processing country' after new section 198AA in new Subdivision B.

116. New subsection 198AB(1) provides that the Minister may, in writing, designate that a country is an ***offshore processing country***.

117. New subsection 198AB(2) provides that the only condition for the exercise of power under subsection 198AB(1) is that the Minister thinks that it is in the national interest to designate the country to be an offshore processing country.

118. New subsection 198AB(3) provides that in considering the national interest for the purposes of subsection 198AB(2), the Minister:

- must have regard to whether or not the country has given Australia assurances to the effect that:
    - the country will not expel or return a person taken to the country under new 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
    - the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by the definition of refugee in Article 1A of the Refugees Convention as amended by the Refugees Protocol ; and

- may have regard to any other matter which, in the opinion of the Minister, relates to the national interest.

119. The term 'national interest' has a broad meaning and refers to matters which relate to Australia's standing, security and interests. For example, these matters may include governmental concerns related to such matters as public safety, border protection, national security, defence, Australia's economic interests, Australia's international obligations and its relations with other countries. Measures for effective border management and migration controls are in the national interest.

120. The purpose of new subsection 198AB(3) is to set out what factors the Minister must have regard to as part of the national interest. It also makes it clear that the Minister may have regard to other factors that he considers to be relevant to the national interest but that he is not bound to do so.

121. The Minister must have regard to whether, given that the country does not need to be a signatory to the Refugees Convention, it has given assurances to the effect that:

- the country will not expel or return a person taken to the country under new 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

- the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by the definition of ***refugee*** in Article 1A of the Refugees Convention as amended by the Refugees Protocol.

122. New subsection 198AB(4) clarifies that the assurances referred to in paragraph 198AB(3)(a) need not be legally binding.

123. New subsection 198AB(5) provides that the power under subsection 198AB(1) may only be exercised by the Minister personally. The power cannot be delegated.

124. New subsection 198AB(6) provides that if the Minister designates a country under subsection 198AB(1), the Minister may, in writing, revoke the designation.

125. New subsection 198AB(7) provides that the rules of natural justice do not apply to the exercise of the power under subsections 198AB(1) or 198AB(6).

126. The purpose of this provision is to make clear that the Minister is not required to give a right to be heard to individuals who may be taken to a country, in relation to the designation of that country as an offshore processing country, or the revocation of such a designation.

127. New subsection 198AB(8) provides that a designation under subsection 198AB(1), or a revocation under subsection 198AB(6), is not a legislative instrument.

128. New subsection 198AB(9) provides that in this section, ***country*** includes a colony, overseas territory or protectorate of a foreign country; and an overseas territory for the international relations of which a foreign country is responsible.

Section 198AC Documents to be laid before Parliament

129. This amendment inserts a new section 198AC 'Documents to be laid before Parliament' after new section 198AB in new Subdivision B.

130. New subsection 198AC(1) provides that section 198AC applies if the Minister designates a country to be an offshore processing country under subsection 198AB(1).

131. New subsection 198AC(2) provides that the Minister must cause to be laid before each House of the Parliament:

(a) a copy of the designation; and

(b) a statement of the Minister's reasons for thinking it is in the national interest to designate the country to be an offshore processing country, referring in particular to any assurances of a kind referred to in paragraph 198AB(3)(a) that have been given by the country; and

(c) a copy of any written agreement between Australia and the country relating to the taking of persons to the country; and

(d) a statement about the Minister's consultations with the Office of the United Nations High Commissioner for Refugees in relation to the designation, including the nature of those consultations; and

(e) a summary of any advice received from that Office in relation to the designation; and

(f) a statement about any arrangements that are in place, or are to be put in place, in the country for the treatment of persons taken to the country.

132. New subsection 198AC(3) provides that the Minister must comply with subsection 198AC(2) within 2 sitting days of each House of the Parliament after the day on which the designation is made.

133. New subsection 198AC(4) provides that the sole purpose of laying the documents referred to in subsection 198AC(2) before the Parliament is to inform the Parliament of the matters referred to in the documents and nothing in the documents affects the validity of the designation. Similarly, the fact that some or all of those documents do not exist at the time the designation was made does not affect the validity of the designation.

134. New subsection 198AC(5) provides that a failure to comply with this section does not affect the validity of the designation.

135. New subsection 198AC(6) provides that in this section, ***agreement*** includes an agreement, arrangement or understanding whether or not it is legally binding, and whether it is made before, on or after the commencement of this section.

