



# Migration Act 1958

No. 62, 1958

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This compilation is in 2 volumes

**Volume 1:** sections 1–261K  
**Volume 2:** sections 262–507  
Schedule  
Endnotes

Each volume has its own contents

Prepared by the Office of Parliamentary Counsel, Canberra

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## About this compilation

### This compilation

This is a compilation of the *Migration Act 1958* that shows the text of the law as amended and in force on 24 March 2016 (the *compilation date*).

The notes at the end of this compilation (the *endnotes*) include information about amending laws and the amendment history of provisions of the compiled law.

### Uncommenced amendments

The effect of uncommenced amendments is not shown in the text of the compiled law. Any uncommenced amendments affecting the law are accessible on the Legislation Register ([www.legislation.gov.au](http://www.legislation.gov.au)). The details of amendments made up to, but not commenced at, the compilation date are underlined in the endnotes. For more information on any uncommenced amendments, see the series page on the Legislation Register for the compiled law.

### Application, saving and transitional provisions for provisions and amendments

If the operation of a provision or amendment of the compiled law is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

### Editorial changes

For more information about any editorial changes made in this compilation, see the endnotes.

### Modifications

If the compiled law is modified by another law, the compiled law operates as modified but the modification does not amend the text of the law. Accordingly, this compilation does not show the text of the compiled law as modified. For more information on any modifications, see the series page on the Legislation Register for the compiled law.

### Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

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**An Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons**

**Part 1—Preliminary**

**1 Short title**

This Act may be cited as the *Migration Act 1958*.

**2 Commencement**

The several Parts of this Act shall come into operation on such dates as are respectively fixed by Proclamation.

**3 Repeal and savings**

- (1) The Acts specified in the Schedule to this Act are repealed.
- (2) Section 9 of the *War Precautions Act Repeal Act 1920-1955* and the heading to that section, and the Schedule to that Act, are repealed.
- (3) The *War Precautions Act Repeal Act 1920-1955*, as amended by this section, may be cited as the *War Precautions Act Repeal Act 1920-1958*.
- (4) Notwithstanding the repeals effected by this section:
  - (a) a certificate of exemption in force under the *Immigration Act 1901-1949* immediately before the date of commencement of this Part shall, for all purposes of this Act, be deemed to be a temporary visa granted under this Act to the person specified in the certificate and authorizing that person to remain in Australia for a period ending on the date on which the

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certificate would have expired if this Act had not been passed.

- (5) For the purposes of paragraph (4)(a), where, before the commencement of this Part, a person who had previously entered Australia re-entered Australia and, upon or after the re-entry, a certificate of exemption purported to be issued to the person, the certificate shall be deemed to have been as validly issued as if the person had not previously entered Australia.

**3A Act not to apply so as to exceed Commonwealth power**

- (1) Unless the contrary intention appears, if a provision of this Act:
- (a) would, apart from this section, have an invalid application; but
  - (b) also has at least one valid application;
- it is the Parliament's intention that the provision is not to have the invalid application, but is to have every valid application.
- (2) Despite subsection (1), the provision is not to have a particular valid application if:
- (a) apart from this section, it is clear, taking into account the provision's context and the purpose or object underlying this Act, that the provision was intended to have that valid application only if every invalid application, or a particular invalid application, of the provision had also been within the Commonwealth's legislative power; or
  - (b) the provision's operation in relation to that valid application would be different in a substantial respect from what would have been its operation in relation to that valid application if every invalid application of the provision had been within the Commonwealth's legislative power.
- (3) Subsection (2) does not limit the cases where a contrary intention may be taken to appear for the purposes of subsection (1).
- (4) This section applies to a provision of this Act, whether enacted before, at or after the commencement of this section.

(5) In this section:

**application** means an application in relation to:

- (a) one or more particular persons, things, matters, places, circumstances or cases; or
- (b) one or more classes (however defined or determined) of persons, things, matters, places, circumstances or cases.

**invalid application**, in relation to a provision, means an application because of which the provision exceeds the Commonwealth's legislative power.

**valid application**, in relation to a provision, means an application that, if it were the provision's only application, would be within the Commonwealth's legislative power.

### **3B Compensation for acquisition of property**

(1) If:

- (a) this Act would result in an acquisition of property; and
- (b) any provision of this Act 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.

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**4 Object of Act**

- (1) The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.
- (2) To advance its object, this Act provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain.
- (3) To advance its object, this Act provides for non-citizens and citizens to be required to provide personal identifiers for the purposes of this Act or the regulations.
- (4) To advance its object, this Act provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by this Act.
- (5) To advance its object, this Act provides for the taking of unauthorised maritime arrivals from Australia to a regional processing country.

**4AA Detention of minors a last resort**

- (1) The Parliament affirms as a principle that a minor shall only be detained as a measure of last resort.
- (2) For the purposes of subsection (1), the reference to a minor being detained does not include a reference to a minor residing at a place in accordance with a residence determination.

**4A Application of the *Criminal Code***

Chapter 2 of the *Criminal Code* (except Part 2.5) applies to all offences against this Act.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

## 5 Interpretation

(1) In this Act, unless the contrary intention appears:

*AAT Act migration decision*: see section 474A.

*absorbed person visa* has the meaning given by section 34.

*adjacent area* means an adjacent area in respect of a State, of the Northern Territory, of the Territory of Ashmore and Cartier Islands, of the Territory of Cocos (Keeling) Islands or of the Territory of Christmas Island, as determined in accordance with section 5 of the Sea Installations Act.

*adoption* has the same meaning as in the regulations.

*allowed inhabitant of the Protected Zone* means an inhabitant of the Protected Zone, other than an inhabitant to whom a declaration under section 16 (presence declared undesirable) applies.

*applicable pass mark*, in relation to a visa of a particular class, means the number of points specified as the pass mark for that class in a notice, under section 96, in force at the time concerned.

*applicable pool mark*, in relation to a visa of a particular class, means the number of points specified as the pool mark for that class in a notice under section 96 in force at the time concerned.

*appointed inspector* has the meaning given by section 140V.

*approved form*, when used in a provision of this Act, means a form approved by the Minister in writing for the purposes of that provision.

*approved sponsor* means:

(a) a person:

- (i) who has been approved by the Minister under section 140E in relation to a class prescribed by the regulations for the purpose of subsection 140E(2); and

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- (ii) whose approval has not been cancelled under section 140M, or otherwise ceased to have effect under section 140G, in relation to that class; or
- (b) a person (other than a Minister) who is a party to a work agreement.

Note: A partnership or an unincorporated association may be an approved sponsor: see subsections 140ZB(1) and 140ZE(1) respectively.

***area in the vicinity of the Protected Zone*** means an area in respect of which a notice is in force under subsection (8).

***ASIO*** means the Australian Security Intelligence Organisation.

***ASIO Act*** means the *Australian Security Intelligence Organisation Act 1979*.

***assessed score***, in relation to an applicant for a visa, means the total number of points given to the applicant in an assessment under section 93.

***assessment***, in relation to ASIO, has the same meaning as in subsection 35(1) of the ASIO Act.

***Australian Border Force Commissioner*** has the same meaning as in the *Australian Border Force Act 2015*.

***Australian passport*** means a passport issued under the *Australian Passports Act 2005*.

***Australian resources installation*** means a resources installation that is deemed to be part of Australia because of the operation of section 8.

***Australian seabed*** means so much of the seabed adjacent to Australia (other than the seabed within the Joint Petroleum Development Area) as is:

- (a) within the area comprising:
  - (i) the areas described in Schedule 1 to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*; and
  - (ii) the Coral Sea area; and

- (b) part of:
- (i) the continental shelf of Australia;
  - (ii) the seabed beneath the territorial sea of Australia (including the territorial sea adjacent to any island forming part of Australia); or
  - (iii) the seabed beneath waters of the sea that are on the landward side of the territorial sea of Australia and are not within the limits of a State or Territory.

***Australian sea installation*** means a sea installation that is deemed to be part of Australia because of the operation of section 9.

***Australian waters*** means:

- (a) in relation to a resources installation—waters above the Australian seabed; and
- (b) in relation to a sea installation—waters comprising all of the adjacent areas and the coastal area.

***authorised officer***, when used in a provision of this Act, means an officer authorised in writing by the Minister, the Secretary or the Australian Border Force Commissioner for the purposes of that provision.

Note: Section 5D can affect the meaning of this term for the purposes of carrying out identification tests.

***authorised system***, when used in a provision of this Act, means an automated system authorised in writing by the Minister or the Secretary for the purposes of that provision.

***behaviour concern non-citizen*** means a non-citizen who:

- (a) has been convicted of a crime and sentenced to death or to imprisonment, for at least one year; or
- (b) has been convicted of 2 or more crimes and sentenced to imprisonment, for periods that add up to at least one year if:
  - (i) any period concurrent with part of a longer period is disregarded; and
  - (ii) any periods not disregarded that are concurrent with each other are treated as one period;

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whether or not:

- (iii) the crimes were of the same kind; or
  - (iv) the crimes were committed at the same time; or
  - (v) the convictions were at the same time; or
  - (vi) the sentencings were at the same time; or
  - (vii) the periods were consecutive; or
- (c) has been charged with a crime and either:
- (i) found guilty of having committed the crime while of unsound mind; or
  - (ii) acquitted on the ground that the crime was committed while the person was of unsound mind;
- (d) has been removed or deported from Australia or removed or deported from another country; or
- (e) has been excluded from another country in prescribed circumstances;

where **sentenced to imprisonment** includes ordered to be confined in a corrective institution.

**bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

**bridging visa** has the meaning given by section 37.

**brought into physical contact** has the same meaning as in the Sea Installations Act.

**bypass immigration clearance** has the meaning given by subsection 172(4).



***certified printout*** means a printout certified by an authorised officer to be a printout of information kept in the movement records.

***character concern*** has the meaning given by section 5C.

***child*** of a person has a meaning affected by section 5CA.

***civil penalty order*** has the meaning given by subsection 486R(4).

***civil penalty provision*** means a subsection, or a section that is not divided into subsections, that has set out at its foot the words “civil penalty” and one or more amounts in penalty units.

***clearance authority*** has the meaning given by section 165.

***clearance officer*** has the meaning given by section 165.

***coastal area*** has the same meaning as in the *Customs Act 1901*.

***committee of management*** of an unincorporated association means a body (however described) that governs, manages or conducts the affairs of the association.

***Convention Against Torture*** means the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 10 December 1984.

Note: The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is in Australian Treaty Series 1989 No. 21 ([1989] ATS 21) and could in 2014 be viewed in the Australian Treaties Library on the AustLII website (<http://www.austlii.edu.au>).

***Coral Sea area*** has the same meaning as in section 7 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*.

***Covenant*** means the International Covenant on Civil and Political Rights, a copy of the English text of which is set out in Schedule 2 to the *Australian Human Rights Commission Act 1986*.

***crime*** includes any offence.

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***criminal justice visa*** has the meaning given by section 38.

***cruel or inhuman treatment or punishment*** means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

***data base*** (except in Part 4A) means a discrete body of information stored by means of a computer.

Note: Section 336A defines this term differently for the purposes of Part 4A.

***de facto partner*** has the meaning given by section 5CB.

***degrading treatment or punishment*** means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

***departure prohibition order*** means an order under subsection 14S(1) of the *Taxation Administration Act 1953*.

***deportation*** means deportation from Australia.

***deportation order*** means an order for the deportation of a person made under, or continued in force by, this Act.

**deportee** means a person in respect of whom a deportation order is in force.

**detain** means:

- (a) take into immigration detention; or
  - (b) keep, or cause to be kept, in immigration detention;
- and includes taking such action and using such force as are reasonably necessary to do so.

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

**detainee** means a person detained.

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

**diplomatic or consular representative**, in relation to a country other than Australia, means a person who has been appointed to, or is the holder of, a post or position in a diplomatic or consular mission of that country in Australia, not being a person who was ordinarily resident in Australia when he or she was appointed to be a member of the mission.

**eligible court** means:

- (a) the Federal Court; or
- (b) the Federal Circuit Court; or
- (c) a District, County or Local Court; or
- (d) a magistrates court; or
- (e) any other State or Territory court that is prescribed by the regulations.

**enforcement visa** has the meaning given by section 38A.

**enter** includes re-enter.

**enter Australia**, in relation to a person, means enter the migration zone.

Note: See also section 9A, which concerns offshore resources activities.

**entered** includes re-entered.

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**entry** includes re-entry.

**environment detention offence** means:

- (a) an offence against the *Environment Protection and Biodiversity Conservation Act 1999*, or against regulations made for the purposes of that Act; or
- (b) an offence against section 6 of the *Crimes Act 1914* relating to an offence described in paragraph (a).

**environment officer** means an authorised officer, within the meaning of the *Environment Protection and Biodiversity Conservation Act 1999*, but does not include a person who is an authorised officer because of subsection 397(3) of that Act.

**environment related activity** has the same meaning as in the Sea Installations Act.

**evidential burden**, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

**excised offshore place** means any of the following:

- (a) the Territory of Christmas Island;
- (b) the Territory of Ashmore and Cartier Islands;
- (c) the Territory of Cocos (Keeling) Islands;
- (d) any other external Territory that is prescribed by the regulations for the purposes of this paragraph;
- (e) any island that forms part of a State or Territory and is prescribed for the purposes of this paragraph;
- (f) an Australian sea installation;
- (g) an Australian resources installation.

**excision time**, for an excised offshore place, means:

- (a) for the Territory of Christmas Island—2 pm on 8 September 2001 by legal time in the Australian Capital Territory; or
- (b) for the Territory of Ashmore and Cartier Islands—2 pm on 8 September 2001 by legal time in the Australian Capital Territory; or

- (c) for the Territory of Cocos (Keeling) Islands—12 noon on 17 September 2001 by legal time in the Australian Capital Territory; or
- (d) for any other external Territory that is prescribed by the regulations for the purposes of the definition of ***excised offshore place***—the time when the regulations commence; or
- (e) for any island that forms part of a State or Territory and is prescribed by the regulations for the purposes of the definition of ***excised offshore place***—the time when the regulations commence; or
- (f) for an Australian sea installation—the commencement of the *Migration Amendment (Excision from Migration Zone) Act 2001*; or
- (g) for an Australian resources installation—the commencement of the *Migration Amendment (Excision from Migration Zone) Act 2001*.

***ex-citizen visa*** has the meaning given by section 35.

***excluded fast track review applicant*** means a fast track applicant:

- (a) who, in the opinion of the Minister:
  - (i) is covered by section 91C or 91N; or
  - (ii) has previously entered Australia and who, while in Australia, made a claim for protection relying on a criterion mentioned in subsection 36(2) in an application that was refused or withdrawn; or
  - (iii) has made a claim for protection in a country other than Australia that was refused by that country; or
  - (iv) has made a claim for protection in a country other than Australia that was refused by the Office of the United Nations High Commissioner for Refugees in that country; or
  - (vi) without reasonable explanation provides, gives or presents a bogus document to an officer of the Department or to the Minister (or causes such a document to be so provided, given or presented) in support of his or her application; or

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- (aa) who makes a claim for protection relying on a criterion mentioned in subsection 36(2) in, or in connection with, his or her application, if, in the opinion of the Minister, the claim is manifestly unfounded because, without limiting what is a manifestly unfounded claim, the claim:
  - (i) has no plausible or credible basis; or
  - (ii) if the claim is based on conditions, events or circumstances in a particular country—is not able to be substantiated by any objective evidence; or
  - (iii) is made for the sole purpose of delaying or frustrating the fast track applicant's removal from Australia; or
- (b) who is, or who is included in a class of persons who are, specified by legislative instrument made under paragraph (1AA)(a).

***Fair Work Inspector*** has the same meaning as in the *Fair Work Act 2009*.

***fast track applicant*** means:

- (a) a person:
  - (i) who is an unauthorised maritime arrival and who entered Australia on or after 13 August 2012, but before 1 January 2014, and who has not been taken to a regional processing country; and
  - (ii) to whom the Minister has given a written notice under subsection 46A(2) determining that subsection 46A(1) does not apply to an application by the person for a protection visa; and
  - (iii) who has made a valid application for a protection visa in accordance with the determination; or
- (b) a person who is, or who is included in a class of persons who are, specified by legislative instrument made under paragraph (1AA)(b).

Note: Some unauthorised maritime arrivals born in Australia on or after 13 August 2012 may not be ***fast track applicants*** even if paragraph (a) applies: see subsection (1AC)

***fast track decision*** means a decision to refuse to grant a protection visa to a fast track applicant, other than a decision to refuse to grant such a visa:

- (a) because the Minister or a delegate of the Minister is not satisfied that the applicant passes the character test under section 501; or
- (b) relying on:
  - (i) subsection 5H(2); or
  - (ii) subsection 36(1B) or (1C); or
  - (iii) paragraph 36(2C)(a) or (b).

Note: Some decisions made in the circumstances mentioned in paragraph (a), or subparagraph (b)(i) or (iii), of the definition of ***fast track decision*** are reviewable by the Administrative Appeals Tribunal in accordance with section 500.

***fast track reviewable decision*** has the meaning given by section 473BB.

***fast track review applicant*** means a fast track applicant who is not an excluded fast track review applicant.

***Federal Circuit Court*** means the Federal Circuit Court of Australia.

***Federal Court*** means the Federal Court of Australia.

***finally determined***: for when an application under this Act is ***finally determined***, see subsections (9) and (9A).

***fisheries detention offence*** means:

- (a) an offence against section 99, 100, 100A, 100B, 101, 101A, 101AA, 101B, 105E, 105EA, 105H or 105I of the *Fisheries Management Act 1991*; or
- (b) an offence against section 45, 46A, 46B, 46C, 46D, 48, 49, 49A, 51 or 51A of the *Torres Strait Fisheries Act 1984*; or
- (c) an offence against section 6 of the *Crimes Act 1914* relating to an offence described in paragraph (a) or (b).

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**fisheries officer** means an officer as defined in the *Fisheries Management Act 1991* or the *Torres Strait Fisheries Act 1984*.

**foreign aircraft (environment matters)** means an aircraft, within the meaning of the *Environment Protection and Biodiversity Conservation Act 1999*, that is not an Australian aircraft (within the meaning of that Act).

**foreign vessel** has the same meaning as in the *Maritime Powers Act 2013*.

**health concern non-citizen** means a non-citizen who is suffering from a prescribed disease or a prescribed physical or mental condition.

**health criterion**, in relation to a visa, means a prescribed criterion for the visa that:

- (a) relates to the applicant for the visa, or the members of the family unit of that applicant; and
- (b) deals with:
  - (i) a prescribed disease; or
  - (ii) a prescribed kind of disease; or
  - (iii) a prescribed physical or mental condition; or
  - (iv) a prescribed kind of physical or mental condition; or
  - (v) a prescribed kind of examination; or
  - (vi) a prescribed kind of treatment.

**holder**, in relation to a visa, means, subject to section 77 (visas held during visa period) the person to whom it was granted or a person included in it.

**identification test** means a test carried out in order to obtain a personal identifier.

**identity document**, in relation to a member of the crew of a vessel, means:

- (a) an identification card, in accordance with a form approved by the Minister, in respect of the member signed by the master of the vessel; or



- (b) a document, of a kind approved by the Minister as an identity document for the purposes of this Act, in respect of the member.

**Immigration Assessment Authority** means the Authority established by section 473JA.

**immigration cleared** has the meaning given by subsection 172(1).

**immigration detention** means:

- (a) being in the company of, and restrained by:
- (i) an officer; or
  - (ii) in relation to a particular detainee—another person directed by the Secretary or Australian Border Force Commissioner to accompany and restrain the detainee; or
- (b) being held by, or on behalf of, an officer:
- (i) in a detention centre established under this Act; or
  - (ii) in a prison or remand centre of the Commonwealth, a State or a Territory; or
  - (iii) in a police station or watch house; or
  - (iv) in relation to a non-citizen who is prevented, under section 249, from leaving a vessel—on that vessel; or
  - (v) in another place approved by the Minister in writing;

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

Note 1: Subsection 198AD(11) provides that being dealt with under subsection 198AD(3) does not amount to **immigration detention**.

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

**incapable person** means a person who is incapable of understanding the general nature and effect of, and purposes of, a requirement to provide a personal identifier.

**independent person** means a person (other than an officer or an authorised officer) who:

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- (a) is capable of representing the interests of a non-citizen who is providing, or is to provide, a personal identifier; and
- (b) as far as practicable, is acceptable to the non-citizen who is providing, or is to provide, the personal identifier; and
- (c) if the non-citizen is a minor—is capable of representing the minor’s best interests.

***inhabitant of the Protected Zone*** means a person who is a citizen of Papua New Guinea and who is a traditional inhabitant.

***in immigration clearance*** has the meaning given by subsection 172(2).

***inspector*** has the meaning given by section 140V.

***installation*** means:

- (a) a resources installation; or
- (b) a sea installation.

***Joint Petroleum Development Area*** has the same meaning as in the *Petroleum (Timor Sea Treaty) Act 2003*.

***lawful non-citizen*** has the meaning given by section 13.

***lawyer*** means:

- (a) a barrister; or
- (b) a solicitor; or
- (c) a barrister and solicitor; or
- (d) a legal practitioner;

of the High Court or of the Supreme Court of a State or Territory.

***leave Australia***, in relation to a person, means, subject to section 80 (leaving without going to other country), leave the migration zone.

Note: See also section 9A, which concerns offshore resources activities.

***maritime crew visa*** has the meaning given by section 38B.

**maritime officer** has the same meaning as in the *Maritime Powers Act 2013*.

**master**, in relation to a vessel, means the person in charge or command of the vessel.

**member of the crew** means:

- (a) in relation to a vessel other than an aircraft—the master of the vessel, or a person whose name is on the articles of the vessel as a member of the crew; or
- (b) in relation to an aircraft—the master of the aircraft, or a person employed by the operator of the aircraft and whose name is included in a list of members of the crew of the aircraft furnished by the master as prescribed.

**member of the family unit** of a person has the meaning given by the regulations made for the purposes of this definition.

**member of the same family unit**: one person is a **member of the same family unit** as another if either is a member of the family unit of the other or each is a member of the family unit of a third person.

**migration decision** means:

- (a) a privative clause decision; or
- (b) a purported privative clause decision; or
- (c) a non-privative clause decision; or
- (d) an AAT Act migration decision.

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

- (a) land that is part of a State or Territory at mean low water; and
- (b) sea within the limits of both a State or a Territory and a port; and
- (c) piers, or similar structures, any part of which is connected to such land or to ground under such sea;

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

Note: See also section 9A, which concerns offshore resources activities.

**minor** means a person who is less than 18 years old.

**movement records** means information stored in a notified data base.

**natural resources** means the mineral and other non-living resources of the seabed and its subsoil.

**non-citizen** means a person who is not an Australian citizen.

**non-disclosable information** means information or matter:

- (a) whose disclosure would, in the Minister's opinion, be contrary to the national interest because it would:
  - (i) prejudice the security, defence or international relations of Australia; or
  - (ii) involve the disclosure of deliberations or decisions of the Cabinet or of a committee of the Cabinet; or
- (b) whose disclosure would, in the Minister's opinion, be contrary to the public interest for a reason which could form the basis of a claim by the Crown in right of the Commonwealth in judicial proceedings; or
- (c) whose disclosure would found an action by a person, other than the Commonwealth, for breach of confidence;

and includes any document containing, or any record of, such information or matter.

**non-political crime:**

- (a) subject to paragraph (b), means a crime where a person's motives for committing the crime were wholly or mainly non-political in nature; and
- (b) includes an offence that, under paragraph (a), (b) or (c) of the definition of **political offence** in section 5 of the *Extradition Act 1988*, is not a political offence in relation to a country for the purposes of that Act.

***non-privative clause decision*** has the meaning given by subsection 474(6).

***non-refoulement obligations*** includes, but is not limited to:

- (a) non-refoulement obligations that may arise because Australia is a party to:
  - (i) the Refugees Convention; or
  - (ii) the Covenant; or
  - (iii) the Convention Against Torture; and
- (b) any obligations accorded by customary international law that are of a similar kind to those mentioned in paragraph (a).

***notified data base*** means a data base declared to be a notified data base under section 489.

***offence against this Act*** includes:

- (a) an offence against section 6 of the *Crimes Act 1914* that relates to an offence against a provision of this Act; and
- (b) an ancillary offence (within the meaning of the *Criminal Code*) that is, or relates to, an offence against a provision of this Act.

***officer*** means:

- (a) an officer of the Department, other than an officer specified by the Minister in writing for the purposes of this paragraph; or
- (b) a person who is an officer for the purposes of the *Customs Act 1901*, other than such an officer specified by the Minister in writing for the purposes of this paragraph; or
- (c) a person who is a protective service officer for the purposes of the *Australian Federal Police Act 1979*, other than such a person specified by the Minister in writing for the purposes of this paragraph; or
- (d) a member of the Australian Federal Police or of the police force of a State or an internal Territory; or
- (e) a member of the police force of an external Territory; or

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

**offshore resources activity** has the meaning given by subsection 9A(5).

**old visa** means a visa, document, or notation, that:

- (a) permits a person to travel to Australia; and
- (b) was issued before 1 September 1994; and
- (c) has not been cancelled or otherwise stopped being in effect.

**parent**: without limiting who is a parent of a person for the purposes of this Act, someone is the **parent** of a person if the person is his or her child because of the definition of **child** in section 5CA.

**Part 5-reviewable decision**: see section 338.

**Part 7-reviewable decision**: see section 411.

**passport** includes a document of identity issued from official sources, whether in or outside Australia, and having the characteristics of a passport, but does not include a document, which may be a document called or purporting to be a passport, that the regulations declare is not to be taken to be a passport.

**permanent visa** has the meaning given by subsection 30(1).

**personal identifier** has the meaning given by section 5A.

**personal information** has the same meaning as in the *Privacy Act 1988*.

**port** means:

- (a) a proclaimed port; or
- (b) a proclaimed airport.

***pre-cleared flight*** means a flight declared under section 17 to be a pre-cleared flight.

***prescribed*** means prescribed by the regulations.

***printout*** means a mechanically or electronically made reproduction of part or all of the movement records.

***privative clause decision*** has the meaning given by subsection 474(2).

***proclaimed airport*** means:

- (a) an airport appointed under section 15 of the *Customs Act 1901*; or
- (b) an airport appointed by the Minister under subsection (5).

***proclaimed port*** means:

- (a) a port appointed under section 15 of the *Customs Act 1901*; or
- (b) a port appointed by the Minister under subsection (5).

***protected area*** means an area that is:

- (a) part of the migration zone; and
- (b) in, or in an area in the vicinity of, the Protected Zone.

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

***protection visa*** has the meaning given by section 35A.

Note: Section 35A covers the following:

- (a) permanent protection visas (classified by the *Migration Regulations 1994* as Protection (Class XA) visas when this definition commenced);
- (b) other protection visas formerly provided for by subsection 36(1);
- (ba) safe haven enterprise visas;
- (c) temporary protection visas (classified by the *Migration Regulations 1994* as Temporary Protection (Class XD) visas when this definition commenced);

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- (d) any additional classes of permanent or temporary visas that are prescribed as protection visas by the regulations.

See also section 36 and Subdivision AL of Division 3 of Part 2.

***purported privative clause decision*** has the meaning given by section 5E.

***questioning detention*** means detention under section 192.

***receiving country***, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

***referred applicant*** has the meaning given by section 473BB.

***refugee*** has the meaning given by section 5H.

***Refugees Convention*** means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951.

***Refugees Protocol*** means the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

***refused immigration clearance*** has the meaning given by subsection 172(3).

***regional processing country*** means a country designated by the Minister under subsection 198AB(1) as a regional processing country.

***Regulatory Powers Act*** means the *Regulatory Powers (Standard Provisions) Act 2013*.

***remain in Australia***, in relation to a person, means remain in the migration zone.

***remove*** means remove from Australia.



**removee** means an unlawful non-citizen removed, or to be removed, under Division 8 of Part 2.

**residence determination** has the meaning given by subsection 197AB(1).

**resources installation** means:

- (a) a resources industry fixed structure within the meaning of subsection (10); or
- (b) a resources industry mobile unit within the meaning of subsection (11).

**score**, in relation to a visa applicant, means the total number of points given to the applicant under section 93 in the most recent assessment or re-assessment under Subdivision B of Division 3 of Part 2.

**sea installation** has the same meaning as in the Sea Installations Act.

**Sea Installations Act** means the *Sea Installations Act 1987*.

**Secretary** means the Secretary of the Department.

**serious Australian offence** means an offence against a law in force in Australia, where:

- (a) the offence:
  - (i) involves violence against a person; or
  - (ii) is a serious drug offence; or
  - (iii) involves serious damage to property; or
  - (iv) is an offence against section 197A or 197B (offences relating to immigration detention); and
- (b) the offence is punishable by:
  - (i) imprisonment for life; or
  - (ii) imprisonment for a fixed term of not less than 3 years; or
  - (iii) imprisonment for a maximum term of not less than 3 years.

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***serious foreign offence*** means an offence against a law in force in a foreign country, where:

- (a) the offence:
  - (i) involves violence against a person; or
  - (ii) is a serious drug offence; or
  - (iii) involves serious damage to property; and
- (b) if it were assumed that the act or omission constituting the offence had taken place in the Australian Capital Territory, the act or omission would have constituted an offence (the ***Territory offence***) against a law in force in that Territory, and the Territory offence would have been punishable by:
  - (i) imprisonment for life; or
  - (ii) imprisonment for a fixed term of not less than 3 years; or
  - (iii) imprisonment for a maximum term of not less than 3 years.

***significant harm*** means harm of a kind mentioned in subsection 36(2A).

***special category visa*** has the meaning given by section 32.

***special purpose visa*** has the meaning given by section 33.

***spouse*** has the meaning given by section 5F.

***student visa*** has the meaning given by the regulations.

***substantive visa*** means a visa other than:

- (a) a bridging visa; or
- (b) a criminal justice visa; or
- (c) an enforcement visa.

***temporary visa*** has the meaning given by subsection 30(2).

***Territory*** means:

- (a) an internal Territory; or
- (b) an external Territory to which this Act extends.

***ticket*** includes a travel document in respect of the conveyance of a person from one place to another place.

***Torres Strait Treaty*** means the Treaty between Australia and the Independent State of Papua New Guinea that was signed at Sydney on 18 December 1978.

***torture*** means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

***traditional activities*** has the same meaning as in the Torres Strait Treaty.

***traditional inhabitants*** has the same meaning as in the *Torres Strait Fisheries Act 1984*.

***transitory person*** means:

- (a) a person who was taken to another country under repealed section 198A; or
- (aa) a person who was taken to a regional processing country under section 198AD; or

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- (b) a person who was taken to a place outside Australia under paragraph 245F(9)(b) of this Act, or under Division 7 or 8 of Part 3 of the *Maritime Powers Act 2013*; or
- (c) a person who, while a non-citizen and during the period from 27 August 2001 to 6 October 2001:
  - (i) was transferred to the ship *HMAS Manoora* from the ship *Aceng* or the ship *MV Tampa*; and
  - (ii) was then taken by *HMAS Manoora* to another country; and
  - (iii) disembarked in that other country; or
- (d) the child of a transitory person mentioned in paragraph (aa) or (b), if:
  - (i) the child was born in a regional processing country to which the parent was taken as mentioned in the relevant paragraph; and
  - (ii) the child was not an Australian citizen at the time of birth; or
- (e) the child of a transitory person mentioned in paragraph (aa) or (b), if:
  - (i) the child was born in the migration zone; and
  - (ii) the child was not an Australian citizen at the time of birth.

Note 1: For who is a child, see section 5CA.

Note 2: A transitory person who entered Australia by sea before being taken to a place outside Australia may also be an unauthorised maritime arrival: see section 5AA.

Note 3: Paragraphs (d) and (e) apply no matter when the child was born, whether before, on or after the commencement of those paragraphs. See the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.

***Tribunal*** means the Administrative Appeals Tribunal.

***unauthorised maritime arrival*** has the meaning given by section 5AA.

***unlawful non-citizen*** has the meaning given by section 14.

**vessel** includes an aircraft or an installation.

**vessel (environment matters)** means a vessel, within the meaning of the *Environment Protection and Biodiversity Conservation Act 1999*.

**visa** has the meaning given by section 29 and includes an **old visa**.

**visa applicant** means an applicant for a visa and, in relation to a visa, means the applicant for the visa.

**visa application charge** means the charge payable under section 45A.

**visa application charge limit** is the amount determined under the *Migration (Visa Application) Charge Act 1997*.

**visa holder** means the holder of a visa and, in relation to a visa, means the holder of the visa.

**visa period**, in relation to a visa, means the period:

- (a) beginning when the visa is granted; and
- (b) ending:
  - (i) in the case of a visa other than a bridging visa—when the visa ceases to be in effect; or
  - (ii) in the case of a bridging visa—when the visa ceases to be in effect otherwise than under subsection 82(3).

**well-founded fear of persecution** has the meaning given by section 5J.

**work agreement** means an agreement that satisfies the requirements prescribed by the regulations for the purposes of this definition.

**working day**, in relation to a place, means any day that is not a Saturday, a Sunday or a public holiday in that place.

**work-related condition** means a condition:

- (a) prohibiting the holder of a visa from working in Australia; or

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- (b) restricting the work that the holder of a visa may do in Australia.
- (1AA) The Minister may make a legislative instrument for the purposes of the following provisions:
  - (a) paragraph (b) of the definition of ***excluded fast track review applicant*** in subsection (1);
  - (b) paragraph (b) of the definition of ***fast track applicant*** in subsection (1).
- (1AB) A legislative instrument made under subsection (1AA) may apply, adopt or incorporate, with or without modification, the provisions of any other legislative instrument, whether or not the other legislative instrument is disallowable, as in force at a particular time or as in force from time to time.
- (1AC) A person is not a fast track applicant only because of paragraph (a) of the definition of ***fast track applicant*** in subsection (1) if:
  - (a) the person is born in Australia on or after 13 August 2012; and
  - (b) the person is the child of an unauthorised maritime arrival who entered Australia before 13 August 2012.
- (1AD) Despite subsection 44(2) of the *Legislative Instruments Act 2003*, section 42 (disallowance) of that Act applies to an instrument made under subsection (1AA).
- (1A) The Minister has power to give authorisations as provided by paragraphs (f) and (g) of the definition of ***officer*** in subsection (1) and, if such an authorisation is given:
  - (a) the Minister is to cause notice of the authorisation to be published in the *Gazette*; but
  - (b) without affecting the obligation of the Minister to cause a notice to be so published:
    - (i) the authorisation takes effect when it is given; and
    - (ii) the validity of the authorisation is not affected if such a notice is not published.

- (1B) The Minister or the Secretary has the power to give authorisations as provided by the definition of *authorised system*.
- (2) For the purposes of this Act, a person has functional English at a particular time if:
- (a) the person passes a test that:
    - (i) is approved in writing by the Minister for the purposes of this subsection; and
    - (ii) is conducted by a person, or organisation, approved for the purposes of this subsection by the Minister by notice in the *Gazette*; or
  - (b) the person provides the Minister with prescribed evidence of the person's English language proficiency.
- (3) Any power that may be exercised by an authorized officer or by an officer under this Act may also be exercised by the Minister.
- (4) Where, in any provision of this Act, reference is made to the exercise of a power by an authorized officer or by an officer and that power is a power which, by virtue of subsection (3), may also be exercised by the Minister, that reference shall be construed as including a reference to the exercise of that power by the Minister.
- (5) The Minister may, by notice published in the *Gazette*:
- (a) appoint ports in an external Territory to which this Act extends as proclaimed ports for the purposes of this Act and fix the limits of those ports; and
  - (b) appoint airports in an external Territory to which this Act extends as proclaimed airports for the purposes of this Act and fix the limits of those airports.
- (6) For the purposes of this Act, where a resources installation that has been brought into Australian waters from a place outside the outer limits of Australian waters becomes attached to the Australian seabed:
- (a) the installation shall be deemed to have entered Australia at the time when it becomes so attached;

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- (b) any person on board the installation at the time when it becomes so attached shall be deemed to have travelled to Australia on board that installation, to have entered Australia at that time and to have been brought into Australia at that time.
- (7) For the purposes of this Act, where a sea installation that has been brought into Australian waters from a place outside the outer limits of Australian waters is installed in an adjacent area or in a coastal area:
  - (a) the installation shall be deemed to have entered Australia at the time that it becomes so installed; and
  - (b) any person on board the installation at the time that it becomes so installed shall be deemed to have travelled to Australia on board that installation, to have entered Australia at that time and to have been brought into Australia at that time.
- (8) The Minister may, by notice published in the *Gazette*, declare an area adjacent to the Protected Zone and to the south of the line described in Annex 5 to the Torres Strait Treaty to be an area in the vicinity of the Protected Zone for the purposes of this Act.
- (9) For the purposes of this Act, subject to subsection (9A), an application under this Act is ***finally determined*** when:
  - (a) a decision that has been made in respect of the application is not, or is no longer, subject to any form of review under Part 5 or 7; or
  - (b) a decision that has been made in respect of the application was subject to some form of review under Part 5 or 7, but the period within which such a review could be instituted has ended without a review having been instituted as prescribed; or
  - (c) in relation to an application for a protection visa by an excluded fast track review applicant—a decision has been made in respect of the application.



- (9A) If a review of a decision that has been made in respect of an application under this Act is instituted under Part 5, 7 or 7AA as prescribed, the application is *finally determined* when a decision on the review in respect of the application is taken to have been made as provided by any of the following provisions:
- (a) subsection 368(2) (written decisions about Part 5-reviewable decisions);
  - (b) subsection 368D(1) (oral decisions about Part 5-reviewable decisions);
  - (c) subsection 430(2) (written decisions about Part 7-reviewable decisions);
  - (d) subsection 430D(1) (oral decisions about Part 7-reviewable decisions).
  - (e) subsection 473EA(2) (Immigration Assessment Authority decisions).
- (9B) However, subsection (9A) does not apply in relation to the following decisions:
- (a) a decision of the Tribunal to remit a Part 5-reviewable decision under paragraph 349(2)(c);
  - (b) a decision of the Tribunal to remit a Part 7-reviewable decision under paragraph 415(2)(c);
  - (c) a decision of the Immigration Assessment Authority under paragraph 473CC(2)(b).
- (10) A reference in this Act to a resources industry fixed structure shall be read as a reference to a structure (including a pipeline) that:
- (a) is not able to move or be moved as an entity from one place to another; and
  - (b) is used or is to be used off-shore in, or in any operations or activities associated with, or incidental to, exploring or exploiting natural resources.
- (11) A reference in this Act to a resources industry mobile unit shall be read as a reference to:
- (a) a vessel that is used or is to be used wholly or principally in:

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- (i) exploring or exploiting natural resources by drilling the seabed or its subsoil with equipment on or forming part of the vessel or by obtaining substantial quantities of material from the seabed or its subsoil with equipment of that kind; or
    - (ii) operations or activities associated with, or incidental to, activities of the kind referred to in subparagraph (i); or
  - (b) a structure (not being a vessel) that:
    - (i) is able to float or be floated;
    - (ii) is able to move or be moved as an entity from one place to another; and
    - (iii) is used or is to be used off-shore wholly or principally in:
      - (A) exploring or exploiting natural resources by drilling the seabed or its subsoil with equipment on or forming part of the structure or by obtaining substantial quantities of material from the seabed or its subsoil with equipment of that kind; or
      - (B) operations or activities associated with, or incidental to, activities of the kind referred to in sub-subparagraph (A).
- (12) A vessel of a kind referred to in paragraph (11)(a) or a structure of a kind referred to in paragraph (11)(b) shall not be taken not to be a resources industry mobile unit by reason only that the vessel or structure is also used or to be used in, or in any operations or activities associated with, or incidental to, exploring or exploiting resources other than natural resources.
- (13) The reference in subparagraph (11)(a)(ii) to a vessel that is used or is to be used wholly or principally in operations or activities associated with, or incidental to, activities of the kind referred to in subparagraph (11)(a)(i) shall be read as not including a reference to a vessel that is used or is to be used wholly or principally in:
- (a) transporting persons or goods to or from a resources installation; or

- (b) manoeuvring a resources installation, or in operations relating to the attachment of a resources installation to the Australian seabed.
- (14) A resources installation shall be taken to be attached to the Australian seabed if:
- (a) the installation:
    - (i) is in physical contact with, or is brought into physical contact with, a part of the Australian seabed; and
    - (ii) is used or is to be used, at that part of the Australian seabed, wholly or principally in or in any operations or activities associated with, or incidental to, exploring or exploiting natural resources; or
  - (b) the installation:
    - (i) is in physical contact with, or is brought into physical contact with, another resources installation that is taken to be attached to the Australian seabed by virtue of the operation of paragraph (a); and
    - (ii) is used or is to be used, at the place where it is brought into physical contact with the other installation, wholly or principally in or in any operations or activities associated with, or incidental to, exploring or exploiting natural resources.
- (15) Subject to subsection (17), for the purposes of this Act, a sea installation shall be taken to be installed in an adjacent area if:
- (a) the installation is in, or is brought into, physical contact with a part of the seabed in the adjacent area; or
  - (b) the installation is in, or is brought into, physical contact with another sea installation that is to be taken to be installed in the adjacent area because of paragraph (a).
- (16) For the purposes of this Act, a sea installation shall be taken to be installed in an adjacent area at a particular time if the whole or part of the installation:
- (a) is in that adjacent area at that time; and
  - (b) has been in a particular locality:

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- (i) that is circular and has a radius of 20 nautical miles; and
  - (ii) the whole or part of which is in that adjacent area;
- for:
- (iii) a continuous period, of at least 30 days, that immediately precedes that time; or
  - (iv) one or more periods, during the 60 days that immediately precede that time, that in sum amount to at least 40 days.
- (17) Where a sea installation, being a ship or an aircraft:
- (a) is brought into physical contact with a part of the seabed in an adjacent area; or
  - (b) is in, or is brought into, physical contact with another sea installation that is to be taken to be installed in an adjacent area;
- for less than:
- (c) in the case of a ship, or an aircraft, registered under the law of a foreign country—30 days; or
  - (d) in any other case—5 days;
- it shall not be taken to be installed in that adjacent area under subsection (15).
- (18) A sea installation shall not be taken to be installed in an adjacent area for the purposes of this Act unless it is to be taken to be so installed under this section.
- (19) Subject to subsection (21), for the purposes of this Act, a sea installation shall be taken to be installed in a coastal area if:
- (a) the installation is in, or is brought into, physical contact with a part of the seabed in the coastal area; or
  - (b) the installation is in, or is brought into, physical contact with another sea installation that is to be taken to be installed in the coastal area because of paragraph (a).

