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## Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014

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**Date introduced:** 25 September 2014

**House:** House of Representatives

**Portfolio:** Immigration and Border  
Protection

**Commencement:** Various, as set out in  
clause 2 of the Bill.

**Links:** The links to the [Bill](#), its [Explanatory Memorandum](#) and [second reading speech](#) can be found on the Bill's home page, or through the [Australian Parliament website](#).

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the [ComLaw website](#).

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## Purpose of the Bill

The purpose of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (the Bill) is to amend the *Migration Act 1958*, the Migration Regulations 1994 (the Regulations); the *Maritime Powers Act 2013* (the MPA), the *Immigration (Guardianship of Children) Act 1946* (IGOC Act) and the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) to change the way Australia manages and processes asylum seekers.

## Background

### Asylum legacy caseload

The 'asylum legacy caseload' referred to in the Bill is comprised of asylum seekers who arrived unauthorised by boat between August 2012 and December 2013 and who have not been transferred to offshore processing centres on Nauru or Manus Island in Papua New Guinea.<sup>1</sup> The Coalition Government argues that the previous Government introduced policies that created this caseload.<sup>2</sup> The number and composition of the 'legacy caseload' is discussed in more detail below.

In response to a significant rise in the number of unauthorised boat arrivals in 2012, an Expert Panel on Asylum Seekers was tasked by the Gillard Government to report back on policy options available 'to prevent asylum seekers risking their lives on dangerous boat journeys to Australia'.<sup>3</sup> After the Panel's report was released in August 2012, the then Government announced that some, but not all, of a suite of recommendations made by the Panel would be implemented, including the reinstatement of offshore processing for selected asylum seekers and the introduction of a 'no advantage' principle which would apply to all asylum seekers who had arrived by boat. What the 'no advantage' principle meant in practice was only ever explained in very general terms as a means to ensure that 'irregular migrants gain no benefit by choosing to circumvent regular migration mechanisms'.<sup>4</sup>

As more boats continued to arrive and the number of 'no advantage' asylum seekers waiting for their claims to be processed began to rise, pressure on the capacities of the onshore detention network and offshore processing centres to absorb the new arrivals increased. On 21 November 2012, the then Minister for Immigration and Citizenship, Chris Bowen, stated that 'given the number of people who had arrived by boat since 13 August 2012, it would not be possible to transfer them all to Nauru or Manus Island in the immediate future'.<sup>5</sup> Instead, under the 'no advantage' principle, many would be released from detention into the community on bridging visas without work rights (BVEs) while they waited an outcome on their asylum claims. Those found to be refugees would not be issued with permanent protection visas 'until such time that they would have been resettled in Australia after being processed in our region'.<sup>6</sup>

On 19 July 2013, after the reinstatement of Kevin Rudd as Prime Minister, it was announced that BVEs would no longer be issued and that all, not some, asylum seekers arriving unauthorised by boat after that date would be transferred to offshore processing centres for processing and resettlement.<sup>7</sup> However, on 4 August 2013, shortly after this decision was made, the election was announced by the Prime Minister and the Parliament was prorogued.

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1. Note: since 19 December 2013 asylum seekers who arrived unauthorised by boat have either been transferred to offshore processing centres (157 asylum seekers) or 'turned around' and returned to international waters or the place they embarked from. For further detail see S Morrison (Minister for Immigration and Border Protection), [Transfer of 157 IMAs from Curtin to Nauru for offshore processing](#), media release, 2 August 2014, accessed 8 October 2014; and S Morrison (Minister for Immigration and Border Protection), [A year of stronger borders](#), media release, 18 September 2014, accessed 8 October 2014.
  2. S Morrison (Minister for Immigration and Border Protection), [Transcript of press conference: reintroducing TPVs to resolve Labor's asylum legacy caseload; Cambodia](#), Parliament House, Canberra, 25 September 2014, accessed 8 October 2014.
  3. Expert Panel on Asylum Seekers, [Report of the Expert Panel on Asylum Seekers](#), Canberra, August 2012, p. 9, accessed 8 October 2014.
  4. A Houston, [Report of the Expert Panel of Asylum Seekers released](#), media release, 13 August 2012, accessed 8 October 2014.
  5. C Bowen (Minister for Immigration and Citizenship), [No advantage onshore for boat arrivals](#), media release, 21 November 2012, accessed 8 October 2014.
  6. Ibid.
  7. K Rudd (Prime Minister), [Australia and Papua New Guinea Regional Settlement Arrangement](#), media release, 19 July 2013; and Department of Immigration and Citizenship (DIAC), [Regional resettlement arrangements](#), DIAC website, July 2013, accessed 8 October 2014.

During the election campaign a commitment was made by the Coalition to ‘clear Labor’s 30,000 border failure’.<sup>8</sup> Although the exact composition of the 30,000 referred to in the election policy was not specified, this figure was comprised of asylum seekers in the community on BVEs and others onshore ‘still waiting in Australia for a decision on their claim.’<sup>9</sup> As at 31 August 2013, the ‘30,000’ comprised approximately 21,364 people in the community on BVEs, approximately 8,732 people in onshore immigration detention facilities and approximately 2,739 being held under community detention arrangements.<sup>10</sup>

The Minister for Immigration and Border Protection, Scott Morrison, has made it clear that the outstanding ‘asylum legacy caseload’ referred to in the Bill still includes around 30,000 people ‘who turned up under Labor’, most of whom ‘are in the community not in held detention’.<sup>11</sup> However, the caseload also now includes approximately 1,550 asylum seekers on the mainland and on Christmas Island who arrived by boat after 19 July 2013 and who have not yet been transferred to offshore processing centres. The Minister has agreed that this cohort will no longer be subject to transfer under section 198AD of the *Migration Act*, although all future boat arrivals ‘will still go to Nauru or Manus Island’.<sup>12</sup>

## Committee consideration

### *Senate Legal and Constitutional Affairs Legislation Committee*

The Bill has been referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 27 November 2014. Details of the inquiry are at the [inquiry webpage](#).<sup>13</sup> At time of writing, no submissions had been received by the Committee.

### Policy position of non-government parties/independents

The Australian Labor Party (ALP) and the Australian Greens have consistently been opposed to the re-introduction of temporary protection visas (TPVs) and have repeatedly united to successfully block their re-introduction.<sup>14</sup> However, recent reports indicate that the ALP may be willing to reconsider its opposition to TPVs if the Government would agree to provide a pathway to permanent residency for those who are unable to return home.<sup>15</sup> It is not known whether the ALP will support other more contentious measures in the Bill such as the fast track assessment process, the introduction of protection visa capping, and the amendments to the *MPA*—an Act it introduced when in Government.

The Palmer United Party had also previously expressed reservations about the reintroduction of TPVs, with Clive Palmer indicating in December 2013 that he would not support moves to reintroduce the visas without the Government promising improvements in other areas of asylum policy in return.<sup>16</sup>

Clive Palmer has previously called on the Government to immediately close immigration detention centres ‘because of their huge human and financial cost’.<sup>17</sup> On the day the Bill was introduced into Parliament he also issued a press release in which he stated that the PUP would support a joint initiative with the Government to introduce the Safe Haven Enterprise Visa.<sup>18</sup> He further stated that the Government had also agreed not to transfer asylum seekers who arrived before 19 December 2013 to regional processing centres and to continue to

8. Liberal Party of Australia and the Nationals, [The Coalition’s policy to clear Labor’s 30,000 border failure backlog](#), Coalition policy document, Election 2013, accessed 8 October 2014.

9. Ibid.

10. DIAC, [Immigration detention and community statistics summary](#), 31 August 2013, accessed 8 October 2014.

11. S Morrison (Minister for Immigration and Border Protection), [Transcript of press conference: reintroducing TPVs to resolve Labor’s asylum legacy caseload: Cambodia](#), op. cit. Note: as at 31 August 2014, 24,702 people remained in the community on bridging visas, 3,440 in onshore immigration detention facilities and 3,038 people in community detention. Source: Department of Immigration and Border Protection (DIBP), [Immigration detention and community statistics summary](#), 31 August 2014, accessed 8 October 2014.

12. S Morrison (Minister for Immigration and Border Protection), [Transcript of press conference: reintroducing TPVs to resolve Labor’s asylum legacy caseload: Cambodia](#), op. cit.

13. Senate Legal and Constitutional Affairs Legislation Committee, [Inquiry into the Migration and Maritime Powers Legislation Amendment \(Resolving the Asylum Legacy Caseload\) Bill 2014](#), The Senate, 2014, accessed 17 October 2014.

14. For further information see: E Karlsen, ‘Temporary Protection by hook or by crook’, 5 March 2014, FlagPost weblog, accessed 2 October 2014.

15. S Whyte, ‘Labor indicates deal on TPVs if residency made available’, *The Sydney Morning Herald*, 25 September 2014, p. 11, accessed 2 October 2014.

16. L Wilson and L Quinn, ‘Palmer to oppose temporary visas’, *The Australian*, 5 December 2013, p. 6, accessed 2 October 2014.

17. C Palmer, [Close the camps](#), media release, 20 August 2014, accessed 2 October 2014.

18. C Palmer, [A solution to save Australia billions of dollars and place refugees into productive employment](#), media release, 25 September 2014, accessed 2 October 2014.

support assisted voluntary return packages. Though Clive Palmer said ‘the PUP will support these measures as they reduce billions of dollars of expenditure’ it is not entirely clear whether PUP will support the Bill in its entirety without amendment.<sup>19</sup>

The Australian Greens also currently have a Bill before Parliament to amend the *Migration Act* to ensure that a child who is born in Australia to a parent who is an unauthorised maritime arrival (UMA) is not classified to have ‘entered Australia by sea’, to preclude the child’s transfer to one Australia’s regional processing centres.<sup>20</sup> This Bill will defeat such statutory changes, if they were to ultimately secure passage.