136. The purpose of the amendments made by section 198AC is to provide a mechanism for the Minister to ensure there is public and political accountability to the Parliament regarding the selection of offshore processing countries.

Section 198AD Taking offshore entry persons to an offshore processing country

137. This amendment inserts a new section 198AD 'Taking offshore entry persons to an offshore processing country' after new section 198AC in new Subdivision B.

138. New subsection 198AD(1) provides that subject to sections 198AE, 198AF and 198AG, this section applies to an offshore entry person who is detained under section 189. New sections 198AE, 198AF and 198AG provide for when new section 198AD does not apply to an offshore entry person.

139. New subsection 198AD(1) has a note that provides, for when this section applies to a transitory person, see section 198AH. New section 198AH provides for the application of new section 198AD to certain transitory persons.

140. New subsection 198AD(2) provides that an officer must, as soon as reasonably practicable, take an offshore entry person to whom this section applies from Australia to an offshore processing country.

141. If it is not appropriate to take an offshore entry person to an offshore processing country, having regard to their personal circumstances, the person's case would be referred to the Minister for consideration of the exercise of his or her personal power under section 198AE.

Powers of an officer

142. New subsection 198AD(3) provides that for the purposes of subsection 198AD(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 the place at which the person is detained, or a vehicle or vessel;

    (d) use such force as is necessary and reasonable.

143. The purpose of subsection 198AD(3) is to provide officers, when acting under subsection 198AD(2), whether within or outside Australia, with power to take actions in respect of an offshore entry person to whom section 198AD applies and use such force as is necessary and reasonable, for the purposes of taking the offshore entry person to an offshore processing country. Subsection 198AD(3) does not limit the actions that may be taken under subsection 198AD(2).

144. New subsection 198AD(4) provides that 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, subsection 198AD(3) applies until the person is returned to Australia, and section 42 of the Migration Act does not apply in relation to the person's return to Australia. Section 42 of the Act provides that a non-citizen must not travel to Australia without a visa that is in effect, subject to certain exceptions.

145. The purpose of new subsection 198AD(4) is to ensure that an officer continues to have the powers set out in new subsection 198AD(3) to return the person to Australia, if the officer considers it necessary. This may arise in situations, for example, where a plane taking a person to an offshore processing country has to turn around and return to Australia for emergency reasons. Further, this amendment also makes clear that section 42 does not apply so that the person does not require a visa to travel to Australia.

Ministerial direction

146. New subsection 198AD(5) provides that 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 198AD(2) to the offshore processing country specified by the Minister in the direction.

147. The effect of subsection 198AD(5) is that the Minister has a duty, where there are 2 or more offshore processing country designated under new subsection 198AB(1), to direct officers as to which offshore processing country an offshore entry person, or a class of offshore entry persons, is to be taken under new subsection 198AD(2). This will allow the Minister to manage a number of considerations such as where it may not be appropriate to take a person, or a class of persons, to a particular offshore processing country, or to manage offshore processing arrangements in a strategic manner.

148. New subsection 198AD(6) provides that if the Minister gives an officer a direction under subsection 198AD(5), the officer must comply with the direction.

149. New subsection 198AD(7) provides that the duty under subsection 198AD(5) may only be performed by the Minister personally. The duty cannot be delegated.

150. New subsection 198AD(8) provides that the only condition for the performance of the duty under subsection 198AD(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 198AD(2) to the offshore processing country specified by the Minister in the direction.

151. The effect of new subsection 198AD(8) is that the only consideration for the Minister in making a direction under new subsection 198AD(5) is that the Minister thinks it is in the public interest to do so.

152. New subsection 198AD(9) provides that the rules of natural justice do not apply to the performance of the duty under subsection 198AD(5).

153. The purpose of subsection 198AD(9) is to make clear that the Minister is not required to give a right to be heard to individuals who may be taken to a country, in relation to a direction to an officer under new subsection 198AD(5).

154. New subsection 198AD(10) provides that a direction under subsection 198AD(5) is not a legislative instrument.

Not in immigration detention

155. New subsection 198AD(11) provides that an offshore entry person who is being dealt with under subsection 198AD(3) is taken not to be in ***immigration detention*** (as defined in subsection 5(1) of the Migration Act). New subsection 198AD(3) provides officers, when acting under subsection 198AD(2), whether within or outside Australia, with power to take certain actions in respect of an offshore entry person to whom section 198AD applies and use such force as necessary and reasonable, for the purposes of taking the offshore entry person to an offshore processing country.