- (20) For the purposes of this Act, a sea installation (other than an installation installed in an adjacent area) shall be taken to be installed at a particular time in a coastal area if the whole or part of the installation:
- (a) is in that coastal area at that time; and
  - (b) has been in a particular locality:
    - (i) that is circular and has a radius of 20 nautical miles; and
    - (ii) the whole or part of which is in that coastal area;
- for:
- (iii) a continuous period, of at least 30 days, that immediately precedes that time; or
  - (iv) one or more periods, during the 60 days that immediately precede that time, that in sum amount to at least 40 days.
- (21) Where a sea installation, being a ship or an aircraft:
- (a) is brought into physical contact with a part of the seabed in a coastal area; or
  - (b) is in, or is brought into, physical contact with another sea installation that is to be taken to be installed in a coastal area;
- for less than:
- (c) in the case of a ship, or an aircraft, registered under the law of a foreign country—30 days; or
  - (d) in any other case—5 days;
- it shall not be taken to be installed in that coastal area under subsection (19).
- (22) A sea installation shall not be taken to be installed in a coastal area for the purposes of this Act unless it is to be taken to be so installed under this section.
- (23) To avoid doubt, in this Act *is taken*, when followed by the infinitive form of a verb, has the same force and effect as *is deemed* when followed by the infinitive form of that verb.

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**5AAA Non-citizen's responsibility in relation to protection claims**

- (1) This section applies in relation to a non-citizen who claims to be a person in respect of whom Australia has protection obligations (however arising).
- (2) For the purposes of this Act, it is the responsibility of the non-citizen to specify all particulars of his or her claim to be such a person and to provide sufficient evidence to establish the claim.
- (3) The purposes of this Act include:
  - (a) the purposes of a regulation or other instrument under this Act; and
  - (b) the purposes of any administrative process that occurs in relation to:
    - (i) this Act; or
    - (ii) a regulation or instrument under this Act.
- (4) To remove doubt, the Minister does not have any responsibility or obligation to:
  - (a) specify, or assist in specifying, any particulars of the non-citizen's claim; or
  - (b) establish, or assist in establishing, the claim.

**5AA Meaning of *unauthorised maritime arrival***

- (1) For the purposes of this Act, a person is an *unauthorised maritime arrival* if:
  - (a) the person entered Australia by sea:
    - (i) at an excised offshore place at any time after the excision time for that place; or
    - (ii) at any other place at any time on or after the commencement of this section; and
  - (b) the person became an unlawful non-citizen because of that entry; and
  - (c) the person is not an excluded maritime arrival.

(1A) For the purposes of this Act, a person is also an ***unauthorised maritime arrival*** if:

- (a) the person is born in the migration zone; and
- (b) a parent of the person is, at the time of the person's birth, an unauthorised maritime arrival because of subsection (1) (no matter where that parent is at the time of the birth); and
- (c) the person is not an Australian citizen at the time of birth.

Note 1: For who is a ***parent*** of a person, see the definition in subsection 5(1) and section 5CA.

Note 2: A parent of the person may be an ***unauthorised maritime arrival*** even if the parent holds, or has held, a visa.

Note 3: A person to whom this subsection applies is an ***unauthorised maritime arrival*** even if the person is taken to have been granted a visa because of section 78 (which deals with the birth in Australia of non-citizens).

Note 4: For when a person is an Australian citizen at the time of his or her birth, see section 12 of the *Australian Citizenship Act 2007*.

Note 5: This subsection applies even if the person was born before the commencement of the subsection. See the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.

(1AA) For the purposes of this Act, a person is also an ***unauthorised maritime arrival*** if:

- (a) the person is born in a regional processing country; and
- (b) a parent of the person is, at the time of the person's birth, an unauthorised maritime arrival because of subsection (1) (no matter where that parent is at the time of the birth); and
- (c) the person is not an Australian citizen at the time of his or her birth.

Note 1: A parent of the person may be an ***unauthorised maritime arrival*** even if the parent holds, or has held, a visa.

Note 2: This Act may apply as mentioned in subsection (1AA) even if either or both parents of the person holds a visa, or is an Australian citizen or a citizen of the regional processing country, at the time of the person's birth.

Note 3: This subsection applies even if the person was born before the commencement of the subsection. See the *Migration and Maritime*

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*Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014.*

*Entered Australia by sea*

- (2) A person ***entered Australia by sea*** if:
- (a) the person entered the migration zone except on an aircraft that landed in the migration zone; or
  - (b) the person entered the migration zone as a result of being found on a ship detained under section 245F (as in force before the commencement of section 69 of the *Maritime Powers Act 2013*) and being dealt with under paragraph 245F(9)(a) (as in force before that commencement); or
  - (ba) the person entered the migration zone as a result of the exercise of powers under Division 7 or 8 of Part 3 of the *Maritime Powers Act 2013*; or
  - (c) the person entered the migration zone after being rescued at sea.

*Excluded maritime arrival*

- (3) A person is an ***excluded maritime arrival*** if the person:
- (a) is a New Zealand citizen who holds and produces a New Zealand passport that is in force; or
  - (b) is a non-citizen who holds and produces a passport that is in force and is endorsed with an authority to reside indefinitely on Norfolk Island; or
  - (c) is included in a prescribed class of persons.

*Definitions*

- (4) In this section:

***aircraft*** has the same meaning as in section 245A.

***ship*** has the meaning given by section 245A (as in force before the commencement of section 69 of the *Maritime Powers Act 2013*).



**vessel** has the same meaning as in the *Maritime Powers Act 2013*.

Note: An unauthorised maritime arrival who has been taken to a place outside Australia may also be a transitory person: see the definition of **transitory person** in subsection 5(1).

### 5A Meaning of *personal identifier*

(1) In this Act:

**personal identifier** means any of the following (including any of the following in digital form):

- (a) fingerprints or handprints of a person (including those taken using paper and ink or digital livescanning technologies);
  - (b) a measurement of a person's height and weight;
  - (c) a photograph or other image of a person's face and shoulders;
  - (d) an audio or a video recording of a person (other than a video recording under section 261AJ);
  - (e) an iris scan;
  - (f) a person's signature;
  - (g) any other identifier prescribed by the regulations, other than an identifier the obtaining of which would involve the carrying out of an intimate forensic procedure within the meaning of section 23WA of the *Crimes Act 1914*.
- (2) Before the Governor-General makes regulations for the purposes of paragraph (1)(g) prescribing an identifier, the Minister must be satisfied that:
- (a) obtaining the identifier would not involve the carrying out of an intimate forensic procedure within the meaning of section 23WA of the *Crimes Act 1914*; and
  - (b) the identifier is an image of, or a measurement or recording of, an external part of the body; and
  - (c) obtaining the identifier will promote one or more of the purposes referred to in subsection (3).
- (3) The purposes are:

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- (a) to assist in the identification of, and to authenticate the identity of, any person who can be required under this Act to provide a personal identifier; and
- (b) to assist in identifying, in the future, any such person; and
- (c) to improve the integrity of entry programs; and
- (ca) to improve passenger processing at Australia's border; and
- (d) to facilitate a visa-holder's access to his or her rights under this Act or the regulations; and
- (e) to improve the procedures for determining visa applications; and
- (f) to improve the procedures for determining claims from people seeking protection as refugees; and
- (fa) to assist in determining whether a person is an unlawful non-citizen or a lawful non-citizen; and
- (g) to enhance the Department's ability to identify non-citizens who have a criminal history or who are of character concern; and
- (ga) to assist in identifying persons who may be a security concern to Australia or a foreign country; and
- (h) to combat document and identity fraud in immigration matters; and
- (i) to detect forum shopping by applicants for visas; and
- (j) to ascertain whether:
  - (i) an applicant for a protection visa; or
  - (ii) an unauthorised maritime arrival who makes a claim for protection as a refugee; or
  - (iii) an unauthorised maritime arrival who makes a claim for protection on the basis that the person will suffer significant harm;had sufficient opportunity to avail himself or herself of protection before arriving in Australia; and
- (k) to complement anti-people smuggling measures; and
- (l) to inform the governments of foreign countries of the identity of non-citizens who are, or are to be, removed or deported from Australia.

**5B When personal identifier taken not to have been provided**

A person is taken, for the purposes of section 257A, not to have provided a personal identifier if:

- (a) the personal identifier that is provided is unusable; or
- (b) the Minister, an authorised officer or an officer is not satisfied:
  - (i) about the integrity or quality of the personal identifier that is provided; or
  - (ii) about the procedure followed to obtain the personal identifier.

**5C Meaning of *character concern***

- (1) For the purposes of this Act, a non-citizen is of *character concern* if:
  - (a) the non-citizen has a substantial criminal record (as defined by subsection (2)); or
  - (b) the non-citizen has or has had an association with someone else, or with a group or organisation, who is reasonably suspected of having been or being involved in criminal conduct; or
  - (c) having regard to either or both of the following:
    - (i) the non-citizen's past and present criminal conduct;
    - (ii) the non-citizen's past and present general conduct;the non-citizen is not of good character; or
  - (d) in the event that the non-citizen were allowed to enter or to remain in Australia, there is a significant risk that the non-citizen would:
    - (i) engage in criminal conduct in Australia; or
    - (ii) harass, molest, intimidate or stalk another person in Australia; or
    - (iii) vilify a segment of the Australian community; or
    - (iv) incite discord in the Australian community or in a segment of that community; or

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- (v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.
- (2) For the purposes of subsection (1), a non-citizen has a ***substantial criminal record*** if:
- (a) the non-citizen has been sentenced to death; or
  - (b) the non-citizen has been sentenced to imprisonment for life; or
  - (c) the non-citizen has been sentenced to a term of imprisonment of 12 months or more; or
  - (d) the non-citizen has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more; or
  - (e) the non-citizen has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution.

**5CA Child of a person**

- (1) Without limiting who is a child of a person for the purposes of this Act, each of the following is the ***child*** of a person:
- (a) someone who is a child of the person within the meaning of the *Family Law Act 1975* (other than someone who is an adopted child of the person within the meaning of that Act);
  - (b) someone who is an adopted child of the person within the meaning of this Act.
- (2) The regulations may provide that, for the purposes of this Act, a person specified by the regulations is not a ***child*** of another person specified by the regulations in circumstances in which the person would, apart from this subsection, be the child of more than 2 persons for the purposes of this Act.
- (3) Subsection (2), and regulations made for the purposes of that subsection, have effect whether the person specified as not being a

child of another person would, apart from that subsection and those regulations, be the child of the other person because of subsection (1) or otherwise.

### **5CB De facto partner**

#### *De facto partners*

- (1) For the purposes of this Act, a person is the **de facto partner** of another person (whether of the same sex or a different sex) if, under subsection (2), the person is in a de facto relationship with the other person.

#### *De facto relationship*

- (2) For the purposes of subsection (1), a person is in a **de facto relationship** with another person if they are not in a married relationship (for the purposes of section 5F) with each other but:
- (a) they have a mutual commitment to a shared life to the exclusion of all others; and
  - (b) the relationship between them is genuine and continuing; and
  - (c) they:
    - (i) live together; or
    - (ii) do not live separately and apart on a permanent basis; and
  - (d) they are not related by family (see subsection (4)).
- (3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

#### *Definition*

- (4) For the purposes of paragraph (2)(d), 2 persons are **related by family** if:

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- (a) one is the child (including an adopted child) of the other; or
- (b) one is another descendant of the other (even if the relationship between them is traced through an adoptive parent); or
- (c) they have a parent in common (who may be an adoptive parent of either or both of them).

For this purpose, disregard whether an adoption is declared void or has ceased to have effect.

### **5D Limiting the types of identification tests that authorised officers may carry out**

- (1) The Minister, Secretary or Australian Border Force Commissioner may, in an instrument authorising an officer as an authorised officer for the purposes of carrying out identification tests under this Act, specify the types of identification tests that the authorised officer may carry out.
- (2) Such an authorised officer is not an authorised officer in relation to carrying out an identification test that is not of a type so specified.

### **5E Meaning of *purported privative clause decision***

- (1) In this Act, *purported privative clause decision* means a decision purportedly made, proposed to be made, or required to be made, under this Act or under a regulation or other instrument made under this Act (whether in purported exercise of a discretion or not), that would be a privative clause decision if there were not:
  - (a) a failure to exercise jurisdiction; or
  - (b) an excess of jurisdiction;in the making of the decision.
- (2) In this section, *decision* includes anything listed in subsection 474(3).

**5F Spouse**

- (1) For the purposes of this Act, a person is the *spouse* of another person if, under subsection (2), the 2 persons are in a married relationship.
- (2) For the purposes of subsection (1), persons are in a *married relationship* if:
  - (a) they are married to each other under a marriage that is valid for the purposes of this Act; and
  - (b) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
  - (c) the relationship between them is genuine and continuing; and
  - (d) they:
    - (i) live together; or
    - (ii) do not live separately and apart on a permanent basis.
- (3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

Note: Section 12 also affects the determination of whether the condition in paragraph (2)(a) of this section exists.

**5G Relationships and family members**

- (1) For the purposes of this Act, if one person is the child of another person because of the definition of *child* in section 5CA, relationships traced to or through that person are to be determined on the basis that the person is the child of the other person.
- (2) For the purposes of this Act, the members of a person's family and relatives of a person are taken to include the following:
  - (a) a de facto partner of the person;
  - (b) someone who is the child of the person, or of whom the person is the child, because of the definition of *child* in section 5CA;

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- (c) anyone else who would be a member of the person's family or a relative of the person if someone mentioned in paragraph (a) or (b) is taken to be a member of the person's family or a relative of the person.

This does not limit who is a member of a person's family or relative of a person.

### 5H Meaning of *refugee*

- (1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a ***refugee*** if the person:
  - (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
  - (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

- (2) Subsection (1) does not apply if the Minister has serious reasons for considering that:
  - (a) the person has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or
  - (b) the person committed a serious non-political crime before entering Australia; or
  - (c) the person has been guilty of acts contrary to the purposes and principles of the United Nations.

### 5J Meaning of *well-founded fear of persecution*

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a ***well-founded fear of persecution*** if:



- (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
- (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
- (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.

- (2) A person does not have a ***well-founded fear of persecution*** if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.

- (3) A person does not have a ***well-founded fear of persecution*** if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
  - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
  - (b) conceal an innate or immutable characteristic of the person; or
  - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
    - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
    - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
    - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
    - (iv) conceal a physical, psychological or intellectual disability;

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- (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
  - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
- (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
  - (b) the persecution must involve serious harm to the person; and
  - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of *serious harm* for the purposes of that paragraph:
- (a) a threat to the person's life or liberty;
  - (b) significant physical harassment of the person;
  - (c) significant physical ill-treatment of the person;
  - (d) significant economic hardship that threatens the person's capacity to subsist;
  - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
  - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a *well-founded fear of persecution* for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

**5K Membership of a particular social group consisting of family**

For the purposes of the application of this Act and the regulations to a particular person (the *first person*), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
  - (i) the first person has ever experienced; or
  - (ii) any other member or former member (whether alive or dead) of the family has ever experienced;where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

**5L Membership of a particular social group other than family**

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
  - (i) the characteristic is an innate or immutable characteristic;
  - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;

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- (iii) the characteristic distinguishes the group from society;  
and
- (d) the characteristic is not a fear of persecution.

**5LA Effective protection measures**

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
  - (a) protection against persecution could be provided to the person by:
    - (i) the relevant State; or
    - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
  - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
  - (a) the person can access the protection; and
  - (b) the protection is durable; and
  - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

**5M Particularly serious crime**

For the purposes of the application of this Act and the regulations to a particular person, paragraph 36(1C)(b) has effect as if a reference in that paragraph to a particularly serious crime included a reference to a crime that consists of the commission of:

- (a) a serious Australian offence; or
- (b) a serious foreign offence.

## 6 Effect of limited meaning of enter Australia etc.

To avoid doubt, although subsection 5(1) limits, for the purposes of this Act, the meanings of *enter Australia*, *leave Australia* and *remain in Australia* and as well, because of section 18A of the *Acts Interpretation Act 1901*, the meaning of parts of speech and grammatical forms of those phrases, this does not mean:

- (a) that, for those purposes, the meaning of *in Australia*, *to Australia* or any other phrase is limited; or
- (b) that this Act does not extend to parts of Australia outside the migration zone; or
- (c) that this Act does not apply to persons in those parts.

Note: See also subsection 9A(3), which deals with when a person is taken to be in Australia, to travel to Australia, to enter Australia or to leave Australia. Section 9A concerns offshore resources activities.

## 7 Act to extend to certain Territories

- (1) In this section, *prescribed Territory* means the Coral Sea Islands Territory, the Territory of Cocos (Keeling) Islands, the Territory of Christmas Island and the Territory of Ashmore and Cartier Islands.
- (2) This Act extends to a prescribed Territory.
- (3) Subject to this Act, a prescribed Territory:
  - (a) shall be deemed to be part of Australia for the purposes of this Act; and
  - (b) shall be deemed not to be a place outside Australia.

## 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.

### **8 Certain resources installations to be part of Australia**

- (1) For the purposes of this Act, a resources installation that:
- (a) becomes attached to the Australian seabed after the commencement of this subsection; or
  - (b) at the commencement of this subsection, is attached to the Australian seabed;
- shall, subject to subsection (2), be deemed to be part of Australia and shall be deemed not to be a place outside Australia.
- (2) A resources installation that is deemed to be part of Australia by virtue of the operation of this section shall, for the purposes of this Act, cease to be part of Australia if:
- (a) the installation is detached from the Australian seabed, or from another resources installation that is attached to the Australian seabed, for the purpose of being taken to a place outside the outer limits of Australian waters (whether or not the installation is to be taken to a place in Australia before being taken outside those outer limits); or
  - (b) after having been detached from the Australian seabed otherwise than for the purpose referred to in paragraph (a), the installation is moved for the purpose of being taken to a place outside the outer limits of Australian waters (whether or not the installation is to be taken to a place in Australia before being taken outside those outer limits).

### **9 Certain sea installations to be part of Australia**

- (1) For the purposes of this Act, a sea installation that:
- (a) becomes installed in an adjacent area or in a coastal area after the commencement of this subsection; or
  - (b) at the commencement of this subsection, is installed in an adjacent area or in a coastal area;
- shall, subject to subsection (2), be deemed to be part of Australia and shall be deemed not to be a place outside Australia.

- (2) A sea installation that is deemed to be part of Australia because of the operation of this section shall, for the purposes of this Act, cease to be part of Australia if:
- (a) the installation is detached from its location for the purpose of being taken to a place outside the outer limits of Australian waters; or
  - (b) after having been detached from its location otherwise than for the purpose referred to in paragraph (a), the installation is moved for the purpose of being taken to a place outside the outer limits of Australian waters.

### **9A Migration zone etc.—offshore resources activities**

#### *Migration zone etc.*

- (1) For the purposes of this Act, a person is taken to be in the migration zone while he or she is in an area to participate in, or to support, an offshore resources activity in relation to that area.

Example 1: A person is taken to be in the migration zone under this section if the person is on a vessel in an area to participate in an offshore resources activity under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* in that area by exploring for, or recovering, petroleum.

Example 2: A person who is a member of the crew of the vessel is also taken to be in the migration zone under this section if the person is supporting the offshore resources activity.

Example 3: Neither a stowaway on the vessel, nor a person on the vessel because the person was rescued at sea, is taken to be in the migration zone, because neither is participating in, or supporting, the offshore resources activity.

- (2) To avoid doubt, a person may be taken to be in the migration zone under subsection (1):
- (a) whether or not the person's participation in, or support of, an offshore resources activity in the area concerned has started, is continuing or has concluded; and
  - (b) whether or not the offshore resources activity concerned has started, is continuing or has concluded.

- (3) For the purposes of this Act:
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- (a) a person is taken to be in Australia while he or she is taken to be in the migration zone because of subsection (1); and
  - (b) a person is taken to travel to Australia if the person travels to an area in which the person is taken to be in the migration zone because of subsection (1); and
  - (c) a person is taken to enter Australia when the person enters an area in which the person is taken to be in the migration zone because of subsection (1); and
  - (d) subject to section 80—a person is taken to leave Australia when the person leaves an area in which the person is taken to be in the migration zone because of subsection (1).
- (4) Unless a provision of this Act, or another Act, expressly provides otherwise, this section does not have the effect of extending, for the purposes of another Act, the circumstances in which a person:
- (a) is in the migration zone or is taken to be in the migration zone; or
  - (b) is in Australia or is taken to be in Australia; or
  - (c) travels to Australia or is taken to travel to Australia; or
  - (d) enters Australia or is taken to enter Australia; or
  - (e) leaves Australia or is taken to leave Australia.

*Meaning of offshore resources activity*

- (5) In this section:

***offshore resources activity***, in relation to an area, means:

- (a) a regulated operation (within the meaning of section 7 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*) that is being carried out, or is to be carried out, within the area, except an operation determined by the Minister under subsection (6); or
- (b) an activity performed under a licence or a special purpose consent (both within the meaning of section 4 of the *Offshore Minerals Act 1994*) that is being carried out, or is to be carried out, within the area, except an activity determined by the Minister under subsection (6); or



- (c) an activity, operation or undertaking (however described) that is being carried out, or is to be carried out:
  - (i) under a law of the Commonwealth, a State or a Territory determined by the Minister under subsection (6); and
  - (ii) within the area, as determined by the Minister under subsection (6).
- (6) The Minister may, in writing, make a determination for the purposes of the definition of *offshore resources activity* in subsection (5).
- (7) A determination made under subsection (6) is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the determination.
- (8) To avoid doubt, for the purposes of subsection (1), a person may participate in, or support, an offshore resources activity in relation to an area whether the person:
  - (a) is on an Australian resources installation in the area; or
  - (b) is otherwise in the area to participate in, or support, the activity.

## **10 Certain children taken to enter Australia at birth**

A child who:

- (a) was born in the migration zone; and
  - (b) was a non-citizen when he or she was born;
- shall be taken to have entered Australia when he or she was born.

## **11 Visa applicable to 2 or more persons**

Where:

- (a) 2 or more persons who are the holders of the same visa travel to Australia on board the same vessel; and

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(b) on entering Australia, one of those persons is in possession of evidence of that visa;  
each of them shall, for the purposes of this Act, be taken to be in possession of that evidence on entering Australia.

**12 Application of Part VA of the Marriage Act**

For the purpose of deciding whether a marriage is to be recognised as valid for the purposes of this Act, Part VA of the *Marriage Act 1961* applies as if section 88E of that Act were omitted.

## **Part 2—Arrival, presence and departure of persons**

### **Division 1—Immigration status**

#### **13 Lawful non-citizens**

- (1) A non-citizen in the migration zone who holds a visa that is in effect is a lawful non-citizen.
- (2) An allowed inhabitant of the Protected Zone who is in a protected area in connection with the performance of traditional activities is a lawful non-citizen.

#### **14 Unlawful non-citizens**

- (1) A non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen.
- (2) To avoid doubt, a non-citizen in the migration zone who, immediately before 1 September 1994, was an illegal entrant within the meaning of the Migration Act as in force then became, on that date, an unlawful non-citizen.

#### **15 Effect of cancellation of visa on status**

To avoid doubt, subject to subsection 13(2) (certain inhabitants of protected zone), if a visa is cancelled its former holder, if in the migration zone, becomes, on the cancellation, an unlawful non-citizen unless, immediately after the cancellation, the former holder holds another visa that is in effect.

#### **16 Removal of immigration rights of inhabitant of Protected Zone**

The Minister may declare, in writing, that it is undesirable that a specified inhabitant of the Protected Zone continue to be permitted to enter or remain in Australia.

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**17 Pre-cleared flights**

- (1) The Minister may, in writing, declare a specified flight by an aircraft on a specified day between a specified foreign country and Australia to be a pre-cleared flight for the purposes of this Act.
- (2) The Minister may declare, in writing, a specified class of flights conducted by a specified air transport enterprise or by another specified person to be pre-cleared flights for the purposes of this Act.
- (3) A particular flight to which a declaration under subsection (1) or (2) applies is not a pre-cleared flight if an authorised officer decides, before the passengers on it disembark in Australia, that it is inappropriate to treat it as such.

## **Division 2—Power to obtain information and documents about unlawful non-citizens**

### **18 Power to obtain information and documents about unlawful non-citizens**

- (1) If the Minister has reason to believe that a person (in this subsection called the *first person*) is capable of giving information which the Minister has reason to believe is, or producing documents (including documents that are copies of other documents) which the Minister has reason to believe are, relevant to ascertaining the identity or whereabouts of another person whom the Minister has reason to believe is an unlawful non-citizen, the Minister may, by notice in writing served on the first person, require the first person:
  - (a) to give to the Minister, within the period and in the manner specified in the notice, any such information; or
  - (b) to produce to the Minister, within the period and in the manner specified in the notice, any such documents; or
  - (c) to make copies of any such documents and to produce to the Minister, within the period and in the manner specified in the notice, those copies.
- (2) A notice under subsection (1) must set out the effects of section 21 of this Act and sections 137.1 and 137.2 of the *Criminal Code*.

### **19 Scales of expenses**

The regulations may prescribe scales of expenses to be allowed to persons required to give information or produce documents under this Division.

### **20 Reasonable compensation**

A person is entitled to be paid by the Commonwealth reasonable compensation for complying with a requirement covered by paragraph 18(1)(c).

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**21 Failure to comply with section 18 notice**

(1) A person must not refuse or fail to comply with a notice under subsection 18(1).

(1A) Subsection (1) does not apply:

(a) to the extent that the person is not capable of complying with the notice; or

(b) if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matters in subsection (1A) (see subsection 13.3(3) of the *Criminal Code*).

(2) The following are 2 of the reasonable excuses for refusing or failing to comply with a notice:

(a) the person whom the Minister had reason to believe was an unlawful non-citizen was not an unlawful non-citizen at the time the notice was given;

(b) the information or documents which the Minister had reason to believe were relevant to ascertaining the identity or whereabouts of a person were not relevant to ascertaining the identity or whereabouts of the person.

(3) An offence against subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Penalty: Imprisonment for 6 months.

**24 Information and documents that incriminate a person**

A person is not excused from giving information or producing a document or a copy of a document under this Division on the ground that the information or the production of the document or copy might tend to incriminate the person, but:

(a) giving the information or producing the document or copy; or

(b) any information, document or thing obtained as a direct or indirect consequence of giving the information or producing the document or copy;

is not admissible in evidence against the person in any criminal proceedings other than a prosecution for:

- (c) an offence against, or arising out of, this Division; or
- (d) an offence against section 137.1 or 137.2 of the *Criminal Code* that relates to this Division.

## **25 Copies of documents**

- (1) The Minister may inspect a document or copy produced under this Division and may make and retain copies of, or take and retain extracts from, such a document or copy.
- (2) The Minister may retain possession of a copy of a document produced in accordance with a requirement covered by paragraph 18(1)(c).

## **26 Minister may retain documents**

- (1) The Minister may, for the purposes of this Act, take, and retain for as long as is necessary for those purposes, possession of a document produced under this Division.
- (2) The person otherwise entitled to possession of the document is entitled to be supplied, as soon as practicable, with a copy certified by the Minister to be a true copy.
- (3) The certified copy must be received in all courts and tribunals as evidence as if it were the original.
- (4) Until a certified copy is supplied, the Minister must, at such times and places as the Minister thinks appropriate, permit the person otherwise entitled to possession of the document, or a person authorised by that person, to inspect and make copies of, or take extracts from, the document.

**Part 2** Arrival, presence and departure of persons

**Division 2** Power to obtain information and documents about unlawful non-citizens

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**27 Division binds the Crown**

- (1) This Division binds the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory and of the Northern Territory.
- (2) Nothing in this Division permits the Crown in right of the Commonwealth, of a State, of the Australian Capital Territory or of the Northern Territory to be prosecuted for an offence.



## **Division 3—Visas for non-citizens**

### **Subdivision A—General provisions about visas**

#### **28 Interpretation**

In this Division:

*specified period* includes the period until a specified date.

#### **29 Visas**

- (1) Subject to this Act, the Minister may grant a non-citizen permission, to be known as a visa, to do either or both of the following:

- (a) travel to and enter Australia;
- (b) remain in Australia.

Note: A maritime crew visa is generally permission to travel to and enter Australia only by sea (as well as being permission to remain in Australia) (see section 38B).

- (2) Without limiting subsection (1), a visa to travel to, enter and remain in Australia may be one to:
- (a) travel to and enter Australia during a prescribed or specified period; and
  - (b) if, and only if, the holder travels to and enters during that period, remain in Australia during a prescribed or specified period or indefinitely.
- (3) Without limiting subsection (1), a visa to travel to, enter and remain in Australia may be one to:
- (a) travel to and enter Australia during a prescribed or specified period; and
  - (b) if, and only if, the holder travels to and enters during that period:
    - (i) remain in it during a prescribed or specified period or indefinitely; and

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- (ii) if the holder leaves Australia during a prescribed or specified period, travel to and re-enter it during a prescribed or specified period.
- (4) Without limiting section 83 (person taken to be included in visa), the regulations may provide for a visa being held by 2 or more persons.

**30 Kinds of visas**

- (1) A visa to remain in Australia (whether also a visa to travel to and enter Australia) may be a visa, to be known as a permanent visa, to remain indefinitely.
- (2) A visa to remain in Australia (whether also a visa to travel to and enter Australia) may be a visa, to be known as a temporary visa, to remain:
  - (a) during a specified period; or
  - (b) until a specified event happens; or
  - (c) while the holder has a specified status.

**31 Classes of visas**

- (1) There are to be prescribed classes of visas.
  - Note: See also subsection 35A(4), which allows additional classes of permanent and temporary visas to be prescribed as protection visas by regulations made for the purposes of this subsection.
- (2) As well as the prescribed classes, there are the classes provided for by the following provisions:
  - (a) section 32 (special category visas);
  - (b) section 33 (special purpose visas);
  - (c) section 34 (absorbed person visas);
  - (d) section 35 (ex-citizen visas);
  - (e) subsection 35A(2) (permanent protection visas);
  - (f) subsection 35A(3) (temporary protection visas);
  - (fa) subsection 35A(3A) (safe haven enterprise visas);

- (g) section 37 (bridging visas);
  - (h) section 37A (temporary safe haven visas);
  - (i) section 38 (criminal justice visas);
  - (j) section 38A (enforcement visas);
  - (k) section 38B (maritime crew visas).
- (3) The regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of this subsection, may be a class provided for by section 32, 35A, 37, 37A or 38B but not by section 33, 34, 35, 38 or 38A).
- (3A) To avoid doubt, subsection (3) does not require criteria to be prescribed for a visa or visas including, without limitation, visas of the following classes:
- (a) special category visas (see section 32);
  - (b) permanent protection visas (see subsection 35A(2));
  - (c) temporary protection visas (see subsection 35A(3));
  - (ca) safe haven enterprise visas (see subsection 35A(3A));
  - (d) bridging visas (see section 37);
  - (e) temporary safe haven visas (see section 37A);
  - (f) maritime crew visas (see section 38B).
- Note 1: An application for any of these visas is invalid if criteria relating to both the application and the grant of the visa have not been prescribed (see subsection 46AA(2)).
- Note 2: If criteria are prescribed by the regulations for any of these visas, the visa cannot be granted unless any criteria prescribed by this Act, as well as any prescribed by regulation, are satisfied (see subsection 46AA(4)).
- (4) The regulations may prescribe whether visas of a class are visas to travel to and enter Australia, or to remain in Australia, or both.
- (5) A visa is a visa of a particular class if this Act or the regulations specify that it is a visa of that class.

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**32 Special category visas**

- (1) There is a class of temporary visas to be known as special category visas.
- (2) A criterion for a special category visa is that the Minister is satisfied the applicant is:
  - (a) a non-citizen:
    - (i) who is a New Zealand citizen and holds, and has presented to an officer or an authorised system, a New Zealand passport that is in force; and
    - (ii) is neither a behaviour concern non-citizen nor a health concern non-citizen; or
  - (b) a person declared by the regulations, to be a person for whom a visa of another class would be inappropriate; or
  - (c) a person in a class of persons declared by the regulations, to be persons for whom a visa of another class would be inappropriate.
- (3) A person may comply with subparagraph (2)(a)(i) by presenting a New Zealand passport to an authorised system only if:
  - (a) the New Zealand passport is of a kind determined under section 175A to be an eligible passport for the purposes of Division 5 of Part 2; and
  - (c) before the person is granted a special category visa, neither the system nor an officer requires the person to present the passport to an officer.

**33 Special purpose visas**

- (1) There is a class of temporary visas to travel to, enter and remain in Australia, to be known as special purpose visas.
- (2) Subject to subsection (3), a non-citizen is taken to have been granted a special purpose visa if:
  - (a) the non-citizen:
    - (i) has a prescribed status; or

- (ii) is a member of a class of persons that has a prescribed status; or
- (b) the Minister declares, in writing, that:
  - (i) the non-citizen is taken to have been granted a special purpose visa; or
  - (ii) persons of a class, of which the non-citizen is a member, are taken to have been granted special purpose visas.
- (3) A non-citizen is not taken to have been granted a special purpose visa if a declaration under subsection (9) is in force in relation to the non-citizen or a class of persons of which the non-citizen is a member.
- (4) A special purpose visa granted under subsection (2) is granted at the beginning of the later or latest of the following days:
  - (a) if paragraph (2)(a) applies:
    - (i) the day the non-citizen commences to have the prescribed status;
    - (ii) the day the class of persons, of which the non-citizen is a member, commences to have the prescribed status;
    - (iii) the day the non-citizen commences to be a member of the class of persons that has a prescribed status;
  - (b) if paragraph (2)(b) applies:
    - (i) the day the declaration is made;
    - (ii) if a day is specified in the declaration as the day the visa comes into effect—that day;
    - (iii) the day the non-citizen commences to be a member of the class of persons specified in the declaration.
- (5) A special purpose visa ceases to be in effect at the earliest of the following times:
  - (a) if paragraph (2)(a) applies:
    - (i) if the non-citizen ceases to have a prescribed status—the end of the day on which the non-citizen so ceases; or
    - (ii) if the non-citizen ceases to be a member of a class of persons that has a prescribed status—the end of the day on which the non-citizen so ceases; or

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- (iii) if the Minister makes a declaration under subsection (9) in relation to the non-citizen, or a class of persons of which the non-citizen is a member—the time when that declaration takes effect;
- (b) if paragraph (2)(b) applies:
  - (i) if a day is specified in the declaration as the day the visa ceases to be in effect—the end of that day; or
  - (ii) if an event is specified in the declaration as the event that causes the visa to cease to be in effect—the end of the day on which the event happens; or
  - (iii) if the non-citizen ceases to be a member of a class of persons specified in the declaration—the end of the day on which the non-citizen so ceases; or
  - (iv) if the declaration is revoked—the end of the day of the revocation; or
  - (v) if the Minister makes a declaration under subsection (9) in relation to the non-citizen, or a class of persons of which the non-citizen is a member—the time when that declaration takes effect.
- (5A) For the purposes of subsection (5), the time when a declaration made by the Minister under subsection (9) takes effect is:
  - (a) if the Minister specifies a time in the declaration (which must be after the time when the declaration is made) as the time the declaration takes effect—the time so specified; or
  - (b) if the Minister does not specify such a time in the declaration—the end of the day on which the declaration is made.
- (6) If the Minister makes a declaration under paragraph (2)(b), he or she is to cause to be laid before each House of the Parliament a statement that:
  - (a) sets out the contents of the declaration; and
  - (b) sets out the Minister's reasons for the declaration.
- (7) A statement under subsection (6) is not to include:
  - (a) the name of the non-citizen; or

- (b) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person.
- (8) A statement under subsection (6) is to be laid before each House of the Parliament within 15 sitting days of that House after:
  - (a) if the declaration is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or
  - (b) if the declaration is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.
- (9) The Minister may make a written declaration, for the purposes of this section, that it is undesirable that a person, or any persons in a class of persons, travel to and enter Australia or remain in Australia.
- (10) Section 43 and Subdivisions AA, AB, AC (other than section 68), AG, AH, C, D, E, F, FA, FB and H do not apply in relation to special purpose visas.

### **34 Absorbed person visas**

- (1) There is a class of permanent visas to remain in, but not re-enter, Australia, to be known as absorbed person visas.
- (2) A non-citizen in the migration zone who:
  - (a) on 2 April 1984 was in Australia; and
  - (b) before that date, had ceased to be an immigrant; and
  - (c) on or after that date, has not left Australia, where left Australia has the meaning it had in this Act before 1 September 1994; and
  - (d) immediately before 1 September 1994, was not a person to whom section 20 of this Act as in force then applied;is taken to have been granted an absorbed person visa on 1 September 1994.

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- (3) Subdivisions AA, AB, AC (other than section 68) and AH do not apply in relation to absorbed person visas.

**35 Ex-citizen visas**

- (1) There is a class of permanent visas to remain in, but not re-enter, Australia, to be known as ex-citizen visas.
- (2) A person who:
- (a) before 1 September 1994, ceased to be an Australian citizen while in the migration zone; and
  - (b) did not leave Australia after ceasing to be a citizen and before that date;
- is taken to have been granted an ex-citizen visa on that date.
- (3) A person who, on or after 1 September 1994, ceases to be an Australian citizen while in the migration zone is taken to have been granted an ex-citizen visa when that citizenship ceases.
- (4) Subdivisions AA, AB, AC (other than section 68) and AH do not apply in relation to ex-citizen visas.

**35A Protection visas—classes of visas**

- (1) A *protection visa* is a visa of a class provided for by this section.
- (2) There is a class of permanent visas to be known as permanent protection visas.
- Note: These visas were classified by the *Migration Regulations 1994* as Protection (Class XA) visas when this section commenced.
- (3) There is a class of temporary visas to be known as temporary protection visas.
- Note: These visas were classified by the *Migration Regulations 1994* as Temporary Protection (Class XD) visas when this section commenced.
- (3A) There is a class of temporary visas to be known as safe haven enterprise visas.



- (3B) The purpose of safe haven enterprise visas is both to provide protection and to encourage enterprise through earning and learning while strengthening regional Australia.

Note: If a person satisfies the requirements for working, study and accessing social security prescribed for the purposes of paragraph 46A(1A)(c), section 46A will not bar the person from making a valid application for any of the onshore visas prescribed for the purposes of paragraph 46A(1A)(b). This does not include permanent protection visas.

- (4) Regulations made for the purposes of subsection 31(1) may prescribe additional classes of permanent and temporary visas as protection visas.

- (5) A class of visas that was formerly provided for by subsection 36(1), as that subsection was in force before the commencement of this section, is also a class of protection visas for the purposes of this Act and the regulations.

Example: An example of a class of visas for subsection (5) is the class of visas formerly classified by the *Migration Regulations 1994* as Protection (Class AZ) visas. These visas can no longer be granted.

Note: This section commenced, and subsection 36(1) was repealed, on the commencement of Part 1 of Schedule 2 to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.

- (6) The criteria for a class of protection visas are:
- (a) the criteria set out in section 36; and
  - (b) any other relevant criteria prescribed by regulation for the purposes of section 31.

Note: See also Subdivision AL.

### **36 Protection visas—criteria provided for by this Act**

- (1A) An applicant for a protection visa must satisfy:
- (a) both of the criteria in subsections (1B) and (1C); and
  - (b) at least one of the criteria in subsection (2).

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(1B) A criterion for a protection visa is that the applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*).

(1C) A criterion for a protection visa is that the applicant is not a person whom the Minister considers, on reasonable grounds:

- (a) is a danger to Australia's security; or
- (b) having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community.

Note: For paragraph (b), see section 5M.

(2) A criterion for a protection visa is that the applicant for the visa is:

- (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
- (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
- (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
  - (i) is mentioned in paragraph (a); and
  - (ii) holds a protection visa of the same class as that applied for by the applicant; or
- (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
  - (i) is mentioned in paragraph (aa); and
  - (ii) holds a protection visa of the same class as that applied for by the applicant.

