



Border Protection (Validation and Enforcement Powers) Act 2001

No. 126, 2001



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An Act to validate the actions of the Commonwealth and others in relation to the *MV Tampa* and other vessels, and to provide increased powers to protect Australia's borders, and for related purposes

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An Act to validate the actions of the Commonwealth and others in relation to the *MV Tampa* and other vessels, and to provide increased powers to protect Australia's borders, and for related purposes

[Assented to 27 September 2001]

The Parliament of Australia enacts:

Part 1—Preliminary

1 Short title

This Act may be cited as the *Border Protection (Validation and Enforcement Powers) Act 2001*.

2 Commencement

This Act commences on the day on which it receives the Royal Assent.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Part 2—Validation of certain actions

4 Definitions

In this Part:

Commonwealth officer includes a person who:

- (a) is in the service or employment of the Commonwealth or an authority of the Commonwealth; or
- (b) holds or performs the duties of any office or position under a law of the Commonwealth; or
- (c) is a member of the Australian Defence Force.

validation period means the period starting on 27 August 2001 and ending at the beginning of the day on which this Act commences.

vessel has the same meaning as in the *Migration Act 1958*.

5 Action to which this Part applies

This Part applies to any action taken during the validation period by the Commonwealth, or by a Commonwealth officer, or any other person, acting on behalf of the Commonwealth, in relation to:

- (a) the *MV Tampa*; or
- (b) the *Aceng*; or
- (c) any other vessel carrying persons in respect of whom there were reasonable grounds for believing that their intention was to enter Australia unlawfully; or
- (d) any person who was on board a vessel mentioned in paragraph (a), (b) or (c) at any time during the validation period (whether or not the action was taken while the person was on board the vessel).

6 Action to which this Part applies taken to be lawful

All action to which this Part applies is taken for all purposes to have been lawful when it occurred.

Section 7

7 No proceedings in respect of action to which this Part applies

- (1) Proceedings, whether civil or criminal, may not be instituted or continued in any court, in respect of action to which this Part applies, against:
 - (a) the Commonwealth; or
 - (b) a Commonwealth officer; or
 - (c) any other person who acted on behalf of the Commonwealth in relation to the action.
- (2) This section applies to:
 - (a) the institution of proceedings on or after the day on which this Act receives the Royal Assent; and
 - (b) the continuation, on or after the day on which this Act receives the Royal Assent, of proceedings that were instituted on or before that day.

8 Compensation for acquisition of property

- (1) If:
 - (a) this Part would result in an acquisition of property; and
 - (b) any provision of this Part would not be valid, apart from this section, because a particular person has not been compensated;the Commonwealth must pay that person:
 - (c) a reasonable amount of compensation agreed on between the person and the Commonwealth; or
 - (d) failing agreement—a reasonable amount of compensation determined by a court of competent jurisdiction.
- (2) Any damages or compensation recovered, or other remedy given, in a proceeding begun otherwise than under this section must be taken into account in assessing compensation payable in a proceeding begun under this section and arising out of the same event or transaction.
- (3) In this section:

acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution.

9 Jurisdiction of High Court

Nothing in this Part is intended to affect the jurisdiction of the High Court under section 75 of the Constitution.

Schedule 1—Amendment of the Customs Act 1901

1 At the end of section 184A

Add:

(13) In this section:

- (a) a reference to the *commander of a Commonwealth ship or Commonwealth aircraft* includes a reference to a commissioned officer of the Australian Defence Force, and a reference to a *member of the commander's crew* includes, in relation to a commissioned officer of the Australian Defence Force, a reference to a person acting under the command of the commissioned officer; and
- (b) *commissioned officer of the Australian Defence Force* means an officer within the meaning of the *Defence Act 1903*.

2 Subsection 185(3)

Omit “to a port, airport or other place”, substitute “to a port or airport, or to another place (including, in relation to a ship, a place within the territorial sea or the contiguous zone in relation to Australia),”.

3 Subsection 185(3A)

Repeal the subsection, substitute:

People on detained ships or aircraft

- (3AAA) If an officer detains a ship or aircraft under this section, any restraint on the liberty of any person found on the ship or aircraft that results from the detention of the ship or aircraft is not unlawful, and proceedings, whether civil or criminal, in respect of that restraint may not be instituted or continued in any court against the Commonwealth, the officer or any person assisting the officer in detaining the ship or aircraft.

Jurisdiction of High Court

- (3AAB) Nothing in subsection (3AAA) is intended to affect the jurisdiction of the High Court under section 75 of the Constitution.

Powers of officers in respect of people found on detained ships or aircraft

- (3A) If an officer detains a ship or aircraft under this section, the officer may:
- (a) detain any person found on the ship or aircraft and bring the person, or cause the person to be brought, to the migration zone (within the meaning of the *Migration Act 1958*); or
 - (b) take the person, or cause the person to be taken, to a place outside Australia.

The definition of *place outside Australia* in subsection 4(1) does not apply for the purposes of paragraph (b).