156. The purpose of subsection 198AD(11) is to clarify that an offshore entry person to whom section 198AD applies is taken not to be ***immigration detention*** (as defined in subsection 5(1)) when the offshore entry person is being dealt with under subsection 198(3). An officer will begin dealing with a person under new subsection 198(3) when the officer commences any of the actions referred to in that subsection for the purpose of taking the person from Australia, either using reasonable force or with the person's cooperation.

Meaning of officer

157. New subsection 198AD(12) provides that in this section, ***officer*** means an officer within the meaning of section 5 of the Migration Act, and includes a member of the Australian Defence Force.

Section 198AE Ministerial determination that section 198AD does not apply

158. This amendment inserts a new section 198AE 'Ministerial determination that section 198AC does not apply' after new section 198AD in new Subdivision B.

159. New subsection 198AE(1) provides that if the Minister thinks that it is in the public interest to do so, the Minister may, in writing, determine that section 198AD does not apply to an offshore entry person.

160. New subsection 198AE(1) directs the reader to the *Acts Interpretation Act 1901* for specification by class.

161. The purpose of new subsection 198AE(1) is to allow the Minister, if he or she thinks it is in the public interest, to determine in writing that section 198AD does not apply to an offshore entry person. The reference to the *Acts Interpretation Act 1901* in the note to new subsection 198AE(1) clarifies that a determination may be relate to a class of offshore entry persons.

162. This is the mechanism whereby the Minister can exempt persons from the duty to be taken to an offshore processing country where the individual assessment of their circumstances that is undertaken prior to a person being taken to an offshore processing country, indicates that taking the person to that country would not be appropriate. For example, the person may have vulnerabilities that cannot be accommodated in the offshore processing country, or have protection claims against the offshore processing country (in addition to those they claim to have against their country of origin or habitual residence).

163. Where the Minister makes a determination under subsection 198AE(1), the expectation is that any refugee status claims made by the person concerned would be processed in Australia.

164. The claims of an offshore entry person to whom section 198AD does not apply because of new section 198AE, would be assessed in Australia. If, after having their claims considered, the person is found not to be in need of protection, the appropriate power for their removal from Australia would be section 198.

165. New subsection 198AE(2) provides that the power under subsection 198AE(1) may only be exercised by the Minister personally. The power cannot be delegated.

166. New subsection 198AE(3) provides that the rules of natural justice do not apply to an exercise of the power under subsection 198AE(1).

167. The purpose of new subsection 198AE(3) is to make clear that the Minister is not required to give a right to be heard to affected individuals in relation to the exercise of the Minister's non-compellable power to determine that section 198AD does not apply to an offshore entry person.

168. New subsection 198AE(4) provides that if the Minister makes a determination under subsection 198AE(1), the Minister must cause to be laid before each House of the Parliament a statement that sets out the determination, and sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that the Minister's actions are in the public interest.

169. New subsection 198AE(5) provides that a statement under subsection 198AE(4) must not include:

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

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

(c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned — the name of that other person or any information that may identify that other person.

170. New subsection 198AE(6) provides that a statement under subsection 198AE(4) must be laid before each House of the Parliament within 15 sitting days of that House after:

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

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

171. The purpose of new subsections 198AE(4), (5) and (6) is to provide a mechanism for the Minister to ensure public and political accountability to the Parliament should the Minister determine that new section 198AD should not to apply to an offshore entry person. Further, new subsection 198AE(5) ensures that the identity of an offshore entry person the subject of a ministerial determination made under new section 198AE is protected.

172. New subsection 198AE(7) provides that the Minister does not have a duty to consider whether to exercise the power under subsection 198AE(1) in respect of any offshore entry person, whether the Minister is requested to do so by the offshore entry person or by any other person, or in any other circumstances.

173. The purpose of subsection 198AE(7) is to put beyond doubt that the Minister does not have a duty to consider whether to exercise the power to make a determination, whether the Minister is requested to do so by any person, or in any other circumstances. There may be circumstances where the Minister is requested to a make determination, but the Minister is not under any duty or obligation to take into account such requests when choosing whether or not to exercise the power in new subsection 198AE(1). Similarly, the Minister will not be required to consult any person, including a person covered by a determination, prior to the making of a determination or a decision not to make a determination.

174. New subsection 198AE(8) provides that a determination under subsection 198AE(1) is not a legislative instrument.

Section 198AF No offshore processing country

175. This amendment inserts a new section 198AF 'No offshore processing country' after new section 198AE in new Subdivision B.

176. New section 198AF provides that section 198AD does not apply to an offshore entry person if there is no offshore processing country.