Crossbench Senator David Leyonhjelm has in the past reportedly ‘flagged the possibility of cutting a deal with the Federal Government on asylum seekers’ in exchange for Government MPs being granted a conscience vote on his Bill to legalise same-sex marriage. He reportedly stated to the media that ‘the temporary protection visa issue is neither here nor there for me’.<sup>21</sup> However, more recently he has reportedly indicated that he is undecided and that ‘I’m not giving the Government a blank cheque on this. There are reservations in the legislation’.<sup>22</sup> He further reportedly has stated ‘the idea of coming here in an unsafe fashion has to be stopped, so I’m very sympathetic to his [the Minister’s] broad objective. Whether he’s got everything right in the legislation aimed at that objective, that’s another matter’.<sup>23</sup>

## Position of major interest groups

There is likely to be significant opposition to this Bill, especially from international agencies, human rights organisations, refugee legal centres, refugee advocacy groups, religious organisations, and refugee law scholars and practitioners. Following is a list of preliminary commentary on the Bill from select stakeholders and commentators (in chronological order):

- UNHCR, [UNHCR statement: Migration and Maritime Powers Legislation Amendment \(Resolving the Asylum Legacy Caseload\) Bill 2014](#)<sup>24</sup>
- Refugee Council of Australia, [New legislation strips away checks on Ministerial powers](#)<sup>25</sup>
- J McAdam, [‘Asylum bill is high-handed and Cambodia deal just a quick fix’](#)<sup>26</sup>
- M Crock and K Bones, [‘Refugee plan an affront to rule of law’](#)<sup>27</sup>
- R Dufty-Jones, [‘Regional Australia can be a carrot or stick in the new refugee policy’](#)<sup>28</sup>
- Andrew and Renata Kaldor Centre for International Refugee Law (UNSW), [Legislative brief](#)<sup>29</sup>
- M Steketee, [‘Refugee bill trashes our “good global citizen” title’](#)<sup>30</sup> and
- G Sheridan, [‘Reclaim sovereign rights’](#).<sup>31</sup>

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19. C Palmer, [A solution to save Australia billions of dollars and place refugees into productive employment](#), op. cit. See also: C Palmer, [Solution for 30,000 asylum seekers held in detention negotiated](#), press conference, 24 September 2014, You Tube, accessed 2 October 2014.

20. Parliament of Australia, [‘Migration Amendment \(Protecting Babies Born in Australia\) Bill 2014 homepage’](#), Australian Parliament website, accessed 2 October 2014.

21. L Bourke, [‘David Leyonhjelm urges libertarians to come out of the closet on gay marriage’](#), ABC News, 14 July 2014, accessed 2 October 2014.

22. D Leyonhjelm, [‘Interview with Sabra Lane’](#), ABC 7:30 Report, transcript, Australian Broadcasting Corporation (ABC), 16 October 2014, accessed 20 October 2014.

23. Ibid.

24. United Nations High Commissioner for Refugees (UNHCR), [UNHCR statement: Migration and Maritime Powers Legislation Amendment \(Resolving the Asylum Legacy Caseload\) Bill 2014](#), media release, 26 September 2014, accessed 18 October 2014.

25. Refugee Council of Australia (RCOA), [New legislation strips away checks on Ministerial powers](#), media release, 26 September 2014, accessed 18 October 2014.

26. J McAdam, [‘Asylum bill is high-handed and Cambodia deal just a quick fix’](#), *The Sydney Morning Herald*, 29 September 2014, accessed 18 October 2014.

27. M Crock and K Bones, [‘Refugee plan an affront to rule of law’](#), *The Drum*, ABC website, 30 September 2014, accessed 18 October 2014.

28. R Dufty-Jones, [‘Regional Australia can be a carrot or stick in the new refugee policy’](#), *The Conversation*, 1 October 2014, accessed 18 October 2014.

29. Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, [Legislative brief](#), Andrew and Renata Kaldor Centre for International Refugee Law, UNSW, 2 October 2014, accessed 18 October 2014.

30. M Steketee, [‘Refugee bill trashes our “good global citizen” title’](#), *The Drum*, ABC website, 3 October 2014, accessed 18 October 2014.

31. G Sheridan, [‘Reclaim sovereign rights’](#), *The Weekend Australian*, 4 October 2014, p. 24, accessed 22 October 2014.

## Financial implications

The Explanatory Memorandum to the Bill notes that the financial impact of the Bill is medium and that any costs will be met from within the existing resources of the Department of Immigration and Border Protection.<sup>32</sup>

## Statement of Compatibility with Human Rights

The Statement of Compatibility with Human Rights can be found at page 219 of the Explanatory Memorandum to the Bill. As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government has assessed the Bill's compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. However, it is worth noting that the *1951 Refugee Convention* is *not* listed as an international instrument for this purpose.<sup>33</sup>

The Government considers that the Bill and Regulation amendments are compatible with human rights because it is consistent with Australia's human rights obligations and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.

At time of writing, the Parliamentary Joint Committee on Human Rights had not commented on the Bill.

This Bill raises a number of human rights implications. Arguably, the most significant and with potentially the most serious consequences, would be Australia's *non-refoulement* (non-return) obligations under international law when exercising powers under the *MPA* and when removing non-citizens from Australia under existing section 198 of the *Migration Act*. While in effect acknowledging that both measures appear to authorise actions which may be inconsistent with Australia's obligations under international law, the Government is nonetheless of the view that:

While on the face of the legislation as proposed to be amended, these provisions are capable of authorising actions which may not be consistent with Australia's *non-refoulement* obligations, the Government intends to continue to comply with these obligations and Australia remains bound by them as a matter of international law. They will not, however, be capable as a matter of domestic law of forming the basis of an invalidation of the exercise of the affected powers. It is the Government's position that the interpretation and application of such obligations is, in this context, a matter for the executive government.<sup>34</sup>

With respect to Australia's *non-refoulement* obligations when removing non-citizens from Australia, the Government is similarly of the view that:

Whilst on its face the measure may appear to be inconsistent with *non-refoulement* obligations under the CAT [the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*] and the ICCPR [*International Covenant on Civil and Political Rights*], as set out in the overview to this Statement, anyone who is found through visa or ministerial intervention processes to engage Australia's *non-refoulement* obligations will not be removed in breach of those obligations. There are a number of personal non compellable powers available for the Minister to allow a visa application or grant a visa where this is in the public interest. The form of administrative arrangements in place to support Australia meeting its *non-refoulement* obligations is a matter for the Government. This consideration is separate from the duty established by the removal power.<sup>35</sup>

Australia has undertaken to abide by certain *non-refoulement* obligations under the *Convention relating to the Status of Refugees* as amended by the *Protocol Relating to the Status of Refugees* (1951 *Refugee Convention*),<sup>36</sup> the *International Covenant on Civil and Political Rights* (ICCPR)<sup>37</sup> and the *Convention against Torture and Other*

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32. Explanatory Memorandum, [Migration and Maritime Powers Legislation Amendment \(Resolving the Asylum Legacy Caseload\) Bill 2014](#), p. 13, accessed 2 October 2014.

33. [Human Rights \(Parliamentary Scrutiny\) Act 2011](#), accessed 17 October 2014.

34. Statement of Compatibility with Human Rights, [Migration and Maritime Powers Legislation Amendment \(Resolving the Asylum Legacy Caseload\) Bill 2014](#), p. 7, accessed 2 October 2014.

35. Statement of Compatibility, op. cit., p. 28.

36. [1951 Convention relating to the Status of Refugees](#) (as amended by the 1967 Protocol relating to the Status of Refugees), opened for signature 28 July 1951, [1954] ATS 5 (entered into force for Australia 22 April 1954), accessed 18 July 2014.

37. [International Covenant on Civil and Political Rights](#), opened for signature 16 December 1966, [1980] ATS 23 (entered into force for Australia 13 November 1980), accessed 18 July 2014.



*Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).<sup>38</sup> Most relevant to the current context, Article 33(1) of the *1951 Refugee Convention* states:

No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Article 7 of the ICCPR states:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.<sup>39</sup>

While Article 3 of CAT states:

No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

The *1951 Refugee Convention*, the ICCPR, and CAT have not been formally incorporated into domestic law through the *Migration Act* or the *MPA*.

## Key issues and provisions

### *Schedule 1—Amendments relating to maritime powers*

#### What are the most significant changes being made by this Schedule?

The amendments in Schedule 1:

- inserts a new provision which provides that a failure to consider or comply with Australia's international obligations or a failure to consider the domestic law or international obligations of another country will not invalidate an authorisation to exercise maritime powers under the *MPA* (**item 6**)<sup>40</sup>
- inserts a new provision which provides that the rules of natural justice do not apply to the exercise of a power to give an authorisation under Division 2 of Part 2 of the *MPA* (**item 6**)
- confirms that a detained vessel can be taken outside Australia and that the destination to which the vessel can be taken can repeatedly change (**item 11**)
- inserts a new provision which extends the period of time a vessel can be detained and provides that the 28 day holding period for detained vessels does not commence until the vessel has reached its destination (**item 12**)
- extends the period of time a person can be required to remain on a detained vessel and confirms that a detained person can be taken outside Australia and that the destination to which they can be taken can repeatedly change (**item 15**)
- inserts a new provision which provides an unspecified period of time a person can be detained during which a destination place is found (**proposed subsection 72A(1)** of the *MPA*, at **item 18**)
- inserts a new provision which provides that a failure to consider or comply with Australia's international obligations or a failure to consider the domestic law or international obligations of another country will not invalidate the exercise of certain powers under the *MPA*, including the power to detain vessels and people (**proposed section 75A** of the *MPA*, at **item 19**). Moreover, the rules of natural justice do not apply to the exercise of these powers (**proposed section 75B**, **item 19**)
- inserts a new provision that provides that the destination to which a vessel or person may be taken does not need to be inside a country and that a vessel or person may be taken to a destination that is outside a

38. [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), opened for signature 10 December 1984, [1989] ATS 21 (entered into force for Australia 7 September 1989), accessed 18 July 2014.

39. Though this provision does not expressly prohibit *refoulement* to such ill-treatment, the UN Human Rights Committee has observed that States Parties to the ICCPR must not remove people in such circumstances: UN Human Rights Committee (HRC), [General Comment No. 31](#), 26 May 2004, accessed 20 October 2014. See further: E Karlsen, [Complementary protection for asylum seekers – overview of the international and Australian legal frameworks](#), Research paper, 7, 2009–10, Parliamentary Library, Canberra, 2009, accessed 18 October 2014.

40. [Maritime Powers Act 2012](#), accessed 18 October 2014.

country whether or not Australia has an agreement with the country, and irrespective of the international obligations or domestic laws of any other country. The destination to which a person can be taken can also be a vessel (**proposed section 75C** of the *MPA*, **item 19**)

- inserts a new Ministerial power to over-ride the general limitations on the exercise of powers in relation to foreign vessels between countries contained in existing section 41 (**proposed section 75D**, **item 19**)
- inserts a new provision which expressly provides that exercise of certain maritime powers are not in any respect subject to or limited by the *Migration Act* (**proposed section 75E**, **item 19**)
- inserts a new Ministerial power to give directions relating to the way in which certain powers in the *MPA* are to be exercised, for example the destination a vessel or person is to be taken or matters to be taken into account when deciding a destination (**proposed section 75F**, **item 19**)<sup>41</sup>
- inserts a new provision which excludes certain maritime laws from operating when a vessel is detained or when a vessel is being used to detain persons under existing subsections 72(4) or (5). The excluded laws include the *Navigation Act 2012*,<sup>42</sup> which relevantly gives effect to Australia's international obligations under various conventions to which Australia is a signatory, covering matters such as the safety of life at sea (**proposed section 75H**, **item 19**)<sup>43</sup>
- amends the *ADJR Act* to provide that certain new decision-making powers (under **proposed sections 75D**, **75F** and **75H** of the *MPA*) are *not* subject to judicial review under the *ADJR Act* (**item 31**) and
- confirms that the Minister does not have guardianship obligations to children under the *IGOC Act* when they are taken to a place outside Australia pursuant to the *MPA* nor does the *IGOC Act* affect the exercise of powers under the *MPA* (**items 32—35**).<sup>44</sup>

### Why are these changes being made?

The Government is of the view that the amendments contained in this Schedule simply clarify a range of matters relating to the exercise of maritime powers and introduce new powers for the Minister to personally ensure the Government has appropriate oversight.<sup>45</sup> It could also be said that these changes are in direct response to *CPCF v Minister for Immigration and Border Protection* which is currently before the High Court.<sup>46</sup> This case is challenging the extent of the Government's maritime enforcement powers under the *MPA* and its non-statutory executive power under section 61 of the *Constitution* to intercept and detain asylum seekers and then take them to a place outside Australia, in this case India (discussed in further detail below).