Powers to move people

- (3AA) For the purpose of moving a person under subsection (3A), an officer may, within or outside Australia:
- (a) place the person on a ship or aircraft; or
 - (b) restrain the person on a ship or aircraft; or
 - (c) remove the person from a ship or aircraft.

Protection if officers etc. act in good faith

- (3AB) Proceedings, whether civil or criminal, may not be instituted or continued, in respect of any action taken under subsection (3AA), against the Commonwealth, an officer or any person assisting an officer if the officer or person who took the action acted in good faith and used no more force than was authorised by subsection (3B).

4 After section 185A

Insert:

185AA Searches of people on certain ships or aircraft

- (1) For the purposes set out in subsection (2), a person, and the person's clothing and any property under the immediate control of the person, may, without warrant, be searched if the person:
- (a) is on a ship or aircraft that has been detained under subsection 185(3); or
 - (b) has been placed on a ship or aircraft under subsection 185(3AA).

- (2) The purpose for which a person, and the person's clothing and any property under the immediate control of the person, may be searched under this section is to find out whether the person is carrying, or there is hidden on the person, in the clothing or in the property, a weapon or other thing capable of being used to inflict bodily injury or to help the person to escape.

Note: Division 1B of Part XII provides search powers in respect of certain persons suspected of unlawfully carrying prohibited goods.

- (3) If, in the course of a search under this section, a weapon or other thing referred to in subsection (2) is found, an officer:
- (a) may take possession of the weapon or other thing; and
 - (b) may retain the weapon or other thing for such time as he or she thinks necessary for the purposes of this Act.
- (4) This section does not authorise an officer, or another person conducting a search pursuant to subsection (5), to remove any of the person's clothing, or to require a person to remove any of his or her clothing, except the person's outer garments (including but not limited to the person's overcoat, coat, jacket, gloves, shoes and head covering).
- (5) A search under this section of a person, and the person's clothing, must be conducted by:
- (a) an officer of the same sex as the person; or
 - (b) in a case where an officer of the same sex as the person is not available to conduct the search—any other person who is of the same sex and:
 - (i) is requested by an officer; and
 - (ii) agrees;to conduct the search.

- (6) An action or proceeding, whether civil or criminal, does not lie against a person who, at the request of an officer, conducts a search under this section if the person acts in good faith and does not contravene subsection (7).
- (7) An officer or other person who conducts a search under this section must not use more force, or subject a person to greater indignity, than is reasonably necessary in order to conduct the search.
- (8) In this section, *officer* has the same meaning as it has in section 185.

185AB Returning persons to ships

- (1) An officer, or a person assisting an officer, may return to a ship that is detained under section 185 a person who:
 - (a) was on the ship when it was initially detained under section 185; and
 - (b) later leaves the ship.For this purpose, reasonable means, including reasonable force, may be used by the officer or another person.
- (2) A person may only be returned to a ship under subsection (1) if the officer or person assisting is satisfied that it is safe to return the person to the ship.
- (3) In this section, *officer* has the same meaning as it has in section 185.

5 At the end of section 185B

Add:

- (9) In this section, *officer* includes a member of the Australian Defence Force.

Schedule 2—Amendment of the Migration Act 1958

1 Subsection 5(1) (subparagraph (b)(v) of the definition of *immigration detention*)

Repeal the subparagraph, substitute:

(v) in another place approved by the Minister in writing; but does not include being restrained as described in subsection 245F(8A), or being dealt with under paragraph 245F(9)(b).

2 After section 7

Insert:

7A Effect on executive power to protect Australia's borders

The existence of statutory powers under this Act does not prevent the exercise of any executive power of the Commonwealth to protect Australia's borders, including, where necessary, by ejecting persons who have crossed those borders.

3 At the end of section 232A

Add:

Note: Sections 233B and 233C limit conviction and sentencing options for offences under this section.

4 At the end of section 233A

Add:

Note: Sections 233B and 233C limit conviction and sentencing options for offences under this section.

5 After section 233A

Insert the following sections:

233B No discharge of offenders without proceeding to conviction for certain offences

The court may not make an order under section 19B of the *Crimes Act 1914* in respect of a charge for an offence under section 232A

or 233A, unless it is established on the balance of probabilities that the person charged was aged under 18 years at the time when the offence was alleged to have been committed.

233C Mandatory penalties for certain offences

- (1) This section applies if a person is convicted of an offence under section 232A or 233A, unless it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed.
- (2) The court must impose a sentence of imprisonment of at least:
 - (a) 8 years, if the conviction is for a repeat offence; or
 - (b) 5 years, in any other case.
- (3) The court must also set a non-parole period of at least:
 - (a) 5 years, if the conviction is for a repeat offence; or
 - (b) 3 years, in any other case.
- (4) In this section:
 - (a) ***non-parole period*** has the same meaning as it has in Part 1B of the *Crimes Act 1914*; and
 - (b) a person's conviction for an offence is for a ***repeat offence*** if, on a previous occasion after the commencement of this section, a court:
 - (i) has convicted the person of another offence, being an offence against section 232A or 233A; or
 - (ii) has found, without recording a conviction, that the person had committed another such offence.

