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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

MIGRATION LEGISLATION AMENDMENT BILL (No.2) 1994

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister
for Immigration and Ethnic Affairs,
Senator the Hon. Nick Bolkus)



MIGRATION LEGISLATION AMENDMENT BILL (No.2) 1994

OUTLINE

1 The Migration Legislation Amendment Bill (No.2) 1994 ("the Bill") seeks to amend the *Migration Act 1958* ("the Act") to clarify the meaning of certain provisions of the Act.

2 The Bill contains a number of clauses which will operate from 1 November 1989 to ensure that certain provisions of the Act are interpreted in a manner consistent with the meaning Parliament intends. This meaning is consistent with the operation that the Minister and the Department previously understood those provisions to have had. These provisions are sections 35 and 36 of the Act as they were prior to 19 December 1989 when they were renumbered as sections 87 and 88 respectively by the *Migration Legislation Amendment Act 1989*.

3 Recent interpretations of section 36 (section 88) of the Act in the cases of *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 and *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (Federal Court, unreported, 22 June 1993, No. NG 926 of 1992) have cast some doubt on the way the Commonwealth administered that section, in practice, for certain unauthorised boat arrivals prior to the enactment of Division 4B of the Act in May 1992 by the *Migration Amendment Act 1992*.

4 Following these decisions, proceedings were commenced in the High Court seeking declarations that the custody of 89 unauthorised boat arrivals under section 36 (section 88) had been unlawful, and awards of damages for unlawful custody. Prior to the handing down of these decisions, none of those persons subject to custody under section 36 (section 88) had sought to challenge the lawfulness of their custody on the basis of the interpretation the section was found to have in the decisions.

5 In late December 1992, section 54RA was inserted into the Act by the *Migration Amendment Act (No.4) 1992*. This section extinguished the right of action for damages for false imprisonment under the general law for persons found to have been unlawfully detained under section 36 (section 88) prior to their transfer to custody under Division 4B of the Act, replacing it with a statutory right of action limiting to one dollar per day the damages payable.

6 The constitutional validity of section 54RA is now being challenged in the High Court. When section 54RA was enacted, it was considered the provision was validly made. A number of High Court decisions since then on the ambit of the "just terms" requirement in the acquisitions power in section 51(xxxi) of the Constitution raise doubts about the constitutional validity of section 54RA.

7 This Bill seeks to make curative amendments to the Act to specifically reflect the Commonwealth's understanding of sections 35 (section 87) and 36 (section 88) and the manner in which they were actually administered in practice prior to the commencement of Division 4B. This will render lawful the custody under section 36 (section 88) of the persons concerned and prevent a possible windfall through substantial awards of damages.

8 Section 36 (section 88) of the Act provides that a person may be kept in custody under that section until the departure from Australia of the vessel on which the person arrived in Australia, or until such earlier time as an authorised officer directs. The understanding of the Minister and the Department was that section 36 (section 88) of the Act authorised the taking into custody of all persons who arrive in Australia without lawful authority on a vessel other than an aircraft prior to their disembarkation from the vessel in Australia, and that such custody was authorised even though the vessel would not, or could not, leave Australia.

9 However, under the interpretation the provision was found to have in the recent decisions noted in paragraph 3 above, custody is no longer authorised under the section once it becomes apparent that the vessel will not depart Australia. The effect of the Bill is to ensure that from 1 November 1989, section 36 (section 88) of the Act authorises custody for a finite time period of a person who arrives in Australia without lawful authority on board a vessel that subsequently is unable to depart Australia because it has been destroyed, or for example, is no longer seaworthy, has been impounded or forfeited, has sunk, or is otherwise reasonably assumed to be unable to depart.

10 In some cases the vessel on board which a person arrives at a port in Australia may not be the same vessel on which the person left another country. This could occur, for instance, if the person was rescued in Australian or international waters by an Australian based vessel (such as an Australian naval or customs vessel) because the boat on which the person left the other country sank or was sinking. The understanding of the Minister and the Department was that in such circumstances section 36 (section 88) authorised the custody of the person for a period which was not limited by reference to when the vessel on which the person arrived was next leaving Australia. The Bill aims to ensure that custody is authorised under the section for such a person for an appropriate period.