(2A) A non-citizen will suffer ***significant harm*** if:

- (a) the non-citizen will be arbitrarily deprived of his or her life;  
or

- (b) the death penalty will be carried out on the non-citizen; or
  - (c) the non-citizen will be subjected to torture; or
  - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
  - (e) the non-citizen will be subjected to degrading treatment or punishment.
- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
  - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
  - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

*Ineligibility for grant of a protection visa*

- (2C) A non-citizen is taken not to satisfy the criterion mentioned in paragraph (2)(aa) if:
- (a) the Minister has serious reasons for considering that:
    - (i) the non-citizen has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or
    - (ii) the non-citizen committed a serious non-political crime before entering Australia; or
    - (iii) the non-citizen has been guilty of acts contrary to the purposes and principles of the United Nations; or
  - (b) the Minister considers, on reasonable grounds, that:
    - (i) the non-citizen is a danger to Australia's security; or
    - (ii) the non-citizen, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious

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Australian offence or serious foreign offence), is a danger to the Australian community.

*Protection obligations*

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
  - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
  - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
  - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in

subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

*Determining nationality*

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.

### **37 Bridging visas**

There are classes of temporary visas, to be known as bridging visas, to be granted under Subdivision AF.

#### **37A Temporary safe haven visas**

- (1) There is a class of temporary visas to travel to, enter and remain in Australia, to be known as temporary safe haven visas.  

Note: A temporary safe haven visa is granted to a person to give the person temporary safe haven in Australia.
- (2) The Minister may, by notice in the *Gazette*, extend the visa period of a temporary safe haven visa so that the visa ceases to be in effect on the day specified in the notice.
- (3) The Minister may, by notice in the *Gazette*, shorten the visa period of a temporary safe haven visa so that the visa ceases to be in effect on the day specified in the notice if, in the Minister's opinion, temporary safe haven in Australia is no longer necessary for the holder of the visa because of changes of a fundamental, durable and stable nature in the country concerned.
- (4) If a notice under subsection (3) is published in the *Gazette*, the Minister must cause a copy of the notice to be laid before each House of the Parliament within 3 sitting days of that House after the publication of the notice, together with a statement that sets out the reasons for the notice, referring in particular to the Minister's

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reasons for thinking that changes of a fundamental, durable and stable nature have occurred in the country concerned.

- (5) If a notice under subsection (2) or (3) is published in the *Gazette* and has not been revoked, then the visa ceases to be in effect on the day specified in the notice, despite any other provision of this Act.
- (6) The Minister does not have a duty to consider whether to exercise the power under subsection (2) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or by any other person, or in any other circumstances.
- (7) In this section:

*country concerned* means the country or countries in which the circumstances exist that give rise to the grant of temporary safe haven visas.

### 38 Criminal justice visas

There is a class of temporary visas, to be known as criminal justice visas, to be granted under Subdivision D of Division 4.

#### 38A Enforcement visas

There is a class of temporary visas to travel to, enter and remain in Australia, to be known as enforcement visas.

Note: Division 4A deals with these visas.

#### 38B Maritime crew visas

- (1) There is a class of temporary visas to travel to and enter Australia by sea, and to remain in Australia, to be known as maritime crew visas.
- (2) Subject to subsection 43(1B), a maritime crew visa held by a non-citizen does not grant the non-citizen permission to travel to or enter Australia by air.

Note: However, a non-citizen might also hold another class of visa that allows the non-citizen to travel to and enter Australia by air.

- (3) The Minister may make a written declaration, for the purposes of this section, that it is undesirable that a person, or any persons in a class of persons, travel to and enter Australia, or remain in Australia.
- (4) If the Minister makes a declaration under subsection (3) in relation to a person, or a class of persons of which a person is a member, a maritime crew visa held by that person ceases to be in effect:
- (a) if the Minister specifies a time in the declaration (which must be after the time when the declaration is made) as the time the declaration takes effect—at the time so specified; or
  - (b) if the Minister does not specify such a time in the declaration—at the end of the day on which the declaration is made.

Note: A maritime crew visa can also cease to be in effect under other sections (see for example section 82).

- (5) If the Minister revokes a declaration made under subsection (4), the Minister is taken never to have made the declaration.

Note: Under subsection 33(3) of the *Acts Interpretation Act 1901*, the Minister may revoke a declaration made under subsection (4).

- (6) Despite subsection (5), any detention of the non-citizen that occurred during any part of the period:
- (a) beginning when the Minister made the declaration; and
  - (b) ending at the time of the revocation of the declaration;
- is lawful and the non-citizen is not entitled to make any claim against the Commonwealth, an officer or any other person because of the detention.

### **39 Criterion limiting number of visas**

- (1) In spite of section 14 of the *Legislation Act 2003*, a prescribed criterion for visas of a class, other than protection visas, may be the criterion that the grant of the visa would not cause the number of visas of that class granted in a particular financial year to exceed

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whatever number is fixed by the Minister, by legislative instrument, as the maximum number of such visas that may be granted in that year (however the criterion is expressed).

- (2) For the purposes of this Act, when a criterion allowed by subsection (1) prevents the grant in a financial year of any more visas of a particular class, any outstanding applications for the grant in that year of visas of that class are taken not to have been made.

**39A Minimum annual numbers of Protection (Class XA) visas and Refugee and Humanitarian (Class XB) visas**

- (1) Despite any legislative instrument made for the purposes of section 39, the Minister must take all reasonably practicable measures to ensure the grant in a financial year of at least the minimum total number of Protection (Class XA) visas and Refugee and Humanitarian (Class XB) visas that is determined by the Minister under subsection (3) of this section for that year.
- (2) Subsection (1) applies subject to this Act, and to any regulation or instrument made under or for the purposes of this Act (other than section 39 of this Act).
- (3) The Minister may, by legislative instrument, determine a minimum total number of Protection (Class XA) visas and Refugee and Humanitarian (Class XB) visas for a financial year specified in the determination.
- (4) Despite regulations made for the purposes of paragraph 44(2)(b) of the *Legislation Act 2003*, section 42 (disallowance) of that Act applies to a legislative instrument made under subsection (3) of this section.
- (5) In this section:

***Protection (Class XA) visas*** means visas classified by regulation as Protection (Class XA) visas.

Note: For this class of visas, see clause 1401 of Schedule 1 to the *Migration Regulations 1994*.



***Refugee and Humanitarian (Class XB) visas*** means visas classified by regulation as Refugee and Humanitarian (Class XB) visas.

Note: For this class of visas, see clause 1402 of Schedule 1 to the *Migration Regulations 1994*.

#### **40 Circumstances for granting visas**

- (1) The regulations may provide that visas or visas of a specified class may only be granted in specified circumstances.
- (2) Without limiting subsection (1), the circumstances may be, or may include, that, when the person is granted the visa, the person:
  - (a) is outside Australia; or
  - (b) is in immigration clearance; or
  - (c) has been refused immigration clearance and has not subsequently been immigration cleared; or
  - (d) is in the migration zone and, on last entering Australia:
    - (i) was immigration cleared; or
    - (ii) bypassed immigration clearance and had not subsequently been immigration cleared.
- (3) Without limiting subsection (1), the circumstances may be, or may include, that a person has complied with any requirement to provide one or more personal identifiers made under section 257A.

#### **41 Conditions on visas**

- (1) The regulations may provide that visas, or visas of a specified class, are subject to specified conditions.

##### *General rules about conditions*

- (2) Without limiting subsection (1), the regulations may provide that a visa, or visas of a specified class, are subject to:
  - (a) a condition that, despite anything else in this Act, the holder of the visa will not, after entering Australia, be entitled to be granted a substantive visa (other than a protection visa, or a

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temporary visa of a specified kind) while he or she remains in Australia; or

- (b) a condition imposing restrictions about the work that may be done in Australia by the holder, which, without limiting the generality of this paragraph, may be restrictions on doing:
  - (i) any work; or
  - (ii) work other than specified work; or
  - (iii) work of a specified kind.

- (2A) The Minister may, in prescribed circumstances, by writing, waive a condition of a kind described in paragraph (2)(a) to which a particular visa is subject under regulations made for the purposes of that paragraph or under subsection (3).

*Conditions about offshore resources activity*

- (2B) In addition to any restrictions applying because of regulations made for the purposes of paragraph (2)(b), a condition of a visa that allows the holder of the visa to work is not taken to allow the holder to participate in, or support, an offshore resources activity in relation to any area unless the visa is:
  - (a) a permanent visa; or
  - (b) a visa prescribed by the regulations for the purposes of this subsection.

Note: For *offshore resources activity*, see subsection 9A(5).

- (2C) To avoid doubt, for the purposes of subsection (2B), a person may participate in, or support, an offshore resources activity in relation to an area whether the person:
  - (a) is on an Australian resources installation in the area; or
  - (b) is, under section 9A, otherwise in the area to participate in, or support, the activity.

*Additional conditions*

- (3) In addition to any conditions specified under subsection (1), or in subsection (2B), the Minister may specify that a visa is subject to

such conditions as are permitted by the regulations for the purposes of this subsection.

#### **42 Visa essential for travel**

- (1) Subject to subsections (2), (2A) and (3), a non-citizen must not travel to Australia without a visa that is in effect.

Note: A maritime crew visa is generally permission to travel to Australia only by sea (see section 38B).

- (2) Subsection (1) does not apply to an allowed inhabitant of the Protected Zone travelling to a protected area in connection with traditional activities.

- (2A) Subsection (1) does not apply to a non-citizen in relation to travel to Australia:

- (a) if the travel is by a New Zealand citizen who holds and produces a New Zealand passport that is in force; or
- (b) if the travel is by a non-citizen who holds and produces a passport that is in force and is endorsed with an authority to reside indefinitely on Norfolk Island; or
- (c) if:
  - (i) the non-citizen is brought to the migration zone under subsection 245F(9) of this Act or under Division 7 or 8 of Part 3 of the *Maritime Powers Act 2013*; and
  - (ii) the non-citizen is a person who would, if in the migration zone, be an unlawful non-citizen; or
- (ca) the non-citizen is brought to Australia under section 198B; or
- (d) if:
  - (i) the non-citizen has been removed under section 198 to another country but has been refused entry by that country; and
  - (ii) the non-citizen travels to Australia as a direct result of that refusal; and
  - (iii) the non-citizen is a person who would, if in the migration zone, be an unlawful non-citizen; or
- (e) if:

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- (i) the non-citizen has been removed under section 198; and
  - (ii) before the removal the High Court, the Federal Court or the Federal Circuit Court had made an order in relation to the non-citizen, or the Minister had given an undertaking to the High Court, the Federal Court or the Federal Circuit Court in relation to the non-citizen; and
  - (iii) the non-citizen's travel to Australia is required in order to give effect to the order or undertaking; and
  - (iv) the Minister has made a declaration that this paragraph is to apply in relation to the non-citizen's travel; and
  - (v) the non-citizen is a person who would, if in the migration zone, be an unlawful non-citizen; or
- (f) if:
- (i) the travel is from Norfolk Island to Australia; and
  - (ii) the Minister has made a declaration that this paragraph is to apply in relation to the non-citizen's travel; and
  - (iii) the non-citizen is a person who would, if in the migration zone, be an unlawful non-citizen.
- (3) The regulations may permit a specified non-citizen or a non-citizen in a specified class to travel to Australia without a visa that is in effect.
- (4) Nothing in subsection (2A) or (3) is to be taken to affect the non-citizen's status in the migration zone as an unlawful non-citizen.

Note: Section 189 provides that an unlawful non-citizen in the migration zone must be detained.

**43 Visa holders must usually enter at a port**

- (1) Subject to subsections (1A) and (3) and the regulations, a visa to travel to and enter Australia that is in effect is permission for the holder to enter Australia:
- (a) at a port; or
  - (b) on a pre-cleared flight; or

- (c) if the holder travels to Australia on a vessel and the health or safety of a person or a prescribed reason, make it necessary to enter in another way, that way; or
  - (d) in a way authorised in writing by an authorised officer.
- (1A) Subject to the regulations, a maritime crew visa that is in effect is permission for the holder to enter Australia:
- (a) at a proclaimed port; or
  - (b) if the health or safety of a person, or a prescribed reason, make it necessary to enter Australia in another way, that way; or
  - (c) in a way authorised by an authorised officer.
- (1B) Despite subsections 38B(1) and (2):
- (a) the holder of a maritime crew visa may enter Australia as mentioned in paragraph (1A)(b) by air; and
  - (b) the authorised officer may, for the purposes of paragraph (1A)(c), authorise the holder to enter Australia by air.
- (2) For the purposes of subsection (1), a holder who travels to and enters Australia on an aircraft is taken to have entered Australia when that aircraft lands.
- (3) This section does not apply to:
- (a) the holder of an enforcement visa; or
  - (b) an Australian resident entering Australia on a foreign vessel as a result of the exercise of powers under section 69 of the *Maritime Powers Act 2013* in relation to a fisheries detention offence; or
  - (c) an Australian resident entering Australia on a vessel (environment matters) as a result of an environment officer, maritime officer or other person in command of a Commonwealth ship or a Commonwealth aircraft:
    - (i) exercising his or her power under paragraph 403(3)(a) of the *Environment Protection and Biodiversity Conservation Act 1999* in relation to the vessel; or

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- (ii) making a requirement of the person in charge of the vessel under paragraph 403(3)(b) of the *Environment Protection and Biodiversity Conservation Act 1999*; or
  - (iii) exercising powers under section 69 of the *Maritime Powers Act 2013* in relation to the vessel;
- because the environment officer, maritime officer or person in command had reasonable grounds to suspect that the vessel had been used or otherwise involved in the commission of an environment detention offence.

Note: Subsection 33(10) also disapplies this section.

- (4) In subsection (3):

*Australian resident* has the same meaning as in the *Fisheries Management Act 1991*.

*Commonwealth aircraft* has the same meaning as in the *Environment Protection and Biodiversity Conservation Act 1999*.

*Commonwealth ship* has the same meaning as in the *Environment Protection and Biodiversity Conservation Act 1999*.

**Subdivision AA—Applications for visas**

**44 Extent of following Subdivisions**

- (1) This Subdivision and the later Subdivisions of this Division, other than this section, Subdivision AG and subsection 138(1), do not apply to criminal justice visas.
- (2) This Subdivision and the later Subdivisions of this Division, other than this section and Subdivision AG, do not apply to enforcement visas.

**45 Application for visa**

- (1) Subject to this Act and the regulations, a non-citizen who wants a visa must apply for a visa of a particular class.

**45AA Application for one visa taken to be an application for a different visa**

*Situation in which conversion regulation can be made*

- (1) This section applies if:
- (a) a person has made a valid application (a ***pre-conversion application***) for a visa (a ***pre-conversion visa***) of a particular class; and
  - (b) the pre-conversion visa has not been granted to the person, whether or not a migration decision has been made in relation to the pre-conversion application; and
  - (c) since the application was made, one or more of the following events has occurred:
    - (i) the requirements for making a valid application for that class of visa change;
    - (ii) the criteria for the grant of that class of visa change;
    - (iii) that class of visa ceases to exist; and
  - (d) had the application been made after the event (or events) occurred, because of that event (or those events):
    - (i) the application would not have been valid; or
    - (ii) that class of visa could not have been granted to the person.
- (2) To avoid doubt, under subsection (1) this section may apply in relation to:
- (a) classes of visas, including protection visas and any other classes of visas provided for by this Act or the regulations; and
  - (b) classes of applicants, including applicants having a particular status; and
  - (c) applicants for a visa who are taken to have applied for the visa by the operation of this Act or the regulations.

Example: If a non-citizen applies for a visa, and then, before the application is decided, gives birth to a child, in some circumstances the child is taken, by the operation of the regulations, to have applied for a

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visa of the same class at the time the child is born (see regulation 2.08).

*Conversion regulation*

- (3) For the purposes of this Act, a regulation (a **conversion regulation**) may provide that, despite anything else in this Act, the pre-conversion application for the pre-conversion visa:
- (a) is taken not to be, and never to have been, a valid application for the pre-conversion visa; and
  - (b) is taken to be, and always to have been, a valid application (a **converted application**) for a visa of a different class (specified by the conversion regulation) made by the applicant for the pre-conversion visa.

Note: This section may apply in relation to a pre-conversion application made before the commencement of the section (see the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*).

For example, a conversion regulation (made after the commencement of this section) could have the effect that a pre-conversion application for a particular type of visa made on 1 August 2014 (before that commencement):

- (a) is taken not to have been made on 1 August 2014 (or ever); and
  - (b) is taken to be, and always to have been, a converted application for another type of visa made on 1 August 2014.
- (4) Without limiting subsection (3), a conversion regulation may:
- (a) prescribe a class or classes of pre-conversion visas; and
  - (b) prescribe a class of applicants for pre-conversion visas; and
  - (c) prescribe a time (the **conversion time**) when the regulation is to start to apply in relation to a pre-conversion application, including different conversion times depending on the occurrence of different events.

*Visa application charge*

- (5) If an amount has been paid as the first instalment of the visa application charge for a pre-conversion application, then, at and after the conversion time in relation to the application:



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- (a) that payment is taken not to have been paid as the first instalment of the visa application charge for the pre-conversion application; and
- (b) that payment is taken to be payment of the first instalment of the visa application charge for the converted application, even if the first instalment of the visa application charge that would otherwise be payable for the converted application is greater than the actual amount paid for the first instalment of the visa application charge for the pre-conversion application; and
- (c) in a case in which the first instalment of the visa application charge payable for the converted application is less than the actual amount paid for the first instalment of the visa application charge for the pre-conversion application, no refund is payable in respect of the difference only for that reason.

Note: For the visa application charge, see sections 45A, 45B and 45C.

*Effect on bridging visas*

- (6) For the purposes of this Act, if, immediately before the conversion time for a pre-conversion application, a person held a bridging visa because the pre-conversion application had not been finally determined, then, at and after the conversion time, the bridging visa has effect as if it had been granted because of the converted application.
- (7) For the purposes of this Act, if, immediately before the conversion time for a pre-conversion application, a person had made an application for a bridging visa because of the pre-conversion application, but the bridging visa application had not been finally determined, then, at and after the conversion time:
  - (a) the bridging visa application is taken to have been applied for because of the converted application; and
  - (b) the bridging visa (if granted) has effect as if it were granted because of the converted application.

Note: This Act and the regulations would apply to a bridging visa to which subsection (6) or (7) applies, and to when the bridging visa would

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cease to have effect, in the same way as this Act and the regulations would apply in relation to any bridging visa.

For example, such a bridging visa would generally cease to be in effect under section 82 if and when the substantive visa is granted because of the converted application.

*Conversion regulation may affect accrued rights etc.*

- (8) To avoid doubt:
- (a) subsection 12(2) (retrospective application of legislative instruments) of the *Legislation Act 2003* does not apply in relation to the effect of a conversion regulation (including a conversion regulation enacted by the Parliament); and
  - (b) subsection 7(2) of the *Acts Interpretation Act 1901*, including that subsection as applied by section 13 of the *Legislation Act 2003*, does not apply in relation to the enactment of this section or the making of a conversion regulation (including a conversion regulation enacted by the Parliament).

**45A Visa application charge**

A non-citizen who makes an application for a visa is liable to pay visa application charge if, assuming the charge were paid, the application would be a valid visa application.

**45B Amount of visa application charge**

- (1) The amount of visa application charge is the amount, not exceeding the visa application charge limit, prescribed in relation to the application.

Note: The visa application charge limit is determined under the *Migration (Visa Application) Charge Act 1997*.

- (2) The amount prescribed in relation to an application may be nil.
- (3) The Minister must publish the Contributory Parent Visa Composite Index (within the meaning of the *Migration (Visa Application) Charge Act 1997*) for a financial year in the *Gazette* before the start of the financial year.

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Note: The Contributory Parent Visa Composite Index affects the visa application charge limit in relation to contributory parent visas (within the meaning of the *Migration (Visa Application) Charge Act 1997*).

- (4) If the Contributory Parent Visa Composite Index for a financial year is not published as required by subsection (3), it is not to be taken, merely because of that fact, to be invalid or to be a figure other than that published by the Australian Government Actuary for the financial year.

**45C Regulations about visa application charge**

- (1) The regulations may:
- (a) provide that visa application charge may be payable in instalments; and
  - (b) specify how those instalments are to be calculated; and
  - (c) specify when instalments are payable.
- (2) The regulations may also:
- (a) make provision for and in relation to:
    - (i) the recovery of visa application charge in relation to visa applications; or
    - (ii) the way, including the currency, in which visa application charge is to be paid; or
    - (iii) working out how much visa application charge is to be paid; or
    - (iv) the time when visa application charge is to be paid; or
    - (v) the persons who may be paid visa application charge on behalf of the Commonwealth; or
  - (b) make provision for the remission, refund or waiver of visa application charge or an amount of visa application charge; or
  - (c) make provision for exempting persons from the payment of visa application charge or an amount of visa application charge; or
  - (d) make provision for crediting visa application charge, or an amount of visa application charge, paid in respect of one

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application against visa application charge payable in respect of another application.

#### 46 Valid visa application

*Validity—general*

- (1) Subject to subsections (1A), (2) and (2A), an application for a visa is valid if, and only if:
- (a) it is for a visa of a class specified in the application; and
  - (b) it satisfies the criteria and requirements prescribed under this section; and
  - (ba) subject to the regulations providing otherwise, any visa application charge that the regulations require to be paid at the time when the application is made, has been paid; and
  - (c) any fees payable in respect of it under the regulations have been paid; and
  - (d) it is not prevented by any provision of this Act, or of any other law of the Commonwealth, including, without limitation, the following provisions of this Act:
    - (i) section 48 (visa refused or cancelled earlier);
    - (ii) section 48A (protection visa refused or cancelled earlier);
    - (iii) section 161 (criminal justice visa holders);
    - (iv) section 164D (enforcement visa holders);
    - (v) section 195 (detainee applying out of time);
    - (vi) section 501E (earlier refusal or cancellation on character grounds); and
  - (e) it is not invalid under any provision of this Act, or of any other law of the Commonwealth, including, without limitation, the following provisions of this Act:
    - (i) section 46AA (visa applications, and the grant of visas, for some Act-based visas);
    - (ii) section 46A (visa applications by unauthorised maritime arrivals);
    - (iii) section 46B (visa applications by transitory persons);

- (iv) section 91E or 91G (CPA and safe third countries);
  - (v) section 91K (temporary safe haven visas);
  - (vi) section 91P (non-citizens with access to protection from third countries).
- (1A) Subject to subsection (2), an application for a visa is invalid if:
- (a) the applicant is in the migration zone; and
  - (b) since last entering Australia, the applicant has held a visa subject to a condition described in paragraph 41(2)(a); and
  - (c) the Minister has not waived that condition under subsection 41(2A); and
  - (d) the application is for a visa of a kind that, under that condition, the applicant is not or was not entitled to be granted.
- (2) Subject to subsection (2A), an application for a visa is valid if:
- (a) it is an application for a visa of a class prescribed for the purposes of this subsection; and
  - (b) under the regulations, the application is taken to have been validly made.

*Provision of personal identifiers*

- (2A) An application for a visa is invalid if:
- (aa) the Minister has not waived the operation of this subsection in relation to the application for the visa; and
  - (ab) the applicant has been required to provide one or more personal identifiers under section 257A for the purposes of this subsection; and
  - (b) the applicant has not complied with the requirement.

Note: An invalid application for a visa cannot give rise to an obligation under section 65 to grant a visa: see subsection 47(3).

*Prescribed criteria for validity*

- (3) The regulations may prescribe criteria that must be satisfied for an application for a visa of a specified class to be a valid application.

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- (4) Without limiting subsection (3), the regulations may also prescribe:
  - (a) the circumstances that must exist for an application for a visa of a specified class to be a valid application; and
  - (b) how an application for a visa of a specified class must be made; and
  - (c) where an application for a visa of a specified class must be made; and
  - (d) where an applicant must be when an application for a visa of a specified class is made.
- (5) To avoid doubt, subsections (3) and (4) do not require criteria to be prescribed in relation to the validity of visa applications, including, without limitation, applications for visas of the following classes:
  - (a) special category visas (see section 32);
  - (b) permanent protection visas (see subsection 35A(2));
  - (c) temporary protection visas (see subsection 35A(3));
  - (ca) safe haven enterprise visas (see subsection 35A(3A));
  - (d) bridging visas (see section 37);
  - (e) temporary safe haven visas (see section 37A);
  - (f) maritime crew visas (see section 38B).

**46AA Visa applications, and the grant of visas, for some Act-based visas**

*Visa classes covered by this section*

- (1) The following classes of visas are covered by this section:
  - (a) special category visas (see section 32);
  - (b) permanent protection visas (see subsection 35A(2));
  - (c) temporary protection visas (see subsection 35A(3));
  - (ca) safe haven enterprise visas (see subsection 35A(3A));
  - (d) bridging visas (see section 37);
  - (e) temporary safe haven visas (see section 37A);
  - (f) maritime crew visas (see section 38B).

*Applications invalid if no prescribed criteria*

- (2) An application for a visa of any of the classes covered by this section is invalid if, when the application is made, both of the following conditions are satisfied:
- (a) there are no regulations in effect prescribing criteria that must be satisfied for a visa of that particular class to be a valid application;
  - (b) there are no regulations in effect prescribing criteria that must be satisfied for a visa of that particular class to be granted.

Note: This subsection does not apply if regulations are in effect prescribing criteria mentioned in paragraph (a) or (b) (or both) for a visa.

- (3) The criteria mentioned in subsection (2) do not include prescribed criteria that apply generally to visa applications or the granting of visas.

Example: The criteria mentioned in subsection (2) do not include the criteria set out in regulation 2.07 of the *Migration Regulations 1994* (application for visa—general).

*Criteria in the Act and the regulations*

- (4) If regulations are in effect prescribing criteria mentioned in paragraph (2)(a) or (b) (or both) for a visa of a class covered by this section:
- (a) an application for the visa is invalid unless the application satisfies both:
    - (i) any applicable criteria under this Act that relate to applications for visas of that class; and
    - (ii) any applicable criteria prescribed by regulation that relate to applications for visas of that class; and
  - (b) the visa must not be granted unless the application satisfies both:
    - (i) any applicable criteria under this Act that relate to the grant of visas of that class; and
    - (ii) any applicable criteria prescribed by regulation that relate to the grant of visas of that class.

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Note: For visa applications generally, see section 46. For the grant of a visa generally, see section 65.

**46A Visa applications by unauthorised maritime arrivals**

- (1) An application for a visa is not a valid application if it is made by an unauthorised maritime arrival who:
- (a) is in Australia; and
  - (b) either:
    - (i) is an unlawful non-citizen; or
    - (ii) holds a bridging visa or a temporary protection visa, or a temporary visa of a kind (however described) prescribed for the purposes of this subparagraph.

Note: Temporary protection visas are provided for by subsection 35A(3).

- (1A) Subsection (1) does not apply in relation to an application for a visa if:
- (a) either:
    - (i) the applicant holds a safe haven enterprise visa (see subsection 35A(3A)); or
    - (ii) the applicant is a lawful non-citizen who has ever held a safe haven enterprise visa; and
  - (b) the application is for a visa prescribed for the purposes of this paragraph; and
  - (c) the applicant satisfies any employment, educational or social security benefit requirements prescribed in relation to the safe haven enterprise visa for the purposes of this paragraph.
- (2) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an unauthorised maritime arrival, determine that subsection (1) does not apply to an application by the unauthorised maritime arrival for a visa of a class specified in the determination.
- (2A) A determination under subsection (2) may provide that it has effect only for the period specified in the determination and, if it does so,



the determination ceases to have effect at the end of the specified period.

- (2B) The period specified in a determination may be different for different classes of unauthorised maritime arrivals.
- (2C) The Minister may, in writing, vary or revoke a determination made under subsection (2) if the Minister thinks that it is in the public interest to do so.
- (3) The power under subsection (2) or (2C) may only be exercised by the Minister personally.
- (4) If the Minister makes, varies or revokes a determination under this section, the Minister must cause to be laid before each House of the Parliament a statement that:
- (a) sets out the determination, the determination as varied or the instrument of revocation; and
  - (b) sets out the reasons for the determination, variation or revocation, referring in particular to the Minister's reasons for thinking that the Minister's actions are in the public interest.
- (5) A statement under subsection (4) must not include:
- (a) the name of the unauthorised maritime arrival; or
  - (b) any information that may identify the unauthorised maritime arrival; or
  - (c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person or any information that may identify that other person.
- (6) A statement under subsection (4) must be laid before each House of the Parliament within 15 sitting days of that House after:
- (a) if the determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or
  - (b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

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- (7) The Minister does not have a duty to consider whether to exercise the power under subsection (2) or (2C) in respect of any unauthorised maritime arrival whether the Minister is requested to do so by the unauthorised maritime arrival or by any other person, or in any other circumstances.

**46B Visa applications by transitory persons**

- (1) An application for a visa is not a valid application if it is made by a transitory person who:
- (a) is in Australia; and
  - (b) either:
    - (i) is an unlawful non-citizen; or
    - (ii) holds a bridging visa or a temporary protection visa, or a temporary visa of a kind (however described) prescribed for the purposes of this subparagraph.

Note: Temporary protection visas are provided for by subsection 35A(3).

- (2) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a transitory person, determine that subsection (1) does not apply to an application by the person for a visa of a class specified in the determination.
- (2A) A determination under subsection (2) may provide that it has effect only for the period specified in the determination and, if it does so, the determination ceases to have effect at the end of the specified period.
- (2B) The period specified in a determination may be different for different classes of transitory persons.
- (2C) The Minister may, in writing, vary or revoke a determination made under subsection (2) if the Minister thinks that it is in the public interest to do so.
- (3) The power under subsection (2) or (2C) may only be exercised by the Minister personally.

- (4) If the Minister makes, varies or revokes a determination under this section, the Minister must cause to be laid before each House of the Parliament a statement that:
- (a) sets out the determination, the determination as varied or the instrument of revocation; and
  - (b) sets out the reasons for the determination, variation or revocation, referring in particular to the Minister's reasons for thinking that the Minister's actions are in the public interest.
- (5) A statement under subsection (4) must not include:
- (a) the name of the transitory person; or
  - (b) any information that may identify the transitory person; or
  - (c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person or any information that may identify that other person.
- (6) A statement under subsection (4) must be laid before each House of the Parliament within 15 sitting days of that House after:
- (a) if the determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or
  - (b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.
- (7) The Minister does not have a duty to consider whether to exercise the power under subsection (2) or (2C) in respect of any transitory person whether the Minister is requested to do so by the transitory person or by any other person, or in any other circumstances.

#### **47 Consideration of valid visa application**

- (1) The Minister is to consider a valid application for a visa.
- (2) The requirement to consider an application for a visa continues until:
- (a) the application is withdrawn; or

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- (b) the Minister grants or refuses to grant the visa; or
  - (c) the further consideration is prevented by section 39 (limiting number of visas) or 84 (suspension of consideration).
- (3) To avoid doubt, the Minister is not to consider an application that is not a valid application.
- (4) To avoid doubt, a decision by the Minister that an application is not valid and cannot be considered is not a decision to refuse to grant the visa.

**48 Non-citizen refused a visa or whose visa cancelled may only apply for particular visas**

- (1) A non-citizen in the migration zone who:
- (a) does not hold a substantive visa; and
  - (b) after last entering Australia:
    - (i) was refused a visa, other than a refusal of a bridging visa or a refusal under section 501, 501A or 501B, for which the non-citizen had applied (whether or not the application has been finally determined); or
    - (ii) held a visa that was cancelled under section 109 (incorrect information), 116 (general power to cancel), 133A (Minister's personal powers to cancel visas on section 109 grounds), 133C (Minister's personal powers to cancel visas on section 116 grounds), 134 (business visas), 137J (student visas) or 137Q (regional sponsored employment visas);
- may, subject to the regulations, apply for a visa of a class prescribed for the purposes of this section or have an application for such a visa made on his or her behalf, but not for a visa of any other class.

- (1A) A non-citizen in the migration zone who:
- (a) does not hold a substantive visa; and
  - (b) after last entering Australia, was refused a visa (other than a refusal of a bridging visa or a refusal under section 501,

501A or 501B) for which an application had been made on the non-citizen's behalf, whether or not:

- (i) the application has been finally determined; or
- (ii) the non-citizen knew about, or understood the nature of, the application due to any mental impairment; or
- (iii) the non-citizen knew about, or understood the nature of, the application due to the fact that the non-citizen was, at the time the application was made, a minor;

may, subject to the regulations, apply for a visa of a class prescribed for the purposes of this section or have an application for such a visa made on his or her behalf, but not for a visa of any other class.

- (2) For the purposes of this section (which applies only in respect of applications made while a non-citizen is in the migration zone), a non-citizen who:
    - (a) has been removed from the migration zone under section 198; and
    - (b) is again in the migration zone as a result of travel to Australia that is covered by paragraph 42(2A)(d) or (e);is taken to have been continuously in the migration zone despite the removal referred to in paragraph (a).
- Note: Paragraphs 42(2A)(d) and (e) cover limited situations where people are returned to Australia despite their removal under section 198.
- (3) For the purposes of this section (which applies only in respect of applications made while a non-citizen is in the migration zone), a non-citizen who, while holding a bridging visa, leaves and re-enters the migration zone is taken to have been continuously in the migration zone despite that travel.
  - (4) In paragraphs (1)(b) and (1A)(b):
    - (a) a reference to an application for a visa made by or on behalf of a non-citizen includes a reference to an application for a visa that is taken to have been made by the non-citizen by the operation of this Act or a regulation; and

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- (b) a reference to the cancellation of a visa includes a reference to the cancellation of a visa for which an application is taken to have been made by the operation of this Act or a regulation.

**48A No further applications for protection visa after refusal or cancellation**

- (1) Subject to section 48B, a non-citizen who, while in the migration zone, has made:

- (a) an application for a protection visa, where the grant of the visa has been refused (whether or not the application has been finally determined); or
- (b) applications for protection visas, where the grants of the visas have been refused (whether or not the applications have been finally determined);

may not make a further application for a protection visa, or have a further application for a protection visa made on his or her behalf, while the non-citizen is in the migration zone.

- (1AA) Subject to section 48B, if:

- (a) an application for a protection visa is made on a non-citizen's behalf while the non-citizen is in the migration zone; and
- (b) the grant of the visa has been refused, whether or not:
  - (i) the application has been finally determined; or
  - (ii) the non-citizen knew about, or understood the nature of, the application due to any mental impairment; or
  - (iii) the non-citizen knew about, or understood the nature of, the application due to the fact that the non-citizen was, at the time the application was made, a minor;

the non-citizen may not make a further application for a protection visa, or have a further application for a protection visa made on his or her behalf, while the non-citizen is in the migration zone.

- (1A) For the purposes of this section, a non-citizen who:

- (a) has been removed from the migration zone under section 198; and

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(b) is again in the migration zone as a result of travel to Australia that is covered by paragraph 42(2A)(d) or (e);  
is taken to have been continuously in the migration zone despite the removal referred to in paragraph (a).

Note: Paragraphs 42(2A)(d) and (e) cover limited situations where people are returned to Australia despite their removal under section 198.

- (1B) Subject to section 48B, a non-citizen in the migration zone who held a protection visa that was cancelled may not make a further application for a protection visa while in the migration zone.
- (1C) Subsections (1) and (1B) apply in relation to a non-citizen regardless of any of the following:
- (a) the grounds on which an application would be made or the criteria which the non-citizen would claim to satisfy;
  - (b) whether the grounds on which an application would be made or the criteria which the non-citizen would claim to satisfy existed earlier;
  - (c) the grounds on which an earlier application was made or the criteria which the non-citizen earlier claimed to satisfy;
  - (d) the grounds on which a cancelled protection visa was granted or the criteria the non-citizen satisfied for the grant of that visa.
- (1D) In paragraphs (1)(a) and (b) and (1AA)(a) and (b), a reference to an application for a protection visa made by or on behalf of a non-citizen includes a reference to an application for a protection visa that is taken to have been made by the non-citizen by the operation of this Act or a regulation.
- (1E) In subsection (1B), a reference to the cancellation of a protection visa includes a reference to the cancellation of a protection visa in relation to which an application for a protection visa is taken to have been made by the operation of this Act or a regulation.
- (2) In this section:

***application for a protection visa*** means:

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- (aa) an application for a visa of a class provided for by section 35A (protection visas—classes of visas), including (without limitation) an application for a visa of a class formerly provided for by subsection 36(1) that was made before the commencement of this paragraph; or

Note: Visas formerly provided for by subsection 36(1) are provided for by subsection 35A(5). Subsection 36(1) was repealed by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, which also inserted section 35A and this paragraph.

- (aaa) an application for a visa, a criterion for which is that the applicant is a non-citizen who is a refugee; or
  - (a) an application for a visa, or entry permit (within the meaning of this Act as in force immediately before 1 September 1994), a criterion for which is that the applicant is a non-citizen who has been determined to be a refugee under the Refugees Convention as amended by the Refugees Protocol; or
  - (b) an application for a decision that a non-citizen is a refugee under the Refugees Convention as amended by the Refugees Protocol; or
  - (c) an application covered by paragraph (a) or (b) that is also covered by section 39 of the *Migration Reform Act 1992*.

**48B Minister may determine that section 48A does not apply to non-citizen**

- (1) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a particular non-citizen, determine that section 48A does not apply to prevent an application for a protection visa made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day after the day on which the notice is given.
- (2) The power under subsection (1) may only be exercised by the Minister personally.



- (3) If the Minister makes a determination under subsection (1), he or she is to cause to be laid before each House of the Parliament a statement that:
- (a) sets out the determination; and
  - (b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.
- (4) A statement under subsection (3) is not to include:
- (a) the name of the non-citizen; or
  - (b) any information that may identify the non-citizen; or
  - (c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person or any information that may identify that other person.
- (5) A statement under subsection (3) is to laid before each House of the Parliament within 15 sitting days of that House after:
- (a) if the determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or
  - (b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.
- (6) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or by any other person, or in any other circumstances.

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**49 Withdrawal of visa application**

- (1) An applicant for a visa may, by written notice given to the Minister, withdraw the application.
- (2) An application that is withdrawn is taken to have been disposed of.
- (3) For the purposes of sections 48 and 48A, the Minister is not taken to have refused to grant the visa if the application is withdrawn before the refusal.
- (4) Subject to the regulations, fees payable in respect of an application that is withdrawn are not refundable.

**50 Only new information to be considered in later protection visa applications**

If a non-citizen who has made:

- (a) an application for a protection visa, where the grant of the visa has been refused and the application has been finally determined; or
- (b) applications for protection visas, where the grants of the visas have been refused and the applications have been finally determined;

makes a further application for a protection visa, the Minister, in considering the further application:

- (c) is not required to reconsider any information considered in the earlier application or an earlier application; and
- (d) may have regard to, and take to be correct, any decision that the Minister made about or because of that information.

Note: Section 48A prevents repeat applications for protection visas in most circumstances where the applicant is in the migration zone.

**51 Order of consideration**

- (1) The Minister may consider and dispose of applications for visas in such order as he or she considers appropriate.

- (2) The fact that an application has not yet been considered or disposed of although an application that was made later has been considered or disposed of does not mean that the consideration or disposal of the earlier application is unreasonably delayed.

### **Subdivision AB—Code of procedure for dealing fairly, efficiently and quickly with visa applications**

#### **51A Exhaustive statement of natural justice hearing rule**

- (1) This Subdivision is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.
- (2) Sections 494A to 494D, in so far as they relate to this Subdivision, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.

#### **52 Communication with Minister**

- (1) A visa applicant or interested person must communicate with the Minister in the prescribed way.
- (2) The regulations may prescribe different ways of communicating and specify the circumstances when communication is to be in a particular way. For this purpose, a *way of communicating* includes any associated process for authenticating identity.
- (3) If the applicant or interested person purports to communicate anything to the Minister in a way that is not the prescribed way, the communication is taken not to have been received unless the Minister in fact receives it.
- (3A) A visa applicant must tell the Minister the address at which the applicant intends to live while the application is being dealt with.
- (3B) If the applicant proposes to change the address at which he or she intends to live for a period of 14 days or more, the applicant must tell the Minister the address and the period of proposed residence.

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- (3C) If, in accordance with the regulations, 2 or more non-citizens apply for visas together, notifications given to any of them about the application are taken to be given to each of them.

Note 1: If the Minister gives a person a document by a method specified in section 494B, the person is taken to have received the document at the time specified in section 494C in respect of that method.

Note 2: Section 494D deals with giving documents to a person's authorised recipient.

- (4) In this section, *interested person* means a person who wants, or who is requested, to give information about the applicant to the Minister.

**54 Minister must have regard to all information in application**

- (1) The Minister must, in deciding whether to grant or refuse to grant a visa, have regard to all of the information in the application.
- (2) For the purposes of subsection (1), information is in an application if the information is:
- (a) set out in the application; or
  - (b) in a document attached to the application when it is made; or
  - (c) given under section 55.
- (3) Without limiting subsection (1), a decision to grant or refuse to grant a visa may be made without giving the applicant an opportunity to make oral or written submissions.