177. The effect of this amendment is that if there is no offshore processing country that has been designated by the Minister under new section 198AB, an officer would not be obliged to take an offshore entry person to an offshore processing country under new subsection 198AD(2).

178. The claims of an offshore entry person to whom section 198AD does not apply because of new section 198AF, would be assessed in Australia. If, after having their claims considered, the person is found not to be in need of protection, the appropriate power for their removal from Australia would be section 198.

Section 198AG Non-acceptance by offshore processing country

179. This amendment inserts a new section 198AG 'Non-acceptance by offshore processing country' after new section 198AF in new Subdivision B.

180. New section 198AG directs the reader to the *Acts Interpretation Act 1901* for specification by class.

181. New section 198AG provides that section 198AD does not apply to an offshore entry person if the offshore processing country, or each offshore processing country (if there is more than one such country), has advised an officer, in writing, that the country will not accept the offshore entry person.

182. The effect of this amendment is that if the offshore processing country, or each offshore processing country (if there is more than one) has advised an officer in writing that the country will not accept the offshore entry person, an officer would not be obliged to take that offshore entry person to an offshore processing country under new subsection 198AD(2).

183. This circumstance may arise for instance where a country is designated as an offshore processing country but the arrangement with that country allows it to refuse to accept an individual, for example, for security reasons. It may also apply where a country is designated but cannot accept any additional persons for processing.

184. The claims of an offshore entry person to whom section 198AD does not apply because of new section 198AG, would be assessed in Australia. If, after having their claims considered, the person is found not to be in need of protection, the appropriate power for their removal from Australia would be section 198.

Section 198AH Application of section 198AD to certain transitory persons

185. This amendment inserts a new section 198AH 'Application of section 198AD to certain transitory persons' after new section 198AG in new Subdivision B.

186. New section 198AH provides that this section 198AD applies, subject to sections 198AE, 198AF and 198AG, to a transitory person if, and only if:

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

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

(c) the person no longer needs to be in Australia for the temporary purpose (whether or not the purpose has been achieved); and

(d) in the case where the person has not made a request under section 198C — an assessment of whether or not the person is covered by the definition of ***refugee*** in Article 1A of the Refugees Convention as amended by the Refugees Protocol was not completed while the person was in the offshore processing country; and

(e) in the case where the person has made such a request — a certificate is in force under section 198D in relation to the person.

187. The purpose of this amendment is to ensure that section 198AD applies to certain transitory persons who are in immigration detention under section 189 of the Migration Act, when the person no longer needs to be in Australia for the temporary purpose (whether or not the purpose has been achieved), to re-take the person back to an offshore processing country in order for the assessment of their claims to be completed, unless there is:

- a Ministerial determination that new section 198AD does not apply (new section 198AE);
- there is no offshore processing country (new section 198AF); or
- there has been non-acceptance by an offshore processing country (new section 198AG).

188. The provision only applies to offshore entry persons who have been taken to an offshore processing country who are then brought back to Australia pursuant to section 198B. This means that a person who is purely a transitory person and not also an offshore entry person, for example, a person taken directly to an offshore processing country pursuant to subsection 245F(9), will not be covered by this provision.

189. The intention is that if the person has not had their claims determined in the offshore processing country before being returned to Australia temporarily, that they will be taken back to that offshore processing country or another offshore processing country for processing. If the person had been determined to not be a refugee in the offshore processing country prior to being brought back they would need to be removed from Australia under section 198.

190. If the person has made a request under section 198C for a determination by the Refugee Review Tribunal, the power to take them to an offshore processing country (new section 198AH) will not be available unless the request is not an active request because there is a certificate of non-cooperation in place.

191. Transitory persons who are solely transitory persons and not also offshore entry persons will not be subject to new section 198AH and therefore to being taken to an offshore processing country under new section 198AD. These transitory persons will be liable to removal under subsection 198(1A) as soon as reasonably practicable after the person no longer needs to be in Australia for the temporary purpose for which they were brought to Australia under section 198B.

Subdivision C Transitory persons etc.

192. This amendment inserts a new heading 'Subdivision C – Transitory Persons etc.' in Division 8 of Part 2 of the Migration Act.

193. The purpose of this amendment is to clarify that new Subdivision C of Division 8 of Part 2 of the Migration Act deals with transitory persons.

194. This is a consequential amendment as a result of item 25 of Schedule 1, which inserts a new framework for offshore processing in Subdivision B of Division 8 of Part 2 of the Migration Act.