### Why are these changes significant?

These changes are extremely important because they significantly broaden the maritime enforcement powers used to intercept and return vessels carrying asylum seekers.

Most significantly, this Bill will expressly enable the Government to exercise a range of powers under the *MPA* even if the exercise of such powers is inconsistent with Australia's international obligations and without regard to the domestic laws or international obligations of any other country (presumably the receiving country) (**proposed section 75A** of the *MPA*, at **item 19**). This includes exercising powers 'between countries' (including on the high seas) to detain vessels, detain people for an unspecified duration, taking people to another destination, and complying with a Ministerial direction in exercising such powers. In doing so, certain maritime laws that give effect to Australia's international obligations covering such matters as the safety of life at sea are also to be suspended (**proposed section 75H** of the *MPA*).

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41. **Proposed subsection 75G(2)** provides that a maritime officer who is a member of the Australian Defence Force is not required to comply with a Ministerial direction made under section 75F to the extent that the direction is inconsistent with an order or other exercise of command under sections 8 and 9 of the [Defence Act 1903](#), accessed 18 October 2014.

42. [Navigation Act 2012](#), accessed 18 October 2014.

43. S Morrison, 'Second reading speech: Migration and Maritime Powers Legislation Amendment (Resolving the Legacy Caseload) Bill 2014', House of Representatives, *Debates*, 25 September 2014, p. 5, accessed 2 October 2014.

44. [Immigration \(Guardianship of Children\) Act 1946](#), accessed 18 October 2014.

45. Explanatory Memorandum, op. cit., p. 5.

46. High Court of Australia (HCA), [CPCF v Minister for Immigration and Border Protection](#), HCA website, accessed 20 October 2014.



Similarly, under **proposed section 75C** of the *MPA*, the Government will be able to take its asylum seekers to a destination which need not be inside a country, could be just outside a country and may in fact be a vessel. This will be able to occur irrespective of whether Australia has an agreement with the country, and irrespective of the international obligations or domestic laws of that country. This amendment is arguably aimed at returning (or as near as possible) asylum seekers to a country which has not agreed to accept them, such as Indonesia, which is not a signatory to the *1951 Refugee Convention*.

The insertion of **proposed section 72A** of the *MPA* will also enable the Government to detain asylum seekers for an unspecified period of time while the Government secures the destination to which they will ultimately be taken.<sup>47</sup> At no time will the Government have an obligation to afford asylum seekers with the rules of natural justice which normally ensure that government decisions are made fairly (such as the right to be heard) under **proposed section 75B**.

The insertion of broad Ministerial powers (under **proposed section 75F**) to give directions relating to the way in which certain powers in the *MPA* are to be exercised (for example the destination to which a vessel or person is to be taken, or matters to be taken into account when deciding a destination) is clearly designed to give the Executive a greater role in maritime enforcement. This is not surprising, given the Government's clearly articulated policy objective of 'stopping the boats' without exception.

The United Nations High Commissioner for Refugees (UNHCR) advises (in its application to appear as *amicus curiae* in the High Court proceedings) that the *non-refoulement* obligation contained in the *1951 Refugee Convention* applies wherever a country exercises jurisdiction in relation to a refugee or asylum seeker. This includes on board an Australian vessel outside of its own territory or in circumstances where the country exercises effective control over the refugee or asylum seeker.

In the view of the UNHCR, the power in section 72(4) of the *MPA* (to detain a person and take them to a place outside Australia) and any non-statutory power to detain is thus constrained by Australia's *non-refoulement* obligations, including under the Refugee Convention and customary international law, and is not available in circumstances where Australia has not assessed whether taking a person to a place would infringe those obligations.<sup>48</sup>

In contrast, the defendant (the Minister) argues that Australia's obligations under the *1951 Refugee Convention* were not enlivened in respect of the plaintiff, because they arise only with respect to persons who enter Australia's territory. The defendant relevantly argues that:

Australia's *non-refoulement* obligations do not require a person who has made a claim for protection against a form of harm to which the obligations are directed to be given protection by Australia. Nor do they limit the places to which Australia may take the person to parties to the treaties which give rise to those obligations, still less to countries whose domestic laws contain schemes for assessment of protection claims. Australia's *non-refoulement* obligations are satisfied if, as a matter of practical reality, the country to which the person is taken offers effective protection. Whether that is so does not depend on its being party to relevant treaties, still less on having enacted them into domestic law.<sup>49</sup>

Such an argument may be contrasted to statements made by the Prime Minister when in Opposition, explaining the Coalition's opposition to statutory changes to enable the ALP's 'Malaysia solution' to proceed:

Well, as I said, we've got a clear policy and our policy reflects our judgements of values as well as our judgement of fact and our judgement of value is that it's not appropriate to send people who have arrived illegally by sea on Australian shores or to Australian territory. It's not appropriate to send them to countries that haven't signed the UN convention.<sup>50</sup>

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47. Note that the 28-day holding period for detained vessels (in section 87 of the *MPA*) does not commence until the vessel has reached its destination (**proposed subsection 69A(3)**, at **item 12**).

48. United Nations High Commissioner for Refugees (UNHCR), [Seeking leave to appear as amicus curiae in \*CPCF v Minister for Immigration and Border Protection\*](#), 15 September 2014, accessed 13 October 2014.

49. High Court of Australia (HCA), '[CPCF v Minister for Immigration and Border Protection: Defendant's submissions](#)', HCA website, 30 September 2014, accessed 13 October 2014.

50. T Abbott, [Press conference transcript](#), Melbourne, 29 June 2012, accessed 16 October 2014.

## Maritime Powers Act

On 30 May 2012, the former Labor Government introduced the [Maritime Powers Bill 2012](#) into Parliament.<sup>51</sup> The purpose of the Bill was to establish a framework for the exercise of maritime enforcement powers in Australian territories. The Bill sought to consolidate and harmonise the Commonwealth's existing maritime enforcement regime, as well as to provide a single framework for use by Australia's on-water enforcement agencies.

Most relevantly to the current context, the Bill established a system of authorisations under which a maritime officer could exercise enforcement powers in relation to vessels. It also provided for the enforcement powers available to maritime officers including, boarding, obtaining information, searching, detaining, seizing and retaining things, and moving and detaining persons. In addition, it provided for processes for dealing with things seized, retained or detained, and persons held, and created offences for failure to comply. According to the Attorney-General's Department, in doing so, the Bill did no more than harmonise and simplify what already existed in legislation.<sup>52</sup>

The Maritime Powers (Consequential Amendments) Bill 2012 was introduced at the same time.<sup>53</sup> Most relevantly, it repealed from the *Migration Act* all the maritime enforcement powers contained therein, the most important (in the current context) being subsection 245F(8). According to the Attorney-General's Department, in summary subsection 245F(8) of the *Migration Act* provided as follows:

An officer may detain the ship or aircraft and bring it or cause it to be brought to a port or to another place (including a place within the territorial sea or the contiguous zone in relation to Australia) that he or she considers appropriate if, in the case of a ship or aircraft that is in Australia, the officer reasonably suspects that the ship or aircraft has been involved in a contravention either in or outside Australia of this Act, and, in the case of an Australian ship that is outside Australia, the officer reasonably suspects that the ship is, will be or has been involved in a contravention either in or outside Australia of this Act.

It then goes on to provide that in the case of a foreign ship where the officer reasonably suspects it has been or will be involved in an act in contravention of the Act and provides expressly in subsection 8AA that to avoid doubt subsection 8 allows an officer to bring a ship or cause it to be brought to a place even if it is necessary for the ship to travel on the high seas to reach the place.<sup>54</sup>

Like the other maritime enforcement provisions contained in the *Migration Act*, subsection 245F(8) of the *Migration Act* was not brought over to the *MPA* in its existing form. However, the Attorney-General's Department asserted at the time that the *MPA* would not reduce or enlarge any of the powers that were contained in the *Migration Act*. The Senate Legal and Constitutional Affairs Legislation Committee recommended that the Senate pass both Bills, but Coalition Senators made a dissenting report on the basis that the Attorney-General's Department had been unable to categorically say whether the power to turn back unauthorised boats would be preserved in the *MPA*.<sup>55</sup> The extent of the maritime enforcement powers in the *Migration Act* were never been tested in the courts.<sup>56</sup> Both Bills were subsequently passed on 13 March 2013.<sup>57</sup> Since the *MPA* came into force on 27 March 2014, the maritime enforcement powers in the *MPA* used to manage vessels carrying asylum seekers has not been the subject of any judicial scrutiny and time of writing, the High Court had not yet delivered its judgment in the case of *CPCF v Minister for Immigration and Border Protection*.

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51. Parliament of Australia, '[Maritime Powers Bill 2012 homepage](#)', Australian Parliament website, accessed 15 July 2014.

52. J Reid (Assistant Secretary, International Law and Trade and Security Branch of the Attorney-General's Department), Evidence to Senate Legal and Constitutional Affairs Legislation Committee, [Inquiry into Maritime Powers Bill 2012 and the Maritime Powers \(Consequential Amendments\) Bill 2012](#), 10 September 2012, accessed 16 October 2014.

53. Parliament of Australia, '[Maritime Powers \(Consequential Amendments\) Bill 2012 homepage](#)', Australian Parliament website, accessed 18 October 2014.

54. Ibid.

55. Coalition Senators, '[Coalition Senators' Dissenting report](#)', Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into Maritime Powers Bill 2012 and the Maritime Powers (Consequential Amendments) Bill 2012*, The Senate, Canberra, 2012, accessed 15 July 2014.

