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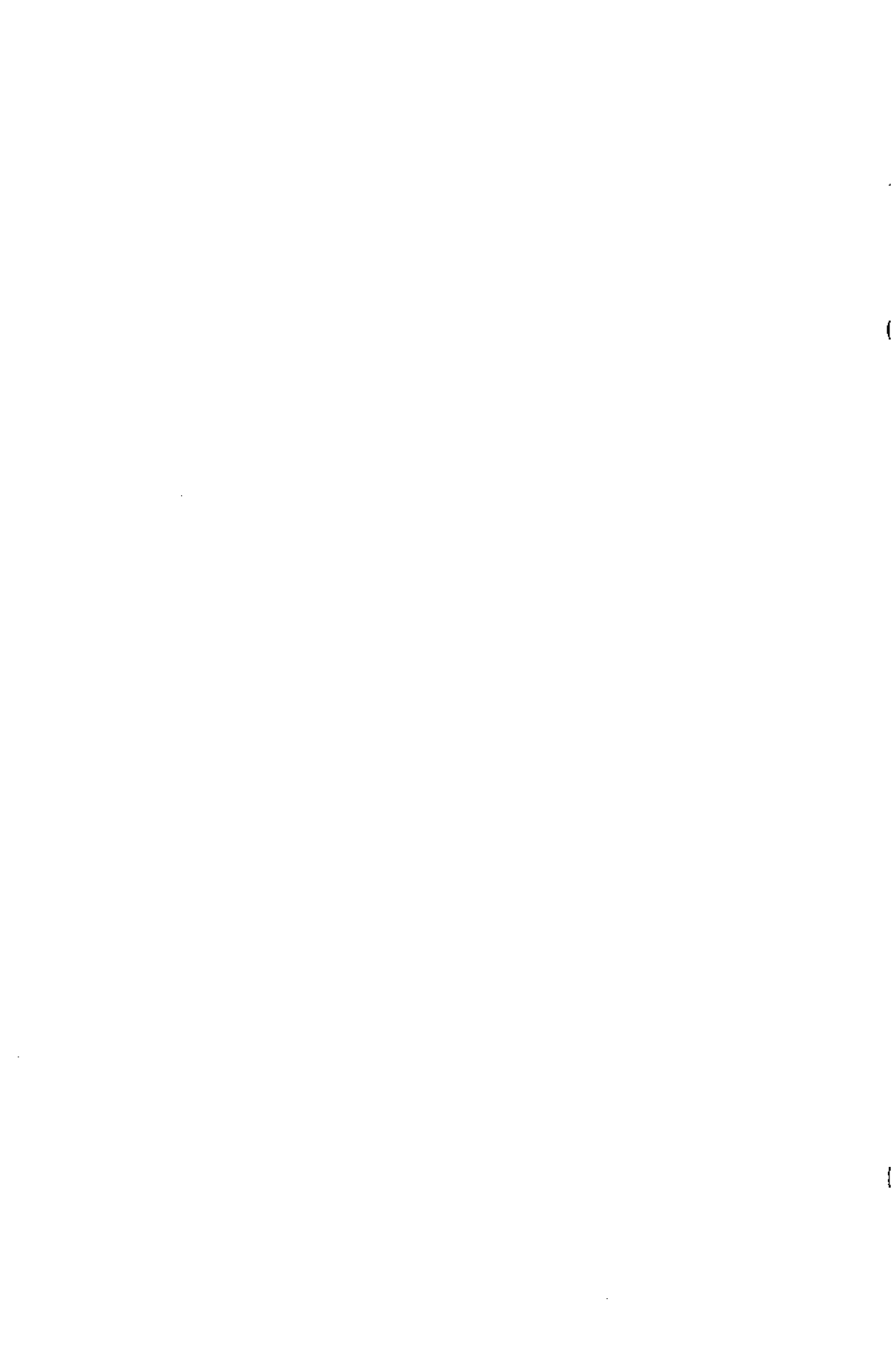
The Parliament of the Commonwealth of Australia

House of Representatives

MIGRATION AMENDMENT BILL (NO.4) 1992

Explanatory Memorandum

(Circulated by authority of the Minister for Immigration,
Local Government and Ethnic Affairs)



OUTLINE

This Bill makes several amendments to the Migration Act 1958 (the Act) to clarify the circumstances in which boat people, who arrived or will arrive in Australia between 19 November 1989 and 1 November 1993, may be held in custody. The Bill also provides that where boat people, defined as designated persons in Division 4B of the Act, have inadvertently been detained unlawfully, no cause of action lies for the unlawful custody. The Bill provides, however, that on application to a court of competent jurisdiction compensation of \$1 per day may be awarded for any unlawful detention.

Division 4B of the Act, which deals with the custody of non-citizens, was inserted into the Act by the Migration Amendment Act (No.2) 1992 and commenced operation on 6 May 1992. Division 4B allows the detention in custody of designated persons for a period of 273 days where they have applied for an entry permit or a determination of refugee status. This detention is known as application custody. The Department of Immigration, Local Government and Ethnic Affairs has 273 days within which to process the application. At the expiration of the 273 days it is intended that, under Division 4B, all applications would be finalised and designated persons who were not successful in their entry applications would remain in custody pending their removal from Australia. The Act is amended to clarify a further circumstance in which the 273 day period ceases to run.