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

195. This item amends paragraph (c) of the definition of ***uncooperative conduct*** in subsection 198(3) in Division 8 of Part 2 of the Migration Act.

196. Section 198D deals with a certificate of non-cooperation, and provides that if the Secretary is satisfied that a transitory person has engaged in uncooperative conduct, either before or after the person was brought to Australia, then the Secretary may issue a certificate to that effect to the Tribunal.

197. ***Uncooperative conduct*** is defined in subsection 198D(3) as refusing or failing to cooperate with relevant authorities in connection with any of the following:

(a) attempts to return the person to a country where the person formerly resided;

(b) attempts to facilitate the entry or stay of the person in another country;

(c) the detention of the person in a country in respect of which a declaration is in force under subsection 198A(3).

198. This amendment repeals paragraph (c) of the definition of ***uncooperative conduct*** in subsection 198D(3) and substitutes it with a new paragraph (c) which provides 'the detention of the person under section 189;'.

199. This amendment also inserts new paragraphs (d) and (e) of the definition of ***uncooperative conduct*** in subsection 198D(3). New paragraph (d) provides 'the taking of the person to an offshore processing country under section 198AD'. New paragraph (e) provides 'the detention of the person in an offshore processing country'.

200. The purpose of this amendment is to refine the meaning of ***uncooperative conduct*** in section 198D to include refusing or failing to cooperate with relevant authorities in connection with the detention of the person under section 189; the taking of the person to an offshore processing country under new section 198AD and the detention of the person in an offshore processing country.

Item 27 At the end of section 199

201. This item amends section 199 in Division 8 of Part 2 of the Migration Act.

202. Section 199 deals with dependants of removed non-citizens and allows for the removal of dependents where they have requested to also be removed from Australia.

203. This amendment will add a new subsection (4) after subsection 199(3). New subsection (4) provides that 'in paragraphs 199(1)(a), 199(2)(a) and 199(3)(a), a reference to remove includes a reference to take to an offshore processing country'.

204. The purpose of this item is to ensure that officers have the power to remove from Australia, as soon as reasonably practicable, spouses, de facto partners and dependent children of offshore entry persons who are to be taken or are about to be taken to an offshore processing country. This could only be done in circumstances where the spouse, de facto partner or the non-citizen/spouse/de facto partner on behalf of the dependent child, requests that they also be removed from Australia, and the offshore processing country agrees to receive the person or persons.

205. The discretion for an officer to decide to remove a spouse, de facto partner or child of the person to be taken to an offshore processing country would need to be exercised with regard to whether the offshore processing country or some other country has agreed to accept them.

Item 28 Subparagraph 336E(2)(a)(vi)

206. This item amends subparagraph 336E(2)(a)(vi) in Division 3 of Part 4A of the Migration Act.

207. Section 336E deals with the disclosure of identifying information. Relevantly, subparagraph 336E(2)(a)(vi) provides that a permitted disclosure of identifying information is a disclosure that is for the purpose of data-matching in order to inform the governments of foreign countries of the identity of non-citizens who are, or are to be, removed or deported from Australia.

208. This amendment inserts ',taken' after 'removed' in subparagraph 336E(2)(a)(vi).

209. The purpose of this amendment is to allow the disclosure of a personal identifier, as defined in section 5A of the Migration Act, as a permitted disclosure for the purposes of data-matching in order to inform the governments of foreign countries of the identity of non-citizens who are, or are to be taken from Australia under the new offshore processing framework in Subdivision B of Division 8 of Part 2 of the Migration Act.

210. It is intended that the foreign governments would only relevantly be the governments of offshore processing countries designated by the Minister under new section 198AD to which an offshore entry person to whom new section 198AD applies could be taken under new Subdivision B of Division 8 of Part 2 of the Migration Act.

Item 29 Subparagraph 336F

211. This item amends subparagraph 336F(5)(c)(ii) in Division 3 of Part 4A of the Migration Act.

212. Section 336F provides for authorising the disclosure of identifying information to foreign countries etc.

213. This amendment will omit 'to whom Australia owes' and substitute it with 'in respect of whom Australia has protection' in subparagraph 336F(5)(c)(ii).

214. The purpose of this amendment is to clarify that Australia's obligations under the Refugees Convention as amended by the Refugees Protocol are owed to Contracting States.