56. *Ruddock v Vadarlis* (2001) 110 FCR turned on the Commonwealth's executive power and the substantive issues never made it to the High Court because special leave to appeal was denied on the basis that the issues to be contested became moot when the plaintiff's detention on board the Tampa came to an end. See further: A Sapienza, '[CPCF: will Tampa finally get its day in the High Court](#)', University of Sydney, Constitutional Critique weblog, 11 October 2014, accessed 15 October 2014.

57. [Maritime Powers Act 2013](#), [Maritime Powers \(Consequential Amendments\) Act 2013](#), accessed 15 July 2014.

### *Maritime turn backs*

The practice of intercepting and turning asylum seeker boats back into international waters or to the territorial waters of another country was first introduced by the Howard Government. However, only a limited number of asylum seeker boats were ever turned around successfully. According to the report of the Expert Panel on Asylum Seekers, between September and December 2001 the Howard Government's turnback policy was attempted on eight occasions and four boats were successfully escorted or towed back in the direction of Indonesian territorial waters. The other four attempts were unsuccessful either due to the 'non-compliant' behaviour of the asylum seekers or because the boats were unseaworthy.<sup>58</sup>

In 2012, the then Leader of the Opposition, Tony Abbott, stated that shortly after taking office he would instruct the Australian Navy to turn boats back and prevent them from entering Australian waters or arriving onshore.<sup>59</sup> As promised, this policy was reinstated by the Abbott Government on 19 December 2013. Since that time, 12 boats with 383 people on board have been turned back at sea:

A total of 45 ventures have been stopped before they even set sail through disruption operations with partner countries and 12 ventures, with 383 people on board, have been turned back at sea, as we promised we would do. The first safe turn back occurred on 19 December 2013 and the most recent on 20 May this year. Four of the turn backs involved the use of lifeboats.<sup>60</sup>

Despite the secrecy surrounding operations conducted under the Government's 'Operation Sovereign Borders', on 7 July 2014 the Government took the unusual step of announcing that in late June it had intercepted a boat carrying 41 Sri Lankan nationals west of Cocos (Keeling) Islands. Instead of returning the boat to sea, the Government delivered it back to Sri Lankan authorities, just outside the Port of Batticaloa. In doing so it emphasised that all the people on board the vessel were subjected to an enhanced screening process.<sup>61</sup> Very little is known about the screening process that was used to find that 40 of these individuals were not refugees. However, the UNHCR issued a press release at the time stating 'UNHCR has previously made known its concerns to Australia about its enhanced screening procedures and their non-compliance with international law. UNHCR's experience over the years with shipboard processing has generally not been positive. Such an environment would rarely afford an appropriate venue for a fair procedure'.<sup>62</sup> The UNHCR was of the view that 'anyone claiming asylum has a right to have their case properly assessed by qualified personnel in accordance with the necessary procedural and legal safeguards'. According to the Minister only one person was identified as requiring a further determination process (to be conducted either in Papua New Guinea or Nauru), but that person subsequently decided to be transferred along with the other 40 individuals. According to the Minister, this transfer of 41 persons (including 37 Sinhalese and four Tamil Sri Lankan nationals) follows previous returns to Sri Lanka including 79 UMAs under Operation Sovereign Borders last year.<sup>63</sup>

### *The High Court challenge to maritime enforcement powers*

On 29 June 2014, an Australian border protection vessel intercepted an Indian flagged vessel carrying 157 people. The interception occurred near Christmas Island, in the contiguous zone to Australia's territorial sea. According to Court documents, after the Indian vessel later became unseaworthy, the detainees were transferred to the Australian vessel and were then detained aboard it. On 1 July 2014 the National Security Committee of Cabinet decided that the detainees should all be taken to India. The detainees remained aboard the Australian vessel while it travelled through international waters and later waited near India while diplomatic negotiations took place. The Minister then decided to take the detainees into Australia's migration zone instead of to India. The detainees remained aboard the Australian vessel until 27 July 2014, when they were taken to the Cocos (Keeling) Islands. They were then detained under subsection 189(3) of the *Migration Act*.<sup>64</sup> In late July the

58. Expert Panel on Asylum Seekers, [Report of the Expert Panel on Asylum Seekers](#), op. cit., attachment 8, p. 125.

59. T Abbott (Leader of the Opposition), [The Coalition's plan for more secure borders: address to the Institute of Public Affairs](#), Melbourne, 27 April 2012, accessed 8 October 2014.

60. S Morrison (Minister for Immigration and Border Protection), [A year of stronger borders](#), op. cit.

61. S Morrison (Minister for Immigration and Border Protection), [Australian Government returns Sri Lankan people smuggling venture](#), media release, 7 July 2014, accessed 13 October 2014.

62. UNHCR, [Returns to Sri Lanka of individuals intercepted at sea](#), media release, 7 July 2014, accessed 13 October 2014.

63. S Morrison (Minister for Immigration and Border Protection), [Australian Government returns Sri Lankan people smuggling venture](#), op. cit.

64. High Court of Australia (HCA), [CPCF v Minister for Immigration and Border Protection: Short Particulars](#), HCA website, accessed 13 October 2014.

157 people were subsequently transferred to detention facilities in Curtin. On 2 August 2014 the Minister announced that following their decision to refuse to meet with Indian consular officials, they had been transferred to Nauru for processing.<sup>65</sup> A writ of summons was filed in the High Court on 7 July 2014 (*CPCF v Minister for Immigration and Border Protection*). The plaintiff challenges the lawfulness of his detention outside of Australia and Australia's contiguous zone and seeks damages for wrongful imprisonment.<sup>66</sup>

The plaintiff, a Sri Lankan asylum seeker, is arguing that there was an obligation to give him an opportunity to be heard prior to any exercise of power to take him to a place outside Australia and that obligation was breached. He is also arguing that his detention was not authorised by either the *MPA* or any non-statutory power and that the power to take him conferred by subsection 72(4) of the *MPA* was constrained in such a way that the places to which he could lawfully be taken was confined to places to which he could be taken consistently with Australia's *non-refoulement* obligations.

The plaintiff is also arguing that the maritime officers making the decisions impermissibly acted under an unlawful policy or under the dictation of the National Security Committee of Cabinet (NSC) and that the Minister impermissibly purported to exercise the powers conferred by subsection 72(4) for the purpose of general deterrence of others.

With respect to the non-statutory executive power, the plaintiff is arguing that an executive power to prevent non-citizens entering Australia, absent statutory authority, does not exist. If it did exist, it was abrogated by the *MPA*; and even if it did exist and was not abrogated, that power is subject to constraints that have been infringed in the current matter.<sup>67</sup>

The defendant (Minister) is arguing that subsection 72(4) is not limited by reference to whether the place to which the person is taken implements the benefit of *non-refoulement* obligations. Subsection 72(4) does not contain an implied condition that, before the power can be exercised to take a person to a place outside Australia, there must be an existing agreement between Australia and the other country. Further, subsection 72(4) empowers maritime officers to engage in conduct in the course of their duties, as part of a chain of command.<sup>68</sup>

The defendant further argues that section 61 of the *Constitution* gives the Executive a non-statutory power to prevent non-citizens from entering Australia and to detain such non-citizens and take them to a place outside Australia.<sup>69</sup> This power is not qualified by reference to international law obligations or limited by the domestic laws of another country. Neither the power under subsection 72(4) of the *MPA*, nor non-statutory executive power, was subject to an obligation to give the plaintiff a prior opportunity to be heard about the exercise of that power.<sup>70</sup>

## **Schedule 2—Protection visas and other measures**

### **What are the most significant changes being made by this Schedule?**

The amendments in Schedule 2:

- insert an amended definition of protection visas into the *Migration Act* (to expressly include both permanent and temporary protection visas) (**item 5**)
- provide that the regulations may prescribe additional classes of permanent and temporary visas as protection visas (**item 5**)
- insert a new temporary protection visa (a Safe Haven Enterprise Visa) (**items 13—18**)

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65. S Morrison, [Transfer of 157 IMAs from Curtin to Nauru for offshore processing](#), media release, 2 August 2014, accessed 13 October 2014.

66. High Court of Australia (HCA), '[CPCF v Minister for Immigration and Border Protection: Short Particulars](#)', HCA website, accessed 13 October 2014.

67. High Court of Australia (HCA), '[CPCF v Minister for Immigration and Border Protection: Plaintiff's submissions](#)', HCA website, 11 September 2014, accessed 13 October 2014.

68. High Court of Australia (HCA), '[CPCF v Minister for Immigration and Border Protection: Defendant's submissions](#)', op. cit.

69. [Australian Constitution](#), accessed 18 October 2014.

70. Ibid.

- enable the regulations to convert an application for one type of visa into an application for a different type of visa (**item 20**) and insert **new regulation 2.08F** which provides that certain applications for permanent protection visas are taken to be applications for temporary protection visas (**item 38**)
- confirm that the application bars (in sections 48, 48A and 501E) apply to people who have been refused a visa or had a visa that was cancelled in circumstances where those applications were taken to have been made (**items 22—24**) and
- insert the criteria for grant of new Subclass 785 (Temporary Protection) visa into the regulations (**items 30—31**).

### Why are these changes being made?

TPVs are being re-introduced because the Government is of the view that those who arrive by boat without a valid visa should not be rewarded with permanent protection. The re-introduction of temporary protection will thus enable the Government to process the claims of some 30,000 asylum seekers (what it terms the ‘legacy caseload’).

The Safe Haven Enterprise Visa (SHEV) is being introduced to provide an alternative to TPVs for those in the ‘legacy caseload’ that are found to be refugees. It will ‘encourage enterprise through earning and learning’ and support regional Australia.<sup>71</sup> It is also the result of negotiations with the Palmer United Party aimed at gaining support for the re-introduction of TPVs.<sup>72</sup>

The Government is of the view that the regulations that enable existing applications for permanent protection visas to be converted into applications for TPVs are needed to ensure that UMAs are not granted permanent protection visas to remain in Australia and to enable it to more effectively manage UMAs. The Government is also of the view that the amendment authorising the making of conversion regulations for *any* class of visa will facilitate greater flexibility in the Department’s management and processing of applications in response to changing Government priorities.<sup>73</sup>

### Why are these changes significant?

The authority to make regulations which deem an application for one type of visa to be an application for a different type of visa is significant because it raises procedural fairness concerns and will inevitably create uncertainty for visa applicants.

In this context it is relevant to note that this mechanism will not only apply to the ‘legacy caseload’ but also have broader application to the Department’s management and processing of applications for any class of visa (not just Protection visas) in response to changing Government priorities.<sup>74</sup>

### Temporary Protection Visas

TPVs were first introduced by the Howard Government in October 1999, and were formally abolished by the Rudd Government in August 2008.<sup>75</sup> Though the Coalition did not oppose the abolition of TPVs in 2008, the reintroduction of TPVs was a key election commitment for the Coalition in 2013 as it consistently maintained that the removal of TPVs had contributed to the spike in irregular maritime arrivals which occurred under Labor between 2008 and 2013.<sup>76</sup> The newly elected Coalition Government attempted to implement this commitment in October 2013, when it registered an amendment to the Migration Regulations 1994 allowing for the reintroduction of TPVs, however this was disallowed in the Senate on 2 December 2013.<sup>77</sup> Other attempts to

71. S Morrison, Second reading speech, op. cit.

72. C Palmer, [A solution to save Australia billions of dollars and place refugees into productive employment](#), media release, Canberra, 25 September 2014, accessed 2 October 2014.