11 In the circumstances envisaged in paragraphs 9 and 10 above it is not appropriate that the period for which a person may be detained should be determined by reference to the departure of a vessel from a port. Custody is therefore to be authorised until the person is granted an entry permit; or for such period as is necessary to allow for the person's removal from Australia, following a request in writing from the person to be removed, or after all applications to remain (for example, entry permit applications and applications for refugee status) and associated appeals or reviews have been finalised, or once all consideration of whether the person will be permitted to remain in Australia has been otherwise concluded; or until such earlier time as an authorised officer directs.

12 The Bill proposes to amend section 35 (section 87) of the Act from 1 November 1989 to ensure that there is no doubt that an officer may, to prevent a person from entering Australia unlawfully, require a vessel to enter a port and require persons who are on board the vessel to remain on board until the vessel arrives at the port. Once the person arrives at a port, that person may be taken into custody under section 36 (section 88) of the Act.

13 The Bill also seeks to insert a constitutional validity provision to provide, unless a contrary intention can be clearly discerned, that where a provision of the Act could have both valid and invalid applications, the provision is not to have the invalid application but is to have every valid application.

FINANCIAL IMPACT STATEMENT

14 The amendments in the Bill will have no financial impact.

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NOTES ON INDIVIDUAL CLAUSES

Clause 1 Short Title

1 This clause provides that the Act may be cited as the *Migration Legislation Amendment Act (No. 2) 1994*. The clause also provides that the term "Principal Act" refers to the *Migration Act 1958*.

Clause 2 Commencement

2 This clause details when the different provisions of this Bill are to commence. Essentially, the effect of this clause is that all provisions of the Bill commence on the day the Bill receives the Royal Assent, with the exception of the amendments effected by clauses 5, 6 and 7, which are taken to have commenced on 1 November 1989.

Clause 3 Object of Section 5

3 This clause sets out the object of clause 5 of the Bill which is to insert a new constitutional validity provision into the Principal Act to ensure, unless a contrary intention can be clearly discerned, that where a provision of the Principal Act could have constitutionally valid and invalid applications, the provision is not to have the invalid application but is to have every valid application.

Clause 4 Object of Section 6 and 7

4 Clause 4 sets out the background and object of clauses 6 and 7 of the Bill.

5 The background to the proposed amendment is that recent interpretations of section 36 of the Principal Act (renumbered as section 88 by section 35 of the *Migration Legislation Amendment Act 1989* on 19 December 1989) in the cases of *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 and *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (Federal Court, unreported, 22 June 1993, No. NG 926 of 1992) have cast some doubt on the way the Commonwealth administered that section, in practice, for certain unauthorised boat arrivals prior to the enactment of Division 4B of the Act in May 1992 by the *Migration Amendment Act 1992*.

6 The object of clauses 6 and 7 is to ensure that sections 87 and 88 of the Principal Act have and have had the operation and effect that Parliament intends. This is consistent with the operation that the Minister and the Department previously understood those provisions to have had. Significantly, prior to those decisions, none of those persons subject to custody under section 36 (section 88) had sought to challenge the lawfulness of their custody on the basis of the interpretation the section was found to have in those decisions.

7 Sub-clause 4(3) notes that proposed section 7 will provide for appropriate time limits to ensure that custody of persons under section 88 cannot be indefinite.

Clause 5 Insertion of New Section

8 This clause inserts new section 4A in Part 1 of the Principal Act. Proposed subsection 4A(1) ensures that, unless a contrary intention is clear, where a provision of the Principal Act has an application which exceeds the Commonwealth's legislative power but also has at least one other application which does not, the provision is not to have the invalid application. Rather, it is to have every valid application.

9 Proposed subsection 4A(2) specifies when a relevant provision will not have a particular valid application.

10 For the purposes of this provision, a valid application is defined as an application within the Commonwealth's legislative power. This means an application that is within a Constitutional head of power and which does not infringe any Constitutional prohibition or guarantee.

11 This provision is similar to and consistent with "reading down" provisions in certain other Commonwealth legislation.

Clause 6 Certain Persons may be Prevented from Entering or Landing

12 This clause amends section 35 of the Principal Act from 1 November 1989, inserting a new subsection (section 35 was renumbered as section 87 on 19 December 1989 by section 35 of the *Migration Legislation Amendment Act 1989*). Proposed subsection 35(1A) is being inserted to avoid any doubts as to the extent of the power under section 35. Under it an officer may, to prevent a person from entering Australia unlawfully, require a vessel to enter a port and require persons who are on board the vessel to remain on board the vessel until it reaches the port.