Where an entry application has been refused, the 273 day period does not continue to run merely because the person has not sought or exhausted all avenues of review. The Act is also amended to remove beyond doubt the power of the Department to continue to detain in custody designated persons pending the hearing of court or tribunal challenges on the refusal of an entry application and any subsequent reconsideration of an application by the Department, and further, pending the removal from Australia following unsuccessful applications. In addition Division 4B has been extended to apply to boat people who arrive in Australia after the present cut off date of 1 December 1992 and up to 1 November 1993 when the relevant provisions in the proposed Migration Reform Act 1992 will commence.

FINANCIAL IMPACT

The financial impact will be small as it is expected that there will be very few cases where designated persons will be unlawfully detained in custody.

NOTES ON INDIVIDUAL CLAUSES

Clause 1 Short title

1 Subclause 1(1) provides that the Act may be cited as the Migration Amendment Act (No.4) 1992.

2 Subclause 1(2) provides that the "Principal Act" means the Migration Act 1958.

Clause 2 Commencement

3 This clause provides for the Act to commence on the day on which it receives Royal Assent.

Clause 3 Interpretation

4 This clause amends section 54K of Division 4B of the Principal Act by omitting "1 December 1992" from paragraph (a) of the definition of "designated person" and substituting "1 November 1993". This will extend the coverage of Division 4B of the Principal Act to include those non-citizens who have been on a boat in the territorial sea of Australia from the present cut off date of 1 December 1992 up until, but not including, 1 November 1993. The Migration Reform Bill 1992 (which is to receive Royal Assent within the next few weeks) will commence on 1 November 1993 and provides for a new regime for the detention, deportation and removal of unlawful non-citizens.

Clause 4 Designated persons to be in custody

5 This clause amends section 54L of Division 4B of the Principal Act by adding a new subsection (4) which removes any doubt as to the effect of section 54L to empower the continued detention in custody of a designated person, pending the removal of that person from Australia under subsection 54P(3), where that person has made an entry application and that application has been refused and where any appeals against, or reviews of the decision have been finalised. It will still remain a requirement under subsection 54P(3) for the Department to remove a designated person as soon as practicable. New subsection (4) removes all doubt that where a designated person has been refused an entry application he or she must be held in custody until his or her removal from Australia can be effected.

Clause 5 No custody or removal after certain period

6 This clause amends section 54Q of the Principal Act by adding at the end new subsections (4), (5) and (6) to clarify the operation of the section.

7 New subsection (4) clarifies the meaning of application custody within the terms of section 54Q. Section 54Q provides that the provisions of sections 54L and 54P, which respectively provide for the detention and removal of a designated person, cease to apply to a designated person where the person has been held in application custody for a continuous period of, or period whose sum is, 273 days. Subsection 54Q(3) provides that a person is in application custody if the person is in custody (paragraph 54Q(3)(a)) and the entry application for the person is being dealt with (paragraph 54Q(3)(b)). New subsection (4) provides that where an entry application has been refused it is not being dealt with under paragraph 54Q(3)(b) and the 273 day clock does not run from the time of the refusal only because an appeal may lie against the refusal or there may be an application to review the refusal.

8 New subsection (5) provides the Department with an extension of 90 days on the original 273 day processing period for each reconsideration of an application following a direction or decision of a court or tribunal where the Department's refusal of an application has been challenged in the court or tribunal. New subsection (5) is added following concern that the reconsideration of an application following a review by a court or tribunal may mean that the Department would not be able to finalise the processing of the application in the 273 day period. The custody provisions of section 54L apply to the extended period.

9 New subsection (6) provides that where a designated person has instituted legal proceedings where the Department has refused an entry application, the custody provisions of section 54L continue to apply to the designated person for the period of the legal proceedings and for the period of 90 days following those proceedings in which the Department may be required to reconsider its refusal.

Clause 6 No actions for certain unlawful custody

10 This clause inserts new section 54RA after section 54S in Division 4B.

11 New subsection 54RA(1) provides that where a designated person was in unlawful custody after 19 November 1989 and before the commencement of Division 4B no action lies, and no action is taken to have lain, against the Commonwealth, an officer or any other person for damages in respect of the custody.

12 New subsection 54RA(2) provides that where a designated person was unlawfully detained in custody after 19 November 1989 and before the commencement of Division 4B on 6 May 1992, that designated person has a right of action in a court of competent jurisdiction for compensation in respect of that unlawful detention.

13 New subsection 54RA(3) fixes the compensation that may be awarded under subsection (2) at \$1 for each day of that person's unlawful detention.

14 New subsection 54RA(4) provides that a designated person does not have any right to remain in Australia only because the person is contemplating or has commenced a right of action in respect of subsection (2), or a right of action in respect of unlawful custody to which subsections(1) and (2) do not apply.

Clause 7 Effect of Division on status etc.

15 This clause makes consequential amendments to section 54S of the Principal Act, arising from the insertion of new Section 54RA.

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