73. Explanatory Memorandum, op. cit., p. 7.

74. Ibid., p. 7.

75. For further information see: H Spinks, [A return to Temporary Protection Visas?](#), FlagPost weblog, 18 November 2013, accessed 2 October 2014.

76. Liberal Party of Australia, [The Coalition’s Operation Sovereign Borders policy](#), Coalition policy document, Election 2013, accessed 2 October 2014.

77. M Nadin, [Labor and Greens combine to sink Coalition’s protection visa scheme](#), *The Australian*, 3 December 2013, p. 2, accessed 2 October 2014.



provide temporary rather than permanent protection to asylum seekers found to be refugees have also been thwarted by the High Court.<sup>78</sup>

Passage of this Bill, along with proposed amendments to the Migration Regulations, will create a class of temporary visas to be known as temporary protection visas. **Item 31** confirms that temporary protection visas will be the only protection visas available to people who: are unauthorised maritime arrivals; otherwise arrived in Australia without a visa (for example, unauthorised air arrivals); were not immigration cleared on their last arrival in Australia; or already hold a TPV.<sup>79</sup> People granted this visa will be barred from ever making a valid application for a permanent protection visa. This is a key point of difference with the temporary protection regime which existed under the Howard Government—around 95 per cent of the 9,043 UMAs granted TPVs between 1999 and 2007 eventually gained permanent visas.<sup>80</sup> In most other respects the conditions placed on TPV holders under the proposed system would mirror those that applied previously. TPVs will be granted for a maximum period of three years, after which time visa holders may be granted a further TPV if they are deemed to still be in need of protection. TPV holders will have permission to work, and access to Medicare and social security, but they will not have access to family reunion, or the right to re-enter Australia should they travel overseas.<sup>81</sup>

TPVs have been widely criticised by refugee advocates, human rights organisations and mental health experts on the basis that they provided inadequate settlement support, the lack of family reunion rights meant family members remained separated for many years, and the fact that TPV holders lived in a state of limbo in which they were uncertain of their future and unable to begin the process of rebuilding their lives, all of which had significant negative mental health impacts.<sup>82</sup> The deterrence value of TPVs has also been questioned, given the fact that the two years following the introduction of the TPV in 1999 saw a large increase in unauthorised boat arrivals, particularly women and children who were unable to access family reunion to join men who had been granted TPVs.<sup>83</sup>

### *The Safe Haven Enterprise Visa*

In addition to reintroducing TPVs, **item 16** provides for the creation of a new class of protection visa, to be called a Safe Haven Enterprise Visa (SHEV). A visa of this type has not been previously floated by the Coalition, but is the result of negotiations with the Palmer United Party aimed at gaining support for TPVs.<sup>84</sup> The Bill does not contain any detail regarding how this visa will operate, and what conditions will apply—these details will be spelt out in the Migration Regulations following passage of the Bill. However the Minister has stated that the SHEV will be a temporary visa available to people from the legacy caseload who are found to be refugees, as an alternative to a TPV, and will be valid for five years. Persons granted a SHEV will be required to live in a ‘designated region’ and encouraged to fill job vacancies in regional areas. States and territories, regions and employers will be able to nominate themselves to participate in this program. Visa holders will have the same access to Medicare and social security as TPV holders, but those who can show they have worked in a regional area without accessing income support for three and a half years will be permitted to apply for other onshore visas, such as family and skilled visas (but not permanent protection visas). They would have the same restrictions on family reunion and re-entry to Australia as TPV holders.<sup>85</sup>

Palmer United Party leader Clive Palmer describes the SHEV as:

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78. *Plaintiff S4-2014 v Minister for Immigration and Border Protection* [2014] HCA 34; S Whyte, ‘[High Court rejects temporary visa](#)’, *The Sydney Morning Herald*, 12 September 2014, p. 8, accessed 2 October 2014. See also: E Karlsen, ‘[Temporary protection by hook or by crook](#)’, FlagPost weblog, 5 March 2014, accessed 15 October 2014.

79. Explanatory Memorandum, op. cit., p. 6.

80. Australian Government, [Report of the Expert Panel on Asylum Seekers](#), August 2012, p. 91, accessed 2 October 2014.

81. S Morrison, Second reading speech, op. cit.

82. For further discussion of these issues see H Spinks, ‘[A return to Temporary Protection Visas?](#)’, FlagPost weblog, op. cit.

83. Senate Legal and Constitutional Affairs Committee, Answers to Questions on Notice, Immigration and Citizenship Portfolio, Budget Estimates 2012–13, 21–22 May 2012, [Question BE12/0265](#), accessed 3 October 2014.

84. C Palmer, [A solution to save Australia billions of dollars and place refugees into productive employment](#), media release, op. cit.

85. S Morrison, Second reading speech, op. cit.

... a win, win situation ... It's a win for refugees who now have a safe haven visa and can protect themselves and work towards establishing themselves in an Australian community. And it's a win for regional Australia, which will benefit from the additional work resources in communities where there is a labour shortage...<sup>86</sup>

While the SHEV does appear to provide a pathway to permanent residency, unlike the TPV, the likelihood of this being the case for the majority of asylum seekers found to be owed protection has been questioned. Minister Morrison has stated that:

... if they do go to those places and they do work for three and half years out of the five, then they may make an onshore application for – it could be student visa, it could be a 457 visa – but they would have to meet the eligibility requirements of those visas. Failure to meet those requirements means the only other visa they could get would get a TPV.<sup>87</sup>

Some commentators have pointed out that refugees may find it difficult to meet the eligibility criteria for these kinds of visas due to high application fees, lack of required English language skills, and a lack of recognised skills required for skilled migrant visas.<sup>88</sup> Minister Morrison himself has acknowledged that the path to permanent residency offered by the SHEV will not be easy one, stating:

... these benchmarks of working or studying in these regional areas are very high. Our experience on resettlement for people in this situation would mean that this is a very high bar to clear. Good luck to them if they choose to do that and if they achieve it. ... There is an opportunity here but I think it is a very limited opportunity and we will see how it works out.<sup>89</sup>

### ***Schedule 3—Act-based visas***

#### **What are the most significant changes being made by this Schedule?**

The amendments in Schedule 3:

- provide that the regulations may, but need not, prescribe criteria for visas (**item 1**)
- provide that an application for a visa is invalid if the regulations do not prescribe specific criteria for visas listed in section 31 of the *Migration Act*, including (amongst others) permanent and temporary protection visas (**item 7**) and
- provide that if there are regulations that prescribe specific criteria, an application will also be invalid unless an applicant satisfies both the criteria in the Regulations *and* in the *Migration Act* (**item 7**).

#### **Why are these changes being made?**

It is not entirely clear why these changes are being made.

#### **Why are these changes significant?**

These changes are significant because they expand the basis upon which certain visa applications (including protection visas) will be deemed to be invalid. For example, under **proposed section 46AA** (at **item 7**), an application for one of the six visas listed in that section (including protection visas) will be invalid if the regulations do not prescribe any criteria which relate to making a valid visa application or being granted the visa. Criteria in the regulations that apply generally to visa applications or the granting of visas are not considered to be criteria for this purpose (**proposed subsection 46AA(3)**). Note that an application will valid if the regulations prescribe criteria which relate to making a valid visa application *or* being granted the visa.

Therefore, there may be specific visas listed in the *Migration Act* (such as the proposed SHEV) for which a valid application could not be made, if prescribed criteria have not been included in the Regulations (relating to either

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86. C Palmer, [A solution to save Australia billions of dollars and place refugees into productive employment](#), media release, op. cit.

87. S Morrison (Minister for Immigration and Border Protection), [Transcript of press conference: reintroducing TPVs to resolve Labor's asylum legacy caseload; Cambodia](#), op. cit.

88. M Crock and K Bones, ['Refugee plan an affront to the rule of law'](#), *The Drum*, ABC website, 30 September 2014, accessed 3 October 2014.

89. S Morrison (Minister for Immigration and Border Protection), [Transcript of press conference: reintroducing TPVs to resolve Labor's asylum legacy caseload; Cambodia](#), op. cit.

the requirements that must be satisfied in order to make a valid application or relating to the criteria that must be satisfied by an applicant in order to be granted the visa).

#### ***Schedule 4—Amendments relating to fast track assessment process***

##### **What are the most significant changes being made by this Schedule?**

The amendments in Schedule 4:

- insert a **new Part 7AA** into the *Migration Act* which will provide for a limited form of merits review of certain decisions to refuse protection visas to some applicants, including unauthorised maritime arrivals that entered Australia on or after 13 August 2012 (**items 1, 2, 21**).

##### **Why are these changes being made?**

The Coalition's election commitment was to implement a new fast track assessment and removal process to have protection claims assessed and immigration status resolved as quickly as possible. In August 2013 the Coalition stated that '... the faster cases can be resolved, the better it is for everyone, eliminating long periods of idleness and uncertainty that can lead to mental illness, reducing detention and bridging visa costs to the community and allowing people to move on and make decisions about the next stage of their lives'.<sup>90</sup>

However, the rationale for the introduction of a fast track process appears to have changed over the last year. In his second reading speech, the Minister explains that the fast track process is being introduced to efficiently and effectively respond to unmeritorious asylum claims:

The government is of the view that a 'one size fits all' approach to responding to the spectrum of asylum claims made under Australia's protection framework is inconsistent with a robust protection system that promotes efficiency and integrity. It limits the government's capacity to address and remove those found to have unmeritorious claims quickly while diverting resources away from those individuals with more complex claims. The government has no truck with people who want to game the system. A new approach is warranted in the Australian context. The fast-track assessment process introduced by schedule 4 of this bill will efficiently and effectively respond to unmeritorious claims for asylum and will replace access to the Refugee Review Tribunal with access to a new model of review, the Immigration Assessment Authority—to be known as the IAA. These measures are specifically aimed at addressing the backlog of IMAs—some 30,000—and will ensure their cases progress towards timely immigration outcomes, either positive or negative... These measures will support a robust and timely process, better prioritise and assess claims and afford a differentiated approach depending on the characteristics of the claims.<sup>91</sup>

##### **Why are these changes significant?**

The introduction of a fast track review process to be conducted by the newly created Immigration Assessment Authority (IAA) is significant because it will enable merits review of certain unsuccessful protection visa applications to be finalised quicker than if the review was to be conducted by the Refugee Review Tribunal.