Item 30 Paragraph 474(7)(a)

215. This item amends paragraph 474(7)(a) in Division 1 of Part 8 of the Migration Act.

216. Section 474 provides that certain decisions under the Migration Act are final. Paragraph 474(7)(a) relevantly provides that a decision of the Minister not to exercise, or not to consider the exercise, of the Minister's power under subsection 37A(2) or (3), section 48B, paragraph 72(1)(c), section 91F, 91L, 91Q, 195A, 197AB, 197AD, 351, 391, 417, 454, or subsection 503A(3) are privative clause decisions.

217. Paragraph 474(1)(a) provides that a privative clause decision is final and conclusive.

218. This amendment inserts '198AE' after '197AD,' in paragraph 474(7)(a).

219. This item provides that a decision of the Minister to exercise or not to consider the exercise of the non-compellable power under new section 198AE is a privative clause decision.

220. This is to achieve consistency with other provisions in the Migration Act relating to the exercise of the Minister's non-compellable power.

Item 31 Subsection 486B(1)

221. This item amends subsection 486B(1) in Part 8A of the Migration Act.

222. Part 8A of the Migration Act deals with restrictions on court proceedings, and section 486B deals with multiple parties in migration litigation. Subsection 486B(1) relevantly provides that this section applies to all migration proceedings in the High Court, the Federal Court or the Federal Magistrates Court that raise an issue in connection with visas (including if a visa is not granted or has been cancelled), deportation or removal of unlawful non-citizens.

223. This amendment inserts 'taking,' after 'deportation,' in subsection 486B(1).

224. The purpose of this amendment is to allow a court to consolidate migration proceedings in the High Court, the Federal Court or the Federal Magistrates Court that raise an issue in connection with the taking of unlawful non-citizens under new Subdivision B of Division 8 of Part 2 of the Migration Act.

Item 32 Paragraph 486C(1)(a)

225. This item amends paragraph 486C(1)(a) in Part 8A of the Migration Act. Section 486C deals with persons who may commence or continue proceedings in the Federal Magistrates Court or the Federal Court. Paragraph 486C(1)(a) relevantly provides that only a person mentioned in this section may commence or continue a proceeding in the Federal Magistrates Court or the Federal Court that raises an issue in connection with visas (including if a visa is not granted or has been cancelled), deportation, or removal of unlawful non-citizens.

226. This item inserts 'taking,' after 'deportation,' in paragraph 486C(1)(a).

227. This is a consequential amendment as a result of item 25. This amendment does not give an offshore entry person an independent right to seek judicial review in the Federal Court or Federal Magistrates Court.

228. It should be noted that the amendment made by item 34 of Schedule 1 prohibits proceedings against the Commonwealth relating to the performance or exercise of a function, duty or power under new Subdivision B of Division 8 of Part 2 of the Migration Act in relation to an offshore entry person from being instituted or continued in any court.

229. To avoid doubt, subsection 486C(4) provides that nothing in section 486C allows a person to commence or continue a proceeding that the person could not otherwise commence or continue.

Item 33 Paragraph 494AA(1)(d)

230. This item amends paragraph 494AA(1)(d) in Part 9 of the Migration Act.

231. Section 494AA provides for a bar on certain legal proceedings relating to offshore entry persons. Subsection 494AA(1) relevantly provides that the following proceedings against the Commonwealth may not be instituted or continued in any court:

(a) proceedings in relation 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.

232. This amendment inserts 'repealed' before 'section' in paragraph 494AA(1)(d).

233. The purpose of this amendment is to ensure that proceedings relating to the exercise of powers under section 198A as in force prior to the commencement of this amending Act continue to be prohibited under section 494AA of the Migration Act following the commencement of this Act.

234. This is a consequential amendment as a result of item 25 of Schedule 1.

Item 34 At the end of subsection 494AA(1)

235. This item amends subsection 494AA(1) in Part 9 of the Migration Act

236. This amendment inserts a new paragraph (e) after paragraph 494AA(1)(d). New paragraph 494AA(1)(e) provides that 'proceedings relating to the performance or exercise of a function, duty or power under Subdivision B of Division 8 of Part 2 in relation to an offshore entry person.'

237. Under section 494AA, certain legal proceedings against the Commonwealth relating to offshore entry persons may not be instituted or continued in any court.

238. Subsection 494AA defines ***Commonwealth*** to include an officer of the Commonwealth and any other person acting on behalf of the Commonwealth.

239. New paragraph 494AA prohibits proceedings against the Commonwealth relating to the performance or exercise of a function, duty or power under new Subdivision B of Division 8 of Part 2 of the Migration Act in relation to an offshore entry person.