**55 Further information may be given**

- (1) Until the Minister has made a decision whether to grant or refuse to grant a visa, the applicant may give the Minister any additional relevant information and the Minister must have regard to that information in making the decision.
- (2) Subsection (1) does not mean that the Minister is required to delay making a decision because the applicant might give, or has told the Minister that the applicant intends to give, further information.

### **56 Further information may be sought**

- (1) In considering an application for a visa, the Minister may, if he or she wants to, get any information that he or she considers relevant but, if the Minister gets such information, the Minister must have regard to that information in making the decision whether to grant or refuse the visa.
- (2) Without limiting subsection (1), the Minister may invite, orally or in writing, the applicant for a visa to give additional information in a specified way.

### **57 Certain information must be given to applicant**

- (1) In this section, **relevant information** means information (other than non-disclosable information) that the Minister considers:
  - (a) would be the reason, or part of the reason:
    - (i) for refusing to grant a visa; or
    - (ii) for deciding that the applicant is an excluded fast track review applicant; and
  - (b) is specifically about the applicant or another person and is not just about a class of persons of which the applicant or other person is a member; and
  - (c) was not given by the applicant for the purpose of the application.

Note: **Excluded fast track review applicant** is defined in subsection 5(1).

- (2) The Minister must:
  - (a) give particulars of the relevant information to the applicant in the way that the Minister considers appropriate in the circumstances; and
  - (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to consideration of the application; and
  - (c) invite the applicant to comment on it.

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**58 Invitation to give further information or comments**

- (1) If a person is:
  - (a) invited under section 56 to give additional information; or
  - (b) invited under section 57 to comment on information;the invitation is to specify whether the additional information or the comments may be given:
  - (c) in writing; or
  - (d) at an interview between the applicant and an officer; or
  - (e) by telephone.
- (2) Subject to subsection (4), if the invitation is to give additional information or comments otherwise than at an interview, the information or comments are to be given within a period specified in the invitation, being a prescribed period or, if no period is prescribed, a reasonable period.
- (3) Subject to subsection (5), if the invitation is to give information or comments at an interview, the interview is to take place:
  - (a) at a place specified in the invitation, being a prescribed place or if no place is prescribed, a reasonable place; and
  - (b) at a time specified in the invitation, being a time within a prescribed period or, if no period is prescribed, a reasonable period.
- (4) If a person is to respond to an invitation within a prescribed period, that period may be extended by the Minister for a prescribed further period, and then the response is to be made in the extended period.
- (5) If a person is to respond to an invitation at an interview at a time within a prescribed period, that time may be changed by the Minister to:
  - (a) a later time within that period; or
  - (b) a time within that period as extended by the Minister for a prescribed further period;and then the response is to be made at an interview at the new time.

## **59 Interviews**

- (1) An applicant must make every reasonable effort to be available for, and attend, an interview.
- (2) Section 58 and this section do not mean that the Minister cannot obtain information from an applicant by telephone or in any other way.

## **60 Medical examination**

- (1) If the health or physical or mental condition of an applicant for a visa is relevant to the grant of a visa, the Minister may require the applicant to visit, and be examined by, a specified person, being a person qualified to determine the applicant's health, physical condition or mental condition, at a specified reasonable time and specified reasonable place.
- (2) An applicant must make every reasonable effort to be available for, and attend, an examination.

## **61 Prescribed periods**

If this Subdivision requires or allows the regulations to prescribe a period or other time limit relating to a step in considering an application for a visa, the regulations may prescribe different limits relating to that step and specify when that specified limit is to apply, which, without limiting the generality of the power, may be to:

- (a) applications for a visa of a specified class; or
- (b) applications in specified circumstances; or
- (c) applicants in a specified class of persons; or
- (d) applicants in a specified class of persons in specified circumstances.

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**62 Failure to receive information not require action**

- (1) If an applicant for a visa:
- (a) is invited to give additional information; and
  - (b) does not give the information before the time for giving it has passed;
- the Minister may make a decision to grant or refuse to grant the visa without taking any action to obtain the additional information.
- (2) If an applicant for a visa:
- (a) is invited to comment on information; and
  - (b) does not give the comments before the time for giving them has passed;
- the Minister may make a decision to grant or refuse to grant the visa without taking any further action to obtain the applicant's views on the information.

**63 When decision about visa may be made**

- (1) Subject to sections 39 (criterion limiting number of visas), 57 (give applicant information), 84 (no further processing), 86 (effect of limit on visas) and 94 (put aside under points system) and subsections (2) and (3) of this section, the Minister may grant or refuse to grant a visa at any time after the application has been made.
- (2) The Minister is not to refuse to grant a visa after inviting the applicant to give information and before whichever of the following happens first:
- (a) the information is given;
  - (b) the applicant tells the Minister that the applicant does not wish to give the information or does not have it;
  - (c) the time in which the information may be given ends.
- (3) The Minister is not to refuse to grant a visa after inviting the applicant to comment on information and before whichever of the following happens first:
- (a) the comments are given;



- (b) the applicant tells the Minister that the applicant does not wish to comment;
  - (c) the time in which the comments are to be given ends.
- (4) The Minister is not to refuse to grant a visa after giving a notice under section 64 and before whichever of the following happens first:
- (a) the applicant pays the visa application charge; or
  - (b) the applicant tells the Minister that the applicant does not intend to pay the visa application charge; or
  - (c) the end of the period set out in the notice.

#### **64 Notice that visa application charge is payable**

- (1) This section applies to a valid application for a visa if the Minister, after considering the application, has made an assessment that:
- (a) the health criteria for it (if any) have been satisfied; and
  - (b) the other criteria for it, prescribed by this Act or the regulations, have been satisfied.
- (2) If this section applies and an amount of visa application charge is unpaid, the Minister must give the applicant written notice stating that:
- (a) an amount of visa application charge is payable within the prescribed period; and
  - (b) subject to the regulations providing otherwise, a visa cannot be granted unless that amount is paid; and
  - (c) the Minister may refuse to grant the visa unless that amount is paid within the prescribed period.
- (3) If, in accordance with the regulations, 2 or more non-citizens apply for a visa together, the Minister may give notices under this section in the same document.

## Subdivision AC—Grant of visas

### 65 Decision to grant or refuse to grant visa

- (1) Subject to sections 84 and 86, after considering a valid application for a visa, the Minister:
- (a) if satisfied that:
    - (i) the health criteria for it (if any) have been satisfied; and
    - (ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and
    - (iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 91W (evidence of identity and bogus documents), 91WA (bogus documents and destroying identity documents), 91WB (applications for protection visas by members of same family unit), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and
    - (iv) any amount of visa application charge payable in relation to the application has been paid;is to grant the visa; or
  - (b) if not so satisfied, is to refuse to grant the visa.

Note 1: Section 84 allows the Minister to suspend the processing of applications for visas of a kind specified in a determination made under that section. Section 86 prevents the Minister from granting a visa of a kind specified in a determination under section 85 if the number of such visas granted in a specified financial year has reached a specified maximum number.

Note 2: See also section 195A, under which the Minister has a non-compellable power to grant a visa to a person in detention under section 189 (whether or not the person has applied for the visa). Subdivision AA, this Subdivision, Subdivision AF and the regulations do not apply to the Minister's power under that section.

Note 3: Decisions to refuse to grant protection visas to fast track review applicants must generally be referred to the Immigration Assessment Authority: see Part 7AA.

- (2) To avoid doubt, an application put aside under section 94 is not taken for the purposes of subsection (1) to have been considered until it has been removed from the pool under subsection 95(3).

## **66 Notification of decision**

- (1) When the Minister grants or refuses to grant a visa, he or she is to notify the applicant of the decision in the prescribed way.
- (2) Notification of a decision to refuse an application for a visa must:
- (a) if the grant of the visa was refused because the applicant did not satisfy a criterion for the visa—specify that criterion; and
  - (b) if the grant of the visa was refused because a provision of this Act or the regulations prevented the grant of the visa—specify that provision; and
  - (c) unless subsection (3) applies to the application—give written reasons (other than non-disclosable information) why the criterion was not satisfied or the provision prevented the grant of the visa; and
  - (d) if the applicant has a right to have the decision reviewed under Part 5 or 7 or section 500—state:
    - (i) that the decision can be reviewed; and
    - (ii) the time in which the application for review may be made; and
    - (iii) who can apply for the review; and
    - (iv) where the application for review can be made; and
  - (e) in the case of a fast track reviewable decision—state that the decision has been referred for review under Part 7AA and that it is not subject to review under Part 5 or Part 7; and
  - (f) in the case of a fast track decision that is not a fast track reviewable decision—state that the decision is not subject to review under Part 5, 7 or 7AA.
- (3) This subsection applies to an application for a visa if:
- (a) the visa is a visa that cannot be granted while the applicant is in the migration zone; and

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- (b) this Act does not provide, under Part 5 or 7, for an application for review of a decision to refuse to grant the visa.
- (4) Failure to give notification of a decision does not affect the validity of the decision.
- (5) This section does not apply to a decision under section 501, 501A, 501B or 501F to refuse to grant a visa to a person.

Note: Sections 501C and 501G provide for notification of a decision under section 501, 501A, 501B or 501F to refuse to grant a visa to a person.

**67 Grant and refusal of visa—how and when**

- (1) The following decisions are taken to be made by the Minister causing a record to be made of the decision:
  - (a) a decision to grant a visa;
  - (b) a decision to refuse to grant a visa.
- (2) The record must state the day and time of its making.
- (3) The decision is taken to have been made on the day and at the time the record is made.
- (4) The Minister has no power to vary or revoke the decision after the day and time the record is made.
- (5) Failure to comply with subsection (2) does not affect the validity of the decision or the operation of subsection (4).

**68 When visa is in effect**

- (1) Subject to subsection (2), a visa has effect as soon as it is granted.
- (2) A visa may provide that it comes into effect at the beginning of a day, being a day after its grant:
  - (a) specified in the visa; or
  - (b) when an event, specified in the visa, happens.
- (3) A visa can only be in effect during the visa period for the visa.

- (4) A bridging visa (the *reactivated bridging visa*), held by a non-citizen, that has ceased to be in effect under subsection 82(3), will come into effect again during the visa period for the visa if:
- (a) the non-citizen does not hold a substantive visa that is in effect; and
  - (b) either:
    - (i) the non-citizen does not hold any other bridging visa; or
    - (ii) the reactivated bridging visa is determined, in accordance with the regulations, to be the most beneficial of the bridging visas held by the applicant.

### **69 Effect of compliance or non-compliance**

- (1) Non-compliance by the Minister with Subdivision AA or AB or section 494D in relation to a visa application does not mean that a decision to grant or refuse to grant the visa is not a valid decision but only means that the decision might have been the wrong one and might be set aside if reviewed.
- (2) If the Minister deals with a visa application in a way that complies with Subdivision AA, AB and this Subdivision, the Minister is not required to take any other action in dealing with it.

### **Subdivision AF—Bridging visas**

#### **72 Interpretation**

- (1) In this Subdivision:

*eligible non-citizen* means a non-citizen who:

  - (a) has been immigration cleared; or
  - (b) is in a prescribed class of persons; or
  - (c) the Minister has determined to be an eligible non-citizen.
- (2) The Minister may make a determination under paragraph (1)(c) that a non-citizen is an eligible non-citizen if:
  - (a) the non-citizen was an unlawful non-citizen when he or she entered the migration zone; and

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- (b) the non-citizen made a valid application for a protection visa after he or she arrived in Australia; and
  - (c) the non-citizen has been in immigration detention for a period of more than 6 months after the application for a protection visa was made; and
  - (d) the Minister has not made a primary decision in relation to the application for a protection visa; and
  - (e) the Minister thinks that the determination would be in the public interest.
- (3) The power to make a determination under paragraph (1)(c) may only be exercised by the Minister personally.
- (4) If the Minister makes a determination under paragraph (1)(c), he or she is to cause to be laid before each House of the Parliament a statement that:
- (a) sets out the determination; and
  - (b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.
- (5) A statement made under subsection (4) is not to include:
- (a) the name of any non-citizen who is the subject of the determination; or
  - (b) any information that may identify the non-citizen; or
  - (c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person, or any information that may identify the person.
- (6) A statement under subsection (4) is to be laid before each House of the Parliament within 15 sitting days of that House after:
- (a) if the determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or
  - (b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

- (7) The Minister does not have a duty to consider whether to make a determination under paragraph (1)(c) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or any other person, or in any other circumstances.

### **73 Bridging visas**

If the Minister is satisfied that an eligible non-citizen satisfies the criteria for a bridging visa as prescribed under subsection 31(3), the Minister may grant a bridging visa permitting the non-citizen to remain in, or to travel to, enter and remain in Australia:

- (a) during a specified period; or
- (b) until a specified event happens.

### **74 Further applications for bridging visa**

- (1) Subject to subsection (2), if:
- (a) an eligible non-citizen who is in immigration detention makes an application for a bridging visa; and
  - (b) the Minister refuses to grant the visa;
- the eligible non-citizen may make a further application for a bridging visa.
- (2) Unless the further application for a bridging visa is made in prescribed circumstances, the further application may be made not earlier than 30 days after:
- (a) if the eligible non-citizen did not make an application for review of the decision to refuse to grant the visa—the refusal; or
  - (b) if the eligible non-citizen made an application for such review—the application is finally determined.

### **75 When eligible non-citizen in immigration detention granted visa**

- (1) If:

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- (a) an eligible non-citizen who is in immigration detention makes an application for a bridging visa of a prescribed class; and
  - (b) the Minister does not make a decision, within the prescribed period, to grant or refuse to grant the bridging visa;
- the non-citizen is taken to have been granted a bridging visa of the prescribed class on prescribed conditions (if any) at the end of that period.
- (2) The period in subsection (1) may be extended in relation to a particular application by agreement between the applicant and the Minister.

**76 Bridging visa not affect visa applications**

- (1) The fact that a non-citizen holds a bridging visa does not prevent or affect:
  - (a) an application by the non-citizen for a visa of another class; or
  - (b) the grant of such a visa.
- (2) To avoid doubt, the holding by a non-citizen of a bridging visa is not to be taken to be, for the purposes of an application for a visa of another class, the holding of a visa.

**Subdivision AG—Other provisions about visas**

**77 Visas held during visa period**

To avoid doubt, for the purposes of this Act, a non-citizen holds a visa at all times during the visa period for the visa.

**78 Children born in Australia**

- (1) If:
  - (a) a child born in Australia is a non-citizen when born; and
  - (b) at the time of the birth:



- (i) one of the child's parents holds a visa (other than a special purpose visa); and
- (ii) the other parent is, under section 83, included in that visa or does not hold a visa (other than a special purpose visa);

the child is taken to have been granted, at the time of the birth, a visa of the same kind and class and on the same terms and conditions (if any) as that visa.

(2) If:

- (a) a child born in Australia is a non-citizen when born; and
- (b) at the time of the birth, each of the child's parents holds a visa (other than a special purpose visa);

the child is taken to have been granted, at the time of the birth, visas of the same kind and class and on the same terms and conditions (if any) as each of those visas.

(3) Subdivisions AA, AB, AC (other than section 68) and AH do not apply in relation to visas granted under this section.

## **79 Effect on visa of leaving Australia**

If the holder of a visa leaves Australia the holder may only re-enter Australia because of the visa if:

- (a) the visa is permission for the re-entry; and
- (b) the visa is in effect on re-entry.

## **80 Certain persons taken not to leave Australia**

A person is taken not to leave Australia if the person goes outside the migration zone on a vessel and:

- (a) does not go (other than for transit purposes) to a foreign country; and
- (b) remains a passenger, or a member of the crew, of that vessel while outside the migration zone; and
- (c) is outside the migration zone for no longer than the prescribed period.

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**81 Extent of visa authority**

- (1) A visa to travel to Australia during a period is not permission to travel to it outside that period.
- (2) A visa to enter Australia within a period is not permission to so enter outside that period.
- (3) A visa to remain in Australia during a period is not permission to so remain outside that period.

**82 When visas cease to be in effect**

- (1) A visa that is cancelled ceases to be in effect on cancellation.
  - (2) A substantive visa held by a non-citizen ceases to be in effect if another substantive visa (other than a special purpose visa) for the non-citizen comes into effect.
- (2AA) Despite subsection (2):
- (a) a maritime crew visa held by a non-citizen does not cease to be in effect if a substantive visa for the non-citizen that is of a class specified by the Minister, by legislative instrument, for the purposes of this subsection comes into effect; and
  - (b) a substantive visa held by a non-citizen that is of a class specified by the Minister, by legislative instrument, for the purposes of this subsection does not cease to be in effect if a maritime crew visa for the non-citizen comes into effect.
- (2A) A temporary visa held by a non-citizen ceases to be in effect if an enforcement visa for the non-citizen comes into effect.
  - (3) A bridging visa held by a non-citizen ceases to be in effect if another visa (other than a special purpose visa or a maritime crew visa) for the non-citizen comes into effect.
  - (4) A visa ceases to be in effect when the holder leaves Australia because of a deportation order made under section 200.

- (5) A visa to travel to and enter Australia (whether also a visa to remain in Australia) during a particular period or until a particular date ceases to be in effect at the end of that period or on that date unless the holder of the visa:
- (a) has entered Australia in that period or on or before that date; and
  - (b) is in Australia at the end of that period or on that date.
- (6) A visa to travel to and enter Australia (whether also a visa to remain in Australia) during a particular period or until a particular date ceases to be in effect if the holder leaves Australia after that period or date.
- (7) A visa to remain in Australia (whether also a visa to travel to and enter Australia) during a particular period or until a particular date ceases to be in effect at the end of that period or on that date.
- (7A) A bridging visa permitting the holder to remain in, or to travel to, enter and remain in, Australia until a specified event happens, ceases to be in effect the moment the event happens.
- (8) A visa to remain in, but not re-enter, Australia that is granted to a non-citizen in Australia ceases to be in effect if the holder leaves Australia.
- (9) This section does not affect the operation of other provisions of this Act under which a visa ceases to be in effect (such as sections 173 and 174).
- (10) For the purposes of subsections (5), (6) and (7), **particular date** includes:
- (a) the date an event, specified in the visa, happens; or
  - (b) the date the holder ceases to have a status specified in the visa or the regulations.

**83 Certain persons taken to be included in spouse, de facto partner or parent's visa**

(1) Where:

- (a) a person's name is included in the passport or other document of identity of the person's spouse or de facto partner; and
- (b) the person accompanies his or her spouse or de facto partner to Australia (whether before or after the commencement of this section);

the person shall be taken to be included in any visa granted to the spouse or de facto partner evidence of which is endorsed on the passport or other document of identity if, and only if, the person's name is included in the endorsement.

Note: Subsection 5(1) defines *de facto partner* and *spouse*. For the purposes of this section, those definitions apply only in relation to visas granted on or after 1 July 2009: see the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008*. This section as in force before the amendment of this Act by that Act continues to apply in relation to visas granted before 1 July 2009.

(2) Where:

- (a) the name of a child is included in the passport or other document of identity of a parent of the child; and
- (b) the child accompanies that parent to Australia (whether before or after the commencement of this section);

the child shall be taken to be included in any visa granted to the parent evidence of which is endorsed on the passport or other document of identity if, and only if, the child's name is included in the endorsement.

Note: Subsection 5(1) defines *child* and *parent*. For the purposes of this section, those definitions apply only in relation to visas granted on or after 1 July 2009: see the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008*.

## **84 Minister may suspend processing of visa applications**

- (1) The Minister may, by legislative instrument, determine that dealing with applications for visas (including protection visas) of a specified class is to stop until a day specified in the determination (in this section called the *resumption day*).
- (2) On and after the commencement of an instrument made under subsection (1), no act is to be done in relation to any application for a visa of the class concerned until the resumption day.
- (3) A determination under this section does not have any effect in relation to an application for a visa made by a person on the ground that he or she is the spouse, de facto partner or dependent child of:
  - (a) an Australian citizen; or
  - (b) the holder of a permanent visa that is in effect; or
  - (c) a person who is usually resident in Australia and whose continued presence in Australia is not subject to a limitation as to time imposed by law.
- (4) Nothing in this section prevents an act being done to implement a decision to grant or to refuse to grant a visa if the decision had been made before the date of the determination concerned.
- (5) For the purposes of this section, a child of a person is a dependent child if the child:
  - (a) does not have a spouse or de facto partner; and
  - (b) either:
    - (i) is under 18; or
    - (ii) is 18, 19 or 20 and is dependent on the person for:
      - (A) financial and psychological support; or
      - (B) physical support.
- (6) In this section:

*act* means an act connected with performing functions or exercising powers under or for the purposes of this Act.

### **Subdivision AH—Limit on visas**

#### **85 Limit on visas**

- (1) Subject to subsection (2), the Minister may, by legislative instrument, determine the maximum number of:
  - (a) the visas (including protection visas) of a specified class; or
  - (b) the visas (including protection visas) of specified classes;that may be granted in a specified financial year.
- (2) Subsection (1) does not apply in relation to temporary protection visas or safe haven enterprise visas.

#### **86 Effect of limit**

If:

- (a) there is a determination of the maximum number of visas of a class or classes that may be granted in a financial year; and
  - (b) the number of visas of the class or classes granted in the year reaches that maximum number;
- no more visas of the class or classes may be granted in the year.

#### **87 Limit does not prevent visas for certain persons**

- (1) Section 86 does not prevent the grant of a visa to a person who applied for it on the ground that he or she is the spouse, de facto partner or dependent child of:
  - (a) an Australian citizen; or
  - (b) the holder of a permanent visa that is in effect; or
  - (c) a person who is usually resident in Australia and whose continued presence in Australia is not subject to a limitation as to time imposed by law.
- (2) For the purposes of this section, a child of a person is a dependent child if the child:
  - (a) does not have a spouse or de facto partner; and
  - (b) either:

- (i) is under 18; or
- (ii) is 18, 19 or 20 and is dependent on the person for:
  - (A) financial and psychological support; or
  - (B) physical support.

**87A Limit does not prevent the grant of visas to certain people who are unable to meet health or character requirements before the limit applies because of circumstances beyond their control**

If:

- (a) a person has applied, whether before or after the commencement of this section, for the grant of a visa; and
  - (b) a time was or is reached when the grant of the visa to the person in a particular financial year was or is prevented by section 86; and
  - (c) the person was requested by the Minister after that time to satisfy requirements for the grant of the visa that relate to health or character; and
  - (d) after the making of the request referred to in paragraph (c) the person satisfies the requirements referred to in that paragraph in a financial year subsequent to the financial year in which the time referred to in paragraph (b) occurred; and
  - (e) the grant of the visa to the person at the time when the requirements referred to in paragraph (c) are satisfied would, apart from this section, be prevented by section 86; and
  - (f) the person was unable to satisfy the requirements referred to in paragraph (c) at a time when, apart from this section, section 86 would not have prevented the grant of the visa to the person; and
  - (g) the Minister is satisfied that the person's inability to satisfy the requirements referred to in paragraph (c) at a time mentioned in paragraph (e) was due to circumstances beyond the person's control;
- section 86 does not prevent the grant of the visa to the person.

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**88 Limit does not affect processing of applications**

Section 86's prevention of the grant of a visa does not prevent any other action related to the application for it.

**89 Determination of limit not to mean failure to decide**

The fact that the Minister has neither granted nor refused to grant a visa of a class or classes to which a determination under section 85 applies does not mean, for any purpose, that the Minister has failed to make a decision to grant or refuse to grant the visa.

**90 Order of dealing with limited visas**

The fact that an application for a visa of a class or classes to which a determination under section 85 applies has not been considered or disposed of although an application for another visa of the class or classes that was made later has been considered or disposed of does not mean, for any purpose, that the consideration or disposal of the earlier application is unreasonably delayed.

**91 Order of dealing with visas**

If a determination under section 85 applies, or has applied, to visas of a class or classes, the Minister may consider or, subject to section 86, dispose of outstanding and further applications for such visas in such order as he or she considers appropriate.

**Subdivision AI—Safe third countries**

**91A Reason for Subdivision**

This Subdivision is enacted because the Parliament considers that certain non-citizens who are covered by the CPA, or in relation to whom there is a safe third country, should not be allowed to apply for a protection visa or, in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal under Division 8.



### **91B Interpretation**

(1) In this Subdivision:

*agreement* includes a written arrangement or understanding, whether or not binding.

*CPA* means the Comprehensive Plan of Action approved by the International Conference on Indo-Chinese Refugees, held at Geneva, Switzerland, from 13 to 14 June 1989.

(2) For the purposes of this Subdivision, if, apart from this section:

(a) a colony, overseas territory or protectorate of a foreign country; or

(b) an overseas territory for the international relations of which a foreign country is responsible;

is not a country in its own right, the colony, territory or protectorate is taken to be a country in its own right.

### **91C Non-citizens covered by Subdivision**

(1) This Subdivision applies to a non-citizen at a particular time if:

(a) the non-citizen is in Australia at that time; and

(b) at that time, the non-citizen is covered by:

(i) the CPA; or

(ii) an agreement, relating to persons seeking asylum, between Australia and a country that is, or countries that include a country that is, at that time, a safe third country in relation to the non-citizen (see section 91D); and

(c) the non-citizen is not excluded by the regulations from the application of this Subdivision.

(2) To avoid doubt, a country does not need to be prescribed as a safe third country at the time that the agreement referred to in subparagraph (1)(b)(ii) is made.

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**91D Safe third countries**

- (1) A country is a *safe third country* in relation to a non-citizen if:
  - (a) the country is prescribed as a safe third country in relation to the non-citizen, or in relation to a class of persons of which the non-citizen is a member; and
  - (b) the non-citizen has a prescribed connection with the country.
- (2) Without limiting paragraph (1)(b), the regulations may provide that a person has a prescribed connection with a country if:
  - (a) the person is or was present in the country at a particular time or at any time during a particular period; or
  - (b) the person has a right to enter and reside in the country (however that right arose or is expressed).
- (3) The Minister must, within 2 sitting days after a regulation under paragraph (1)(a) is laid before a House of the Parliament, cause to be laid before that House a statement, covering the country, or each of the countries, prescribed as a safe third country by the regulation, about:
  - (a) the compliance by the country, or each of the countries, with relevant international law concerning the protection of persons seeking asylum; and
  - (b) the meeting by the country, or each of the countries, of relevant human rights standards for the persons in relation to whom the country is prescribed as a safe third country; and
  - (c) the willingness of the country, or each of the countries, to allow any person in relation to whom the country is prescribed as a safe third country:
    - (i) to go to the country; and
    - (ii) to remain in the country during the period in which any claim by the person for asylum is determined; and
    - (iii) if the person is determined to be a refugee while in the country—to remain in the country until a durable solution relating to the permanent settlement of the person is found.

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- (4) A regulation made for the purposes of paragraph (1)(a) ceases to be in force at the end of 2 years after the regulation commences.

**91E Non-citizens to which this Subdivision applies unable to make valid applications for certain visas**

Despite any other provision of this Act, if this Subdivision applies to a non-citizen at a particular time and, at that time, the non-citizen applies, or purports to apply, for a protection visa then, subject to section 91F:

- (a) if the non-citizen has not been immigration cleared at that time—neither that application nor any other application made by the non-citizen for a visa is a valid application; or
- (b) if the non-citizen has been immigration cleared at that time—neither that application nor any other application made by the non-citizen for a protection visa is a valid application.

**91F Minister may determine that section 91E does not apply to non-citizen**

- (1) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a particular non-citizen, determine:
  - (a) that section 91E does not apply to an application for a visa made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day after the day that the notice is given; or
  - (b) that section 91G does not apply to an application for a visa made by the non-citizen during the transitional period referred to in that section.
- (2) The power under subsection (1) may only be exercised by the Minister personally.
- (3) If the Minister makes a determination under subsection (1), he or she is to cause to be laid before each House of the Parliament a statement that:
  - (a) sets out the determination; and

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- (b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.
- (4) A statement under subsection (3) is not to include:
  - (a) the name of the non-citizen; or
  - (b) any information that may identify the non-citizen; or
  - (c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person or any information that may identify that other person.
- (5) A statement under subsection (3) is to be laid before each House of the Parliament within 15 sitting days of that House after:
  - (a) if the determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or
  - (b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.
- (6) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or by any other person, or in any other circumstances.

**91G Applications made before regulations take effect**

- (1) Subject to section 91F and subsection (3), if:
  - (a) this Subdivision applies to a non-citizen immediately after a regulation prescribing a country as a safe third country takes effect and did not apply to the non-citizen immediately before that time; and
  - (b) the regulation prescribes a day as the cut off day; and
  - (c) during the period (the *transitional period*) from the beginning of the cut off day until immediately before that regulation takes effect, the non-citizen made an application for a protection visa;

then:

- (d) if the non-citizen had not been immigration cleared at the time of making the application—that application, and any other application made by the non-citizen for a visa made during the transitional period, ceases to be a valid application when the regulation takes effect; and
  - (e) if the non-citizen had been immigration cleared at the time of making the application—that application, and any other application made by the non-citizen for a protection visa made during the transitional period, ceases to be a valid application when the regulation takes effect; and
  - (f) on and after the regulation takes effect, this Act applies as if the non-citizen had applied for a protection visa immediately after the regulation takes effect.
- (2) To avoid doubt:
- (a) paragraphs (1)(d) and (e) apply even if an application referred to in the paragraph concerned, or a decision in relation to such an application, is the subject of a review by, or an appeal or application to, the Administrative Appeals Tribunal, a Federal Court or any other body or court; and
  - (b) no visa may be granted to the non-citizen as a direct, or indirect, result of such an application.
- (3) Subsection (1) does not apply in relation to a non-citizen who, before the regulation referred to in that subsection takes effect, has:
- (a) been granted a substantive visa as a result of an application referred to in that subsection; or
  - (b) been determined under this Act to be a non-citizen who satisfies the criterion mentioned in subsection 36(2).
- (4) The cut off day specified in the regulation must not be:
- (a) before a day on which the Minister, by notice in the *Gazette*, announces that he or she intends that such a regulation will be made; or
  - (b) more than 6 months before the regulation takes effect.

## **Subdivision AJ—Temporary safe haven visas**

### **91H Reason for this Subdivision**

This Subdivision is enacted because the Parliament considers that a non-citizen (other than an unauthorised maritime arrival or a transitory person) who holds a temporary safe haven visa, or who has not left Australia since ceasing to hold such a visa, should not be allowed to apply for a visa other than another temporary safe haven visa. Any such non-citizen who ceases to hold a visa will be subject to removal under Division 8.

Note: For temporary safe haven visas, see section 37A.

### **91J Non-citizens to whom this Subdivision applies**

- (1) This Subdivision applies to a non-citizen in Australia at a particular time if, at that time, the non-citizen:
  - (a) holds a temporary safe haven visa; or
  - (b) has not left Australia since ceasing to hold a temporary safe haven visa.
- (2) This Subdivision does not apply to an unauthorised maritime arrival or a transitory person.

Note: Unauthorised maritime arrivals are covered by section 46A and transitory persons are covered by section 46B.

### **91K Non-citizens to whom this Subdivision applies are unable to make valid applications for certain visas**

Despite any other provision of this Act but subject to section 91L, if this Subdivision applies to a non-citizen at a particular time and, at that time, the non-citizen applies, or purports to apply, for a visa (other than a temporary safe haven visa), then that application is not a valid application.

**91L Minister may determine that section 91K does not apply to a non-citizen**

- (1) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a particular non-citizen, determine that section 91K does not apply to an application for a visa made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day after the day that the notice is given.
- (2) The power under subsection (1) may only be exercised by the Minister personally.
- (3) If the Minister makes a determination under subsection (1), he or she is to cause to be laid before each House of the Parliament a statement that:
  - (a) sets out the determination; and
  - (b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.
- (4) A statement under subsection (3) is not to include:
  - (a) the name of the non-citizen; or
  - (b) any information that may identify the non-citizen; or
  - (c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person or any information that may identify that other person.
- (5) A statement under subsection (3) is to be laid before each House of the Parliament within 15 sitting days of that House after:
  - (a) if the determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or
  - (b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

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- (6) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or by any other person, or in any other circumstances.

**Subdivision AK—Non-citizens with access to protection from third countries**

**91M Reason for this Subdivision**

This Subdivision is enacted because the Parliament considers that a non-citizen who can avail himself or herself of protection from a third country, because of nationality or some other right to re-enter and reside in the third country, should seek protection from the third country instead of applying in Australia for a protection visa, or, in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal under Division 8.

Note: For protection visas, see section 36.

**91N Non-citizens to whom this Subdivision applies**

- (1) This Subdivision applies to a non-citizen at a particular time if, at that time, the non-citizen is a national of 2 or more countries.
- (2) This Subdivision also applies to a non-citizen at a particular time if, at that time:
- (a) the non-citizen has a right to re-enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country (the *available country*) apart from:
    - (i) Australia; or
    - (ii) a country of which the non-citizen is a national; or
    - (iii) if the non-citizen has no country of nationality—the country of which the non-citizen is an habitual resident; and
  - (b) the non-citizen has ever resided in the available country for a continuous period of at least 7 days or, if the regulations



- prescribe a longer continuous period, for at least that longer period; and
- (c) a declaration by the Minister is in effect under subsection (3) in relation to the available country.
- (3) The Minister may, after considering any advice received from the Office of the United Nations High Commissioner for Refugees:
- (a) declare in writing that a specified country:
- (i) provides access, for persons seeking protection, to effective procedures for assessing their need for protection; and
- (ii) provides protection to persons to whom that country has protection obligations; and
- (iii) meets relevant human rights standards for persons to whom that country has protection obligations; or
- (b) in writing, revoke a declaration made under paragraph (a).
- (4) A declaration made under paragraph (3)(a):
- (a) takes effect when it is made by the Minister; and
- (b) ceases to be in effect if and when it is revoked by the Minister under paragraph (3)(b).
- (5) The Minister must cause a copy of a declaration, or of a revocation of a declaration, to be laid before each House of the Parliament within 2 sitting days of that House after the Minister makes the declaration or revokes the declaration.

*Determining nationality*

- (6) For the purposes of this section, the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.

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**91P Non-citizens to whom this Subdivision applies are unable to make valid applications for certain visas**

- (1) Despite any other provision of this Act but subject to section 91Q, if:
- (a) this Subdivision applies to a non-citizen at a particular time; and
  - (b) at that time, the non-citizen applies, or purports to apply, for a visa; and
  - (c) the non-citizen is in the migration zone and has not been immigration cleared at that time;
- neither that application, nor any other application the non-citizen makes for a visa while he or she remains in the migration zone, is a valid application.
- (2) Despite any other provision of this Act but subject to section 91Q, if:
- (a) this Subdivision applies to a non-citizen at a particular time; and
  - (b) at that time, the non-citizen applies, or purports to apply, for a protection visa; and
  - (c) the non-citizen is in the migration zone and has been immigration cleared at that time;
- neither that application, nor any other application made by the non-citizen for a protection visa while he or she remains in the migration zone, is a valid application.

**91Q Minister may determine that section 91P does not apply to a non-citizen**

- (1) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a particular non-citizen, determine that section 91P does not apply to an application for a visa made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day after the day that the notice is given.

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- (2) For the purposes of subsection (1), the matters that the Minister may consider include information that raises the possibility that, although the non-citizen satisfies the description set out in subsection 91N(1) or (2), the non-citizen might not be able to avail himself or herself of protection from the country, or any of the countries, by reference to which the non-citizen satisfies that description.
- (3) The power under subsection (1) may only be exercised by the Minister personally.
- (4) If the Minister makes a determination under subsection (1), he or she is to cause to be laid before each House of the Parliament a statement that:
  - (a) sets out the determination; and
  - (b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.
- (5) A statement under subsection (4) is not to include:
  - (a) the name of the non-citizen; or
  - (b) any information that may identify the non-citizen; or
  - (c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person or any information that may identify that other person.
- (6) A statement under subsection (4) is to be laid before each House of the Parliament within 15 sitting days of that House after:
  - (a) if the determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or
  - (b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.
- (7) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any non-citizen,

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whether he or she is requested to do so by the non-citizen or by any other person, or in any other circumstances.

**Subdivision AL—Other provisions about protection visas**

**91V Verification of information**

*Applicant for protection visa*

- (1) If an applicant for a protection visa has given information to the Minister or an officer in, or in connection with, the application for the visa, the Minister or an officer may, either orally or in writing, request the applicant to make an oral statement, on oath or affirmation, to the effect that the information is true.
- (2) If:
  - (a) the applicant has been given a request under subsection (1); and
  - (b) the applicant refuses or fails to comply with the request; and
  - (c) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister may draw an inference unfavourable to the applicant's credibility in the event that the applicant refuses or fails to comply with the request;then, in making a decision whether to grant the protection visa to the applicant, the Minister may draw any reasonable inference unfavourable to the applicant's credibility.
- (3) If:
  - (a) the applicant has been given a request under subsection (1); and
  - (b) the applicant complies with the request; and
  - (c) the Minister has reason to believe that, because of:
    - (i) the manner in which the applicant complied with the request; or
    - (ii) the applicant's demeanour in relation to compliance with the request;

the applicant was not sincere;  
then, in making a decision whether to grant the protection visa to the applicant, the Minister may draw any reasonable inference unfavourable to the applicant's credibility.

*Non-citizen refused immigration clearance*

- (4) If:
- (a) either:
    - (i) a non-citizen gave information to an officer when the non-citizen was in immigration clearance, and the non-citizen is subsequently refused immigration clearance; or
    - (ii) a non-citizen was refused immigration clearance and subsequently gave information to an officer; and
  - (b) the information is relevant to the administration or enforcement of this Act or the regulations;
- an officer may, either orally or in writing, request the non-citizen to make an oral statement, on oath or affirmation, to the effect that the information is true.
- (5) If:
- (a) the non-citizen has been given a request under subsection (4); and
  - (b) the non-citizen refuses or fails to comply with the request; and
  - (c) when the request was made, the non-citizen was given a warning, either orally or in writing, that the Minister may draw an inference unfavourable to the non-citizen's credibility in the event that the non-citizen refuses or fails to comply with the request;
- then, in making a decision about the non-citizen under this Act or the regulations, the Minister may draw any reasonable inference unfavourable to the non-citizen's credibility.

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- (6) If:
- (a) the non-citizen has been given a request under subsection (4); and
  - (b) the non-citizen complies with the request; and
  - (c) the Minister has reason to believe that, because of:
    - (i) the manner in which the non-citizen complied with the request; or
    - (ii) the non-citizen's demeanour in relation to compliance with the request;the non-citizen was not sincere;
- then, in making a decision about the non-citizen under this Act or the regulations, the Minister may draw any reasonable inference unfavourable to the non-citizen's credibility.

*Officer*

- (7) A reference in this section to an *officer* includes a reference to a person who is a clearance officer within the meaning of section 165.

*Oaths or affirmations*

- (8) The Minister or an officer may administer an oath or affirmation for the purposes of this section.

**91W Evidence of identity and bogus documents**

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
  - (a) the applicant has been given a request under subsection (1); and
  - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and

- (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
  - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
    - (i) refuses or fails to comply with the request; or
    - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
- (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
  - (b) either:
    - (i) produces documentary evidence of his or her identity, nationality or citizenship; or
    - (ii) has taken reasonable steps to produce such evidence.
- (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

#### **91WA Providing bogus documents or destroying identity documents**

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
- (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
  - (b) the Minister is satisfied that the applicant:
    - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
    - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:

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- (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
- (b) either:
  - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
  - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

**91WB Application for protection visa by member of same family unit**

- (1) This section applies to a non-citizen in Australia (the *family applicant*):
  - (a) who applies for a protection visa; and
  - (b) who is a member of the same family unit as a person (the *family visa holder*) who has been granted a protection visa.
- (2) Despite anything else in this Act, the Minister must not grant the protection visa to the family applicant on the basis of a criterion mentioned in paragraph 36(2)(b) or (c) unless the family applicant applies for the protection visa before the family visa holder is granted a protection visa.

**91X Names of applicants for protection visas not to be published by the High Court, Federal Court or Federal Circuit Court**

- (1) This section applies to a proceeding before the High Court, the Federal Court or the Federal Circuit Court if the proceeding relates to a person in the person's capacity as:
  - (a) a person who applied for a protection visa; or
  - (b) a person who applied for a protection-related bridging visa;or



- (c) a person whose protection visa has been cancelled; or
  - (d) a person whose protection-related bridging visa has been cancelled.
- (2) The court must not publish (in electronic form or otherwise), in relation to the proceeding, the person's name.
- (3) In this section:

***application for a protection-related bridging visa*** means an application for a bridging visa, where the applicant for the bridging visa is, or has been, an applicant for a protection visa.

***proceeding*** means a proceeding in a court, whether between parties or not, and includes an incidental proceeding in the course of, or in connection with, a proceeding, and also includes an appeal.

***protection-related bridging visa*** means a bridging visa granted as a result of an application for a protection-related bridging visa.

## **Subdivision B—The “points” system**

### **92 Operation of Subdivision**

This Subdivision has effect where one of the prescribed criteria in relation to a visa of a particular class is the criterion that the applicant receives the qualifying score when assessed as provided by this Subdivision.