However, this is also significant because it would exclude certain asylum seekers from merits review altogether (**item 1**). Initially, this would include (amongst others) those who can access protection elsewhere or who present unmeritorious claims or who without reasonable explanation use a bogus document to support their application. Not insignificantly, under the proposed amendments the Minister will have the power to expand the class of persons that will be excluded from merits review altogether and will also be able to expand the class of persons that will be subject to the fast track process. Both will be by way of a non-disallowable legislative instrument (**item 2**).<sup>92</sup>

The removal of merits review for certain asylum seekers and the introduction of a limited review process for others may be expedient for Government as it will certainly enable applications to be disposed of more efficiently. However, in turn it raises concerns because of the potentially dire consequences of incorrect decision-making in this area. Such concerns could arguably be alleviated to some degree if one is assured of the

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90. Liberal Party of Australia and the Nationals, [The Coalition's policy to clear Labor's 30,000 border failure backlog](#), Coalition policy document, Election 2013, accessed 2 October 2014.

91. S Morrison, Second reading speech, op. cit.

92. See **item 26** of the table at subsection 44(2) of the [Legislative Instruments Act 2003](#), accessed 18 October 2014.

reliability and adequacy of the initial fast track assessment process that will be conducted by the Department. However, very little information is known about this process other than 'it will be conducted under existing provisions of the *Migration Act* [and] will be supported by a code of procedure with shorter time frames which will be prescribed in the Migration Regulations'.<sup>93</sup> In the past, when officers have conducted streamlined refugee assessment processes on Christmas Island, the rate at which such decisions were subsequently found to be incorrect was significantly high.<sup>94</sup>

Moreover, the introduction of a fast track assessment and review process for most of the UMAs who arrived on or after 13 August 2012 appears to presuppose that most of this caseload are *not* genuine refugees and that their applications should thus be finalised and disposed of as quickly as possible. Historically however, the statistics indicate that asylum seekers who have entered Australia by boat have high acceptance rates, that is, most are ultimately found to be genuine refugees.<sup>95</sup> It is also worth bearing in mind that the majority of asylum seekers who will be subject to the new fast track process have already been waiting for years to have their protection visa applications assessed.

The IAA will be established as a separate office of the Refugee Review Tribunal (RRT) and will be headed by a Principal Member. The merits review will be conducted by a Senior Reviewer and other Reviewers. Not insignificantly, these people will be engaged under the *Public Service Act 1999* (**proposed section 473JE**). It is thus not clear what their qualifications and/or level of experience will be. While there are also no mandatory qualifications for the appointment of RRT Members, persons appointed by the Governor-General under the *Migration Act* as Members of the RRT have typically worked in a relevant profession or have had extensive experience at senior levels in the private or public sectors. It is not clear why experienced RRT Members will not undertake merits review under the IAA (as was the case previously when UMAs were being processed on Christmas Island using a non-statutory process). Relevantly, last financial year there were some 144 Members spread across the Refugee and Migration Review Tribunals.<sup>96</sup>

On a procedural level, many of the procedural fairness obligations owed to asylum seekers having their unsuccessful applications reviewed by the RRT will be similarly provided to fast track review applicants (for example, **proposed sections 473DE and 473DF**). However, there are some notable differences. While the RRT is required under existing section 420 of the *Migration Act* to provide a mechanism of review that is 'fair, just, economical, informal and quick', the limited review mechanism to be provided by the IAA need only be 'efficient and quick'—not fair and just (**proposed section 473FA**). In contrast to the procedures adopted at the RRT, the IAA will not (unless there are exceptional circumstances) hold hearings and will only make decisions 'on the papers'—that is using the information that was available to the original decision-maker (see **proposed sections 473DB and 473DD**). Not insignificantly, a fast track review applicant will be provided with a written decision that will set out the decision and the reasons for decision (**proposed sections 473EA and 473EB**). The Principal Member may issue 'guidance decisions' which the IAA must follow unless the facts or circumstances of the decision are clearly different from the facts or circumstances of the guidance decision (**proposed section 473FC**). The IAA has a discretion whether to publish decisions which are considered to be of particular interest without disclosing the identity of the fast track review applicant (**proposed section 473EC**).

Significantly, all fast track applicants will continue to have access to judicial review.<sup>97</sup> However, unlike decisions of the RRT, it appears the Minister will *not* have the ability to substitute a decision of the IAA with a decision that is more favourable to the applicant on public interest grounds (the non-compellable Ministerial intervention power in existing section 417 of the *Migration Act*).

## ***Schedule 5—Clarifying Australia's international law obligations***

### **What are the most significant changes being made by this Schedule?**

The amendments in Schedule 5:

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93. Explanatory Memorandum, op. cit., p. 8.

94. See overturn rates of boat arrival assessments conducted during the period 2010 to 2012 in Expert Panel on Asylum Seekers, [Report of the Expert Panel on Asylum Seekers](#), op. cit., table 14, p. 98.

95. See E Karlsen, 'Offshore processing: lessons from the 'Pacific Solution'', 15 April 2014, FlagPost weblog, accessed 15 October 2014.

96. Migration and Refugee Review Tribunals, *Annual report 2012–13*, Canberra, 2013, p. vii.

97. Statement of Compatibility with Human Rights, op. cit., p. 22.

- insert a provision into the *Migration Act* that states that Australia's *non-refoulement* (non-return) obligations under international law are irrelevant for the purposes of removing unlawful non-citizens (**items 1—2**)
- remove references to the *1951 Refugee Convention* (**items 10, 14, 15** amongst others)<sup>98</sup> and
- insert a new statutory framework to codify the Government's interpretation of its international obligations towards assessing asylum seekers (**items 7—12**).

### Why are these changes being made?

The changes being made by **item 2** (inserting **proposed section 197C** into the *Migration Act*) are being made because the courts have found that the removal power under section 198 of the *Migration Act* is to be read in light of, and subject to, Australia's *non-refoulement* obligations under international law.<sup>99</sup> Such an interpretation is hindering efforts to remove some unlawful non-citizens from Australia.<sup>100</sup>

The Government is removing most references to the *1951 Refugee Convention* and inserting a new statutory framework into the Act because the courts have been interpreting provisions in the *Migration Act* 'in light of a presumed legislative intention for the *Migration Act* as a whole' to facilitate Australia's compliance with its obligations under the *1951 Refugee Convention*.<sup>101</sup> The Government obviously disagrees with such an interpretation—which for example, led to the High Court finding in 2010 that the Government owed unauthorised maritime arrivals on Christmas Island procedural fairness obligations when processing and reviewing asylum assessments.<sup>102</sup> By way of explanation, in the second reading speech to the Bill, the Minister states:

The new statutory framework will enable parliament to legislate its understanding of these obligations within certain sections of the Migration Act without referring directly to the refugees convention and therefore not being subject to the interpretations of foreign courts or judicial bodies which seek to expand the scope of the refugees convention well beyond what was ever intended by this country or this parliament. This parliament should decide what our obligations are under these conventions—not those who seek to direct us otherwise from places outside this country.<sup>103</sup>

### Why are these changes significant?

#### *International non-refoulement obligations*

On a simplistic level, the changes being made by **item 2** (inserting **proposed section 197C** into the *Migration Act*) are merely an expression of the fact that an assessment of Australia's *non-refoulement* obligations will henceforth be undertaken *prior* to removal and is thus irrelevant when officers begin the process of removing non-citizens from Australia.

However, these changes are arguably far more significant. Though the Government asserts that 'it will continue to meet its *non-refoulement* obligations'<sup>104</sup> it is extremely difficult to see how the Government can make such a statement when, under the proposed changes, people (including asylum seekers and others who fear being returned to a place where they are likely to suffer persecution, torture, or other significant harm) can be returned to such a place, *irrespective* of whether the Government has even determined or made an assessment, according to law, of Australia's *non-refoulement* obligations in respect of the person. In this regard, the Government has stated that it wants to remove the ability of a person to challenge their removal in the courts on the basis that there has not been an assessment of protection obligations according to law or procedural fairness. Presumably, if Australia was adhering to its international *non-refoulement* obligations by conducting

98. For example, **item 10** removes reference to the *1951 Refugee Convention* in existing section 36(2) of the *Migration Act* as a criteria for a protection visa, replacing it with 'because the person is a refugee'.

99. Such as *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (Malaysian Declaration case).

100. Explanatory Memorandum, op. cit., p. 165, paragraph 1135.

101. Explanatory Memorandum, op. cit., p. 165.

102. *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* [2010] HCA 41, accessed 13 October 2014.

103. Second reading speech, op. cit.

104. Explanatory Memorandum, op. cit., p. 166.



thorough and lawful assessments, they would arguably withstand a legal challenge and the Government in turn would not be precluded from removing such persons from Australia.

The Government is of the view that it will instead adhere to its international *non-refoulement* obligations through other means such as either the protection visa application process or through the use of the Ministerial intervention powers under existing sections 46A, 195A or 417 of the *Migration Act*. However, all these mechanisms are completely discretionary upon the Minister (personally), non-compellable, non-transparent, and non-reviewable (see existing sections 46A, 195A or 417 of the *Migration Act*). The only process that does not entirely fall within such a categorisation is the protection visa application process though again, some asylum seekers (such as UMAs) are *not* entitled to lodge a protection visa application unless the Minister thinks it is in the public interest to permit them to do so (section 46A of the *Migration Act*). In this context it is also relevant to note that there are limitations on a person's ability to even request Ministerial intervention. For example, the Minister's personal intervention power in existing section 417 of the *Migration Act* to substitute a decision of the RRT with a decision that is more favourable to the applicant does not appear to be available to fast track applicants, and under section 195A of the *Migration Act* the Minister can only grant a visa (without application) if the person is in detention.

One provision from the *1951 Refugee Convention* that is *not* being codified by this Bill is Article 33(1).<sup>105</sup> This article contains the prohibition of expulsion or return ('refoulement')—which is the cornerstone of refugee protection. According to the principle of non-refoulement, signatory States must not forcibly expel or return a refugee to a situation where their life or freedom may be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. The principle of *non-refoulement* has become part of customary international law and is considered to be binding on all states, even those which have not signed the *1951 Refugee Convention*. While the exception to the principle of *non-refoulement*, contained in Article 33(2) of the *1951 Refugee Convention* will be codified by the insertion of **proposed subsection 36(1C)** (see **item 9** of Schedule 5), the actual obligation not to return refugees to persecution will *not* be codified. If this crucial element of the *1951 Refugee Convention* was to be similarly incorporated into the Act, it would arguably make the Government's assertions that it will abide by its international *non-refoulement* obligations more convincing.