240. The effect of this amendment is that proceedings against the Commonwealth relating to any performance or exercise of a function, duty or power under new Subdivision B of Division 8 of Part 2 of the Migration Act in relation to an offshore entry person cannot be instituted or continued in any court. However, this amendment does not affect the jurisdiction of the High Court under section 75 of the Constitution.

Item 35 After paragraph 494AB(1)(c)

241. This item amends subsection 494AB(1) in Part 9 of the Migration Act.

242. This amendment inserts a new paragraph (ca) after paragraph 494AB(1) (c). New paragraph 494AB(1)(ca) provides that proceedings relating to the performance or exercise of a function, duty or power under Subdivision B of Division 8 of Part 2 in relation to a transitory person'.

243. Under section 494AB certain legal proceedings against the Commonwealth relating to transitory persons may not be instituted or continued in any court.

244. New paragraph 494AB(1)(ca) prohibits proceedings against the Commonwealth relating to the performance or exercise of a function, duty or power under new Subdivision B of Division 8 of Part 2 in relation to a transitory person.

245. The effect of this amendment is that legal proceedings against the Commonwealth relating to any performance or exercise of a function, duty or power under new Subdivision B of Division 8 of Part 2 of the Migration Act in relation to a transitory person cannot be instituted or continued in any court. However, this amendment does not affect the jurisdiction of the High Court under section 75 of the Constitution.

Part 2 – Application provisions

Item 36 Application – section 198AD of the *Migration Act 1958*

246. This item provides that section 198AD of the Migration Act, as inserted by this Schedule, applies in relation to an offshore entry person who enters Australia on or after the commencement of this item.

247. This amendment provides for the application of new section 198AD of the Migration Act 1958, as inserted by this Schedule 1.

248. Section 198AD of the Migration Act 1958, as inserted by item 25 of Schedule 1, applies in relation to an offshore entry person who enters Australia on or after the commencement of this item. Clause 2 relevantly provides that this Act commences on the day after this Act receives the Royal Assent.

249. The effect of this amendment is that new section 198AD applies in relation to offshore entry persons who enter Australia on or after the commencement of this item.

SCHEDULE 2 – Other amendments

Immigration (Guardianship of Children) Act 1946

Item 1 Section 4

250. This item amends section 4 of the *Immigration (Guardianship of Children) Act 1946* ('the IGOC Act').

251. Section 4 of the IGOC Act deals with definitions.

252. This amendment inserts a new definition, ***migration law***, which means the Migration Act, the regulations made under the Migration Act, or any instrument made under that Act or those regulations.

253. The term ***migration law*** is used in the new provisions inserted by item 8 of Schedule 2. The insertion of this definition is a result of amendments made by that item.

254. This amendment aims to assist readers by avoiding the need to individually specify the Act, Regulations and legislative instruments where all three are applicable.

Item 2 Section 4

255. This item amends section 4 of the IGOC Act.

256. This amendment inserts a new definition, ***offshore processing country***, which has the same meaning as it has in the Migration Act.

257. ***Offshore processing country*** is defined at subsection 5(1) of the Migration Act (as amended by item 4 of Schedule 1) to mean a country designated by the Minister under new subsection 198AB(1) as an offshore processing country. New section 198AB is inserted into the Migration Act by item 25 of Schedule 1.

258. The term ***offshore processing country*** is used in new provisions inserted by item 4 and item 8 of Schedule 2. The insertion of this definition is a result of amendments made by that item.

Item 3 Section 6

259. This item amends section 6 of the IGOC Act.

260. Section 6 of the IGOC act deals with the guardianship of non-citizen children. Section 6 relevantly provides that:

> The Minister shall be the guardian of the person, and of the estate in Australia, of every non-citizen child who arrives in Australia after the commencement of this Act to the exclusion of the parents and every other guardian of the child, and shall have, as guardian, the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have, until the child reaches the age of 18 years or leaves Australia permanently, or until the provisions of this Act cease to apply to and in relation to the child, whichever first happens.

261. This amendment inserts '(1)' before 'The Minister' in section 6. The effect of this amendment is that the current content of section 6 becomes subsection 6(1).

262. This is a consequential amendment as a result of item 4 of Schedule 2.

Item 4 At the end of section 6

263. This item amends section 6 of the IGOC Act.

264. This amendment adds a new subsection 6(2) after new subsection 6(1) (as amended by item 3 of Schedule 2) of the IGOC Act.