### **93 Determination of applicant's score**

- (1) The Minister shall make an assessment by giving the applicant the prescribed number of points for each prescribed qualification that is satisfied in relation to the applicant.
- (2) In this section:

***prescribed*** means prescribed by regulations in force at the time the assessment is made.

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**94 Initial application of “points” system**

- (1) An applicant whose assessed score is more than or equal to the applicable pass mark at the time when the score is assessed is taken to have received the qualifying score.
- (2) An applicant whose assessed score is less than the applicable pool mark at the time when the score is assessed is taken not to have received the qualifying score.
- (3) If an applicant’s assessed score is more than or equal to the applicable pool mark, but less than the applicable pass mark, at the time when the score is assessed:
  - (a) the Minister must, unless the application is withdrawn, put the application aside and deal with it in accordance with section 95; and
  - (b) if the Minister puts the application aside—the Minister is taken to have put the application into a pool.
- (4) Where, in accordance with this section, the Minister puts an application aside, he or she shall be taken for all purposes not to have failed to make a decision to grant or refuse to grant a visa.

**95 Applications in pool**

*When section applies*

- (1) This section applies if the Minister puts an application into a pool.

*How applications to be dealt with*

- (2) If, within 12 months after the assessment of the applicant’s assessed score, the Minister gives a notice under section 96 varying the applicable pass mark or the applicable pool mark:
  - (a) the Minister must, without re-assessing that score, compare that score with the applicable pass mark and the applicable pool mark; and

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- (b) if that score is more than or equal to the applicable pass mark—the applicant is taken to have received the qualifying score; and
- (c) if that score is less than the applicable pool mark—the applicant is taken not to have received the qualifying score; and
- (d) if that score is more than or equal to the applicable pool mark but less than the applicable pass mark—the application remains in the pool until it is removed from the pool (see subsection (3)).

*Removal of applications from pool*

- (3) An application in the pool is taken to have been removed from the pool at whichever is the earliest of the following times:
  - (a) the end of 12 months after the assessment of the applicant's assessed score;
  - (b) the earliest time (if any) when the applicant is taken to have received the qualifying score as the result of the operation of subsection (2);
  - (c) the earliest time (if any) when the applicant is taken not to have received the qualifying score as the result of the operation of subsection (2).

*Removal from pool under paragraph (3)(a) treated as failure to receive qualifying score*

- (4) If an application is removed from the pool because of paragraph (3)(a), the applicant is taken not to have received the qualifying score.

*Section to be subject to section 95A*

- (5) This section has effect subject to section 95A.

**95A Extension of period in pool**

- (1) This section applies to an application that:

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- (a) is in the pool at the commencement of this section; or
  - (b) is put in the pool after that commencement.
- (2) Section 95 has effect in relation to the application as if references in subsections 95(2) and (3) to 12 months were references to 2 years.

**96 Minister may set pool mark and pass mark**

- (1) The Minister may, from time to time, by notice in the *Gazette*, specify, in relation to a class of visas, the pool mark for the purposes of this Act and the regulations.
- (2) The Minister may, from time to time, by notice in the *Gazette*, specify, in relation to applications for visas of a particular class, the pass mark for the purposes of this Act and the regulations.
- (3) A notice under subsection (1) or (2) operates to revoke the previous notice under that subsection in relation to the same class of visas and also operates as a variation of the mark specified in the previous notice.
- (4) The Minister shall cause copies of each notice under subsection (1) or (2) to be laid before each House of the Parliament within 15 sitting days of that House after the publication of the notice in the *Gazette*.
- (5) This Act does not prevent a pool mark and a pass mark from being equal.
- (6) This Act does not prevent a pool mark and a pass mark from being varied independently of each other.

**Subdivision C—Visas based on incorrect information may be cancelled**

**97 Interpretation**

In this Subdivision:

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**application form**, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

**passenger card** has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: **Bogus document** is defined in subsection 5(1).

### **97A Exhaustive statement of natural justice hearing rule**

- (1) This Subdivision is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.
- (2) Sections 494A to 494D, in so far as they relate to this Subdivision, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.

### **98 Completion of visa application**

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

### **99 Information is answer**

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment Authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

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**100 Incorrect answers**

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

**101 Visa applications to be correct**

A non-citizen must fill in or complete his or her application form in such a way that:

- (a) all questions on it are answered; and
- (b) no incorrect answers are given or provided.

**102 Passenger cards to be correct**

A non-citizen must fill in his or her passenger card in such a way that:

- (a) all questions on it are answered; and
- (b) no incorrect answers are given.

**103 Bogus documents not to be given etc.**

A non-citizen must not give, present, produce or provide to an officer, an authorised system, the Minister, the Immigration Assessment Authority, or the Tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented, produced or provided.

**104 Changes in circumstances to be notified**

- (1) If circumstances change so that an answer to a question on a non-citizen's application form or an answer under this section is incorrect in the new circumstances, he or she must, as soon as practicable, inform an officer in writing of the new circumstances and of the correct answer in them.

- (2) If the applicant is in Australia at the time the visa is granted, subsection (1) only applies to changes in circumstance before the visa is granted.
- (3) If the applicant is outside Australia at the time the visa is granted, subsection (1) only applies to changes in circumstances after the application and before the applicant is immigration cleared.
- (4) Subsection (1) applies despite the grant of any visa.

### **105 Particulars of incorrect answers to be given**

- (1) If a non-citizen becomes aware that:
  - (a) an answer given or provided in his or her application form; or
  - (b) an answer given in his or her passenger card; or
  - (c) information given by him or her under section 104 about the form or card; or
  - (d) a response given by him or her under section 107;was incorrect when it was given or provided, he or she must, as soon as practicable, notify an officer in writing of the incorrectness and of the correct answer.
- (2) Subsection (1) applies despite the grant of any visa.

### **106 Obligations to give etc. information is not affected by other sources of information**

The requirement for a non-citizen to comply with sections 101, 102, 103, 104 and 105, is not removed or otherwise affected by the fact that the Minister or an officer had, or had access to:

- (a) any information given by the non-citizen for purposes unrelated to the non-citizen's visa application; or
- (b) any other information.

### **107 Notice of incorrect applications**

- (1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not

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comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:

- (a) giving particulars of the possible non-compliance; and
- (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:
  - (i) if the holder disputes that there was non-compliance:
    - (A) shows that there was compliance; and
    - (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or
  - (ii) if the holder accepts that there was non-compliance:
    - (A) give reasons for the non-compliance; and
    - (B) shows cause why the visa should not be cancelled; and
- (c) stating that the Minister will consider cancelling the visa:
  - (i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
  - (ii) if the holder gives the Minister a written response within that period—when the response is given; or
  - (iii) otherwise—at the end of that period; and
- (d) setting out the effect of sections 108, 109, 111 and 112; and
- (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
- (f) requiring the holder:
  - (i) to tell the Minister the address at which the holder is living; and
  - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether



there was non-compliance by the holder—to tell the Minister the changed address.

- (1A) The period to be stated in the notice under subsection (1) must be:
- (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
  - (b) otherwise—14 days.
- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
- (a) visas of a stated class; or
  - (b) visa holders in stated circumstances; or
  - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
  - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.
- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.

### **107A Possible non-compliances in connection with a previous visa may be grounds for cancellation of current visa**

The possible non-compliances that:

- (a) may be specified in a notice by the Minister under section 107 to a person who is the holder of a visa; and
- (b) if so specified, can constitute a ground for the cancellation of that visa under section 109;

include non-compliances that occurred at any time, including non-compliances in respect of any previous visa held by the person.

### **108 Decision about non-compliance**

The Minister is to:

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- (a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and
- (b) decide whether there was non-compliance by the visa holder in the way described in the notice.

**109 Cancellation of visa if information incorrect**

- (1) The Minister, after:
  - (a) deciding under section 108 that there was non-compliance by the holder of a visa; and
  - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and
  - (c) having regard to any prescribed circumstances;may cancel the visa.
- (2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled.

**110 Cancellation provisions apply whatever source of knowledge of non-compliance**

To avoid doubt, sections 107, 108 and 109 apply whether or not the Minister became aware of the non-compliance because of information given by the holder.

**111 Cancellation provisions apply whether or not non-compliance deliberate**

To avoid doubt, sections 107, 108 and 109 apply whether the non-compliance was deliberate or inadvertent.

**112 Action because of one non-compliance not prevent action because of other non-compliance**

- (1) A notice under section 107 to a person because of an instance of possible non-compliance does not prevent another notice under that

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section to that person because of another instance of possible non-compliance.

- (2) The non-cancellation of a visa under section 109 despite an instance of non-compliance does not prevent the cancellation, or steps for the cancellation, of the visa because of another instance of non-compliance.

**113 No cancellation if full disclosure**

If the holder of a visa who has been immigration cleared complied with sections 101, 102, 103, 104 and 105 in relation to the visa, it cannot be cancelled under this Subdivision because of any matter that was fully disclosed in so complying.

**114 Effect of setting aside decision to cancel visa**

- (1) If the Federal Court, the Federal Circuit Court or the Administrative Appeals Tribunal sets aside a decision under section 109 to cancel a person's visa, the visa is taken never to have been cancelled.
- (2) In spite of subsection (1), any detention of the non-citizen between the purported cancellation of the visa and the decision to set aside the decision to cancel is lawful and the non-citizen is not entitled to make any claim against the Commonwealth or an officer because of the detention.

**115 Application of Subdivision**

- (1) This Subdivision applies to:
  - (a) applications for visas made; and
  - (b) passenger cards filled in;on or after 1 September 1994.
- (2) This Subdivision, other than sections 101 and 102, applies to:
  - (a) applications for visas, or entry permits, within the meaning of the *Migration Act 1958* as in force before 1 September 1994, that under the regulations are taken to be applications for

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- visas and that have not been finally determined before that date; and
- (b) passenger cards filled in before 1 September 1994.
- (3) This Subdivision applies to a visa granted otherwise than because of an application on or after 1 September 1994 and does so as if:
- (a) this Subdivision had applied to:
- (i) the application for the visa; and
- (ii) passenger cards filled in before that date; and
- (b) the application for any other visa, or entry permit, (within the meaning of the *Migration Act 1958* as in force immediately before that date) because of which the visa is held had been the application for the visa; and
- (c) for the purposes of sections 107 to 114, non-compliance by the holder of the visa with the sections referred to in section 107 included any action or condition of the holder because of which section 20 of that Act as so in force applied to the holder.

**Subdivision D—Visas may be cancelled on certain grounds**

**116 Power to cancel**

- (1) Subject to subsections (2) and (3), the Minister may cancel a visa if he or she is satisfied that:
- (a) the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or that no longer exists; or
- (aa) the decision to grant the visa was based, wholly or partly, on the existence of a particular fact or circumstance, and that fact or circumstance did not exist; or
- (b) its holder has not complied with a condition of the visa; or
- (c) another person required to comply with a condition of the visa has not complied with that condition; or
- (d) if its holder has not entered Australia or has so entered but has not been immigration cleared—it would be liable to be cancelled under Subdivision C (incorrect information given

- by holder) if its holder had so entered and been immigration cleared; or
- (e) the presence of its holder in Australia is or may be, or would or might be, a risk to:
- (i) the health, safety or good order of the Australian community or a segment of the Australian community; or
  - (ii) the health or safety of an individual or individuals; or
- (f) the visa should not have been granted because the application for it or its grant was in contravention of this Act or of another law of the Commonwealth; or
- (fa) in the case of a student visa:
- (i) its holder is not, or is likely not to be, a genuine student; or
  - (ii) its holder has engaged, is engaging, or is likely to engage, while in Australia, in conduct (including omissions) not contemplated by the visa; or
- (g) a prescribed ground for cancelling a visa applies to the holder.
- (1AA) Subject to subsections (2) and (3), the Minister may cancel a visa if he or she is not satisfied as to the visa holder's identity.
- (1AB) Subject to subsections (2) and (3), the Minister may cancel a visa (the **current visa**) if he or she is satisfied that:
- (a) incorrect information was given, by or on behalf of the person who holds the current visa, to:
    - (i) an officer; or
    - (ii) an authorised system; or
    - (iii) the Minister; or
    - (iv) any other person, or a tribunal, performing a function or purpose under this Act; or
    - (v) any other person or body performing a function or purpose in an administrative process that occurred or occurs in relation to this Act; and

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- (b) the incorrect information was taken into account in, or in connection with, making:
  - (i) a decision that enabled the person to make a valid application for a visa; or
  - (ii) a decision to grant a visa to the person; and
- (c) the giving of the incorrect information is not covered by Subdivision C.

This subsection applies whenever the incorrect information was given and whether the visa referred to in subparagraph (b)(i) or (ii) is the current visa or a previous visa that the person held.

(1AC) Subject to subsections (2) and (3), the Minister may cancel a visa (the *current visa*) if he or she is satisfied that:

- (a) a benefit was asked for or received by, or on behalf of, the person (the *visa holder*) who holds the current visa from another person in return for the occurrence of a sponsorship-related event; or
- (b) a benefit was offered or provided by, or on behalf of, the person (the *visa holder*) who holds the current visa to another person in return for the occurrence of a sponsorship-related event.

(1AD) Subsection (1AC) applies:

- (a) whether or not the visa holder held the current visa or any previous visa at the time the benefit was asked for, received, offered or provided; and
- (b) whether or not the sponsorship-related event relates to the current visa or any previous visa that the visa holder held; and
- (c) whether or not the sponsorship-related event occurred.

(1A) The regulations may prescribe matters to which the Minister may have regard in determining whether he or she is satisfied as mentioned in paragraph (1)(fa). Such regulations do not limit the matters to which the Minister may have regard for that purpose.

- (2) The Minister is not to cancel a visa under subsection (1), (1AA), (1AB) or (1AC) if there exist prescribed circumstances in which a visa is not to be cancelled.
- (3) If the Minister may cancel a visa under subsection (1), (1AA), (1AB) or (1AC), the Minister must do so if there exist prescribed circumstances in which a visa must be cancelled.
- (4) In this section:

*benefit* has a meaning affected by section 245AQ.

*sponsorship-related event* has the meaning given by section 245AQ.

### **117 When visa may be cancelled**

- (1) Subject to subsection (2), a visa held by a non-citizen may be cancelled under subsection 116(1), (1AA), (1AB) or (1AC):
  - (a) before the non-citizen enters Australia; or
  - (b) when the non-citizen is in immigration clearance (see section 172); or
  - (c) when the non-citizen leaves Australia; or
  - (d) while the non-citizen is in the migration zone.
- (2) A permanent visa cannot be cancelled under subsection 116(1) if the holder of the visa:
  - (a) is in the migration zone; and
  - (b) was immigration cleared on last entering Australia.

### **118 Cancellation powers do not limit or affect each other**

The powers to cancel a visa under:

- (a) section 109 (incorrect information); or
- (b) section 116 (general power to cancel); or
- (c) section 128 (when holder outside Australia); or
- (ca) section 133A (Minister's personal powers to cancel visas on section 109 grounds); or

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- (cb) section 133C (Minister's personal powers to cancel visas on section 116 grounds); or
  - (cc) section 134B (emergency cancellation on security grounds); or
  - (d) section 134 (cancellation of business visas); or
  - (da) section 137Q (cancellation of regional sponsored employment visas); or
  - (e) section 140 (consequential cancellation of other visas); or
  - (ea) section 500A (refusal or cancellation of temporary safe haven visas); or
  - (f) section 501, 501A or 501B (special power to refuse or cancel on character grounds);
- are not limited, or otherwise affected, by each other.

**Subdivision E—Procedure for cancelling visas under Subdivision D in or outside Australia**

**118A Exhaustive statement of natural justice hearing rule**

- (1) This Subdivision is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.
- (2) Sections 494A to 494D, in so far as they relate to this Subdivision, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.

**119 Notice of proposed cancellation**

- (1) Subject to Subdivision F (non-citizens outside Australia), if the Minister is considering cancelling a visa, whether its holder is in or outside Australia, under section 116, the Minister must notify the holder that there appear to be grounds for cancelling it and:
  - (a) give particulars of those grounds and of the information (not being non-disclosable information) because of which the grounds appear to exist; and
  - (b) invite the holder to show within a specified time that:



- (i) those grounds do not exist; or
  - (ii) there is a reason why it should not be cancelled.
- (2) The holder is to be notified in the prescribed way or, if there is no prescribed way, a way that the Minister considers to be appropriate.
- (3) The way of notifying the holder, whether prescribed or considered appropriate, may, without limiting the generality of subsection (2), be orally.
- (4) The other provisions of this Subdivision do not apply to a cancellation:
- (a) under a provision other than section 116; or
  - (b) to which Subdivision F applies.

### **120 Certain information must be given to visa holder**

- (1) In this section, **relevant information** means information (other than non-disclosable information) that the Minister considers:
- (a) would be the reason, or a part of the reason, for cancelling a visa; and
  - (b) is specifically about the holder or another person and is not just about a class of persons of which the holder or other person is a member; and
  - (c) was not given by the holder; and
  - (d) was not disclosed to the holder in the notification under section 119.
- (2) The Minister must:
- (a) give particulars of the relevant information to the holder; and
  - (b) ensure, as far as reasonably practicable, that the holder understands why it is relevant to the cancellation; and
  - (c) invite the holder to comment on it.
- (3) The particulars and invitation are to be given in the way that the Minister considers appropriate in the circumstances.

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**121 Invitation to give comments etc.**

- (1) An invitation under paragraph 119(1)(b) or 120(2)(c) is to specify whether the response to the invitation may be given:
  - (a) in writing; or
  - (b) at an interview between the holder and an officer; or
  - (c) by telephone.
- (2) Subject to subsection (4), if the invitation is to respond otherwise than at an interview, the response is to be given within a period specified in the invitation, being a prescribed period or, if no period is prescribed, a reasonable period.
- (3) Subject to subsection (5), if the invitation is to respond at an interview, the interview is to take place:
  - (a) at a place specified in the invitation, being a prescribed place or, if no place is prescribed, a reasonable place; and
  - (b) at a time specified in the invitation, being a time within a prescribed period or, if no period is prescribed, within a reasonable period.
- (4) If a person is to respond to an invitation within a prescribed period, that period may be extended by the Minister for a prescribed further period, and then the response is to be given in the extended period.
- (5) If a person is to respond to an invitation at an interview at a time within a prescribed period, that time may be changed by the Minister to:
  - (a) a later time within that period; or
  - (b) a time within that period as extended by the Minister for a prescribed further period;and then the response is to be given at an interview at the new time.
- (6) This section is subject to sections 125 and 126.

### **122 Prescribed periods**

Regulations prescribing a period or other time limit relating to a step in considering the cancellation of a visa may prescribe different limits relating to that step and specify when a particular limit is to apply, which, without limiting the generality of the power, may be to:

- (a) visas of a specified class; or
- (b) visa holders in specified circumstances; or
- (c) visa holders in a specified class of persons (which may be visa holders in a specified place); or
- (d) visa holders in a specified class of persons (which may be visa holders in a specified place) in specified circumstances.

### **123 Failure to accept invitation not require action**

If a visa holder does not respond to an invitation under paragraph 119(1)(b) or 120(2)(c) before the time for giving it has passed or tells the Minister that the visa holder does not wish to respond, the Minister may make the decision about cancellation without taking any further action about the information.

### **124 When decision about visa cancellation may be made**

- (1) Subject to section 120 (give information) and subsection (2), the Minister may cancel a visa at any time after notice about the cancellation has been given under section 119 and after whichever one of the following happens first:
  - (a) the holder responds to the notice;
  - (b) the holder tells the Minister that the holder does not wish to respond;
  - (c) the time for responding to the notice passes.
- (2) The Minister is not to cancel a visa after inviting the visa holder to comment on information and before whichever one of the following happens first:
  - (a) the comments are given;

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- (b) the holder tells the Minister that the holder does not wish to comment;
- (c) the time for commenting passes.

**125 Application of Subdivision to non-citizen in immigration clearance**

If a non-citizen in immigration clearance who is not taken into questioning detention is given an invitation under paragraph 119(1)(b) or 120(2)(c), the period within which he or she may respond to the invitation is to end when, or before, he or she ceases to be in immigration clearance.

**126 Application of Subdivision to non-citizen in questioning detention**

- (1) If a non-citizen in questioning detention who is not released before the end of the 4 hours for which he or she may be detained is given an invitation under paragraph 119(1)(b) or 120(2)(c), the period within which he or she may respond to the invitation is to end when, or before, those 4 hours end.
- (2) If a non-citizen who has been given an invitation under paragraph 119(1)(b) or 120(2)(c) (whether in immigration clearance or otherwise) is taken into questioning detention and not released before the end of the 4 hours for which he or she may be detained, the period within which he or she is to respond to the invitation is to end when, or before, those 4 hours end.

**127 Notification of decision**

- (1) When the Minister decides to cancel a visa, he or she is to notify the visa holder of the decision in the prescribed way.
- (2) Notification of a decision to cancel a visa must:
  - (a) specify the ground for the cancellation; and
  - (b) state whether the decision is reviewable under Part 5 or 7; and

- (c) if the former visa holder has a right to have the decision reviewed under Part 5 or 7—state:
  - (i) that the decision can be reviewed; and
  - (ii) the time in which the application for review may be made; and
  - (iii) who can apply for the review; and
  - (iv) where the application for review can be made.
- (3) Failure to give notification of a decision does not affect the validity of the decision.

### **Subdivision F—Other procedure for cancelling visas under Subdivision D outside Australia**

#### **127A Exhaustive statement of natural justice hearing rule**

- (1) This Subdivision is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.
- (2) Sections 494A to 494D, in so far as they relate to this Subdivision, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.

#### **128 Cancellation of visas of people outside Australia**

If:

- (a) the Minister is satisfied that:
    - (i) there is a ground for cancelling a visa under section 116; and
    - (ii) it is appropriate to cancel in accordance with this Subdivision; and
  - (b) the non-citizen is outside Australia;
- the Minister may, without notice to the holder of the visa, cancel the visa.

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**129 Notice of cancellation**

- (1) If the Minister cancels a visa under section 128, he or she must give the former holder of the visa a notice:
  - (a) stating the ground on which it was cancelled; and
  - (b) giving particulars of that ground and of the information (not being non-disclosable information) because of which the ground was considered to exist; and
  - (c) inviting the former holder to show, within a specified time, being a prescribed time, that:
    - (i) that ground does not exist; or
    - (ii) there is a reason why the visa should not have been cancelled; and
  - (d) stating that, if the former holder shows, within the specified time, that the ground does not exist, the cancellation will be revoked; and
  - (e) stating that, if the former holder shows that there is a reason why the visa should not have been cancelled, the cancellation might be revoked.
- (2) The notice is to be given in the prescribed way.
- (3) Failure to give notification of a decision does not affect the validity of the decision.

**130 Prescribed periods**

Regulations prescribing a period for the purpose of paragraph 129(1)(c) may prescribe different periods and specify when a particular period is to apply, which, without limiting the generality of the power, may be to:

- (a) visas of a specified class; or
- (b) former visa holders in specified circumstances; or
- (c) former visa holders in a specified class of persons (which may be former visa holders in a specified place); or

- (d) former visa holders in a specified class of persons (which may be former visa holders in a specified place) in specified circumstances.

### **131 Decision about revocation of cancellation**

- (1) Subject to subsection (2), after considering any response to a notice under section 129 of the cancellation of a visa, the Minister:
  - (a) if not satisfied that there was a ground for the cancellation; or
  - (b) if satisfied that there is another reason why the cancellation should be revoked;is to revoke the cancellation.
- (2) The Minister is not to revoke the cancellation of a visa if there exist prescribed circumstances in which the visa must be cancelled.

### **132 Notification of decision about revocation of cancellation**

When, under section 131, the Minister revokes or does not revoke the cancellation of a visa, he or she is to notify the visa holder or former visa holder of the decision in the prescribed way.

### **133 Effect of revocation of cancellation**

- (1) If the cancellation of a visa is revoked, then, without limiting its operation before cancellation, it has effect as if it were granted on the revocation.
- (2) Subject to subsection (1), if the cancellation of a visa is revoked, the Minister may vary the time the visa is to be in effect or any period in which, or date until which, the visa permits its holder to travel to, enter and remain in Australia, or to remain in Australia.

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**Subdivision FA—Additional personal powers for Minister to cancel visas on section 109 or 116 grounds**

**133A Minister’s personal powers to cancel visas on section 109 grounds**

*Action by Minister—natural justice applies*

- (1) If a notice was given under section 107 to the holder of a visa in relation to a ground for cancelling the visa under section 109, and the Administrative Appeals Tribunal or the former Migration Review Tribunal or former Refugee Review Tribunal, or a delegate of the Minister:
  - (a) decided that the ground did not exist; or
  - (b) decided not to exercise the power in subsection 109(1) to cancel the visa (despite the existence of the ground);the Minister may set aside that decision and cancel the visa, if:
  - (c) the Minister considers that the ground exists; and
  - (d) the visa holder does not satisfy the Minister that the ground does not exist; and
  - (e) the Minister is satisfied that it would be in the public interest to cancel the visa.

Note: The grounds for cancellation under section 109 are non-compliance with section 101, 102, 103, 104 or 105.

- (2) The procedure set out in Subdivision C does not apply to a decision under subsection (1).

*Action by Minister—natural justice does not apply*

- (3) The Minister may cancel a visa held by a person who has been immigration cleared (whether or not because of that visa) if:
  - (a) the Minister is satisfied that a ground for cancelling the visa under section 109 exists; and
  - (b) the Minister is satisfied that it would be in the public interest to cancel the visa.



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Note: The grounds for cancellation under section 109 are non-compliance with section 101, 102, 103, 104 or 105.

- (4) The rules of natural justice, and the procedure set out in Subdivision C, do not apply to a decision under subsection (3).
- (5) The Minister may cancel a visa under subsection (3) whether or not:
  - (a) the visa holder was given a notice under section 107 in relation to the ground for cancelling the visa; or
  - (b) the visa holder responded to any such notice; or
  - (c) the Administrative Appeals Tribunal or the former Migration Review Tribunal or former Refugee Review Tribunal, or a delegate of the Minister:
    - (i) decided that the ground did not exist; or
    - (ii) decided not to exercise the power in subsection 109(1) to cancel the visa (despite the existence of the ground).
- (6) If a decision was made as mentioned in paragraph (5)(c), the power under subsection (3) to cancel a visa is a power to set aside that decision and cancel the visa.

*Minister's exercise of power*

- (7) The power in subsection (1) or (3) may only be exercised by the Minister personally.
- (8) The Minister does not have a duty to consider whether to exercise the power in subsection (1) or (3), whether or not the Minister is requested to do so, or in any other circumstances.
- (9) Subsection 138(4) does not prevent the Minister setting aside a decision of a Tribunal or a delegate and cancelling a visa in accordance with this section.

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**133B Other provisions relating to the exercise of powers in section 133A**

- (1) Subject to subsection (2), the possible non-compliances that can constitute a ground for the cancellation of a visa under subsection 133A(1) or (3) include non-compliances that occurred at any time (whether before or after the commencement of this section), including non-compliances in respect of any previous visa held by the person.
- (2) Section 115 (application of Subdivision C) applies in relation to section 133A in the same way that it applies in relation to Subdivision C.
- (3) To avoid doubt, subsections 133A(1) and (3) apply:
  - (a) whether or not the Minister became aware of the ground for cancelling the visa because of information given by the visa holder; and
  - (b) whether the non-compliance because of which the ground is considered to exist was deliberate or inadvertent.
- (4) Steps taken for the purposes of the Minister exercising the power in subsection 133A(1) or (3) in relation to an instance of possible non-compliance by a person do not prevent:
  - (a) a notice under section 107 being given to that person because of another instance of possible non-compliance; or
  - (b) the exercise of the power in subsection 133A(1) or (3) in relation to the person because of another instance of possible non-compliance.
- (5) The non-cancellation of a visa under section 133A despite an instance of non-compliance does not prevent the cancellation, or steps for the cancellation, of the visa because of another instance of non-compliance.

**133C Minister's personal powers to cancel visas on section 116 grounds**

*Action by Minister—natural justice applies*

- (1) If a notification was given under section 119 to the holder of a visa in relation to a ground for cancelling the visa under section 116, and the Administrative Appeals Tribunal or the former Migration Review Tribunal or former Refugee Review Tribunal, or a delegate of the Minister:
- (a) decided that the ground did not exist; or
  - (b) decided not to exercise the power in section 116 to cancel the visa (despite the existence of the ground);
- the Minister may set aside that decision and cancel the visa if:
- (c) the Minister considers that the ground exists; and
  - (d) the visa holder does not satisfy the Minister that the ground does not exist; and
  - (e) the Minister is satisfied that it would be in the public interest to cancel the visa.

Note: The Minister's power to cancel a visa under this subsection is subject to section 117 (see subsection (9) of this section).

- (2) The procedures set out in Subdivisions E and F do not apply to a decision under subsection (1).

*Action by Minister—natural justice does not apply*

- (3) The Minister may cancel a visa held by a person if:
- (a) the Minister is satisfied that a ground for cancelling the visa under section 116 exists; and
  - (b) the Minister is satisfied that it would be in the public interest to cancel the visa.

Note: The Minister's power to cancel a visa under this subsection is subject to section 117 (see subsection (9) of this section).

- (4) The rules of natural justice, and the procedures set out in Subdivisions E and F, do not apply to a decision under subsection (3).

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- (5) The Minister may cancel a visa under subsection (3) whether or not:
- (a) the visa holder was given a notification under section 119 in relation to the ground for cancelling the visa; or
  - (b) the visa holder responded to any such notification; or
  - (c) the Administrative Appeals Tribunal or the former Migration Review Tribunal or former Refugee Review Tribunal, or a delegate of the Minister:
    - (i) decided that the ground did not exist; or
    - (ii) decided not to exercise the power in section 116 to cancel the visa (despite the existence of the ground); or
  - (d) a delegate of the Minister decided to revoke, under subsection 131(1), a cancellation of the visa in accordance with section 128 in relation to the ground.
- (6) If a decision was made as mentioned in paragraph (5)(c), the power under subsection (3) to cancel a visa is a power to set aside that decision and cancel the visa.

*Minister's exercise of power*

- (7) The power in subsection (1) or (3) may only be exercised by the Minister personally.
- (8) The Minister does not have a duty to consider whether to exercise the power in subsection (1) or (3), whether or not the Minister is requested to do so, or in any other circumstances.
- (9) Section 117 applies in relation to the power in subsection (1) or (3) in the same way as it applies to the cancellation of a visa under section 116.
- (10) Subsection 138(4) does not prevent the Minister setting aside a decision of a Tribunal or a delegate and cancelling a visa in accordance with this section.

**133D Cancellation under subsection 133A(1) or 133C(1)—method of satisfying Minister of matters**

The regulations may provide that, in determining for the purposes of subsection 133A(1) or 133C(1) whether:

- (a) a person; or
- (b) a person included in a specified class of persons;

satisfies the Minister that a ground for cancelling the person's visa does not exist, any information or material submitted by or on behalf of the person must not be considered by the Minister unless the information or material is submitted within the period, and in the manner, ascertained in accordance with the regulations.

**133E Cancellation under subsection 133A(1) or 133C(1)—notice of cancellation**

- (1) If a decision is made under subsection 133A(1) or 133C(1) to cancel a visa that has been granted to a person, the Minister must give the former holder of the visa a written notice that:
  - (a) sets out the decision; and
  - (b) specifies the provision under which the decision was made; and
  - (c) sets out the reasons (other than non-disclosable information) for the decision.
- (2) The notice is to be given in the prescribed manner.
- (3) A failure to comply with this section in relation to a decision does not affect the validity of the decision.

**133F Cancellation under subsection 133A(3) or 133C(3)—Minister may revoke cancellation in certain circumstances**

- (1) This section applies if the Minister makes a decision (the *original decision*) under subsection 133A(3) or 133C(3) to cancel a visa that has been granted to a person.

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- (2) For the purposes of this section, *relevant information* is information (other than non-disclosable information) that the Minister considers:
- (a) would be the reason, or a part of the reason, for making the original decision; and
  - (b) is specifically about the person or another person and is not just about a class of persons of which the person or other person is a member.
- (3) As soon as practicable after making the original decision, the Minister must:
- (a) give the person, in the way that the Minister considers appropriate in the circumstances:
    - (i) a written notice that sets out the original decision; and
    - (ii) particulars of the relevant information; and
  - (b) invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision.
- (4) The Minister may revoke the original decision if:
- (a) the person makes representations in accordance with the invitation; and
  - (b) the person satisfies the Minister that the ground for cancelling the visa referred to in subsection 133A(3) or 133C(3) (as the case requires) does not exist.
- (5) The power in subsection (4) may only be exercised by the Minister personally.
- (6) If the Minister revokes the original decision, the original decision is taken not to have been made. This subsection has effect subject to subsection (7).
- (7) Any detention of the person that occurred during any part of the period:
- (a) beginning when the original decision was made; and
  - (b) ending at the time of the revocation of the original decision;

is lawful and the person is not entitled to make any claim against the Commonwealth, an officer or any other person because of the detention.

### **Subdivision FB—Emergency cancellation on security grounds**

#### **134A Natural justice**

The rules of natural justice do not apply to a decision made under this Subdivision.

#### **134B Emergency cancellation on security grounds**

The Minister must cancel a visa held by a person if:

- (a) there is an assessment made by ASIO for the purposes of this section; and
- (b) the assessment contains advice that ASIO suspects that the person might be, directly or indirectly, a risk to security (within the meaning of section 4 of the ASIO Act); and
- (c) the assessment contains a recommendation that all visas held by the person be cancelled under this section; and
- (d) the person is outside Australia.

#### **134C Decision about revocation of emergency cancellation**

##### *Application of section*

- (1) This section applies to a visa that is cancelled under section 134B.

##### *First ground to revoke cancellation*

- (2) The Minister must revoke the cancellation of the visa as soon as reasonably practicable after the end of the period referred to in subsection (5).
- (3) However, the Minister must not revoke the cancellation under subsection (2) if:

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- (a) there is an assessment made by ASIO for the purposes of this section before the end of the period referred to in subsection (5); and
- (b) the assessment contains advice that the former holder of the visa is, directly or indirectly, a risk to security (within the meaning of section 4 of the ASIO Act); and
- (c) the assessment contains a recommendation that the cancellation not be revoked under subsection (2).

*Second ground to revoke cancellation*

- (4) If:
  - (a) there is an assessment made by ASIO for the purposes of this section before the end of the period referred to in subsection (5); and
  - (b) the assessment contains a recommendation that the cancellation of the visa be revoked under this subsection;then the Minister must revoke the cancellation as soon as reasonably practicable after the assessment is made.

*Period*

- (5) For the purposes of subsections (2), (3) and (4), the period is the period that:
  - (a) starts at the beginning of the day (the *cancellation day*) the visa is cancelled; and
  - (b) ends at the end of the 28th day after the cancellation day.

**134D Effect of revocation of cancellation**

- (1) If the cancellation of a visa is revoked under section 134C, then, without limiting its operation before cancellation, it has effect as if it were granted on the revocation.
- (2) However, the Minister may vary:
  - (a) the time the visa is to be in effect; or



- (b) any period in which, or date until which, the visa permits its holder to travel to, enter and remain in Australia, or to remain in Australia.

#### **134E Notice of cancellation**

- (1) If:
  - (a) the Minister decides under section 134B to cancel a visa; and
  - (b) the Minister decides under subsection 134C(3) not to revoke the cancellation;then the Minister must give the former holder of the visa notice of the cancellation.
- (2) The notice must be given:
  - (a) if the assessment made by ASIO for the purposes of section 134C contains an advice that it is essential to the security of the nation that a notice is not given to the person under this section—as soon as reasonably practicable after ASIO advises the Minister, in writing, that it is no longer essential to the security of the nation for the notice not to be given; and
  - (b) otherwise—as soon as reasonably practicable after the Minister decides under subsection 134C(3) not to revoke the cancellation.
- (3) The notice must:
  - (a) state that the visa was cancelled under section 134B; and
  - (b) be given to the person in the prescribed way.
- (4) Failure to give the notice does not affect the validity of either:
  - (a) the decision under section 134B to cancel the visa; or
  - (b) the decision under subsection 134C(3) not to revoke the cancellation.

#### **134F Effect of cancellation on other visas**

- (1) This section applies if:
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- (a) a visa held by a person (the *relevant person*) is cancelled under section 134B; and
  - (b) the Minister decides under subsection 134C(3) not to revoke the cancellation; and
  - (c) the Minister has given a notice to the relevant person under section 134E about the cancellation.
- (2) If another person holds a visa only because the relevant person held a visa, then the Minister may, without notice to the other person, cancel the other person's visa.

**Subdivision G—Cancellation of business visas**

**134 Cancellation of business visas**

- (1) Subject to subsection (2) and to section 135, the Minister may cancel a business visa (other than an established business in Australia visa, an investment-linked visa or a family member's visa) if the Minister is satisfied that its holder:
- (a) has not obtained a substantial ownership interest in an eligible business in Australia; or
  - (b) is not utilising his or her skills in actively participating at a senior level in the day-to-day management of that business; or
  - (c) does not intend to continue to:
    - (i) hold a substantial ownership interest in; and
    - (ii) utilise his or her skills in actively participating at a senior level in the day-to-day management of; an eligible business in Australia.
- (2) The Minister must not cancel a business visa under subsection (1) if the Minister is satisfied that its holder:
- (a) has made a genuine effort to obtain a substantial ownership interest in an eligible business in Australia; and
  - (b) has made a genuine effort to utilise his or her skills in actively participating at a senior level in the day-to-day management of that business; and

- (c) intends to continue to make such genuine efforts.
- (3) Without limiting the generality of matters that the Minister may take into account in determining whether a person has made the genuine effort referred to in subsection (2), the Minister may take into account any or all of the following matters:
- (a) business proposals that the person has developed;
  - (b) the existence of partners or joint venturers for the business proposals;
  - (c) research that the person has undertaken into the conduct of an eligible business in Australia;
  - (d) the period or periods during which the person has been present in Australia;
  - (e) the value of assets transferred to Australia by the person for use in obtaining an interest in an eligible business;
  - (f) the value of ownership interest in eligible businesses in Australia that are, or have been, held by the person;
  - (g) business activity that is, or has been, undertaken by the person;
  - (h) whether the person has failed to comply with a notice under section 137;
  - (i) if the person no longer holds a substantial ownership interest in a particular business or no longer utilises his or her skills in actively participating at a senior level of a day-to-day management of a business:
    - (i) the length of time that the person held the ownership interest or participated in the management (as the case requires); and
    - (ii) the reasons why the person no longer holds the interest or participates in the management (as the case requires).
- (3A) Subject to section 135, the Minister may cancel an investment-linked visa (other than a family member's visa) if the Minister is satisfied that the person, or any of the persons, who held the relevant designated investment when the visa was granted has or have ceased, for any reason, to hold that investment within 3 years of that investment being made.

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- (4) Subject to subsection (5) and to section 135, if:
- (a) the Minister cancels a person's business visa under subsection (1) or (3A); and
  - (b) a business visa is held by another person who is or was a member of the family unit of the holder of the cancelled visa; and
  - (c) the other person would not have held that business visa if he or she had never been a member of the family unit of the holder of the cancelled visa;
- the Minister must cancel the other person's business permit or business visa.
- (5) The Minister must not cancel the other person's business visa under subsection (4) if the cancellation of that visa would result in extreme hardship to the person.
- (6) The Minister is taken not to have cancelled a person's business visa under subsection (4) if the Administrative Appeals Tribunal has set aside the decision of the Minister to cancel the business visa of the relevant person to whom paragraph (4)(a) applied.
- (7) If the Minister cancels a business visa under this section, the Minister must give written notice of the cancellation decision to its holder, including:
- (a) the Minister's reason for the cancellation; and
  - (b) a statement to the effect that the holder may, within 28 days after receiving the notice, apply to the Administrative Appeals Tribunal for review of the cancellation.
- (8) A cancellation under this section has effect on and from:
- (a) if the person applies to the Administrative Appeals Tribunal for a review of the decision to cancel the visa—the 28th day after the day on which the Administrative Appeals Tribunal gives its decision on that review; or
  - (b) if:
    - (i) the person's visa was cancelled under subsection (4); and

- (ii) the relevant person to whom paragraph (4)(a) applied has applied to the Administrative Appeals Tribunal for a review of the decision to cancel that person's visa; the 28th day after the day on which the Administrative Appeals Tribunal gives its decision on that review; or
  - (c) the 28th day after the day on which the notice of cancellation is given to the holder of the cancelled visa;whichever is the latest.
- (9) The Minister must not cancel a business visa under subsection (1), (3A) or (4) unless a notice under section 135 was given to its holder within the period of 3 years commencing:
  - (a) if its holder was in Australia when he or she was first granted a business visa—on the day on which that first visa was granted; or
  - (b) if its holder was not in Australia when he or she was first granted a business visa—on the day on which its holder first entered Australia after that first visa was granted.
- (10) In this section:
  - business visa*** means:
    - (a) a visa included in a class of visas, being a class that:
      - (i) has the words “Business Skills” in its title; and
      - (ii) is prescribed for the purposes of this paragraph; or
    - (b) a visa:
      - (i) to which a prescribed provision of the Migration Reform (Transitional Provisions) Regulations applies; and
      - (ii) that is of a kind prescribed for the purposes of this paragraph; or
    - (c) a return visa that is granted to a person who is or was the holder of a business permit or business visa;that is or was granted on or after 17 February 1992.