The inherent difficulties with discretionary mechanisms such as Ministerial intervention to ensure compliance with Australia's *non-refoulement* obligations is perhaps ironically best illustrated by the 2013 Full Federal Court case of *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33, the very case the Government is responding to with this amendment.<sup>106</sup> The Full Bench of the Federal Court in this case unanimously ruled in favour of the applicant and granted an injunction restraining the Minister from removing the applicant from Australia. Most relevant to the current context are their Honours' findings that the Minister intended to remove the applicant from Australia even if the applicant was a person to whom Australia owed protection obligations and in contravention of Australia's international obligations.<sup>107</sup>

This was an application by an irregular maritime arrival for judicial review of a decision of the Minister not to exercise any personal public interest powers in respect of him. Following assessments that the applicant was not owed protection obligations under the Refugees Convention he was subject to a Departmental 'International Treaty Obligations Assessment' (ITOA). This was the process used to determine whether removal would accord with Australia's *non-refoulement* obligations prior to the commencement of the statutory complementary protection regime in March 2012. The ITOA concluded the applicant's removal to Afghanistan would not breach Australia's *non-refoulement* obligations under CAT or the ICCPR.<sup>108</sup>

On the same day the applicant was notified that the Department had not found any international obligations owing to him, or unique and exceptional circumstances in his case and, as a result, his case had not been

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105. [1951 Convention relating to the Status of Refugees](#), op. cit.

106. Explanatory Memorandum, op. cit., p. 166.

107. *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33, accessed 13 October 2014.

108. The ITOA stated: '... there is a real risk that they will be arbitrarily deprived of life, will have the death penalty carried out on him or her or be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Departmental policy is that this should be interpreted as meaning that the necessary chance of the harm occurring is balance of probabilities, but that this should not be construed too narrowly in cases which are very close to that threshold. That is, the possibility must be more likely than not, which is a higher threshold than the real chance test used in the Refugees Convention under Australian law': *Minister for Immigration and Citizenship v SZQRB* (2013) ALR 525, per Lander and Gordon JJ at 240.

referred to the Minister for the Minister's consideration. In August 2012, the Department completed a pre-removal clearance concluding his removal to Afghanistan did not raise concerns relating to Australia's *non-refoulement* obligations and that his removal did not warrant any Departmental protection assessment.

In the absence of Ministerial intervention, section 198 of the *Migration Act* then required the removal of the applicant from Australia. On 21 September 2012 the Minister made a decision, based among other things on the ITOA, that the applicant's removal to Afghanistan was consistent with Australia's international obligations under the Refugees Convention, the CAT and the ICCPR. The Minister decided not to consider, or further consider, the exercise of any of his personal non-compellable public interest powers in respect of the applicant (including his power under section 91L to allow the applicant to make a protection visa application, and under section 195A to grant him a visa).

The issues before the Court were (amongst other things) whether the Minister's decision not to exercise his public interest powers was affected by jurisdictional error because it was stated to be made whether or not his views on compliance with international law obligations were correct, and irrespective of any legal or factual error in the ITOA or any other circumstance, and because it was based on the ITOA which had applied the wrong standard of proof required by the CAT and ICCPR and was made by a process that denied the applicant procedural fairness.

The Federal Court unanimously allowed the applicant's application. Lander and Gordon JJ (Besanko, Flick and Jagot JJ agreeing) found that:

In our opinion, the test is as for s 36(2)(a) and as stated by SZQRB – is there a real chance that SZQRB will suffer significant harm (as that is defined in s 36(2A)) were he to be returned to Afghanistan. That being the case, the ITOA applied the wrong test in considering SZQRB's entitlement for Australia's protection obligations under the CAT and ICCPR as defined in s 36(2)(aa) and s 36(2A). The ITOA assessed SZQRB's claims as against whether it was "more likely than not" that SZQRB would suffer significant harm, which was not the appropriate standard. The "Departmental policy", if the ITOA was right to describe it that way, was not in accordance with Australian law. SZQRB's contention that the ITOA was not carried out according to law must be accepted on that ground alone...

The ITOA was completed after SZQRB made his written submission and before the Country Information that was relied upon was put to SZQRB. SZQRB was never asked to comment upon the MOU or its effectiveness. Some of the Country Information was published after SZQRB's written submission. The process that led to the ITOA was flawed in that the assessor failed to accord SZQRB procedural fairness by bringing to his attention information that the ITOA might rely upon for concluding that returning SZQRB would not breach Australia's *non-refoulement* obligations under the CAT or ICCPR. For both reasons advanced by SZQRB, SZQRB is entitled to a declaration that the ITOA was not carried out according to law...

**On this appeal, the Minister does intend to remove SZQRB from Australia without necessarily first obtaining an ITOA which would be conducted procedurally fairly and in which the law would be correctly applied. The Minister's decision of 21 September 2012 unambiguously is that he will allow SZQRB to be removed from Australia whether the ITOA with which he was provided was factually or legally correct and even if his view that SZQRB is not a person to whom Australia owes protection obligations is not correct. In other words, the Minister threatens to remove SZQRB from Australia even if SZQRB is a person to whom Australia owes protection obligations and in contravention of Australia's international obligations.** [Emphasis added].<sup>109</sup>

The Court thus granted the injunction restraining the Minister from removing SZQRB from Australia until his claims for protection under the CAT and ICCPR have been assessed according to law and until the Minister has decided that SZQRB is not a person to whom Australia owes protection obligations under paragraph 36(2)(aa) of the *Migration Act*.<sup>110</sup> The Minister's application for special leave to appeal this judgment to the High Court of Australia was refused on 13 December 2013 on the basis that there were insufficient prospects of success.<sup>111</sup>

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109. *Minister for Immigration and Citizenship v SZQRB* (2013) 296 ALR 525, per Lander and Gordon JJ at 246–268.

110. *Ibid.*, at 272.

111. *Minister for Immigration and Citizenship v SZQRB* [2013] HCATrans 323 (13 December 2013), accessed 14 January 2014.

### *New statutory scheme*

The changes being made by **items 7 to 12** are significant in many respects. Removal of references to the *1951 Refugee Convention* appears to be an attempt at the very least to limit Australia's obligations under the Convention and curtail the way in which such obligations are interpreted by the judiciary. To this end it should be noted that the jurisprudence surrounding Australian refugee law is extremely dense, complex and continuously evolving.<sup>112</sup> It is not immediately clear that these amendments will ultimately have their desired effect and whether they may in turn simply lead to greater litigation (in what is already a heavily litigated area).

The proposed definition of 'refugee' in **proposed section 5H** inserts what are known as the 'exclusion clauses' into subsection (2) of the definition. These are taken from Article 1F of the *1951 Refugee Convention*. **Proposed subsection 36(1C)** is inserted into the Act by **item 9**. This will codify Article 33(2) of the *1951 Refugee Convention* into the Act. This provides the exception to the principle of *non-refoulement*. These amendments respectively exclude certain people from the operation of the Convention and from the prohibition on expulsion or return ('*refoulement*'). As previously mentioned, one provision from the *1951 Refugee Convention* that is not being codified by this Bill is Article 33(1). This article contains the prohibition on expulsion or return ('*refoulement*')—which is the cornerstone of refugee protection.

The proposed definition of 'well-founded fear' in **proposed section 5J** significantly changes this essential element of the Convention definition, in that it considerably broadens the basis upon which asylum seekers can be deemed not to have a well-founded fear of persecution and thus be found ineligible for protection. For example, an asylum seeker will be deemed *not* to have a well-founded fear if they can relocate to another part of the country. It will no longer be a requirement that the decision-maker assess whether it is reasonable for them to do so.<sup>113</sup> In addition, an asylum seeker will be deemed *not* to have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour so as to avoid persecution—provided the modification does not conflict with a characteristic that is fundamental to the person's identity or conscience or conceal an innate or immutable characteristic of the person.

In this context it is relevant to note that on 9 October 2014 the High Court heard an appeal from a Full Federal Court decision<sup>114</sup> which concluded that the RRT had committed a jurisdictional error by reasoning that the applicant could avoid persecution in Afghanistan by making certain choices as to his profession and his domicile.<sup>115</sup> The Full Federal Court held that the RRT had limited itself to what the applicant *could* reasonably do upon his return to Afghanistan rather than what he *would* do. In this case, the applicant maintained that he should not be required to modify his conduct or to alter his means of earning a livelihood in the manner advanced by the RRT. The applicant was a self-employed truck driver in Afghanistan who had come to the attention of the Taliban, particularly by reason of his carriage of construction materials. The RRT was satisfied that the applicant 'could reasonably obtain relevant employment in Kabul so that he would not be obliged to travel between Kabul and Jaghori to make a living'. The RRT was further satisfied that he had 'long-established skills making jewellery – a trade at which he worked from 1977 to 2001 – giving him real options in a very big city, either with his own business or as an employee'.<sup>116</sup> This amendment will arguably put it beyond doubt that decision-makers will only need to ask themselves what the applicant *could* do upon return.<sup>117</sup>

The proposed definition of 'membership of a particular social group other than family' in **proposed section 5L** of the Act will similarly limit the basis upon which asylum seekers can claim to have a well-founded fear of persecution for reasons of membership of a particular social group. This amendment will insert a new requirement—that a person can only claim to be a member of a particular social group if each member of the group shares a common characteristic and the characteristic is an innate or immutable characteristic or the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it. The latter requirement is an expansion of the test adopted in *Applicant S v Minister for Immigration*

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112. For example, see Refugee Review Tribunal (RRT) '[RRT guide to refugee law](#)', RRT website, accessed 13 October 2014.

113. For further information on the 'internal relocation' principle see [Chapter 6](#) of the RRT guide to refugee law, RRT website, accessed 13 October 2014.

114. *Minister for Immigration and Border Protection v SZSCA* (2013) 308 ALR 18, [\[2013\] FCAFC 155](#), accessed 13 October 2014.

115. *Minister for Immigration and Border Protection v SZSCA & Anor* (S109/2014). Further information available at the [High Court website](#), accessed 13 October 2014.

116. *Ibid.*

117. For further analysis of this case see: M O'Sullivan, [Before the High Court. Minister for Immigration and Border Protection v SZSCA: should asylum seekers modify their conduct to avoid persecution?](#), *Sydney Law Review*, 36, 2014, p. 541, accessed 16 October 2014.

and *Multicultural Affairs*<sup>118</sup> but considered necessary by the Government in order to confine the test, or prohibit applicants benefiting from a broad test.<sup>119</sup> It should be noted that Article 1A(2) of the *1951 Refugee Convention* does not contain any such limitation on the definition of ‘particular social group’. While other amendments in Schedule 5 have been designed specifically to exclude the interpretations of ‘foreign courts or judicial bodies’, here, the Government is expressly and selectively drawing on interpretations taken in other jurisdictions, such as Canada, the United States of America, and New Zealand.<sup>120</sup>

## ***Schedule 6—Unauthorised maritime arrivals and transitory persons: newborn children***

### **What are the most significant changes being made by this Schedule?**

The amendments in Schedule 6:

- make retrospective amendments to expand the definitions of ‘unauthorised maritime arrival’ and ‘transitory person’ to include a child of such a person who is born either in the migration zone or in a regional processing country (**items 1—2 and 11**) and
- insert a new provision which imposes an obligation on an officer to remove the non-citizen and their child as soon as reasonably practicable after the non-citizen no longer needs to be in Australia for the temporary purpose for which they were brought to Australia (which, in these circumstances, would be (or include) the purpose of giving birth) (**item 7**).