6 At the end of section 245B

Add:

- (11) In this section:
 - (a) a reference to the ***commander of a Commonwealth ship or Commonwealth aircraft*** includes a reference to a commissioned officer of the Australian Defence Force, and a reference to a ***member of the commander's crew*** includes, in relation to a commissioned officer of the Australian Defence

Force, a reference to a person acting under the command of the commissioned officer; and

- (b) *commissioned officer of the Australian Defence Force* means an officer within the meaning of the *Defence Act 1903*.

7 Subsection 245F(8)

Omit “to a port or other place”, substitute “to a port, or to another place (including a place within the territorial sea or the contiguous zone in relation to Australia),”.

8 Subsection 245F(9)

Repeal the subsection, substitute:

People on detained ships or aircraft

- (8A) If an officer detains a ship or aircraft under this section, any restraint on the liberty of any person found on the ship or aircraft that results from the detention of the ship or aircraft is not unlawful, and proceedings, whether civil or criminal, in respect of that restraint may not be instituted or continued in any court against the Commonwealth, the officer or any person assisting the officer in detaining the ship or aircraft.

Jurisdiction of High Court

- (8B) Nothing in subsection (8A) is intended to affect the jurisdiction of the High Court under section 75 of the Constitution.

Powers of officers in respect of people found on detained ships or aircraft

- (9) If an officer detains a ship or aircraft under this section, the officer may:
- (a) detain any person found on the ship or aircraft and bring the person, or cause the person to be brought, to the migration zone; or
 - (b) take the person, or cause the person to be taken, to a place outside Australia.

Powers to move people

- (9A) For the purpose of moving a person under subsection (9), an officer may, within or outside Australia:
- (a) place the person on a ship or aircraft; or
 - (b) restrain the person on a ship or aircraft; or
 - (c) remove the person from a ship or aircraft.

Protection if officers etc. act in good faith

- (9B) Proceedings, whether civil or criminal, may not be instituted or continued, in respect of any action taken under subsection (9A), against the Commonwealth, an officer or any person assisting an officer if the officer or person who took the action acted in good faith and used no more force than was authorised by subsection (10).

9 After section 245F

Insert:

245FA Searches of people on certain ships or aircraft

- (1) For the purposes set out in subsection (2), a person, and the person's clothing and any property under the immediate control of the person, may, without warrant, be searched if the person:
- (a) is on a ship or aircraft that has been detained under subsection 245F(8); or
 - (b) has been placed on a ship or aircraft under subsection 245F(9A).

Note: Division 13 of Part 2 provides search powers in respect of persons who are in immigration detention.

- (2) The purpose for which a person, and the person's clothing and any property under the immediate control of the person, may be searched under this section is to find out whether the person is carrying, or there is hidden on the person, in the clothing or in the property, a weapon or other thing capable of being used to inflict bodily injury or to help the person to escape.
- (3) If, in the course of a search under this section, a weapon or other thing referred to in subsection (2) is found, an officer:

- (a) may take possession of the weapon or other thing; and
 - (b) may retain the weapon or other thing for such time as he or she thinks necessary for the purposes of this Act.
- (4) This section does not authorise an officer, or another person conducting a search pursuant to subsection (5), to remove any of the person's clothing, or to require a person to remove any of his or her clothing, except the person's outer garments (including but not limited to the person's overcoat, coat, jacket, gloves, shoes and head covering).
- (5) A search under this section of a person, and the person's clothing, must be conducted by:
- (a) an officer of the same sex as the person; or
 - (b) in a case where an officer of the same sex as the person is not available to conduct the search—any other person who is of the same sex and:
 - (i) is requested by an officer; and
 - (ii) agrees;to conduct the search.
- (6) An action or proceeding, whether civil or criminal, does not lie against a person who, at the request of an officer, conducts a search under this section if the person acts in good faith and does not contravene subsection (7).
- (7) An officer or other person who conducts a search under this section must not use more force, or subject a person to greater indignity, than is reasonably necessary in order to conduct the search.
- (8) In this section, *officer* has the same meaning as it has in section 245F.

245FB Returning persons to ships

- (1) An officer, or a person assisting an officer, may return to a ship that is detained under section 245F a person who:
- (a) was on the ship when it was initially detained under section 245F; and
 - (b) later leaves the ship.

For this purpose, reasonable means, including reasonable force, may be used by the officer or another person.

- (2) A person may only be returned to a ship under subsection (1) if the officer or person assisting is satisfied that it is safe to return the person to the ship.
- (3) In this section, *officer* has the same meaning as it has in section 245F.

10 At the end of section 245H

Add:

- (8) In this section, *officer* means an officer within the meaning of section 5, and includes:
 - (a) a member of the Australian Defence Force; and
 - (b) any other person who is an officer within the meaning of section 245F in relation to the ship concerned.

*[Minister's second reading speech made in—
House of Representatives on 18 September 2001
Senate on 20 September 2001]*

(185/01)