***designated investment*** has the meaning given by the regulations.

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**eligible business** means a business that the Minister reasonably believes is resulting or will result in one or more of the following:

- (a) the development of business links with the international market;
- (b) the creation or maintenance of employment in Australia;
- (c) the export of Australian goods or services;
- (d) the production of goods or the provision of services that would otherwise be imported into Australia;
- (e) the introduction of new or improved technology to Australia;
- (f) an increase in commercial activity and competitiveness within sectors of the Australian economy.

**established business in Australia visa** means a business visa a criterion for whose grant:

- (a) relates to the applicant having an established business in Australia; or
- (b) is that the applicant is a member of the family unit of the holder of a visa a criterion for whose grant is as mentioned in paragraph (a).

**family member's visa** means a business visa held by a person:

- (a) who is or was a member of the family unit of another person who held a business visa; and
- (b) who would not have held the business visa if he or she had never been a member of the family unit of the other person.

**investment-linked visa** means a business visa a criterion for whose grant:

- (a) relates to the holding of a designated investment; or
- (b) is that the applicant is a member of the family unit of the holder of a visa a criterion for whose grant is as mentioned in paragraph (a).

**ownership interest**, in relation to a business, means an interest in the business as:

- (a) a shareholder in a company that carries on the business; or
- (b) a partner in a partnership that carries on the business; or

(c) the sole proprietor of the business;  
including such an interest held indirectly through one or more  
interposed companies, partnerships or trusts.

***relevant designated investment***, in relation to an investment-linked  
visa (other than a family member's visa), means the designated  
investment that was, in deciding to grant the visa, regarded as  
satisfying the criterion referred to in paragraph (a) of the definition  
of ***investment-linked visa***.

***return visa*** has the same meaning as in the regulations.

### **135 Representations concerning cancellation of business visa**

- (1) Before cancelling a visa under subsection 134(1), (3A) or (4), the  
Minister must give its holder a written notice:
  - (a) stating that the Minister proposes to cancel the visa; and
  - (b) inviting its holder to make representations to the Minister  
concerning the proposed cancellation within:
    - (i) if the notice is given in Australia—28 days after the  
notice is given; or
    - (ii) if the notice is given outside Australia—70 days after  
the notice is given.
- (2) The holder may make such representations to the Minister within  
the time specified in the notice.
- (3) The Minister must give due consideration to any representations.
- (4) If:
  - (a) the time specified in the notice ends after the end of the  
period referred to in subsection 134(9); and
  - (b) at the end of the period of 90 days commencing at the time  
specified in the notice, the Minister has not made a decision  
on whether to proceed with the cancellation;the Minister is not to proceed with the cancellation.
- (5) If the Minister decides not to proceed with the cancellation, the  
Minister must give its holder written notice to that effect.

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**136 Review of decisions**

Application may be made to the Administrative Appeals Tribunal for review of a decision of the Minister under subsection 134(1), (3A) or (4).

**137 Provision of information—holders of business visas**

- (1) The Secretary or Australian Border Force Commissioner may by written notice require the holder of a business visa to give the Secretary or Australian Border Force Commissioner such information as is specified in the notice.
- (2) The Secretary or Australian Border Force Commissioner may not require information under subsection (1) unless the information is to be used by the Secretary, the Australian Border Force Commissioner or the Minister for the purpose of the administration of this Act or of regulations made under this Act.
- (3) A notice under subsection (1) is only valid in the period of 3 years commencing:
  - (a) if the holder was in Australia when he or she was first granted a business visa—on the day on which that first visa was granted; or
  - (b) if the holder was not in Australia when he or she was first granted a business visa—on the day on which the holder first entered Australia after that first visa was granted.
- (4) Without limiting the generality of the information that may be required under subsection (1), the Secretary or Australian Border Force Commissioner may require the holder to advise the Secretary or Australian Border Force Commissioner in writing of any change in the address of the holder during a period specified in the notice.
- (5) A notice under subsection (1) must state that the information must be provided within a period of 28 days commencing on a day specified in the notice.
- (6) The day specified in the notice may be:



- (a) the day on which the notice is issued; or
  - (b) a later particular day; or
  - (c) the day on which an event specified in the notice occurs.
- (7) A person who fails to comply with a notice under subsection (1) commits an offence at the end of every successive 28 day period that is contained in the period commencing on the day specified in the notice and ending when the person complies with the notice.
- (7A) Subsection (7) does not apply if the person has a reasonable excuse.
- Note: A defendant bears an evidential burden in relation to the matter in subsection (7A) (see subsection 13.3(3) of the *Criminal Code*).
- (7B) An offence against subsection (7) is an offence of strict liability.
- Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (8) Subsection 4K(2) of the *Crimes Act 1914* does not apply to an offence under subsection (7).
- (10) In this section:
- business visa*** has the same meaning as in section 134.
- Penalty: \$5,000.

### **Subdivision GB—Automatic cancellation of student visas**

#### **137J Non-complying students may have their visas automatically cancelled**

- (1) This section applies if a notice is sent to a non-citizen under section 20 of the *Education Services for Overseas Students Act 2000* in relation to a visa held by the non-citizen (even if the non-citizen never receives the notice).
- Note 1: Under that section, a registered education provider must send a notice to a non-citizen who breaches a condition of the non-citizen's visa that is prescribed by regulations made for the purposes of that Act. The notice must give particulars of the breach and must require the non-citizen to attend before an officer for the purpose of making any

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submissions about the breach and the circumstances that led to the breach.

Note 2: Under subsection 20(4A) of that Act, a registered provider must not send a notice on or after the day that subsection commences.

- (2) The non-citizen's visa is cancelled by force of this section at the end of the 28th day after the day that the notice specifies as the date of the notice unless, before the end of that 28th day:
- (a) the non-citizen complies with the notice; or
  - (b) the non-citizen, while attending in person at an office of Immigration (within the meaning of the regulations) that is either:
    - (i) in Australia; or
    - (ii) approved for the purposes of this paragraph by the Minister by notice in the *Gazette*;makes himself or herself available to an officer for the stated purpose of making any submissions about the breach and the circumstances that led to the breach.

**137K Applying for revocation of cancellation**

- (1) A non-citizen whose visa has been cancelled under section 137J may apply in writing to the Minister for revocation of the cancellation.
- (2) A non-citizen who is in the migration zone cannot apply for revocation at a time when, because of section 82, the visa would no longer have been in effect anyway had the visa not been cancelled under section 137J.
- (3) In addition to the restriction in subsection (2), a non-citizen who is in the migration zone and who has been detained under section 189 cannot apply for revocation later than:
  - (a) 2 working days after the day on which section 194 was complied with in relation to his or her detention; or
  - (b) if he or she informs an officer in writing within those 2 days of his or her intention to so apply—within the next 5 working days after those 2 working days.

- (4) A non-citizen who is outside the migration zone cannot apply for revocation later than 28 days after the day of the cancellation.
- (5) In any case, a non-citizen cannot apply for revocation if he or she has previously made such an application in respect of the same cancellation.

### **137L Dealing with the application**

- (1) On an application under section 137K, the Minister may revoke the cancellation if, and only if, the applicant satisfies the Minister:
  - (a) that the non-citizen did not in fact breach the relevant visa condition or conditions; or
  - (b) that the breach was due to exceptional circumstances beyond the non-citizen's control; or
  - (c) of any other matter prescribed in the regulations.
- (2) However, the Minister must not revoke the cancellation on the ground that the non-citizen was unaware of the notice or of the effect of section 137J.
- (3) A cancellation is revoked under this section by the Minister causing a record of the revocation to be made.

### **137M Notification of decision**

- (1) When the Minister decides whether to revoke a cancellation under section 137L, he or she must give the non-citizen written notice of the decision.
- (2) Notice of a decision not to revoke a cancellation must:
  - (a) specify the grounds for the decision; and
  - (b) state:
    - (i) that if the non-citizen was in the migration zone when the decision was made, the decision is reviewable under Part 5; and
    - (ii) the time in which the application for review may be made; and

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- (iii) who may apply for the review; and
  - (iv) where the application for review may be made.
- (3) Failure to notify of a decision whether to revoke a cancellation does not affect the validity of the decision.

**137N Minister may revoke cancellation on his or her own initiative**

- (1) The Minister may, on his or her own initiative, revoke the cancellation under section 137J of a particular non-citizen's visa, if the Minister thinks that it is in the public interest to do so.
- (2) The Minister must give the relevant non-citizen written notice of a decision under subsection (1) to revoke a cancellation.
- (3) The power in subsection (1) may only be exercised by the Minister personally.
- (4) The Minister does not have a duty to consider whether to exercise the power in subsection (1), whether or not the non-citizen or anyone else requests him or her to do so, or in any other circumstances.
- (5) A cancellation is revoked under this section by the Minister causing a record of the revocation to be made.

**137P Effect of revocation**

- (1) If the cancellation of a visa is revoked under section 137L or 137N, the visa is taken never to have been cancelled under section 137J.
- (2) If the revocation is under section 137L and the decision is made wholly or partly on the ground that paragraph 137L(1)(a) or (b) applies to the breach that was alleged in the notice mentioned in section 137J, then that breach cannot be a ground for cancelling the visa under section 116.
- (3) However, a revocation under section 137L or 137N does not otherwise limit or affect any other power to cancel the visa under this Act.

- (4) In particular, a different or later breach of a condition of the visa can be a ground for cancelling the visa under section 116.
- (5) Despite subsection (1), any detention of the non-citizen that occurred during any part of the period:
  - (a) beginning when the visa was cancelled under section 137J;  
and
  - (b) ending at the time of the revocation of the cancellation;is lawful and the non-citizen is not entitled to make any claim against the Commonwealth, an officer or any other person because of the detention.

### **Subdivision GC—Cancellation of regional sponsored employment visas**

#### **137Q Cancellation of regional sponsored employment visas**

##### *Employment does not commence*

- (1) The Minister may cancel a regional sponsored employment visa held by a person if:
  - (a) the Minister is satisfied that the person has not commenced the employment referred to in the relevant employer nomination within the period prescribed by the regulations;  
and
  - (b) the person does not satisfy the Minister that he or she has made a genuine effort to commence that employment within that period.

##### *Employment terminates within 2 years*

- (2) The Minister may cancel a regional sponsored employment visa held by a person if:
  - (a) the Minister is satisfied that:
    - (i) the person commenced the employment referred to in the relevant employer nomination (whether or not within the period prescribed by the regulations); and

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- (ii) the employment terminated within the period (the *required employment period*) of 2 years starting on the day the person commenced that employment; and
- (b) the person does not satisfy the Minister that he or she has made a genuine effort to be engaged in that employment for the required employment period.

*Regional sponsored employment visa*

- (3) In this section:

*regional sponsored employment visa* means a visa of a kind that:

- (a) is included in a class of visas that has the words “Employer Nomination” in its title; and
- (b) is prescribed by the regulations for the purposes of this definition.

**137R Representations concerning cancellation etc.**

- (1) Before cancelling a person’s visa under section 137Q, the Minister must give the person a written notice:
  - (a) stating that the Minister proposes to cancel the visa; and
  - (b) inviting the person to make representations to the Minister concerning the proposed cancellation within:
    - (i) if the notice is given in Australia—28 days after the notice is given; or
    - (ii) if the notice is given outside Australia—70 days after the notice is given.
- (2) The Minister must consider any representations received within that period.
- (3) If the Minister decides not to proceed with the cancellation, the Minister must give the person written notice of the decision.

### **137S Notice of cancellation**

- (1) If the Minister decides to cancel a person's visa under section 137Q, he or she must give the person written notice of the decision. The notice must:
  - (a) specify the reasons for the cancellation; and
  - (b) state whether or not the decision to cancel the visa is reviewable under Part 5; and
  - (c) if the decision to cancel the visa is reviewable under Part 5—state the period within which an application for review can be made, who can apply for the review and where the application for review can be made.
- (2) Failure to give notice of the decision does not affect the validity of the decision.

### **137T Cancellation of other visas**

- (1) If a person's visa is cancelled under section 137Q, a visa held by another person because of being a member of the family unit of the person is also cancelled.
- (2) The cancellation under subsection (1) of this section is set aside if the cancellation of the person's visa under section 137Q is set aside under Part 5.

## **Subdivision H—General provisions on cancellation**

### **138 Cancellation and revocation of cancellation of visas—how and when**

- (1) The following decisions are taken to be made by the Minister causing a record to be made of the decision:
  - (a) a decision to cancel a visa, or not to cancel a visa;
  - (b) a decision to revoke the cancellation of a visa, or not to revoke the cancellation of a visa.
- (2) The record must state the day and time of its making.

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- (3) The decision is taken to have been made on the day and at the time the record is made.
- (4) The Minister has no power to vary or revoke the decision after the day and time the record is made.
- (5) Failure to comply with subsection (2) does not affect the validity of the decision or the operation of subsection (4).

**139 Visas held by 2 or more**

If a visa is held by 2 or more non-citizens:

- (a) Subdivisions C, D, E, F and FA and this Subdivision apply as if each of them were the holder of the visa; and
- (b) to avoid doubt, if the visa is cancelled because of one non-citizen being its holder, it is cancelled so that all those non-citizens cease to hold the visa.

**140 Cancellation of visa results in other cancellation**

- (1) If a person's visa is cancelled under section 109 (incorrect information), 116 (general power to cancel), 128 (when holder outside Australia), 133A (Minister's personal powers to cancel visas on section 109 grounds), 133C (Minister's personal powers to cancel visas on section 116 grounds) or 137J (student visas), a visa held by another person because of being a member of the family unit of the person is also cancelled.
- (2) If:
  - (a) a person's visa is cancelled under section 109 (incorrect information), 116 (general power to cancel), 128 (when holder outside Australia), 133A (Minister's personal powers to cancel visas on section 109 grounds), 133C (Minister's personal powers to cancel visas on section 116 grounds) or 137J (student visas); and
  - (b) another person to whom subsection (1) does not apply holds a visa only because the person whose visa is cancelled held a visa;



the Minister may, without notice to the other person, cancel the other person's visa.

(3) If:

- (a) a person's visa (the *cancelled visa*) is cancelled under any provision of this Act; and
- (b) the person is a parent of another person; and
- (c) the other person holds a particular visa (the *other visa*), that was granted under section 78 (child born in Australia) because the parent held the cancelled visa;

the other visa is also cancelled.

(4) If:

- (a) a visa is cancelled under subsection (1), (2) or (3) because another visa is cancelled; and
- (b) the cancellation of the other visa is revoked under section 131, 133F, 137L or 137N;

the cancellation under subsection (1), (2) or (3) is revoked.

## **Division 3A—Sponsorship**

### **Subdivision A—Preliminary**

#### **140A Division applies to prescribed kinds of visa**

This Division applies to visas of a prescribed kind (however described).

#### **140AA Division 3A—purposes**

The purposes of this Division are as follows:

- (a) to provide a framework for a temporary sponsored work visa program in order to address genuine skills shortages;
- (b) to address genuine skills shortages in the Australian labour market:
  - (i) without displacing employment and training opportunities for Australian citizens and Australian permanent residents (within the meaning of the regulations); and
  - (ii) without the temporary sponsored work visa program serving as a mainstay of the skilled migration program;
- (c) to balance the objective of ensuring employment and training opportunities for Australian citizens and Australian permanent residents with that of upholding the rights of non-citizens sponsored to work in Australia under the program;
- (d) to impose obligations on sponsors to ensure that:
  - (i) non-citizens sponsored to work in Australia under the program are protected; and
  - (ii) the program is not used inappropriately;
- (e) to enable monitoring, detection, deterrence and enforcement in relation to any inappropriate use of the program;
- (f) to give Fair Work Inspectors (including the Fair Work Ombudsman) and inspectors appointed under this Division

the necessary powers and functions to investigate compliance with the program.

**140AB Ministerial Advisory Council on Skilled Migration**

- (1) The Minister must take all reasonable steps to ensure that, at all times, there is in existence a council that:
  - (a) is known as the Ministerial Advisory Council on Skilled Migration; and
  - (b) is established under the executive power of the Commonwealth; and
  - (c) includes representatives of unions, industry and State and Territory governments and other members (if any) nominated by the Minister; and
  - (d) meets at least quarterly.
- (2) Without limiting its functions apart from this section, the Ministerial Advisory Council on Skilled Migration is to provide advice to the Minister in relation to the temporary sponsored work visa program.

**Subdivision B—Approving sponsors and nominations**

**140E Minister to approve sponsor**

- (1) The Minister must approve a person as a sponsor in relation to one or more classes prescribed for the purpose of subsection (2) if prescribed criteria are satisfied.

Note: A person (other than a Minister) who is a party to a work agreement is an approved sponsor and does not need to be approved as a sponsor under this section: see paragraph (b) of the definition of *approved sponsor*.
- (2) The regulations must prescribe classes in relation to which a person may be approved as a sponsor.
- (3) Different criteria may be prescribed for:
  - (a) different kinds of visa (however described); and

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- (b) different classes in relation to which a person may be approved as a sponsor; and
- (c) different classes of person within a class in relation to which a person may be approved as a sponsor.

**140F Process for approving sponsors**

- (1) The regulations may establish a process for the Minister to approve a person as a sponsor.
- (2) Different processes may be prescribed for:
  - (a) different kinds of visa (however described); and
  - (b) different classes in relation to which a person may be approved as a sponsor.

**140G Terms of approval as a sponsor**

- (1) An approval as a sponsor may be on terms specified in the approval.
- (2) The terms must be of a kind prescribed by the regulations.

Note: The following are examples of the kinds of terms that might be set out in the regulations:

- (a) the number of people whom the approved sponsor may sponsor under the approval;
  - (b) the duration of the approval.
- (3) An actual term may be prescribed by the regulations.
  - (4) Different kinds of terms may be prescribed for:
    - (a) different kinds of visa (however described); and
    - (b) different classes in relation to which a person may be approved as a sponsor.

**140GA Variation of terms of approval as a sponsor**

- (1) The regulations may establish a process for the Minister to vary a term of a person's approval as a sponsor.

- (2) The Minister must vary a term specified in an approval if:
  - (a) the term is of a kind prescribed by the regulations for the purposes of this paragraph; and
  - (b) prescribed criteria are satisfied.
- (3) Different processes and different criteria may be prescribed for:
  - (a) different kinds of visa (however described); and
  - (b) different kinds of terms; and
  - (c) different classes in relation to which a person may be approved as a sponsor.

### **140GB Minister to approve nominations**

- (1) An approved sponsor may nominate:
  - (a) an applicant, or proposed applicant, for a visa of a prescribed kind (however described), in relation to:
    - (i) the applicant or proposed applicant's proposed occupation; or
    - (ii) the program to be undertaken by the applicant or proposed applicant; or
    - (iii) the activity to be carried out by the applicant or proposed applicant; or
  - (b) a proposed occupation, program or activity.
- (2) The Minister must approve an approved sponsor's nomination if:
  - (a) in a case to which section 140GBA applies, unless the sponsor is exempt under section 140GBB or 140GBC—the labour market testing condition under section 140GBA is satisfied; and
  - (b) in any case—the prescribed criteria are satisfied.

Note: Section 140GBB provides an exemption from the labour market testing condition in the case of a major disaster. Section 140GBC provides for exemptions from the labour market testing condition to apply in relation to the required skill level and occupation for a nominated position.

- (3) The regulations may establish a process for the Minister to approve an approved sponsor's nomination.
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- (4) Different criteria and different processes may be prescribed for:
  - (a) different kinds of visa (however described); and
  - (b) different classes in relation to which a person may be approved as a sponsor.

**140GBA Labour market testing—condition**

*Scope*

- (1) This section applies to a nomination by an approved sponsor, under section 140GB, if:
  - (a) the approved sponsor is in a class of sponsors prescribed by the regulations; and
  - (b) the sponsor nominates:
    - (i) a proposed occupation for the purposes of paragraph 140GB(1)(b); and
    - (ii) a particular position, associated with the nominated occupation, that is to be filled by a visa holder, or applicant or proposed applicant for a visa, identified in the nomination; and
  - (c) it would not be inconsistent with any international trade obligation of Australia determined under subsection (2) to require the sponsor to satisfy the labour market testing condition in this section, in relation to the nominated position.
- (2) For the purposes of paragraph (1)(c), the Minister may, by legislative instrument, determine (as an international trade obligation of Australia) an obligation of Australia under international law that relates to international trade, including such an obligation that arises under any agreement between Australia and another country, or other countries.

*Labour market testing condition*

- (3) The labour market testing condition is satisfied if:
    - (a) the Minister is satisfied that the approved sponsor has undertaken labour market testing in relation to the nominated
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- position within a period determined under subsection (4) in relation to the nominated occupation; and
- (b) the nomination is accompanied by:
- (i) evidence in relation to that labour market testing (see subsections (5) and (6)); and
  - (ii) if one or more Australian citizens or Australian permanent residents were, in the previous 4 months, made redundant or retrenched from positions in the nominated occupation in a business, or an associated entity, of the approved sponsor—information about those redundancies or retrenchments; and
- (d) having regard to that evidence, and information (if any), the Minister is satisfied that:
- (i) a suitably qualified and experienced Australian citizen or Australian permanent resident is not readily available to fill the nominated position; and
  - (ii) a suitably qualified and experienced eligible temporary visa holder is not readily available to fill the nominated position.
- (4) For the purposes of paragraph (3)(a), the Minister may, by legislative instrument, determine a period within which labour market testing is required in relation to a nominated occupation.
- (4A) Despite paragraph (3)(a) and subsection (4), if there have been redundancies or retrenchments as mentioned in subparagraph (3)(b)(ii), the labour market testing must be undertaken after those redundancies and retrenchments.

*Evidence of labour market testing*

- (5) For the purposes of subparagraph (3)(b)(i), the evidence in relation to the labour market testing:
- (a) must include information about the approved sponsor's attempts to recruit suitably qualified and experienced Australian citizens or Australian permanent residents to the position and any other similar positions (see also subsection (6)); and

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- (b) may also include other evidence, such as:
  - (i) copies of, or references to, any research released in the previous 4 months relating to labour market trends generally and in relation to the nominated occupation; or
  - (ii) expressions of support from Commonwealth, State and Territory government authorities with responsibility for employment matters; or
  - (iii) any other type of evidence determined by the Minister, by legislative instrument, for this subparagraph.
- (6) For the purposes of paragraph (5)(a), the information mentioned:
  - (a) must include details of:
    - (i) any advertising (paid or unpaid) of the position, and any similar positions, commissioned or authorised by the approved sponsor; and
    - (ii) fees and other expenses paid (or payable) for that advertising; and
  - (b) may also include other information, such as:
    - (i) information about the approved sponsor's participation in relevant job and career expositions; or
    - (ii) details of any other fees and expenses paid (or payable) for any recruitment attempts mentioned in paragraph (5)(a) (including any participation mentioned in subparagraph (i) of this paragraph); or
    - (iii) details of the results of such recruitment attempts, including details of any positions filled as a result.
- (6A) If the approved sponsor elects to provide other evidence and information as mentioned in paragraphs (5)(b) and (6)(b), the Minister may take that evidence and information into account. But if the approved sponsor elects not to provide such other evidence or information, the Minister is not to treat the nomination less favourably merely because of that fact.



*Definitions*

(7) In this section:

***associated entity*** has the same meaning as in Part 2A of the regulations.

***Australian permanent resident*** means an Australian permanent resident within the meaning of the regulations.

***eligible temporary visa holder***: a person is an ***eligible temporary visa holder*** in relation to a nomination by an approved sponsor if, at the time when the nomination is made:

- (a) the person is the holder of a temporary visa referred to in the regulations as a Subclass 417 (Working Holiday) visa or a Subclass 462 (Work and Holiday) visa; and
- (b) the person is employed in the agricultural sector by the approved sponsor (or an associated entity of the approved sponsor); and
- (c) the temporary visa does not prohibit the person from performing that employment.

***labour market testing***, in relation to a nominated position, means testing of the Australian labour market to demonstrate whether a suitably qualified and experienced Australian citizen or Australian permanent resident is readily available to fill the position.

**140GBB Labour market testing—major disaster exemption**

- (1) An approved sponsor is exempt from the requirement to satisfy the labour market testing condition in section 140GBA if an exemption under subsection (2) of this section is in force in relation to the sponsor.
- (2) The Minister may, in writing, exempt a sponsor from the requirement to satisfy the labour market testing condition in section 140GBA if the Minister is satisfied that:
  - (a) an event (a ***major disaster***) has occurred in Australia, whether naturally or otherwise, that has such a significant

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- impact on individuals that a government response is required;  
and
- (b) the exemption is necessary or desirable in order to assist disaster relief or recovery.
- (3) In deciding whether a major disaster has occurred, the Minister must have regard to matters including the following:
- (a) the number of individuals affected;
- (b) the extent to which the nature or extent of the disaster is unusual.
- (4) An exemption of an approved sponsor under subsection (2):
- (a) may be expressed to apply in relation to:
- (i) a specified nomination by the sponsor; or
- (ii) a specified class of nominations by the sponsor; and
- (b) must be expressed to apply to a particular sponsor specified in the exemption rather than a class of sponsors, despite subsections 33(3A) and (3AB) of the *Acts Interpretation Act 1901*.
- (5) An exemption made under subsection (2) is not a legislative instrument.

**140GBC Labour market testing—skill and occupational exemptions**

*Scope*

- (1) This section applies to a nomination by an approved sponsor, under section 140GB, if the sponsor nominates:
- (a) a proposed occupation for the purposes of paragraph 140GB(1)(b); and
- (b) a particular position, associated with the nominated occupation, that is to be filled by a visa holder, or applicant or proposed applicant for a visa, identified in the nomination.

*Skill and occupational exemptions*

- (2) The approved sponsor is exempt from the requirement to satisfy the labour market testing condition in section 140GBA if:
- (a) either or both of the following are required for the nominated position, in relation to the nominated occupation:
    - (i) a relevant bachelor degree or higher qualification, other than a protected qualification;
    - (ii) 5 years or more of relevant experience, other than protected experience; and
  - (b) the nominated occupation is specified for the purposes of this subsection under subsection (4).
- (3) The approved sponsor is exempt from the requirement to satisfy the labour market testing condition in section 140GBA if:
- (a) either or both of the following are required for the nominated position, in relation to the nominated occupation:
    - (i) a relevant associate degree, advanced diploma or diploma covered by the AQF, other than a protected qualification;
    - (ii) 3 years or more of relevant experience, other than protected experience; and
  - (b) the nominated occupation is specified for the purposes of this subsection under subsection (4).

*Legislative instrument*

- (4) The Minister may, by legislative instrument:
- (a) specify an occupation (or occupations) for the purposes of subsection (2); and
  - (b) specify an occupation (or occupations) for the purposes of subsection (3).
- (5) Despite regulations made for the purposes of paragraph 44(2)(b) of the *Legislation Act 2003*, section 42 (disallowance) of that Act applies to an instrument made under subsection (4).

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*Definitions*

(6) In this section:

**AQF** means the Australian Qualifications Framework within the meaning of the *Higher Education Support Act 2003*.

**protected experience** means experience in the field of engineering (including shipping engineering) or nursing.

**protected qualification** means a qualification (however described) in engineering (including shipping engineering) or nursing.

**140GC Work agreements**

For the purposes of the definition of **work agreement**, the regulations may prescribe requirements that an agreement must satisfy.

Note: A person (other than a Minister) who is a party to a work agreement is an approved sponsor and must satisfy sponsorship obligations.

**Subdivision C—Sponsorship obligations**

**140H Sponsorship obligations—general**

*Requirement to satisfy sponsorship obligations*

(1) A person who is or was an approved sponsor must satisfy the sponsorship obligations prescribed by the regulations.

*Work agreements and sponsorship obligations*

(2) However, if:

- (a) a person (other than a Minister) is or was a party to a work agreement; and
- (b) a sponsorship obligation, that would otherwise be imposed on the person by the regulations, is varied by a term of the agreement;

then, the person must satisfy the sponsorship obligation as so varied.

- (3) If:
- (a) a person (other than a Minister) is or was a party to a work agreement; and
  - (b) an obligation, identified in the agreement as a sponsorship obligation, is imposed on the person by a term of the agreement;

then, the person must also satisfy the sponsorship obligation imposed by the term of the agreement.

*Sponsorship obligation regulations*

- (4) The regulations may require a person to satisfy sponsorship obligations in respect of each visa holder sponsored by the person or generally.
- (5) Sponsorship obligations must be satisfied in the manner (if any) and within the period (if any) prescribed by the regulations.
- (6) Different kinds of sponsorship obligations may be prescribed for:
  - (a) different kinds of visa (however described); and
  - (b) different classes in relation to which a person may be, or may have been, approved as a sponsor.
- (7) The regulations cannot prescribe, as a sponsorship obligation, an obligation to pay the Commonwealth an amount relating to the cost of a person's immigration detention.

**140HA Sponsorship obligations—Minister's responsibility**

- (1) Subject to subsection (2), the Minister must take all reasonable steps to ensure that regulations made under section 504 for the purposes of subsection 140H(1) include obligations in relation to the following matters:
  - (a) paying a market salary rate (however described) to a visa holder;

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- (b) paying prescribed costs to the Commonwealth in relation to locating a former visa holder, and removing a former visa holder from Australia;
  - (c) paying prescribed costs of the departure of a visa holder (or a former visa holder) from Australia;
  - (d) complying with prescribed requirements to keep information, and provide information to the Minister;
  - (e) notifying the Department of prescribed changes in the circumstances of an approved sponsor, a former approved sponsor, a visa holder or a former visa holder;
  - (f) cooperating with the exercise of powers under or for the purposes of Subdivision F (which deals with inspector powers);
  - (g) ensuring that a visa holder participates in an occupation, program or activity nominated by an approved sponsor (including by preventing the on-hire of a visa holder);
  - (h) requiring an approved sponsor or former approved sponsor not to transfer, charge or recover prescribed costs;
  - (i) requiring an approved sponsor or former approved sponsor to meet prescribed training requirements.
- (2) For any particular matter mentioned in subsection (1), the Minister must take all reasonable steps to ensure that the obligations in the relevant regulations apply in relation to:
- (a) all approved sponsors or former approved sponsors; or
  - (b) a specified class (or classes) of approved sponsors or former approved sponsors, and not to all approved sponsors or former approved sponsors.
- (3) Subsection (1) does not limit the sponsorship obligations that may be prescribed for the purposes of subsection 140H(1).

**140J Amounts payable in relation to sponsorship obligations**

- (1) If an amount is payable under the regulations by a person who is or was an approved sponsor in relation to a sponsorship obligation,

the person is not liable to pay to the Commonwealth more than the lesser of:

- (a) if a limit is prescribed by the regulations—that limit; and
- (b) the actual costs incurred by the Commonwealth.

Example: If the Commonwealth incurs costs in locating a person, the person who is or was an approved sponsor is not liable to pay to the Commonwealth more than the total amount of those costs or a lesser amount (if a limit is prescribed in the regulations and that limit is less than the actual costs incurred by the Commonwealth).

- (2) The Minister may, by legislative instrument, specify one or more methods for working out the actual costs incurred by the Commonwealth in relation to a sponsorship obligation.
- (3) If an amount is payable under the regulations by a person who is or was an approved sponsor in relation to a sponsorship obligation, the person (the *sponsor*) is taken not to have satisfied the sponsorship obligation if a visa holder or former visa holder, or a person on behalf of a visa holder or former visa holder, reimburses the sponsor or another person for all or part of the amount.

## **Subdivision D—Enforcement**

### **140K Sanctions for failing to satisfy sponsorship obligations**

*Actions that may be taken in relation to approved sponsors*

- (1) If a person is an approved sponsor and fails to satisfy an applicable sponsorship obligation, one or more of the following actions may be taken:
  - (a) the Minister may do one or more of the following:
    - (i) if regulations are prescribed under section 140L, bar the sponsor under subsection 140M(1) from doing certain things;
    - (ii) if regulations are prescribed under section 140L, cancel the person's approval as a sponsor under subsection 140M(1);
    - (iii) apply for a civil penalty order;

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- (iv) accept an undertaking under section 119 of the Regulatory Powers Act, for the purposes of this Subdivision from the person;
- (v) if the Minister considers that the person has breached such an undertaking—apply for an order under section 120 of the Regulatory Powers Act, for the purposes of this Subdivision;
- (b) the person may be issued with an infringement notice under regulations made for the purposes of section 506A as an alternative to proceedings for a civil penalty order;
- (c) an authorized officer may require and take a security under section 269 or enforce a security already taken under that section.

*Actions that may be taken in relation to former approved sponsors*

- (2) If a person was an approved sponsor and fails to satisfy an applicable sponsorship obligation, one or more of the following actions may be taken:
  - (a) the Minister may do one or more of the following:
    - (i) if regulations are prescribed under section 140L, bar the person under subsection 140M(2) from making future applications for approval;
    - (ii) apply for a civil penalty order;
    - (iii) accept an undertaking under section 119 of the Regulatory Powers Act, for the purposes of this Subdivision from the person;
    - (iv) if the Minister considers that the person has breached such an undertaking—apply for an order under section 120 of the Regulatory Powers Act, for the purposes of this Subdivision;
  - (b) the person may be issued with an infringement notice under regulations made for the purposes of section 506A as an alternative to proceedings for a civil penalty order;
  - (c) an authorized officer may require and take a security under section 269 or enforce a security already taken under that section.



- (3) To avoid doubt, subsections (1) and (2) do not limit the circumstances in which:
- (a) the Minister may:
    - (i) bar a sponsor under section 140M from doing certain things; or
    - (ii) cancel a person's approval as a sponsor under section 140M; or
  - (b) an authorized officer may require and take a security under section 269 or enforce a security already taken under that section.

**140L Regulations may prescribe circumstances in which sponsor may be barred or sponsor's approval cancelled**

*Circumstances in which the Minister may take action*

- (1) The regulations may prescribe:
- (a) either or both of the following:
    - (i) circumstances in which the Minister may take one or more of the actions mentioned in section 140M in relation to a person who is or was an approved sponsor if the Minister is reasonably satisfied that the person has failed to satisfy a sponsorship obligation in the manner (if any) or within the period (if any) prescribed by the regulations;
    - (ii) other circumstances in which the Minister may take one or more of the actions mentioned in section 140M; and
  - (b) the criteria to be taken into account by the Minister in determining what action to take under section 140M.

*Circumstances in which the Minister must take action*

- (2) The regulations may prescribe either or both of the following:
- (a) circumstances in which the Minister must take one or more of the actions mentioned in section 140M in relation to a person who is or was an approved sponsor if the Minister is reasonably satisfied that the person has failed to satisfy a

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- sponsorship obligation in the manner (if any) or within the period (if any) prescribed by the regulations;
- (b) other circumstances in which the Minister must take one or more of the actions mentioned in section 140M.
- (3) Different circumstances and different criteria may be prescribed for:
- (a) different kinds of visa (however described); and
- (b) different classes in relation to which a person may be, or may have been, approved as a sponsor.

**140M Cancelling approval as a sponsor or barring a sponsor**

*Actions that may be taken in relation to approved sponsors*

- (1) If regulations are prescribed under section 140L, the Minister may (or must) take one or more of the following actions in relation to an approved sponsor:
- (a) cancelling the approval of a person as a sponsor in relation to a class to which the sponsor belongs;
- (b) cancelling the approval of a person as a sponsor for all classes to which the sponsor belongs;
- (c) barring the sponsor, for a specified period, from sponsoring more people under the terms of one or more existing specified approvals for different kinds of visa (however described);
- (d) barring the sponsor, for a specified period, from making future applications for approval as a sponsor in relation to one or more classes prescribed by the regulations for the purpose of subsection 140E(2).

*Action that may be taken in relation to former approved sponsors*

- (2) If regulations are prescribed under section 140L and a person was an approved sponsor, the Minister may (or must) bar the person, for a specified period, from making future applications for approval as a sponsor in relation to one or more classes prescribed by the regulations for the purpose of subsection 140E(2).

**140N Process for cancelling or barring approval as a sponsor**

- (1) The regulations may establish a process for the Minister to cancel the approval of a person as a sponsor under section 140M.
- (2) The regulations may establish a process for the Minister to place a bar on a person under section 140M.
- (3) Different processes may be prescribed for:
  - (a) different kinds of visa (however described); and
  - (b) different classes in relation to which a person may be, or may have been, approved as a sponsor.

**140O Waiving a bar**

- (2) The Minister may, in prescribed circumstances, waive a bar placed on a person under section 140M.
- (3) The regulations may prescribe the criteria to be taken into account by the Minister in determining whether to waive the bar.
- (4) Different circumstances and different criteria may be prescribed for:
  - (a) different kinds of visa (however described); and
  - (b) different classes in relation to which a person may be, or may have been, approved as a sponsor.

**140P Process for waiving a bar**

- (1) The regulations may establish a process for the Minister to waive a bar placed on a person under section 140M.
- (2) Different processes may be prescribed for:
  - (a) different kinds of visa (however described); and
  - (b) different classes in relation to which a person may be, or may have been, approved as a sponsor.

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**140Q Civil penalty—failing to satisfy sponsorship obligations**

- (1) A person contravenes this subsection if:
- (a) the regulations impose a sponsorship obligation on the person; and
  - (b) the person fails to satisfy the sponsorship obligation in the manner (if any) or within the period (if any) prescribed by the regulations.

Civil penalty: 60 penalty units.

- (2) A person contravenes this subsection if:
- (a) the person (other than a Minister) is a party to a work agreement; and
  - (b) the terms of the work agreement:
    - (i) vary a sponsorship obligation that would otherwise be imposed on the person by the regulations; or
    - (ii) impose an obligation, identified in the agreement as a sponsorship obligation, on the person; and
  - (c) the person fails to satisfy the sponsorship obligation in the manner (if any) or within the period (if any) specified in the work agreement.

Civil penalty: 60 penalty units.

**140RA Enforceable undertakings**

*Enforceable provision*

- (1) Section 140H is ***enforceable***, in relation to a sponsorship obligation, under Part 6 of the Regulatory Powers Act.

Note: Part 6 of the Regulatory Powers Act creates a framework for accepting and enforcing undertakings relating to compliance with provisions.

*Authorised person*

- (2) For the purposes of Part 6 of the Regulatory Powers Act, the Minister is an **authorised person** in relation to the provision mentioned in subsection (1).

*Relevant court*

- (3) For the purposes of Part 6 of the Regulatory Powers Act, an eligible court is a **relevant court** in relation to the provision mentioned in subsection (1).

*Enforceable undertaking may be published on the internet*

- (4) The authorised person in relation to the provision mentioned in subsection (1) may publish an undertaking given in relation to the provision on the Department's website.

*Extension to external Territories*

- (5) Part 6 of the Regulatory Powers Act, as it applies in relation to the provision mentioned in subsection (1), extends to a Territory to which this Act extends.

Note: See section 7 of this Act.

## **Subdivision E—Liability and recovery of amounts**

### **140S Liability to pay amounts**

- (1) This section applies if a person who is or was an approved sponsor is required to pay an amount of a kind prescribed in the regulations to the Commonwealth, a State or Territory or another person (the **payee**) in relation to a sponsorship obligation.
- (2) The payee may recover the amount as a debt due to the payee in an eligible court.
- (3) To avoid doubt, an amount may be recovered under this section if proceedings for a civil penalty order are brought under Part 8D and

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discontinued or completed without the court making an order of a kind referred to in subsection 486S(4) in relation to the amount.

- (4) For the purpose of paragraph (e) of the definition of *eligible court*, the regulations may prescribe a court of a State or Territory in which an amount may be recovered under this section.

**140SA Interest up to judgment**

- (1) A party to proceedings under section 140S may apply to the eligible court for an order under subsection (2).
- (2) If an application is made under subsection (1), the eligible court must, unless good cause is shown to the contrary, either:
- (a) order that there be included in the sum for which judgment is given interest at such rate as the eligible court thinks fit on the whole or any part of the money for the whole or any part of the period between:
    - (i) the date when the cause of action arose; and
    - (ii) the date as of which judgment is entered; or
  - (b) without proceeding to calculate interest in accordance with paragraph (a)—order that there be included in the sum for which judgment is given, a lump sum instead of any such interest.
- (3) Subsection (2) does not:
- (a) authorise the giving of interest upon interest or of a sum instead of such interest; or
  - (b) apply in relation to any debt upon which interest is payable as of right, whether because of an agreement or otherwise; or
  - (c) authorise the giving of interest, or a sum instead of interest, otherwise than by consent, upon any sum for which judgment is given by consent.

**140SB Interest on judgment**

A judgment debt under a judgment of an eligible court under section 140S carries interest:

- (a) from the date as of which the judgment is entered; and
- (b) at the rate that would apply under section 52 of the *Federal Court of Australia Act 1976* as if the debt were a judgment debt to which that section applies.