Clause 7 Custody of Certain Persons Arriving on Board Vessels

13 This clause amends section 36 of the Principal Act from 1 November 1989, (section 36 of the Principal Act was renumbered as section 88 from 19 December 1989 by section 35 of the *Migration Legislation Amendment Act 1989*).

14 Recent interpretations of section 36 (section 88) in the cases of *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 and *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (Federal Court, unreported, 22 June 1993, No. NG 926 of 1992) have cast some doubt on the way the Commonwealth administered that section, in practice, for certain unauthorised boat arrivals prior to the enactment of Division 4B of the Act in May 1992 by the *Migration Amendment Act 1992*.

15 These amendments ensure that section 36 of the Principal Act operates, and can be taken to have operated, in the manner that Parliament intends. This is consistent with the operation the Minister and the Department have always understood it to have until the recent decisions noted above. Significantly, prior to those decisions, none of those persons subject to custody under section 36 (section 88) had sought to challenge the lawfulness of their custody on the basis of the interpretation the section was found to have in those decisions.

16 The understanding of the Minister and the Department was that section 36 (section 88) of the Principal Act authorised the taking into custody of all persons who arrive in Australia without lawful authority on a vessel other than an aircraft prior to their disembarkation from the vessel in Australia, and that such custody was authorised even though the vessel would not, or could not, leave Australia. The clause will provide that, from 1 November 1989, section 36 (section 88) of the Principal Act authorises the custody for a finite period of a person who arrives without lawful authority on board a vessel that subsequently is unable to depart Australia because it has been destroyed, or for example, is not seaworthy, has been impounded or forfeited, has sunk, or is otherwise reasonably assumed to be unable to depart (proposed paragraph 36(1AA)(a)).

17 The clause also provides that section 36 (section 88) of the Principal Act, from 1 November 1989, permits the taking and keeping of persons in custody, notwithstanding that the vessel on which those persons departed for Australia might not necessarily be the same vessel as that on which those persons arrive (proposed paragraph 36(1AA)(b)). It is restricted to persons who arrive on vessels that have left an Australian port and returned to an Australian port without having entered any other country. This covers situations where a person arrives at a port in Australia on an Australian-based vessel to which the person was transferred from the vessel on which that person left another country (eg., where the person is rescued by an Australian naval or customs vessel in Australian or international waters because the vessel on which he or she left another country was sinking).

18 In the circumstances covered in paragraphs 16 and 17 above, custody is authorised by section 36 (section 88) of the Principal Act until the person is granted an entry permit; or for such period as is necessary to allow the person's removal from Australia, following a request in writing from the person to be removed, or after all applications to remain (for example, entry permit applications and applications for refugee status) and associated appeals or reviews have been finalised, or once all consideration of whether the person will be permitted to remain in Australia has been otherwise concluded; or until such earlier time as an authorised officer directs.

19 Under the Principal Act, a person enters Australia if he or she disembarks in Australia. Proposed subsection 36(1AB) makes it clear that, for the purposes of subsections 36(1) and 36(1A) (subsections 88(1) and 88(2)), a person is taken not to have entered Australia if any entry of the person consisted only of the person temporarily disembarking the vessel only to reboard the vessel and continue on to a port.

Clause 8 Amendments to Apply Even if Section 88 Already Repealed

20 The *Migration Reform Act 1992* and the *Migration Legislation Amendment Act 1994* make significant and substantial amendments to the Principal Act. One effect of these amendments will be the repeal of section 88 on 1 September 1994. This clause provides that the amendments made by clause 7 are to apply and have effect even if section 88 of the Principal Act is repealed before the commencement of these amendments.

Clause 9 Transitional - Renumbering of the *Migration Act 1958* by the *Migration Legislation Amendment Act 1989*

21 This clause provides that the renumbering effected by section 35 of the *Migration Legislation Amendment Act 1989* is not to be changed by these amendments. This is necessary because the amendments will commence operation on 1 November 1989.

Clause 10 Transitional - Renumbering of the *Migration Act 1958* by the *Migration Legislation Amendment Act 1994*

22 This clause provides that the renumbering effected by section 83 of the *Migration Legislation Amendment Act 1994* is not to be changed by these amendments. This is necessary because the amendments will commence operation on 1 November 1989.