### **Why are these changes being made?**

The Government is of the view that children of UMAs born in Australia should be subject to offshore processing, like their parents. Similarly, children of UMAs born in a regional processing country should be included in the statutory definition of UMA so that families are treated consistently and children are not treated separately from their family in the protection assessment process.<sup>121</sup>

Prior to the Bill being introduced, litigation was commenced in the Federal Circuit Court challenging the Government’s interpretation of the definition of UMA. However, on 15 October 2014 the Federal Circuit Court confirmed the Government’s view that children born to parents who are UMAs are classified to have entered Australia by boat and are thus not entitled to lodge a protection visa application. However, the lawyers representing the applicant have reportedly told the media that an urgent appeal will be lodged to prevent the baby and others in a similar situation being removed to Nauru.<sup>122</sup> There are reportedly some 94 other children born in detention in similar circumstances.<sup>123</sup>

There is also a Bill before Parliament, introduced by the Australian Greens in June 2014 (the Senate Legal and Constitutional Affairs Committee is due to report on the Bill on 28 October 2014) that will expressly exclude from the definition of UMAs children born in the migration zone.<sup>124</sup>

### **Why are these changes significant?**

These changes are significant because it means children who are born in Australia or in a regional processing centre will have the same legal status under the *Migration Act* as their parent/s who arrived by boat— that is, they will be UMAs.

In June 2014, Senator Hanson-Young of the Australian Greens introduced the Migration Amendment (Protecting Babies Born in Australia) Bill 2014.<sup>125</sup> The Bill would amend the *Migration Act* to ensure that a child who is born in Australia is *not* classified to have ‘entered Australia by sea’ and is therefore not a UMA subject to offshore

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118. *Applicant S v Minister for Immigration and Multicultural Affairs* (2003) 217 CLR 387, [2004] HCA 25, accessed 13 October 2014. See also: Explanatory Memorandum, op. cit., p. 178.

119. Explanatory Memorandum, op. cit., p. 178.

120. Ibid.

121. S Morrison, Second reading speech, op cit.

122. S Smail, ‘Baby Ferouz: family to appeal against Federal Circuit Court’s refusal of protection visa’, *ABC News* (online), 16 October 2014, accessed 6 October 2014.

123. Ibid.

124. Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Protecting Babies Born in Australia) Bill 2014*, inquiry homepage, The Senate, 2014, accessed 13 October 2014.

125. Parliament of Australia, ‘*Migration Amendment (Protecting Babies Born in Australia) Bill 2014 homepage*’, op. cit.

processing. The Senator's second reading speech explains why, in her view, children of UMAs should not be included in the definition of UMAs:

As I stand here today and introduce this Bill, dozens of newborn babies and their parents anxiously await their imminent deportation to Australia's offshore detention centres. These babies, however, were not born in their parents' home country, they were born here in Australia. These babies did not enter Australia by sea or by air, they were born safely on Australian soil and this is where they should remain.

This is not purely a question of policy nor is it simply political; it is in fact a question of morality. We have an obligation to provide these children with the safety and protection they need and deserve. We must find common ground and ensure that these children are provided with the best start in life. This cannot be achieved if we send them offshore to be detained in immigration detention.

These children and their families are already here in Australia, therefore the argument that this policy acts as a deterrence is void. They are here, they were born in Australia, and they deserve to be cared for and protected from further harm. Offshore detention is no place for a child to grow up. The best option for these children is to be able to stay in Australia with their parents while their claims for protection are assessed.<sup>126</sup>

If the Australian Greens' Bill was to secure passage it would reverse the impact of the decision of the Federal Circuit Court.

The obligation imposed by **proposed subsection 198(1C)** (at **item 7**) to remove the non-citizen and child 'as soon as reasonably practicable after the non-citizen no longer needs to in Australia for that purpose' may also raise some concerns if strictly applied. For example, it is not clear whether the legislation allows for a reasonable period of post-natal care and for other unforeseen circumstances when an asylum seeker is brought to Australia for the purpose of giving birth.

## ***Schedule 7—Caseload management***

### **What are the most significant changes being made by this Schedule?**

The amendments in Schedule 7:

- make amendments to enable the Minister to suspend the processing of applications for protection visas (**item 6**)
- limit the number of protection visas that can be granted in a specified financial year (**item 12**) and
- remove the obligation on the Minister and the RRT to each make a decision on a protection visa within 90 days (the so-called 90 day rule) (**items 4 and 14**) and the associated reporting obligation to Parliament (**items 13 and 15**).

### **Why are these changes being made?**

On 20 June 2014 the High Court unanimously upheld separate challenges by two asylum seekers who questioned the ability of the Minister to limit or cap the number of protection visas that can be granted in a financial year.<sup>127</sup> The High Court recognised that the obligation on the Minister under section 65A to make a decision on protection visas within 90 days was incompatible with the capping power in section 85 of the Act. To resolve this conflict within the Act, the Court found that the obligation to process within 90 days was superior to the general capping power in section 85 and thus superseded it. Though the Minister has acknowledged the capping of protection visas was originally a tactical measure to deny permanent protection to UMAs,<sup>128</sup> this proposed amendment will repeal the obligations in existing sections 65A and 414 of the *Migration Act* to finalise applications for protection visas within 90 days and in doing so, overcome the High Court's ruling.

126.S Hanson-Young, 'Second reading speech: Migration Amendment (Protecting Babies Born in Australia) Bill 2014', Senate, *Debates*, 18 June 2014, p. 3282, accessed 13 October 2014.

127.Plaintiff M150 of 2013 v Minister for Immigration and Border Protection [2014] HCA 25; Plaintiff S297-2013 v Minister for Immigration and Border Protection [2014] HCA 24. For further information see: E Karlsen, 'High Court strikes down Minister's decision to cap permanent visas for refugees', FlagPost weblog, 25 June 2014, accessed 13 October 2014.

128.R Hadley, 'Interview with Scott Morrison', 2GB Ray Hadley Program, 23 June 2014, accessed 13 October 2014.



The introduction of processing time frames for protection visas was introduced by the former Howard Government in 2005.<sup>129</sup> This amendment was part of a suite of changes driven by some Liberal Party backbenchers (led by Petro Georgiou) who challenged a number of the Howard Government's policies on asylum seekers and refugees.<sup>130</sup> The aim of the amendment was to ensure decisions on protection visa applications would be made in a timely and efficient manner.

The Government's view is that the 90-day rule should now be repealed because it is no longer an effective mechanism to achieve a flexible, fair and timely resolution of protection visa applications. The Government argues that 'Ministerial directions have been put in place regarding the order of consideration for processing of protection visa applications which achieve a more effective and responsive approach to different caseloads, without generating resource-intensive reporting'.<sup>131</sup>

### Why are these changes significant?

These changes are significant because they will enable the Government to limit or put a cap on the number of protection visas it will grant in a financial year. The last time the Minister made a determination limiting the number of permanent protection visas that could be granted during the 2013/14 financial year the limit of 2,773 was reached only three weeks after the cap had been set.<sup>132</sup> Though such a measure undoubtedly supports the desire to have an orderly migration program, it is also arguable that it sits uneasily with the institution of asylum and Australia's obligations under the *1951 Refugee Convention*. Once imposed, a limitation on the number of protection visas that can be granted in a given year may inevitably create a back-log of cases awaiting resolution, as it does with other non-humanitarian visa classes. However for asylum seekers, such extended delays may likely exacerbate existing medical conditions (such as post-traumatic stress disorder) that are common amongst asylum seekers who have been forced to flee their homeland for fear of persecution. In this program year alone, there have been more than 9,000 new protection visa applications lodged by non-UMAs and more than 900 applications lodged by UMAs.<sup>133</sup>

Arguably, it is not that the obligation to finalise protection visa applications within 90-days (or three months) has been ineffectual. Rather, since its introduction, successive Government policies have conflicted or run counter to this statutory obligation. For example, implementation of the Expert Panel's 'no advantage' principle by the former Labor Government meant the processing of thousands of protection visa applications by UMAs, and the granting of their visas, was deliberately delayed so that they would not get preferential treatment or be advantaged by the fact that they travelled to Australia by boat. Similarly, the current Government's policy that no such asylum seekers will be granted permanent protection visas has resulted in the same caseload waiting indefinitely for resolution of their status.

These changes are also significant because they will enable the Government to prolong (if it so wishes) the protection visa decision-making process. Under the proposed changes to the *Migration Act*, the Government will also no longer need to report to Parliament on how long it takes to process protection visa applications. Though reporting to Parliament is understandably currently quite resource intensive (especially since as of February this year, there were more than 10,000 protection visa applications that had exceeded the Department's 90 day decision-making target in the preceding quarter), the 90-day rule clearly supports transparency and encourages accountability.<sup>134</sup>

Though Ministerial Directions issued under the *Migration Act* inform officers of the priority in which protection visa applications are to be processed, they arguably serve a very different function to the obligation to process all protection visa applications within 90 days. This obligation, though unenforceable to a great extent, is a target and arguably recognition of the unique situation of asylum seekers.

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129.Parliament of Australia, '[Migration and Ombudsman Legislation Amendment Bill 2005 homepage](#)', Australian Parliament website, accessed 13 October 2014.

130.Parliament of Australia, '[Migration and Ombudsman Legislation Amendment Bill 2005 homepage](#)', Australian Parliament website, accessed 18 October 2014; J Howard (former Prime Minister), '[Immigration Detention](#)', media release, 17 June 2005, accessed 18 October 2014.

131.Explanatory Memorandum, op. cit., p. 13.

132.S Morrison, '[Determination of Granting of Protection Class XA Visas in 2013/2014 Financial Year \(IMMI 14/026\)](#)', Comlaw website, accessed 13 October 2014; *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* [2014] HCA 25, paragraph 10, accessed 18 October 2014.

133.DIBP, *Annual report 2013—14*, Canberra, 2014, p. 111.

134.DIBP, *Migration Act 1958*, section 91Y-Protection visa processing taking more than 90 days, Report for the period 1 November 2013 to 28 February 2014, tabled in the House of Representatives on 17 June 2014, hardcopy available upon request.

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