**140SC Certain plaintiffs may choose small claims procedure in magistrates courts**

- (1) This section applies if:
  - (a) a person brings proceedings under section 140S in a magistrates court; and
  - (b) the person indicates, in a manner prescribed by the regulations or by rules of court relating to that court, that the person wants a small claims procedure to apply in relation to the proceeding.
- (2) The procedure is governed by the following conditions:
  - (a) the court may not award an amount exceeding \$5,000 or such higher amount as is prescribed;
  - (b) the court may act in an informal manner, is not bound by any rules of evidence, and may act without regard to legal forms and technicalities;
  - (c) at any stage of the action, the court may amend the papers initiating the action if sufficient notice is given to any party adversely affected by the amendment;
  - (d) a person is not entitled to legal representation unless allowed by the court.
- (3) If the court allows a person to have legal representation, the court may, if it thinks fit, do so subject to conditions designed to ensure that a party is not unfairly disadvantaged.
- (4) Despite paragraph (2)(d) and subsection (3):
  - (a) in a case heard in a court of a State—if, in a particular proceeding (whatever the nature of the proceeding) the law of the State prohibits or restricts legal representation of the parties, the regulations may prohibit or restrict legal

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representation of the parties to the same extent as that law;  
and

- (b) in a case heard in a court of a Territory—the regulations may prohibit or restrict legal representation of the parties.

**140T Notice regarding amount of debt or other amount**

- (1) Where a debt, or other amount, that a person is required to pay to the Commonwealth becomes payable, the Minister may issue a notice in writing stating the amount of the debt or other amount.
- (2) In any proceedings a notice under this section is prima facie evidence that the amount of the debt or other amount is that stated in the notice.

**140U Liability is in addition to any other liability**

Any liability created under this Division is in addition to any liability created under:

- (a) this or any other Act; or  
(b) regulations made under this or any other Act.

**Subdivision F—Inspector powers**

**140UA Exercise of inspector powers**

- (1) An inspector may exercise powers under this Subdivision for a purpose set out in section 140X.

Note: Inspectors include Fair Work Inspectors (see section 140V).

- (2) A Fair Work Inspector may, subject to section 706 of the *Fair Work Act 2009*, exercise compliance powers under Subdivision D of Division 3 of Part 5-2 of that Act for the purposes of this Subdivision.

Note: Under paragraph 706(1)(d) of the *Fair Work Act 2009*, a Fair Work Inspector may exercise certain compliance powers for the purposes of a provision of another Act that confers functions or powers on Fair Work Inspectors.



## 140V Inspectors

### *Who is an inspector?*

- (1A) For the purposes of this Act, each of the following is an **inspector**:
- (a) a person, or a member of a class of persons, appointed under subsection (1) (an **appointed inspector**);
  - (b) a Fair Work Inspector.

### *Appointed inspectors*

- (1) The Minister may, by written instrument:
  - (a) appoint a person to be an inspector; or
  - (b) appoint a class of persons to be inspectors.
- (2) An appointed inspector is appointed for the period specified in the instrument of appointment, which must not be longer than the period specified in regulations made for the purposes of this subsection.
- (3) An appointed inspector has the powers conferred on an inspector by this Division, or the regulations, that are specified in his or her instrument of appointment.

### *Fair Work Inspectors*

- (4) An inspector who is a Fair Work Inspector has the powers conferred on an inspector by this Division or the regulations.
- (5) A Fair Work Inspector continues to be an inspector for the purposes of this Act while he or she continues to be a Fair Work Inspector (under the *Fair Work Act 2009*).

Note: The Minister may give written directions specifying the manner in which, and any conditions and qualifications subject to which, powers conferred on inspectors are to be exercised: see section 499.

## 140W Identity cards

### *General*

- (1A) An inspector's identity card is:
- (a) for an appointed inspector—the identity card issued to the inspector under subsection (1); or
  - (b) for an inspector who is a Fair Work Inspector—the identity card issued to the inspector under the *Fair Work Act 2009* (see section 702 of that Act).

### *Identity cards—appointed inspectors*

- (1) The Minister must issue an identity card to an appointed inspector.
- (2) An identity card for an appointed inspector:
- (a) must be in the form prescribed by the regulations; and
  - (b) must contain a recent photograph of the inspector.

### *Identity card to be carried*

- (3) An inspector must carry the identity card at all times when exercising powers as an inspector.

### *Offence*

- (4) A person commits an offence if:
- (a) the person has been issued with an identity card under subsection (1); and
  - (b) the person ceases to be an inspector; and
  - (c) the person does not return his or her identity card to the Secretary within 14 days after ceasing to be an inspector.

Penalty: 1 penalty unit.

- (5) An offence against subsection (4) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

- (6) However, a person does not commit an offence against subsection (4) if the person's identity card was lost or destroyed.

Note: A defendant bears an evidential burden in relation to the matter in subsection (6): see subsection 13.3(3) of the *Criminal Code*.

### **140X Purpose for which powers of inspectors may be exercised**

The powers of an inspector under this Subdivision may be exercised:

- (a) for the purpose of investigating whether a sponsorship obligation is being, or has been, complied with; or
- (aa) for the purpose of investigating whether a person who is required under subsection 140H(1) to satisfy a sponsorship obligation has committed an offence, or contravened a civil penalty provision, under Subdivision C or D of Division 12 of this Part; or
- (b) for a purpose prescribed by the regulations.

### **140XA When powers of inspectors may be exercised**

An inspector may exercise powers under this Subdivision:

- (a) at any time during working hours; or
- (b) at any other time, if the inspector reasonably believes that it is necessary to do so for the purposes referred to in section 140X.

### **140XB Power of inspectors to enter premises or places**

- (1) An inspector may, without force, enter business premises or another place, if the inspector reasonably believes that there are records or documents relevant to the purposes referred to in section 140X on the premises or at the place, or accessible from a computer on the premises or at the place.
- (2) The inspector must, either before or as soon as practicable after entering those premises or that place, show his or her identity card to the occupier, or another person who apparently represents the

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occupier, if the occupier or other person is present at the premises or place.

**140XC Powers of inspectors while on premises or at a place**

- (1) An inspector who enters premises or a place under section 140XB may exercise one or more of the following powers while on the premises or at the place:
  - (a) inspect any work, process or object;
  - (b) interview any person;
  - (c) require a person to tell the inspector who has custody of, or access to, a record or document;
  - (d) require a person who has the custody of, or access to, a record or document to produce the record or document to the inspector either while the inspector is on the premises or at the place, or within a specified period;
  - (e) inspect, and make copies of, any record or document that:
    - (i) is kept on the premises or at the place; or
    - (ii) is accessible from a computer that is kept on the premises or at the place.
- (2) A Fair Work Inspector who enters premises or a place under the *Fair Work Act 2009* for any compliance purpose under section 706 of that Act may, for a purpose mentioned in section 140X of this Act, exercise any of the powers mentioned in subsection (1) of this section while on the premises or at the place.

Note: See also sections 140XG, 140XH and 140XI (which deal with self-incrimination and produced documents etc.).

**140XD Persons assisting inspectors**

- (1) A person (the *assistant*) may accompany an inspector onto premises or to a place mentioned in subsection 140XC(1) to assist the inspector if:
  - (a) for any inspector—the Secretary or Australian Border Force Commissioner is satisfied that:
    - (i) the assistance is necessary and reasonable; and

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- (ii) the assistant has suitable qualifications and experience to properly assist the inspector; or
  - (b) for an inspector who is a Fair Work Inspector—the assistant is authorised to accompany the inspector onto the premises or to the place under section 710 of the *Fair Work Act 2009* for any compliance purpose under section 706 of that Act.
- (2) The assistant:
  - (a) may do such things on the premises or at the place as the inspector requires to assist the inspector to exercise powers under this Subdivision; but
  - (b) must not do anything that the inspector does not have power to do.
- (3) Anything done by the assistant is taken for all purposes to have been done by the inspector.

**140XE Power to ask for person's name and address**

- (1) An inspector may require a person to tell the inspector the person's name and address if the inspector reasonably believes that the person has contravened a civil penalty provision.
- (2) If the inspector reasonably believes that the name or address is false, the inspector may require the person to give evidence of its correctness.
- (3) A person contravenes this subsection if:
  - (a) the inspector requires the person to do a thing referred to in subsection (1) or (2); and
  - (b) the inspector advises the person that he or she may contravene a civil penalty provision if he or she fails to comply with the requirement; and
  - (c) the inspector shows his or her identity card to the person; and
  - (d) the person does not comply with the requirement.

Civil penalty: 60 penalty units.

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- (4) Subsection (3) does not apply if the person has a reasonable excuse.

**140XF Power to require persons to produce records or documents**

- (1) An inspector may require a person, by notice, to produce a record or document to the inspector.

- (2) The notice must:

- (a) be in writing; and
- (b) be served on the person; and
- (c) require the person to produce the record or document at a specified place within a specified period of at least 7 days.

The notice may be served by sending the notice to the person's fax number.

- (3) A person contravenes this subsection if:

- (a) the person is served with a notice to produce under subsection (1); and
- (b) the person fails to comply with the notice.

Civil penalty: 60 penalty units.

- (4) Subsection (3) does not apply if the person has a reasonable excuse.

**140XG Self-incrimination**

- (1) A person is not excused from producing a record or document under paragraph 140XC(1)(d), or subsection 140XF(1), on the ground that the production of the record or document might tend to incriminate the person or expose the person to a penalty.

- (2) However, in the case of an individual, none of the following are admissible in evidence against the individual in criminal proceedings:

- (a) the record or document produced;
- (b) producing the record or document;

(c) any information, document or thing obtained as a direct or indirect consequence of producing the record or document; except in proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code* (false or misleading information or documents) in relation to the information or document.

#### **140XH Certain records and documents are inadmissible**

The following are not admissible in evidence in criminal proceedings against an individual:

- (a) any record or document inspected or copied under paragraph 140XC(1)(e) of which the individual had custody, or to which the individual had access, when it was inspected or copied;
- (b) any information, document or thing obtained as a direct or indirect consequence of inspecting or copying a record or document of which the individual had custody, or to which the individual had access, when it was inspected or copied under paragraph 140XC(1)(e).

#### **140XI Power to keep records or documents**

- (1) If a record or document is produced to an inspector in accordance with this Subdivision, the inspector may:
  - (a) inspect, and make copies of, the record or document; and
  - (b) keep the record or document for such period as is necessary.
- (2) While an inspector keeps a record or document, the inspector must allow the following persons to inspect, or make copies of, the record or document at all reasonable times:
  - (a) the person who produced the record or document;
  - (b) any person otherwise entitled to possession of the record or document;
  - (c) a person authorised by the person referred to in paragraph (b).

**140XJ Disclosure of information by the Secretary or Australian Border Force Commissioner**

*Information to which this section applies*

- (1) This section applies to the following information:
  - (a) information acquired by an inspector in the course of performing functions, or exercising powers, as an inspector under this Subdivision;
  - (b) information acquired by a person in the course of assisting an inspector under section 140XD.

*Disclosure that is necessary or appropriate, or likely to assist administration or enforcement*

- (2) The Secretary or Australian Border Force Commissioner may disclose, or authorise the disclosure of, the information if the Secretary or Australian Border Force Commissioner reasonably believes:
  - (a) that it is necessary or appropriate to do so in the course of performing functions, or exercising powers, under Division 3A of Part 2 of this Act; or
  - (b) that the disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory.

**Subdivision G—Application of Division to partnerships and unincorporated associations**

**140ZB Partnerships—sponsorship rights and obligations**

- (1) This Division, the regulations made under it and any other provision of this Act as far as it relates to this Division or the regulations, apply to a partnership as if it were a person, but with the changes set out in this section and sections 140ZC and 140ZD.
- (2) A sponsorship right that would otherwise be exercisable by the partnership is exercisable by each partner instead.



- (3) A sponsorship obligation that would otherwise be imposed on the partnership:
  - (a) is imposed on each partner instead; but
  - (b) may be discharged by any of the partners.
- (4) Subject to section 140ZC, the partners are jointly and severally liable to pay an amount in relation to a sponsorship obligation.

### **140ZC Partnerships—offences and civil penalties**

- (1) An offence against this Division that would otherwise be committed by a partnership is taken to have been committed by each partner in the partnership, at the time the offence is committed, who:
  - (a) did the relevant act or made the relevant omission; or
  - (b) aided, abetted, counselled or procured the relevant act or omission; or
  - (c) was in any way knowingly concerned in, or party to, the relevant act or omission (whether directly or indirectly or whether by any act or omission of the partner).
- (2) A civil penalty provision of this Division that would otherwise be contravened by a partnership is taken to have been contravened by each partner in the partnership, at the time of the conduct constituting the contravention, who:
  - (a) engaged in the conduct; or
  - (b) aided, abetted, counselled or procured the conduct; or
  - (c) was in any way knowingly concerned in, or party to, the conduct (whether directly or indirectly or whether by any act or omission of the partner).
- (3) If a partner in a partnership contravenes a civil penalty provision, the civil penalty that may be imposed on the partner must not exceed an amount equal to one-fifth of the maximum penalty that could be imposed on a body corporate for the same contravention.

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- (4) For the purposes of subsections (1) and (2), to establish that a partnership engaged in particular conduct, it is sufficient to show that the conduct was engaged in by a partner:
  - (a) in the ordinary course of the business of the partnership; or
  - (b) within the scope of the actual or apparent authority of the partner.
- (5) For the purposes of subsection (1), to establish that a partnership had a particular state of mind when it engaged in particular conduct, it is sufficient to show that a relevant partner had the relevant state of mind.

**140ZD Partnership ceases to exist**

- (1) If a partnership ceases to exist, the persons who were partners immediately before the cessation must continue to satisfy any applicable sponsorship obligation.
- (2) Section 140ZB applies as if:
  - (a) references to a partnership were to a partnership that ceases to exist; and
  - (b) references to partners of the partnership were to the persons who were partners immediately before the cessation.
- (3) For the purpose of this section, a partnership ceases to exist if the dissolution of the partnership does not result in the creation of another partnership.

**140ZE Unincorporated associations—sponsorship rights and obligations**

- (1) This Division, the regulations made under it and any other provision of this Act as far as it relates to this Division or the regulations, apply to an unincorporated association as if it were a person, but with the changes set out in this section and sections 140ZF and 140ZG.

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- (2) A sponsorship right that would otherwise be exercisable by the unincorporated association is exercisable by each member of the association's committee of management instead.
- (3) A sponsorship obligation that would otherwise be imposed on the unincorporated association:
  - (a) is imposed on each member of the association's committee of management instead; but
  - (b) may be discharged by any of those members.
- (4) Subject to section 140ZF, the members are jointly and severally liable to pay an amount in relation to a sponsorship obligation.

**140ZF Unincorporated associations—offences and civil penalties**

- (1) An offence against this Division that would otherwise be committed by an unincorporated association is taken to have been committed by each member of the association's committee of management, at the time the offence is committed, who:
  - (a) did the relevant act or made the relevant omission; or
  - (b) aided, abetted, counselled or procured the relevant act or omission; or
  - (c) was in any way knowingly concerned in, or party to, the relevant act or omission (whether directly or indirectly or whether by any act or omission of the member).
- (2) A civil penalty provision of this Division that would otherwise be contravened by an unincorporated association is taken to have been contravened by each member of the association's committee of management, at the time of the conduct constituting the contravention, who:
  - (a) engaged in the conduct; or
  - (b) aided, abetted, counselled or procured the conduct; or
  - (c) was in any way knowingly concerned in, or party to, the conduct (whether directly or indirectly or whether by any act or omission of the member).

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- (3) If a member of an unincorporated association's committee of management contravenes a civil penalty provision, the civil penalty that may be imposed on the member must not exceed an amount equal to one-fifth of the maximum penalty that could be imposed on a body corporate for the same contravention.
- (4) For the purposes of subsection (1), to establish that an unincorporated association had a particular state of mind when it engaged in particular conduct, it is sufficient to show that a relevant member of the association's committee of management had the relevant state of mind.

**140ZG Unincorporated association ceases to exist**

- (1) If an unincorporated association ceases to exist, the persons who were members of the association's committee of management immediately before the cessation must continue to satisfy any applicable sponsorship obligation.
- (2) Section 140ZE applies as if:
  - (a) references to an unincorporated association were to an unincorporated association that ceases to exist; and
  - (b) references to members of the association's committee of management were to the persons who were members immediately before the cessation.
- (3) To avoid doubt, for the purpose of this section, an unincorporated association ceases to exist if the dissolution of the association does not result in the creation of another association.

**Subdivision H—Miscellaneous**

**140ZH Disclosure of personal information by Minister**

- (1) The Minister may disclose personal information of a prescribed kind about a person mentioned in column 2 of the following table in relation to an item to the person or persons mentioned in column 3 of the table in relation to the item:

<b>To whom the Minister may disclose personal information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Item</b>	<b>If the personal information of a prescribed kind is about ...</b>	<b>then, the Minister may disclose that personal information to ...</b>
1	a visa holder	(a) an approved sponsor of the visa holder; or (b) a former approved sponsor of the visa holder; or (c) an agency of the Commonwealth or a State or Territory prescribed by the regulations
2	a former visa holder	(a) an approved sponsor of the visa holder; or (b) a former approved sponsor of the visa holder; or (c) an agency of the Commonwealth or a State or Territory prescribed by the regulations
3	an approved sponsor of a visa holder or an approved sponsor of a former visa holder	(a) the visa holder; or (b) a former visa holder; or (c) an agency of the Commonwealth or a State or Territory prescribed by the regulations
4	a former approved sponsor of a visa holder or a former approved sponsor of a former visa holder	(a) the visa holder; or (b) a former visa holder; or (c) an agency of the Commonwealth or a State or Territory prescribed by the regulations

(2) The regulations may prescribe circumstances in which the Minister may disclose the personal information.

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- (3) The regulations may prescribe circumstances in which the recipient may use or disclose the personal information disclosed.
- (4) If the Minister discloses personal information under subsection (1) (other than to an agency of the Commonwealth or a State or Territory prescribed by the regulations), the Minister must give written notice to the person about whom the information is disclosed of:
  - (a) the disclosure; and
  - (b) the details of the personal information disclosed.

**140ZI Disclosure of personal information to Minister**

- (1) For the purposes of this Division, the Minister may request a person mentioned in column 2 of the following table in relation to an item to disclose to the Minister personal information of a prescribed kind about a person mentioned in column 3 of the table in relation to the item:

<b>From whom the Minister may request disclosure of personal information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Item</b>	<b>The Minister may request ...</b>	<b>to disclose personal information of a prescribed kind to the Minister about ...</b>
1	an approved sponsor or former approved sponsor of a visa holder	the visa holder
2	an approved sponsor or former approved sponsor of a former visa holder	the former visa holder

- (2) For the purposes of:
  - (a) paragraph 6.2(b) of Australian Privacy Principle 6; and
  - (c) a provision of a law of a State or Territory that provides that information that is personal may be disclosed if the disclosure is authorised by law;

the disclosure of information by a person in response to a request under this section is taken to be a disclosure that is authorised by this Act.

- (3) Nothing in this section has the effect of authorising a disclosure that, despite subsection (2), is prevented by a law of the Commonwealth, a State or Territory.

#### **140ZJ Unclaimed money**

- (1) If a person who is or was an approved sponsor has not paid an amount in relation to a sponsorship obligation because the person does not know the location of the intended recipient, the person may pay the amount to the Commonwealth.
- (2) The Commonwealth holds the amount in trust for the intended recipient.
- (3) Payment of the amount to the Commonwealth is a sufficient discharge to the person, as against the intended recipient, for the amount paid.

#### **140ZK Other regulation making powers not limited**

Regulations made for the purposes of this Division do not limit the power to make regulations under any other provision of this or any other Act.

## Division 4—Criminal justice visitors

### Subdivision A—Preliminary

#### 141 Object of Division

This Division is enacted so that, if the administration of criminal justice requires the presence in Australia of a non-citizen, that non-citizen may be brought to, or allowed to stay in, Australia for the purposes of that administration.

#### 142 Interpretation

In this Division:

*administration of criminal justice* means:

- (a) an investigation to find out whether an offence has been committed; or
- (b) the prosecution of a person for an offence; or
- (c) the punishment by way of imprisonment of a person for the commission of an offence.

*Australia* means the migration zone.

*authorised official*, in relation to a State, means a person authorised under section 144 to be an authorised official for that State.

*criminal justice certificate* means:

- (a) a criminal justice entry certificate; or
- (b) a criminal justice stay certificate.

*criminal justice entry certificate* means:

- (a) a certificate given under section 145; or
- (b) a certificate given under subsection 146(1) and endorsed under subsection 146(2).

*criminal justice entry visa* has the meaning given by section 155.



***criminal justice stay certificate*** means a certificate given under section 147 or 148.

***criminal justice stay visa*** has the meaning given by section 155.

***criminal justice stay warrant*** means a warrant described in section 151.

***criminal justice visa*** has the meaning given by section 38.

***State*** includes Territory.

### **143 Delegation by Attorney-General**

- (1) The Attorney-General may, in writing, delegate any of his or her powers under this Division to:
  - (a) the Secretary of the Attorney-General's Department; or
  - (b) an SES employee, or acting SES employee, in that Department.
- (2) Subject to subsection (3), the Attorney-General may, in writing, delegate his or her power under section 147 to a commissioned police officer (within the meaning of the *Australian Federal Police Act 1979*).
- (3) A delegation under subsection (2) must provide that:
  - (a) the power may only be exercised in relation to a person at a port; and
  - (b) any certificate that is issued by the member is to remain in force for no longer than 5 days.
- (4) The Attorney-General may, at any time, by written notice, revoke a certificate issued by a person exercising a power delegated under subsection (2).

### **144 Authorised officials**

The Attorney-General may, in writing, appoint as an authorised official for a State for the purposes of this Division:

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- (a) the Attorney-General of the State; or
- (b) a person holding an office under a law of the State that is like the office of the Director of Public Prosecutions; or
- (c) the highest ranking member of the police force of the State.

**Subdivision B—Criminal justice certificates for entry**

**145 Commonwealth criminal justice entry certificate**

- (1) If the Attorney-General considers that:
  - (a) the temporary presence in Australia of a non-citizen who is outside Australia is required for the purposes of:
    - (i) the *Extradition Act 1988*; or
    - (ia) the *International War Crimes Tribunals Act 1995*; or
    - (ib) the *International Criminal Court Act 2002*; or
    - (ii) the *Mutual Assistance in Criminal Matters Act 1987*; or
    - (iii) the administration of criminal justice in relation to an offence against a law of the Commonwealth; and
  - (b) the presence of the non-citizen in Australia for the relevant purposes would not hinder the national interest in any way to such an extent that the non-citizen should not be present in Australia; and
  - (c) satisfactory arrangements have been made to make sure that the person or organisation who wants the non-citizen for the relevant purposes or the non-citizen or both will meet the cost of bringing the non-citizen to, keeping the non-citizen in, and removing the non-citizen from, Australia;the Attorney-General may give a certificate that the presence of the non-citizen in Australia is required for the administration of criminal justice.
- (2) For the purposes of paragraph (1)(c), the cost of keeping the non-citizen in Australia does not include the cost of immigration detention (if any).

### **146 State criminal justice entry certificate**

- (1) If an authorised official for a State considers that:
- (a) the temporary presence in Australia of a non-citizen who is outside Australia is required for the purposes of the administration of criminal justice in relation to an offence against a law of the State; and
  - (b) satisfactory arrangements have been made to make sure that the person or organisation who wants the non-citizen for those purposes or the non-citizen or both will meet the cost of bringing the non-citizen to, keeping the non-citizen in, and removing the non-citizen from, Australia;
- the official may give a certificate that the presence of the non-citizen in Australia is required for the administration of criminal justice by the State.
- (2) If:
- (a) a certificate has been given under subsection (1) about a non-citizen; and
  - (b) the Attorney-General considers that the temporary presence of the non-citizen in Australia in order to advance the administration of criminal justice by the State would not hinder the national interest in any way to such an extent that the non-citizen should not be present in Australia;
- the Attorney-General may endorse the certificate with a statement that it is to be a criminal justice certificate for the purposes of this Division.
- (3) For the purposes of paragraph (1)(b), the cost of keeping the non-citizen in Australia does not include the cost of immigration detention (if any).

### **Subdivision C—Criminal justice certificates etc. staying removal or deportation**

#### **147 Commonwealth criminal justice stay certificate**

- (1) If:
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- (a) an unlawful non-citizen is to be, or is likely to be, removed or deported; and
  - (b) the Attorney-General considers that the non-citizen should remain in Australia temporarily for the purposes of:
    - (i) the *Extradition Act 1988*; or
    - (ia) the *International War Crimes Tribunals Act 1995*; or
    - (ib) the *International Criminal Court Act 2002*; or
    - (ii) the *Mutual Assistance in Criminal Matters Act 1987*; or
    - (iii) the administration of criminal justice in relation to an offence against a law of the Commonwealth; and
  - (c) the Attorney-General considers that satisfactory arrangements have been made to make sure that the person or organisation who wants the non-citizen for the relevant purposes or the non-citizen or both will meet the cost of keeping the non-citizen in Australia;
- the Attorney-General may give a certificate that the stay of the non-citizen's removal or deportation is required for the administration of criminal justice.
- (2) For the purposes of paragraph (1)(c), the cost of keeping the non-citizen in Australia does not include the cost of immigration detention (if any).

**148 State criminal justice stay certificate**

- (1) If:
  - (a) an unlawful non-citizen is to be, or is likely to be, removed or deported; and
  - (b) an authorised official for a State considers that the non-citizen should remain in Australia temporarily for the purposes of the administration of criminal justice in relation to an offence against a law of the State; and
  - (c) that authorised official considers that satisfactory arrangements have been made to make sure that the person or organisation who wants the non-citizen for those purposes or the non-citizen or both will meet the cost of keeping the non-citizen in Australia;

the official may give a certificate that the stay of the non-citizen's removal or deportation is required for the administration of criminal justice by the State.

- (2) For the purposes of paragraph (1)(c), the cost of keeping the non-citizen in Australia does not include the cost of immigration detention (if any).

#### **149 Application for visa not to prevent certificate**

A criminal justice stay certificate for a non-citizen may be given even though an application for a visa for the non-citizen has been made but not finalised.

#### **150 Criminal justice stay certificates stay removal or deportation**

If a criminal justice stay certificate about a non-citizen is in force, the non-citizen is not to be removed or deported.

#### **151 Certain warrants stay removal or deportation**

- (1) If an unlawful non-citizen is to be, or is likely to be, removed or deported, this Act does not prevent a court issuing for the purposes of the administration of criminal justice in relation to an offence against a law a warrant to stay the removal or deportation.
- (2) If a criminal justice stay warrant about a non-citizen is in force, the non-citizen is not to be removed or deported.
- (3) If a court issues a criminal justice stay warrant about a non-citizen, the applicant for the warrant is responsible for the costs of any maintenance or accommodation (other than immigration detention) of the non-citizen while the warrant is in force.

#### **152 Certain subjects of stay certificates and stay warrants may be detained etc.**

If:

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- (a) a criminal justice stay certificate or a criminal justice stay warrant about a non-citizen is in force; and
- (b) the non-citizen does not have a visa to remain in Australia; the certificate or warrant does not limit any power under this Act relating to the detention of the non-citizen.

**153 Removal or deportation not contempt etc. if no stay certificate or warrant**

- (1) Subject to subsection (2), if:
  - (a) this Act requires the removal or deportation of a non-citizen; and
  - (b) there is no criminal justice stay certificate or criminal justice stay warrant about the non-citizen;any other law, or anything done under any other law, of the Commonwealth or a State (whether passed or made before or after the commencement of this section), not being an Act passed after that commencement expressed to be exempt from this section, does not prevent the removal or deportation.
- (2) Subsection (1) does not permit the removal or deportation of a non-citizen if that removal or deportation would be in breach of an order of the High Court, the Federal Court or the Federal Circuit Court.

**154 Officer not liable—criminal justice stay certificates or warrants**

An officer is not liable to any civil or criminal action for doing in good faith, or failing in good faith to do, any act or thing for the purpose of exercising a power under this Act to keep a person who is the subject of a criminal justice stay certificate or criminal justice stay warrant in immigration detention.

## **Subdivision D—Criminal justice visas**

### **155 Criminal justice visas**

- (1) A criminal justice visa may be a visa permitting a non-citizen to travel to and enter, and remain temporarily in, Australia, to be known as a criminal justice entry visa.
- (2) A criminal justice visa may be a visa permitting a non-citizen to remain temporarily in Australia, to be known as a criminal justice stay visa.

### **156 Criterion for criminal justice entry visas**

A criterion for a criminal justice entry visa for a non-citizen is that a criminal justice entry certificate about the non-citizen is in force.

### **157 Criterion for criminal justice stay visas**

A criterion for a criminal justice stay visa for a non-citizen is that either:

- (a) a criminal justice stay certificate about the non-citizen is in force; or
- (b) a criminal justice stay warrant about the non-citizen is in force.

### **158 Criteria for criminal justice visas**

The criteria for a criminal justice visa for a non-citizen are, and only are:

- (a) the criterion required by section 156 or 157; and
- (b) the criterion that the Minister, having had regard to:
  - (i) the safety of individuals and people generally; and
  - (ii) in the case of a criminal justice entry visa, arrangements to ensure that if the non-citizen enters Australia, the non-citizen can be removed; and
  - (iii) any other matters that the Minister considers relevant;

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has decided, in the Minister's absolute discretion, that it is appropriate for the visa to be granted.

**159 Procedure for obtaining criminal justice visa**

- (1) If a criminal justice certificate, or a criminal justice stay warrant, in relation to a non-citizen is in force, the Minister may consider the grant of a criminal justice visa for the non-citizen.
- (2) If the Minister, after considering the grant of a criminal justice visa for a non-citizen, is satisfied that the criteria for it have been met, the Minister may, in his or her absolute discretion:
  - (a) grant it by causing a record of it to be made; and
  - (b) give such evidence of it as the Minister considers appropriate.

**160 Conditions of criminal justice visa**

- (1) The regulations may provide that criminal justice visas are subject to specified conditions.
- (2) It is a condition of a criminal justice entry visa for a non-citizen that the non-citizen must not do any work in Australia, whether for reward or otherwise.
- (3) In subsection (2):

*work*, in relation to a non-citizen, does not include work for the purposes for which there is a criminal justice certificate or criminal justice stay warrant about the non-citizen, including, if those purposes are or include the imprisonment of the non-citizen, work as a prisoner.

**161 Effect of criminal justice visas**

- (1) A criminal justice entry visa for a non-citizen is permission for the non-citizen to travel to and enter and remain in Australia while it is in effect.



- (2) A criminal justice stay visa for a non-citizen:
  - (a) is permission for the non-citizen to remain in Australia while it is in effect; and
  - (b) if the non-citizen is in immigration detention, entitles the non-citizen to be released from that detention.
- (3) A criminal justice visa for a person does not prevent the non-citizen leaving Australia.
- (4) Subsection (3) does not limit the operation of any order or warrant of a court.
- (5) The holder of a criminal justice entry visa may not apply for a visa other than a protection visa.
- (6) If a non-citizen who has held a criminal justice entry visa remains in Australia when the visa is cancelled, the non-citizen may not make an application for a visa other than a protection visa.

### **Subdivision E—Cancellation etc. of criminal justice certificates and criminal justice visas**

#### **162 Criminal justice certificates to be cancelled**

- (1) If the presence in Australia of a non-citizen in respect of whom a criminal justice certificate has been given is no longer required for the purposes for which it was given, then:
  - (a) if it was given under section 145 or 147, the Attorney-General; or
  - (b) if it was given under section 146 or 148—an authorised official;is to cancel it.
- (2) Before cancelling the certificate, the Attorney-General or authorised official is, an adequate time before doing so, to tell the Secretary:
  - (a) when it is to be cancelled; and

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- (b) the expected whereabouts of the non-citizen when it is cancelled; and
- (c) the arrangements for the non-citizen's departure from Australia.

**163 Stay warrant to be cancelled**

- (1) If:
  - (a) the presence in Australia of a non-citizen in respect of whom a criminal justice stay warrant has been given is no longer required for the purposes for which it was given; and
  - (b) if the warrant is to expire at a certain time—that time has not been reached;a person entitled to apply for the warrant's cancellation must apply to the court for the cancellation.
- (2) The applicant for a criminal justice stay warrant in respect of a non-citizen is to tell the Secretary a reasonable time before the warrant expires:
  - (a) the time it will expire; and
  - (b) the expected whereabouts of the non-citizen at the time of expiry; and
  - (c) the arrangements for the non-citizen's departure from Australia.
- (3) An applicant for the cancellation of a criminal justice stay warrant is to tell the Secretary, as soon as practicable:
  - (a) the time of cancellation for which application will be made; and
  - (b) if the time of cancellation is different from that applied for, the time of cancellation; and
  - (c) the expected whereabouts of the non-citizen at the expected time, and, if paragraph (b) applies, the time of cancellation; and
  - (d) the arrangements for the non-citizen's departure from Australia.

**164 Effect of cancellation etc. on criminal justice visa**

If:

- (a) a criminal justice certificate is cancelled; or
  - (b) a criminal justice stay warrant is cancelled or expires;
- any criminal justice visa granted because of the certificate or warrant is cancelled and the Minister is to make a record of the cancellation.

## Division 4A—Enforcement visas

### 164A Definitions

In this Division:

**Commonwealth aircraft** has the same meaning as in the *Environment Protection and Biodiversity Conservation Act 1999*.

**Commonwealth ship** has the same meaning as in the *Environment Protection and Biodiversity Conservation Act 1999*.

**enforcement visa (environment matters)** means an enforcement visa that is granted by section 164BA.

**enforcement visa (fisheries matters)** means an enforcement visa that is granted by section 164B.

**environment detention** means detention under Schedule 1 to the *Environment Protection and Biodiversity Conservation Act 1999*.

**fisheries detention** means detention under:

- (a) Schedule 1A to the *Fisheries Management Act 1991*; or
- (b) Schedule 2 to the *Torres Strait Fisheries Act 1984*.

### 164B Grant of enforcement visas (fisheries matters)

*Non-citizen on foreign vessel outside migration zone*

- (1) A non-citizen on a foreign vessel outside the migration zone is granted an enforcement visa when the vessel is detained under section 69 of the *Maritime Powers Act 2013* in relation to a fisheries detention offence.

Note: The grant of an enforcement visa effectively cancels any temporary visa that the non-citizen may have held (see subsection 82(2A)).

*Non-citizen in migration zone*

- (2) A non-citizen in the migration zone who does not already hold an enforcement visa is granted an enforcement visa when he or she is detained under Schedule 1A to the *Fisheries Management Act 1991* or Schedule 2 to the *Torres Strait Fisheries Act 1984*.

Note: The grant of an enforcement visa effectively cancels any temporary visa that the non-citizen may have held (see subsection 82(2A)).

*Non-citizen in prescribed circumstances*

- (3) An enforcement visa is granted to a non-citizen (who does not already hold an enforcement visa) when a fisheries officer or a maritime officer exercises under, or for the purposes of, the *Fisheries Management Act 1991* or the *Torres Strait Fisheries Act 1984* a prescribed power in prescribed circumstances in relation to the non-citizen. The visa is granted at the time the power is exercised.

Note: The grant of an enforcement visa effectively cancels any temporary visa that the non-citizen may have held (see subsection 82(2A)).

*Non-citizen on foreign vessel in prescribed circumstances*

- (4) An enforcement visa is granted to a non-citizen (who does not already hold an enforcement visa) who is on a foreign vessel when a fisheries officer or a maritime officer exercises under, or for the purposes of, the *Fisheries Management Act 1991* or the *Torres Strait Fisheries Act 1984* a prescribed power in prescribed circumstances in relation to the vessel. The visa is granted at the time the power is exercised.

Note: The grant of an enforcement visa effectively cancels any temporary visa that the non-citizen may have held (see subsection 82(2A)).

*Enforcement visas granted by force of this section*

- (5) To avoid doubt, an enforcement visa is granted by force of this section.

Note: No administrative action under this Act is necessary to grant the visa.

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*Exception if Minister's declaration in force*

- (6) Despite subsections (1), (2), (3) and (4), a non-citizen is not granted an enforcement visa if a declaration under subsection (7) is in force in relation to:
- (a) the non-citizen; or
  - (b) a class of persons of which the non-citizen is a member.

*Declaration*

- (7) The Minister may make a written declaration, for the purposes of this section, that it is undesirable that a person, or any persons in a class of persons, travel to and enter Australia or remain in Australia.

*Section does not apply to Australian residents*

- (8) This section does not apply to non-citizens who are Australian residents as defined in the *Fisheries Management Act 1991*.

**164BA Grant of enforcement visas (environment matters)**

*Non-citizen on vessel (environment matters) outside migration zone*

- (1) A non-citizen on a vessel (environment matters) outside the migration zone is granted an enforcement visa when, because an environment officer, maritime officer or other person in command of a Commonwealth ship or a Commonwealth aircraft has reasonable grounds to suspect that the vessel has been used or otherwise involved in the commission of an environment detention offence, the environment officer, maritime officer or person in command:
- (a) exercises his or her power under paragraph 403(3)(a) of the *Environment Protection and Biodiversity Conservation Act 1999* in relation to the vessel; or
  - (b) makes a requirement of the person in charge of the vessel under paragraph 403(3)(b) of the *Environment Protection and Biodiversity Conservation Act 1999*; or

(c) exercises powers under section 69 of the *Maritime Powers Act 2013* in relation to the vessel;

whichever occurs first.

Note 1: Under paragraph 403(3)(a) of the *Environment Protection and Biodiversity Conservation Act 1999*, an environment officer, or the person in command of a Commonwealth ship or a Commonwealth aircraft, may bring a vessel into the migration zone. Under paragraph 403(3)(b) of that Act, an environment officer, or the person in command of a Commonwealth ship or a Commonwealth aircraft, may require the person in charge of a vessel to bring the vessel into the migration zone.

Note 2: The grant of an enforcement visa effectively cancels any temporary visa that the non-citizen may have held (see subsection 82(2A)).

*Non-citizen in migration zone*

- (2) A non-citizen in the migration zone who does not already hold an enforcement visa is granted an enforcement visa when he or she is detained by an environment officer under Schedule 1 to the *Environment Protection and Biodiversity Conservation Act 1999*.

Note: The grant of an enforcement visa effectively cancels any temporary visa that the non-citizen may have held (see subsection 82(2A)).

*Non-citizen in prescribed circumstances*

- (3) An enforcement visa is granted to a non-citizen (who does not already hold an enforcement visa) when an environment officer or a maritime officer exercises under, or for the purposes of, the *Environment Protection and Biodiversity Conservation Act 1999* a prescribed power in prescribed circumstances in relation to the non-citizen. The visa is granted at the time the power is exercised.

Note: The grant of an enforcement visa effectively cancels any temporary visa that the non-citizen may have held (see subsection 82(2A)).

*Non-citizen on vessel or aircraft in prescribed circumstances*

- (4) An enforcement visa is granted to a non-citizen (who does not already hold an enforcement visa) who is on a vessel (environment matters) or a foreign aircraft (environment matters) when an environment officer or maritime officer exercises under, or for the

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purposes of, the *Environment Protection and Biodiversity Conservation Act 1999* a prescribed power in prescribed circumstances in relation to the vessel or aircraft. The visa is granted at the time the power is exercised.

Note: The grant of an enforcement visa effectively cancels any temporary visa that the non-citizen may have held (see subsection 82(2A)).

*Enforcement visas granted by force of this section*

- (5) To avoid doubt, an enforcement visa is granted by force of this section.

Note: No administrative action under this Act is necessary to grant the visa.

*Exception if Minister's declaration in force*

- (6) Despite subsections (1), (2), (3) and (4), a non-citizen is not granted an enforcement visa if a declaration under subsection (7) is in force in relation to:
- (a) the non-citizen; or
  - (b) a class of persons of which the non-citizen is a member.

*Declaration*

- (7) The Minister may make a written declaration, for the purposes of this section, that it is undesirable that a person, or any persons in a class of persons, travel to and enter Australia or remain in Australia.

*Section does not apply to Australian residents*

- (8) This section does not apply to non-citizens who are Australian residents as defined in Schedule 1 to the *Environment Protection and Biodiversity Conservation Act 1999*.



### **164C When enforcement visa ceases to be in effect**

*Enforcement visa (fisheries matters)—non-citizen in fisheries detention*

- (1) The enforcement visa (fisheries matters) of a non-citizen who is in fisheries detention ceases to be in effect:
  - (a) at the time the non-citizen is released, or escapes, from fisheries detention; or
  - (b) at the time the Minister makes a declaration under subsection 164B(7) in relation to the non-citizen, or a class of persons of which the non-citizen is a member; or
  - (c) on the occurrence of a prescribed event;whichever occurs first.

*Enforcement visa (fisheries matters)—non-citizen not in fisheries detention*

- (2) The enforcement visa (fisheries matters) of a non-citizen who is not in fisheries detention ceases to be in effect:
  - (a) at the time a decision is made not to charge the non-citizen with a fisheries detention offence; or
  - (b) at the time the Minister makes a declaration under subsection 164B(7) in relation to the non-citizen, or a class of persons of which the non-citizen is a member; or
  - (c) on the occurrence of a prescribed event;whichever occurs first.

*Enforcement visa (environment matters)—non-citizen in environment detention*

- (3) The enforcement visa (environment matters) of a non-citizen who is in environment detention ceases to be in effect:
  - (a) at the time the non-citizen is released, or escapes, from environment detention; or

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- (b) at the time the Minister makes a declaration under subsection 164BA(7) in relation to the non-citizen, or a class of persons of which the non-citizen is a member; or
  - (c) on the occurrence of a prescribed event;
- whichever occurs first.