265. New subsection 6(2) provides that without limiting the meaning of ***leaves Australia permanently*** in subsection 6(1), a non-citizen child leaves Australia permanently if they:

a. are removed from Australia under section 198 or 199 of the Migration Act; or

b. are taken from Australia to an offshore processing country under section 198AD of the Migration Act; or

c. are deported under section 200 of the Migration Act; or

d. are taken to a place outside Australia under paragraph 245F(9)(b) of the Migration Act.

266. The purpose of this amendment is to put beyond doubt that the circumstances stated in paragraphs to new subsection 6(2) are circumstances in which a child is taken to have left Australia permanently. The list is non-exhaustive, and as such the natural meaning of the expression ***leaves Australia permanently*** is not limited to the circumstances listed in the paragraphs to new subsection 6(2).

Item 5 Subsection 6A(4)

267. This item repeals subsection 6A(4) of the IGOC Act.

268. Section 6A of the IGOC Act deals with the giving of consent for non-citizen child to leave Australia.

269. Relevantly, subsection 6A(4) provided that section 6A shall not affect the operation of any other law regulating the departure of persons from Australia.

270. In *Plaintiff M106 of 2011 by his litigation guardian, Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 the High Court of Australia held that laws providing for the compulsory removal of certain persons from Australia or taking such persons to another country are not laws "regulating the departure of persons from Australia". In the absence of these amendments the effect of this decision is that no unaccompanied minor who is subject to the IGOC Act can be removed, taken or deported from Australia in the exercise of any power under the Migration Act unless the Minister for Immigration and Citizenship, in the exercise of a separate statutory power as guardian of that minor, gives written consent to the removal or taking from Australia, having regard to the minor's interests.

271. The High Court's decision does not align with the Government's policy intention which is that the Minister's consent under section 6A of the IGOC Act is not required for a non-citizen child to be removed, taken or deported from Australia under the Migration Act. This intention is given effect by item 8 of Schedule 2. As such, this amendment is a consequential amendment as a result of item 8. Subsection 6A(4) is effectively replaced by the amendments to section 8 made by item 8 of Schedule 2.

Item 6 Section 8 (heading)

272. This item amends section 8 of the IGOC Act.

273. Currently, the heading of section 8 of the IGOC Act provides 'Saving of application of State laws' and the section provides that except as prescribed, nothing in the IGOC Act shall affect the operation in relation to non-citizen children of any provision of the laws of any State or Territory relating to child welfare.

274. This amendment repeals the heading to section 8 'Saving of application of State laws' and substitutes it with 'Operation of other laws'.

275. This is a consequential amendment as a result of item 8 of Schedule 2.

Item 7 Section 8

276. This item amends section 8 of the IGOC Act.

277. This amendment inserts '(1)' before 'Except as'. The effect of this amendment is that section 8 becomes subsection 8(1).

278. This is a consequential amendment as a result of item 8 of Schedule 2.

Item 8 At the end of section 8

279. This item amends section 8 of the IGOC Act.

280. This amendment inserts new subsections 8(2) and 8(3) after subsection 8(1) of the IGOC Act.

281. New subsection 8(2) provides that nothing in the IGOC Act affects the operation of the migration law, or the performance or exercise, or the purported performance or exercise, of any function, duty or power under the migration law, or imposes any obligation on the Minister to exercise, or to consider exercising, any power conferred on the Minister by or under the migration law.

282. ***Migration law*** for the purposes of new subsection 8(2) is a new defined term inserted into section 4 by item 1 of Schedule 2.

283. New subsection 8(3) provides that without limiting subsection 8(2), nothing in the IGOC Act affects the performance or exercise, or the purported performance or exercise, of any function, duty or power relating to:

(a) the removal of a non-citizen child from Australia under section 198 or 199 of the Migration Act; or

(b) the taking of a non-citizen child from Australia to an offshore processing country under section 198AD of the Migration Act; or

(c) the deportation of a non-citizen child under section 200 of the Migration Act; or

(d) taking of a non-citizen child to a place outside Australia under paragraph 245F(9)(b) of the Migration Act.

284. The purpose of this amendment is to restore the law to the position as it was understood prior to the High Court of Australia's decision in *Plaintiff M106 of 2011 by his litigation guardian, Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32. That is, it will clarify that the *Migration Act 1958* is not subject to the IGOC Act. For example, it is intended that the Minister's consent under section 6A of the IGOC Act will not be required before a non-citizen child may be removed, taken or deported from Australia under the Migration Act.

285. The matters listed in the paragraphs to new subsection 8(3) are intended to put it beyond doubt that the IGOC Act does not affect those matters. It is not an exhaustive list of all circumstances that fall within the meaning of new subsection 8(2).