*Enforcement visa (environment matters)—non-citizen not in environment detention*

- (4) The enforcement visa (environment matters) of a non-citizen who is not in environment detention ceases to be in effect:
  - (a) at the time a decision is made not to charge the non-citizen with an environment detention offence; or
  - (b) at the time the Minister makes a declaration under subsection 164BA(7) in relation to the non-citizen, or a class of persons of which the non-citizen is a member; or
  - (c) on the occurrence of a prescribed event;whichever occurs first.

**164D Applying for other visas**

- (1) The holder of an enforcement visa may not apply for a visa other than a protection visa while he or she is in Australia.
- (2) While a non-citizen who has held an enforcement visa remains in Australia when the visa ceases to be in effect, the non-citizen may not apply for a visa other than a protection visa.

## **Division 5—Immigration clearance**

### **165 Interpretation**

In this Division:

**clearance authority** means:

- (a) a clearance officer; or
- (b) an authorised system.

**clearance officer** means an officer, or other person, authorised by the Minister to perform duties for the purposes of this Division.

**eligible passport** means a passport of a kind specified in a determination under section 175A.

**on-port**, in relation to a person, means a port in Australia to which the person will travel after entering Australia at another port.

**overseas vessel** means:

- (a) a vessel on which persons travel from outside Australia to a port and then to an on-port or ports; or
- (b) a vessel on which persons travel from a port to another port or ports and then to a place outside Australia.

### **166 Persons entering to present certain evidence of identity etc.**

*Requirement to be immigration cleared*

- (1) A person, whether a citizen or a non-citizen, who enters Australia must, without unreasonable delay:
  - (a) present the following evidence (which might include a personal identifier) to a clearance authority:
    - (i) if the person is a citizen (whether or not the person is also the national of a country other than Australia)—the person's Australian passport or prescribed other evidence of the person's identity and Australian citizenship;

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- (ii) if the person is a non-citizen—evidence of the person’s identity and of a visa that is in effect and is held by the person; and
- (b) provide to a clearance authority any information (including the person’s signature, but not any other personal identifier) required by this Act or the regulations; and
- (c) comply with any requirement, made by a clearance officer under section 257A before an event referred to in subparagraph 172(1)(a)(iii) or (b)(iii) or paragraph 172(1)(c) occurs, to provide one or more personal identifiers to a clearance authority; and
- (d) if under paragraph (a) the person presents evidence to an authorised system—provide to the authorised system a photograph or other image of the person’s face and shoulders.

Note: A person might be taken to have complied with this section under subsection 167(3) or (4) or might not be required to comply under section 168 or 169.

*Who may use an authorised system*

- (2) A person may comply with a requirement referred to in subsection (1) to present or provide evidence, information or personal identifiers to an authorised system only if:
  - (a) the person holds an eligible passport; and
  - (c) either:
    - (i) before an event referred to in subparagraph 172(1)(a)(iii) or (b)(iii) or paragraph 172(1)(c) occurs, a clearance officer does not require the person to present or provide evidence, information or personal identifiers referred to in subsection (1) of this section (other than a passenger card) to a clearance officer; or
    - (ii) if subparagraph (i) of this paragraph applies—a clearance officer determines that the person has complied with subsection (1) of this section.

*Complying with paragraphs (1)(a) and (b)*

- (3) Subject to section 167, a person is to comply with paragraphs (1)(a) and (b) of this section in a prescribed way.
- (4) A person is taken to have complied with subparagraph (1)(a)(i) if a clearance officer knows or reasonably believes that the person is an Australian citizen.

**167 When and where evidence to be presented**

- (1) Subject to this section, a person required to comply with section 166 who enters Australia at a port must comply:
  - (a) if paragraph (b) or (c) does not apply—at that port; or
  - (b) if the person is required by an officer to comply at a particular on-port—at that on-port; or
  - (c) if the person is allowed by an officer to comply at the port or a particular on-port—at either of them.
- (2) Subject to subsection (4), a person required to comply with section 166 who enters Australia otherwise than at a port must comply at a prescribed place within a prescribed period after entering.
- (3) If:
  - (a) a person proposes to enter Australia; and
  - (b) with the permission of a clearance officer, complies with paragraphs 166(1)(a), (b) and (c) on the vessel on which the person travels to Australia and before entering Australia;the person is taken to have complied with section 166.
- (4) A person who travels to Australia on a pre-cleared flight:
  - (a) must comply with paragraphs 166(1)(a) and (b) before beginning the flight; and
  - (b) if he or she so complies, is taken to have complied with section 166.

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**168 Section 166 not to apply**

- (1) An allowed inhabitant of the Protected Zone who enters a protected area in connection with the performance of traditional activities is not required to comply with section 166.
- (2) If an allowed inhabitant of the Protected Zone:
  - (a) enters a protected area in connection with the performance of traditional activities; and
  - (b) goes from the protected area to a part of the migration zone outside that area;he or she must comply with section 166 at a prescribed place within a prescribed period.
- (3) A person in a prescribed class is not required to comply with section 166.

**169 Section 166 not usually to apply**

- (1) If:
  - (a) a person goes outside the migration zone; and
  - (b) under section 80 is not taken to leave Australia;the person is not, on re-entering the migration zone, taken to enter Australia for the purposes of section 166 but may be directed by a clearance officer to comply with that section.

*International passenger cruise ships*

- (2) However, subsection (1) does not apply if the person goes outside the migration zone on an international passenger cruise ship (see subsection (4)).

Note: The effect of this subsection is that people on international passenger cruise ships are required to be immigration cleared under section 166 (unless the Minister or Secretary determines otherwise under subsection (3) of this section).

- (3) However, the Minister or Secretary may, in writing, determine that, despite subsection (2), subsection (1) does apply to a class of persons that includes the person.

- (4) In this section, a ship is an *international passenger cruise ship* if:
- (a) the ship has sleeping facilities for at least 100 persons (other than crew members); and
  - (b) the ship is being used to provide a service of sea transportation of persons from a place outside Australia to a port in Australia; and
  - (c) that service:
    - (i) is provided in return for a fee payable by persons using the service; and
    - (ii) is available to the general public.
- (5) A determination made under subsection (3) is not a legislative instrument.

### **170 Certain persons to present evidence of identity**

*Persons on overseas vessels may be required to present evidence of identity*

- (1) A person, whether a citizen or a non-citizen, who travels, or appears to intend to travel, on an overseas vessel from a port to another port may be required by a clearance officer at either port or by officers at both ports:
- (a) to present to a clearance authority prescribed evidence (which might include a personal identifier) of the person's identity; and
  - (b) to provide to a clearance authority any information (including the person's signature, but not any other personal identifier) required by this Act or the regulations; and
  - (c) to comply with any requirement made by a clearance officer under section 257A to provide one or more personal identifiers to a clearance authority; and
  - (d) if under paragraph (a) the person presents evidence to an authorised system—to provide to the authorised system a photograph or other image of the person's face and shoulders.

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- (2) A person is to comply with paragraphs (1)(a) and (b) in a prescribed way.

*Who may use an authorised system*

- (2AA) A person may comply with a requirement referred to in subsection (1) to present or provide evidence, information or personal identifiers to an authorised system only if:
- (a) the person holds an eligible passport; and
  - (c) either:
    - (i) before the person leaves the port at which the requirement is made, a clearance officer does not require the person to present or provide evidence, information or personal identifiers referred to in subsection (1) (other than a passenger card) to a clearance officer; or
    - (ii) if subparagraph (i) applies—a clearance officer determines that the person has complied with the requirement referred to in subsection (1).

**171 Assistance with evidence**

If a person:

- (a) cannot comply with section 166 by presenting evidence; and
- (b) requests the Department to assist him or her to obtain that evidence;

that assistance may be given but only on payment of, or agreement to pay, a prescribed fee to meet the cost of doing so.

**172 Immigration clearance**

*When a person is immigration cleared*

- (1) A person is immigration cleared if, and only if:
- (a) the person:
    - (i) enters Australia at a port; and
    - (ii) complies with section 166; and



- (iii) leaves the port at which the person complied and so leaves with the permission of a clearance authority and otherwise than in immigration detention; or
- (b) the person:
  - (i) enters Australia otherwise than at a port; and
  - (ii) complies with section 166; and
  - (iii) leaves the prescribed place at which the person complied and so leaves with the permission of a clearance authority and otherwise than in immigration detention; or
- (ba) the person:
  - (i) enters Australia by virtue of the operation of section 10; and
  - (ii) at the time of the person's birth, had at least one parent who was immigration cleared on his or her last entry into Australia; or
- (c) the person is refused immigration clearance, or bypasses immigration clearance, and is subsequently granted a substantive visa; or
- (d) the person is in a prescribed class of persons.

*When a person is in immigration clearance*

- (2) A person is in immigration clearance if the person:
  - (a) is with an officer or at an authorised system for the purposes of section 166; and
  - (b) has not been refused immigration clearance.

*When a person is refused immigration clearance*

- (3) A person is refused immigration clearance if the person:
  - (a) is with a clearance officer for the purposes of section 166; and
  - (b) satisfies one or more of the following subparagraphs:
    - (i) the person has his or her visa cancelled;

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- (ii) the person refuses, or is unable, to present to a clearance officer evidence referred to in paragraph 166(1)(a);
- (iii) the person refuses, or is unable, to provide to a clearance officer information referred to in paragraph 166(1)(b);
- (iv) the person refuses, or is unable, to comply with any requirement referred to in paragraph 166(1)(c) to provide one or more personal identifiers to a clearance officer.

*When a person bypasses immigration clearance*

- (4) A person, other than a person who is refused immigration clearance, bypasses immigration clearance if:
  - (a) the person:
    - (i) enters Australia at a port; and
    - (ii) is required to comply with section 166; and
    - (iii) leaves that port without complying; or
  - (b) the person:
    - (i) enters Australia otherwise than at a port; and
    - (ii) is required to comply with section 166; and
    - (iii) does not comply within the prescribed period for doing so.

**173 Visa ceases if holder enters in way not permitted**

- (1) If the holder of a visa enters Australia in a way that contravenes section 43, or regulations to which that section is subject, the visa ceases to be in effect.
- (1A) A maritime crew visa held by a non-citizen does not cease to be in effect under subsection (1) if:
  - (a) the non-citizen travels to and enters Australia by air; and
  - (b) at the time the non-citizen travels to and enters Australia, the non-citizen holds another class of visa that is in effect.

- (2) To avoid doubt, a non-citizen child who is taken to have been granted a visa or visas, at the time of the child's birth, by virtue of the operation of section 78, is not to be taken, by virtue of that birth, to have entered Australia in a way that contravenes section 43 or regulations to which that section is subject.

#### **174 Visa ceases if holder remains without immigration clearance**

If the holder of a visa:

- (a) is required to comply with section 166; and
  - (b) does not comply;
- the visa ceases to be in effect.

#### **175 Departing person to present certain evidence etc.**

*Departing persons may be required to present evidence etc.*

- (1) A clearance officer may require a person who is on board, or about to board, a vessel that is due to depart from a place in Australia to a place outside Australia (whether or not after calling at other places in Australia) to:
- (a) present the following evidence (which might include a personal identifier) to a clearance authority:
    - (i) if the person is a citizen (whether or not the person is also the national of a country other than Australia)—the person's Australian passport or prescribed other evidence of the person's identity and Australian citizenship;
    - (ii) if the person is a non-citizen—evidence of the person's identity and permission to remain in Australia; and
  - (b) provide to a clearance authority any information (including the person's signature, but not any other personal identifier) required by this Act or the regulations; and
  - (c) comply with any requirement made by a clearance officer under section 257A to provide one or more personal identifiers to a clearance authority; and

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- (d) if under paragraph (a) the person presents evidence to an authorised system—provide to the authorised system a photograph or other image of the person’s face and shoulders.
- (2) A person is to comply with paragraphs (1)(a) and (b) in a prescribed way.

*Who may use an authorised system*

- (2AA) A person may comply with a requirement referred to in subsection (1) to present or provide evidence, information or personal identifiers to an authorised system only if:
  - (a) the person holds an eligible passport; and
  - (c) either:
    - (i) before the vessel leaves Australia, a clearance officer does not require the person to present or provide evidence, information or personal identifiers referred to in subsection (1) (other than a passenger card) to a clearance officer; or
    - (ii) if subparagraph (i) applies—a clearance officer determines that the person has complied with the requirement referred to in subsection (1).

**175A Determinations relating to kinds of passports**

For the purposes of this Division, the Minister or the Secretary may, by legislative instrument, determine that a specified kind of passport is an eligible passport.

**175B Collection, access and disclosure of information**

*Collection of information*

- (1) If a person presents or provides a document to a clearance authority under this Division, the clearance authority may collect information (including personal identifiers) in the document.

*Access to, and disclosure of, personal information*

- (2) The following provisions:
- (a) section 336D (which authorises access to identifying information);
  - (b) section 336E (other than subsection 336E(1)) and section 336F (which authorise disclosure of identifying information);
  - (c) a provision of an instrument made under section 336D or 336F;
- apply to personal information (other than personal identifiers) collected under this Division in the same way as they apply to identifying information.

*Effect on interpretation*

- (3) This section does not, by implication, affect the interpretation of any other provision of this Act or an instrument made under this Act.

## Division 6—Certain non-citizens to be kept in immigration detention

### 176 Reason for Division

This Division is enacted because the Parliament considers that it is in the national interest that each non-citizen who is a designated person should be kept in immigration detention until he or she:

- (a) leaves Australia; or
- (b) is given a visa.

### 177 Interpretation

In this Division:

**boat** means a vessel of any description, but does not include an aircraft.

**commencement** means the commencement of this Division.

**designated person** means a non-citizen who:

- (a) has been on a boat in the territorial sea of Australia after 19 November 1989 and before 1 September 1994; and
- (b) has not presented a visa; and
- (c) is in the migration zone; and
- (d) has not been granted a visa; and
- (e) is a person to whom the Department has given a designation by:
  - (i) determining and recording which boat he or she was on; and
  - (ii) giving him or her an identifier that is not the same as an identifier given to another non-citizen who was on that boat;

and includes a non-citizen born in Australia whose mother is a designated person.

**entry application**, in relation to a person, means an application for:

- (a) a determination by the Minister that the person is a refugee;  
or
- (b) a visa for the person.

### **178 Designated persons to be in immigration detention**

- (1) Subject to subsection (2), after commencement, a designated person must be kept in immigration detention.
- (2) A designated person is to be released from immigration detention if, and only if, he or she is:
  - (a) removed from Australia under section 181; or
  - (b) granted a visa under section 65, 351 or 417.
- (3) This section is subject to section 182.
- (4) To avoid doubt and despite section 182, if subsection 181(3) applies to a designated person, the person must be kept in immigration detention until the person is removed from Australia under that subsection.

### **179 Beginning of immigration detention of certain designated persons**

- (1) If, immediately after commencement, a designated person is in a place described in paragraph 11(a) (as in force at that time) or a processing area, he or she then begins to be in immigration detention for the purposes of section 178.
- (2) If, immediately after commencement, a designated person is in the company of, and restrained by, a person described in paragraph 11(b) (as in force at that time), the designated person then begins to be in immigration detention for the purposes of section 178.

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**180 Detention of designated person**

- (1) If a designated person is not in immigration detention immediately after commencement, an officer may, without warrant:
  - (a) detain the person; and
  - (b) take reasonable action to ensure that the person is kept in immigration detention for the purposes of section 178.
- (2) Without limiting the generality of subsection (1), that subsection even applies to a designated person who was held in a place described in paragraph 11(a) (as in force at that time) or a processing area before commencement and whose release was ordered by a court.
- (3) If a designated person escapes from immigration detention after commencement, an officer may, without warrant:
  - (a) detain the person; and
  - (b) take reasonable action to ensure that the person is kept in immigration detention for the purposes of section 178.

**181 Removal from Australia of designated persons**

- (1) An officer must remove a designated person from Australia as soon as practicable if the designated person asks the Minister, in writing, to be removed.
- (2) An officer must remove a designated person from Australia as soon as practicable if:
  - (a) the person has been in Australia for at least 2 months or, if a longer period is prescribed, at least that prescribed period; and
  - (b) there has not been an entry application for the person.
- (3) An officer must remove a designated person from Australia as soon as practicable if:
  - (a) there has been an entry application for the person; and
  - (b) the grant of the visa has been refused; and



- (c) all appeals against, or reviews of, the refusal (if any) have been finalised.
- (4) If:
- (a) 2 designated persons are liable to be removed from Australia under this section; and
  - (b) they are the parents of another designated person in Australia who is under 18;
- the other designated person is to be removed from Australia.
- (5) If:
- (a) a designated person is liable to be removed from Australia under this section; and
  - (b) he or she is the only parent in Australia of another designated person in Australia who is under 18;
- the other designated person is to be removed from Australia.
- (6) If:
- (a) 2 designated persons are liable to be removed from Australia under this section; and
  - (b) they have the care and control of another designated person in Australia who:
    - (i) is under 18; and
    - (ii) does not have a parent who is a designated person;
- the other designated person is to be removed from Australia.
- (7) If:
- (a) a designated person is liable to be removed from Australia under this section; and
  - (b) he or she is the only person who has the care and control of another designated person in Australia who:
    - (i) is under 18; and
    - (ii) does not have a parent who is a designated person;
- the other designated person is to be removed from Australia.
- (8) This section is subject to section 182.

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**182 No immigration detention or removal after certain period**

- (1) Sections 178 and 181 cease to apply to a designated person who was in Australia on 27 April 1992 if the person has been in application immigration detention after commencement for a continuous period of, or periods whose sum is, 273 days.
- (2) Sections 178 and 181 cease to apply to a designated person who was not in Australia on 27 April 1992, if:
  - (a) there has been an entry application for the person; and
  - (b) the person has been in application immigration detention, after the making of the application, for a continuous period of, or periods whose sum is, 273 days.
- (3) For the purposes of this section, a person is in application immigration detention if:
  - (a) the person is in immigration detention; and
  - (b) an entry application for the person is being dealt with;unless one of the following is happening:
  - (c) the Department is waiting for information relating to the application to be given by a person who is not under the control of the Department;
  - (d) the dealing with the application is at a stage whose duration is under the control of the person or of an adviser or representative of the person;
  - (e) court or tribunal proceedings relating to the application have been begun and not finalised;
  - (f) continued dealing with the application is otherwise beyond the control of the Department.
- (4) To avoid doubt, an entry application that has been refused is not being dealt with within the meaning of paragraph (3)(b) because only there could be an appeal against, or an application for the review of, the refusal.
- (5) If:
  - (a) an entry application for a designated person has been refused; and

(b) because of a direction or decision of a court or tribunal, the application is required to be considered further;  
whichever of subsection (1) or (2) applies to the designated person so applies as if the reference in it to 273 days were a reference to that number of days increased by 90 as well as by any number by which it has been increased under this subsection in relation to that entry application before.

(6) If:

- (a) an entry application for a designated person has been refused;  
and
- (b) apart from this subsection, section 178 would cease to apply to the person; and
- (c) the person begins court or tribunal proceedings in relation to the refusal;

that section applies to the person during both these proceedings and the period of 90 days after they end, whether or not this subsection has applied to that entry application before.

### **183 Courts must not release designated persons**

A court is not to order the release from immigration detention of a designated person.

### **185 Effect of Division on status etc.**

- (1) This Division does not affect the other status that a designated person has under this Act except so far as the status is inconsistent with section 178, 179, 180, 181 or 183.
- (2) This Division does not affect the rights of a designated person under this Act except so far as they, or their exercise, are inconsistent with section 178, 179, 180, 181 or 183.
- (3) This Division does not affect any application made by a designated person under this Act except so far as the application, or the success of the application, is inconsistent with section 178, 179, 180, 181 or 183.

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**186 Division applies despite other laws**

If this Division is inconsistent with another provision of this Act or with another law in force in Australia, whether written or unwritten, other than the Constitution:

- (a) this Division applies; and
- (b) the other law only applies so far as it is capable of operating concurrently with this Division.

**187 Evidence**

A statement by an officer, on oath or affirmation, that the Department has given a particular person a designation described in paragraph (e) of the definition of *designated person* in section 177 is conclusive evidence that the Department has given that person that designation.

## **Division 7—Detention of unlawful non-citizens**

### **Subdivision A—General provisions**

#### **188 Lawful non-citizen to give evidence of being so**

*Officer may require evidence*

- (1) An officer may require a person whom the officer knows or reasonably suspects is a non-citizen to:
  - (a) present to the officer evidence (which might include a personal identifier) of being a lawful non-citizen; or
  - (b) present to the officer evidence (which might include a personal identifier) of the person's identity.
- (2) The person must comply with the requirement within a period specified by the officer, being a prescribed period or such further period as the officer allows.
- (3) Regulations prescribing a period for compliance may prescribe different periods and the circumstances in which a particular prescribed period is to apply which may be:
  - (a) when the requirement is oral; or
  - (b) when the requirement is in writing.

#### **189 Detention of unlawful non-citizens**

- (1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.
- (2) If an officer reasonably suspects that a person in Australia but outside the migration zone:
  - (a) is seeking to enter the migration zone (other than an excised offshore place); and
  - (b) would, if in the migration zone, be an unlawful non-citizen;the officer may detain the person.

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- (3) If an officer knows or reasonably suspects that a person (other than a person referred to in subsection (3A)) in an excised offshore place is an unlawful non-citizen, the officer must detain the person.
- (3A) If an officer knows or reasonably suspects that a person in a protected area:
- (a) is a citizen of Papua New Guinea; and
  - (b) is an unlawful non-citizen;
- the officer may detain the person.
- (4) If an officer reasonably suspects that a person in Australia but outside the migration zone:
- (a) is seeking to enter an excised offshore place; and
  - (b) would, if in the migration zone, be an unlawful non-citizen;
- the officer may detain the person.
- (5) In subsections (3), (3A) and (4) and any other provisions of this Act that relate to those subsections, *officer* means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

Note: See Subdivision B for the Minister's power to determine that people who are required or permitted by this section to be detained may reside at places not covered by the definition of *immigration detention* in subsection 5(1).

**190 Non-compliance with immigration clearance or requirement to provide personal identifier**

- (1) For the purposes of section 189, an officer suspects on reasonable grounds that a person in Australia is an unlawful non-citizen if, but not only if, the officer knows, or suspects on reasonable grounds, that the person:
- (a) was required to comply with section 166; and
  - (b) did one or more of the following:
    - (i) bypassed, attempted to bypass, or appeared to attempt to bypass, immigration clearance;

- (ii) went to a clearance authority but was not able to present, or otherwise did not present, evidence required by section 166 to be presented;
  - (iii) if a non-citizen—went to a clearance authority but was not able to provide, or otherwise did not provide, information required by section 166 to be provided;
  - (iv) if a non-citizen—went to a clearance officer but was not able to comply with, or did not otherwise comply with, any requirement referred to in section 166 to provide one or more personal identifiers to the clearance officer.
- (2) For the purposes of section 189, an officer suspects on reasonable grounds that a person in Australia is an unlawful non-citizen if, but not only if:
- (a) that person fails to provide a personal identifier, under section 257A, of a type or types prescribed; and
  - (b) prescribed circumstances exist.

### **191 End of certain detention**

- (1) A person detained because of section 190 must be released from immigration detention if:
- (a) the person gives evidence of his or her identity and Australian citizenship; or
  - (b) an officer knows or reasonably believes that the person is an Australian citizen; or
  - (c) the person complies with section 166 and either:
    - (i) presents to a clearance officer evidence of being a lawful non-citizen; or
    - (ii) is granted a visa.
- (2) A person detained because of subsection 190(2) must be released from immigration detention if:
- (a) the person provides to an authorised officer one or more personal identifiers of the type or types prescribed, and the officer is satisfied that the person is not an unlawful non-citizen; or

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- (b) the person gives evidence of his or her identity and Australian citizenship; or
- (c) an officer knows or reasonably believes that the person is an Australian citizen; or
- (d) the officer becomes aware that the non-citizen's visa is not one that may be cancelled under Subdivision C, D, FA or G of Division 3 or section 501 or 501A.

**192 Detention of visa holders whose visas liable to cancellation**

- (1) Subject to subsection (2), if an officer knows or reasonably suspects that a non-citizen holds a visa that may be cancelled under Subdivision C, D, FA or G of Division 3 or section 501 or 501A, the officer may detain the non-citizen.
- (2) An officer must not detain an immigration cleared non-citizen under subsection (1) unless the officer reasonably suspects that if the non-citizen is not detained, the non-citizen would:
  - (a) attempt to evade the officer and other officers; or
  - (b) otherwise not co-operate with officers in their inquiries about the non-citizen's visa and matters relating to the visa.
- (3) An officer may question a non-citizen detained because of this section about the visa and matters relevant to the visa.
- (4) A non-citizen detained under subsection (1) must be released from questioning detention if the officer becomes aware that the non-citizen's visa is not one that may be cancelled under Subdivision C, D, FA or G of Division 3 or section 501 or 501A.
- (5) A non-citizen detained under subsection (1) must be released from detention within 4 hours after being detained, unless the non-citizen is detained under section 189 because of subsection 190(2).
- (6) If the non-citizen has been detained because of subsection (1) more than once in any period of 48 hours, the 4 hours provided for by subsection (5) is reduced by so much of the earlier period of detention as occurred within that 48 hours.



- (7) In finding out whether 4 hours have passed since a non-citizen was detained, the following times are to be disregarded:
- (a) if the detainee is detained at a place that is inappropriate for questioning the detainee, the time that is reasonably required to take the detainee from that place to the nearest place that is appropriate;
  - (b) any time during which the questioning is suspended or delayed to allow the detainee, or someone else on the detainee's behalf, to communicate with a legal practitioner, friend, relative, guardian, interpreter or consular representative of the country of which the detainee is a citizen;
  - (c) any time during which the questioning is suspended or delayed to allow a person so communicated with or an interpreter required by an officer to arrive at the place where the questioning is to take place;
  - (d) any time during which the questioning is suspended or delayed to allow the detainee to receive medical attention;
  - (e) any time during which the questioning is suspended or delayed because of the detainee's intoxication;
  - (f) any reasonable time during which the questioning is suspended or delayed to allow the detainee to rest or recuperate.

Note: Section 5G may be relevant for determining relationships for the purposes of paragraph (7)(b).

- (8) In paragraph (7)(b), **guardian** includes a person who is responsible, under a parenting order (within the meaning of the *Family Law Act 1975*), for the detainee's long-term care, welfare and development.

### **193 Application of law to certain non-citizens while they remain in immigration detention**

- (1) Sections 194 and 195 do not apply to a person:
- (a) detained under subsection 189(1):
    - (i) on being refused immigration clearance; or

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- (ii) after bypassing immigration clearance; or
  - (iii) after being prevented from leaving a vessel under section 249; or
  - (iv) because of a decision the Minister has made personally under section 501, 501A or 501B to refuse to grant a visa to the person or to cancel a visa that has been granted to the person; or
- (b) detained under subsection 189(1) who:
- (i) has entered Australia after 30 August 1994; and
  - (ii) has not been immigration cleared since last entering; or
- (c) detained under subsection 189(2), (3), (3A) or (4); or
- (d) detained under section 189 who:
- (i) held an enforcement visa that has ceased to be in effect; and
  - (ii) has not been granted a substantive visa since the enforcement visa ceased to be in effect.
- (2) Apart from section 256, nothing in this Act or in any other law (whether written or unwritten) requires the Minister or any officer to:
- (aa) give a person covered by subsection (1) an application form for a visa; or
  - (a) advise a person covered by subsection (1) as to whether the person may apply for a visa; or
  - (b) give a person covered by subsection (1) any opportunity to apply for a visa; or
  - (c) allow a person covered by subsection (1) access to advice (whether legal or otherwise) in connection with applications for visas.
- (3) If:
- (a) a person covered by subsection (1) has not made a complaint in writing to the Australian Human Rights Commission, paragraph 20(6)(b) of the *Australian Human Rights Commission Act 1986* does not apply to the person; and

- (c) a person covered by subsection (1) has not made a complaint to the Postal Industry Ombudsman, paragraph 7(3)(b) of the *Ombudsman Act 1976* (as that paragraph applies because of section 19R of that Act) does not apply to the person.
- (4) This section applies to a person covered by subsection (1) for as long as the person remains in immigration detention.

#### **194 Detainee to be told of consequences of detention**

As soon as reasonably practicable after an officer detains a person under section 189, the officer must ensure that the person is made aware of:

- (a) the provisions of sections 195 and 196; and
- (b) if a visa held by the person has been cancelled under section 137J—the provisions of section 137K.

#### **195 Detainee may apply for visa**

- (1) A detainee may apply for a visa:
  - (a) within 2 working days after the day on which section 194 was complied with in relation to his or her detention; or
  - (b) if he or she informs an officer in writing within those 2 working days of his or her intention to so apply—within the next 5 working days after those 2 working days.
- (2) A detainee who does not apply for a visa within the time allowed by subsection (1) may not apply for a visa, other than a bridging visa or a protection visa, after that time.

#### **195A Minister may grant detainee visa (whether or not on application)**

*Persons to whom section applies*

- (1) This section applies to a person who is in detention under section 189.

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*Minister may grant visa*

- (2) If the Minister thinks that it is in the public interest to do so, the Minister may grant a person to whom this section applies a visa of a particular class (whether or not the person has applied for the visa).
- (3) In exercising the power under subsection (2), the Minister is not bound by Subdivision AA, AC or AF of Division 3 of this Part or by the regulations, but is bound by all other provisions of this Act.

*Minister not under duty to consider whether to exercise power*

- (4) The Minister does not have a duty to consider whether to exercise the power under subsection (2), whether he or she is requested to do so by any person, or in any other circumstances.

*Minister to exercise power personally*

- (5) The power under subsection (2) may only be exercised by the Minister personally.

*Tabling of information relating to the granting of visas*

- (6) If the Minister grants a visa under subsection (2), he or she must cause to be laid before each House of the Parliament a statement that (subject to subsection (7)):
  - (a) states that the Minister has granted a visa under this section; and
  - (b) sets out the Minister's reasons for granting the visa, referring in particular to the Minister's reasons for thinking that the grant is in the public interest.
- (7) A statement under subsection (6) in relation to a decision to grant a visa is not to include:
  - (a) the name of the person to whom the visa is granted; or
  - (b) any information that may identify the person to whom the visa is granted; or

- (c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the grant of the visa—the name of that other person or any information that may identify that other person.
- (8) A statement under subsection (6) is to be laid before each House of the Parliament within 15 sitting days of that House after:
  - (a) if the decision to grant the visa is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or
  - (b) if the decision to grant the visa is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

### **196 Duration of detention**

- (1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until:
  - (a) he or she is removed from Australia under section 198 or 199; or
  - (aa) an officer begins to deal with the non-citizen under subsection 198AD(3); or
  - (b) he or she is deported under section 200; or
  - (c) he or she is granted a visa.
- (2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.
- (3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than as referred to in paragraph (1)(a), (aa) or (b)) unless the non-citizen has been granted a visa.
- (4) Subject to paragraphs (1)(a), (b) and (c), if the person is detained as a result of the cancellation of his or her visa under section 501, the detention is to continue unless a court finally determines that the detention is unlawful, or that the person detained is not an unlawful non-citizen.

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- (4A) Subject to paragraphs (1)(a), (b) and (c), if the person is detained pending his or her deportation under section 200, the detention is to continue unless a court finally determines that the detention is unlawful.
- (5) To avoid doubt, subsection (4) or (4A) applies:
- (a) whether or not there is a real likelihood of the person detained being removed from Australia under section 198 or 199, or deported under section 200, in the reasonably foreseeable future; and
  - (b) whether or not a visa decision relating to the person detained is, or may be, unlawful.
- (5A) Subsections (4) and (4A) do not affect by implication the continuation of the detention of a person to whom those subsections do not apply.
- (6) This section has effect despite any other law.
- (7) In this section:
- visa decision* means a decision relating to a visa (including a decision not to grant the visa, to cancel the visa or not to reinstate the visa).

**197 Effect of escape from immigration detention**

If a non-citizen:

- (a) was in immigration detention; and
- (b) escaped from that detention; and
- (c) was taken back into that detention;

then, for the purposes of sections 194 and 195, the non-citizen is taken not to have ceased to be in immigration detention.

## **Subdivision B—Residence determinations**

### **197AA Persons to whom Subdivision applies**

This Subdivision applies to a person who is required or permitted by section 189 to be detained, or who is in detention under that section.

### **197AB Minister may determine that person is to reside at a specified place rather than being held in detention centre etc.**

- (1) If the Minister thinks that it is in the public interest to do so, the Minister may make a determination (a *residence determination*) to the effect that one or more specified persons to whom this Subdivision applies are to reside at a specified place, instead of being detained at a place covered by the definition of *immigration detention* in subsection 5(1).
- (2) A residence determination must:
  - (a) specify the person or persons covered by the determination by name, not by description of a class of persons; and
  - (b) specify the conditions to be complied with by the person or persons covered by the determination.
- (3) A residence determination must be made by notice in writing to the person or persons covered by the determination.

### **197AC Effect of residence determination**

*Act and regulations apply as if person were in detention in accordance with section 189*

- (1) While a residence determination is in force, this Act and the regulations apply (subject to subsection (3)) to a person who is covered by the determination and who is residing at the place specified in the determination as if the person were being kept in immigration detention at that place in accordance with section 189.

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(2) If:

- (a) a person covered by a residence determination is temporarily staying at a place other than the place specified in the determination; and
- (b) the person is not breaching any condition specified in the determination by staying there;

then, for the purposes of subsection (1), the person is taken still to be residing at the place specified in the determination.

*Certain provisions do not apply to people covered by residence determinations*

(3) Subsection (1):

- (a) does not apply for the purposes of section 197 or 197A, or any of sections 252AA to 252E; and
- (b) does not apply for the purposes of any other provisions of this Act or the regulations that are specified in regulations made for the purposes of this paragraph.

*What constitutes release from immigration detention?*

(4) If:

- (a) a residence determination is in force in relation to a person; and
- (b) a provision of this Act requires the person to be released from immigration detention, or this Act no longer requires or permits the person to be detained;

then, at the time when paragraph (b) becomes satisfied, the residence determination, so far as it covers the person, is revoked by force of this subsection and the person is, by that revocation, released from immigration detention.

Note: Because the residence determination is revoked, the person is no longer subject to the conditions specified in the determination.

(5) If a person is released from immigration detention by operation of subsection (4), the Secretary must, as soon as possible, notify the person that he or she has been so released.



*Secretary must ensure section 256 complied with*

- (6) The Secretary must ensure that a person covered by a residence determination is given forms and facilities as and when required by section 256.

### **197AD Revocation or variation of residence determination**

- (1) If the Minister thinks that it is in the public interest to do so, the Minister may, at any time, revoke or vary a residence determination in any respect (subject to subsection (2)).

Note 1: If a person covered by a residence determination does not comply with a condition specified in the determination, the Minister may (subject to the public interest test) decide to revoke the determination, or to vary the determination by altering the conditions, whether by omitting or amending one or more existing conditions or by adding one or more additional conditions.

Note 2: If the Minister revokes a residence determination (without making a replacement determination) and a person covered by the determination is a person whom section 189 requires to be detained, the person will then have to be taken into detention at a place that is covered by the definition of *immigration detention* in subsection 5(1).

- (2) Any variation of a residence determination must be such that the determination, as varied, will comply with subsections 197AB(1) and (2).
- (3) A revocation or variation of a residence determination must be made by notice in writing to the person or persons covered by the determination.

### **197AE Minister not under duty to consider whether to exercise powers**

The Minister does not have a duty to consider whether to exercise the power to make, vary or revoke a residence determination, whether he or she is requested to do so by any person, or in any other circumstances.

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**197AF Minister to exercise powers personally**

The power to make, vary or revoke a residence determination may only be exercised by the Minister personally.

**197AG Tabling of information relating to the making of residence determinations**

- (1) If the Minister makes a residence determination, he or she must cause to be laid before each House of the Parliament a statement that (subject to subsection (2)):
  - (a) states that the Minister has made a determination under this section; and
  - (b) sets out the Minister's reasons for making the determination, referring in particular to the Minister's reasons for thinking that the determination is in the public interest.
- (2) A statement under subsection (1) in relation to a residence determination is not to include:
  - (a) the name of any person covered by the determination; or
  - (b) any information that may identify any person covered by the determination; or
  - (c) the address, name or location of the place specified in the determination; or
  - (d) any information that may identify the address, name or location of the place specified in the determination; or
  - (e) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the determination—the name of that other person or any information that may identify that other person.
- (3) A statement under subsection (1) is to be laid before each House of the Parliament within 15 sitting days of that House after:
  - (a) if the residence determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or

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

## **Division 7A—Offences relating to immigration detention**

### **197A Detainees must not escape from detention**

A detainee must not escape from immigration detention.

Penalty: Imprisonment for 5 years.

### **197B Manufacture, possession etc. of weapons by detainees**

- (1) A detainee commits an offence if he or she manufactures, possesses, uses or distributes a weapon.

Penalty: Imprisonment for 5 years.

- (2) In this section:

*weapon* includes:

- (a) a thing made or adapted for use for inflicting bodily injury;  
or
- (b) a thing where the detainee who has the thing intends or threatens to use the thing, or intends that the thing be used, to inflict bodily injury.

## **Division 8—Removal of unlawful non-citizens etc.**

### **Subdivision A—Removal**

#### **197C Australia’s non-refoulement obligations irrelevant to removal of unlawful non-citizens under section 198**

- (1) For the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.
- (2) An officer’s duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia’s non-refoulement obligations in respect of the non-citizen.

#### **198 Removal from Australia of unlawful non-citizens**

##### *Removal on request*

- (1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.

##### *Removal of transitory persons brought to Australia for a temporary purpose*

- (1A) In the case of an unlawful non-citizen who has been brought to Australia under section 198B for a temporary purpose, an officer must remove the person as soon as reasonably practicable after the person no longer needs to be in Australia for that purpose (whether or not the purpose has been achieved).

Note: Some unlawful non-citizens are transitory persons. Section 198B provides for transitory persons to be brought to Australia for a temporary purpose. See the definition of *transitory person* in subsection 5(1).

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- (1B) Subsection (1C) applies if:
- (a) an unlawful non-citizen who is not an unauthorised maritime arrival has been brought to Australia under section 198B for a temporary purpose; and
  - (b) the non-citizen gives birth to a child while the non-citizen is in Australia; and
  - (c) the child is a transitory person within the meaning of paragraph (e) of the definition of *transitory person* in subsection 5(1).
- (1C) An officer must remove the non-citizen and the child as soon as reasonably practicable after the non-citizen no longer needs to be in Australia for that purpose (whether or not that purpose has been achieved).

*Removal of unlawful non-citizens in other circumstances*

- (2) An officer must remove as soon as reasonably practicable an unlawful non-citizen:
- (a) who is covered by subparagraph 193(1)(a)(i), (ii) or (iii) or paragraph 193(1)(b), (c) or (d); and
  - (b) who has not subsequently been immigration cleared; and
  - (c) who either:
    - (i) has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; or
    - (ii) has made a valid application for a substantive visa, that can be granted when the applicant is in the migration zone, that has been finally determined.
- (2A) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:
- (a) the non-citizen is covered by subparagraph 193(1)(a)(iv); and
  - (b) since the Minister's decision (the *original decision*) referred to in subparagraph 193(1)(a)(iv), the non-citizen has not made a valid application for a substantive visa that can be granted when the non-citizen is in the migration zone; and

- (c) in a case where the non-citizen has been invited, in accordance with section 501C, to make representations to the Minister about revocation of the original decision—either:
  - (i) the non-citizen has not made representations in accordance with the invitation and the period for making representations has ended; or
  - (ii) the non-citizen has made representations in accordance with the invitation and the Minister has decided not to revoke the original decision.

Note: The only visa that the non-citizen could apply for is a protection visa or a visa specified in regulations under section 501E.

- (3) The fact that an unlawful non-citizen is eligible to apply for a substantive visa that can be granted when the applicant is in the migration zone but has not done so does not prevent the application of subsection (2) or (2A) to him or her.
- (5) An officer must remove as soon as reasonably practicable an unlawful non-citizen if the non-citizen:
  - (a) is a detainee; and
  - (b) neither applied for a substantive visa in accordance with subsection 195(1) nor applied under section 137K for revocation of the cancellation of a substantive visa;regardless of whether the non-citizen has made a valid application for a bridging visa.
- (5A) Despite subsection (5), an officer must not remove an unlawful non-citizen if:
  - (a) the non-citizen has made a valid application for a protection visa (even if the application was made outside the time allowed by subsection 195(1)); and
  - (b) either:
    - (i) the grant of the visa has not been refused; or
    - (ii) the application has not been finally determined.
- (6) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

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- (a) the non-citizen is a detainee; and
  - (b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and
  - (c) one of the following applies:
    - (i) the grant of the visa has been refused and the application has been finally determined;
    - (iii) the visa cannot be granted; and
  - (d) the non-citizen has not made another valid application for a substantive visa that can be granted when the applicant is in the migration zone.
- (7) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:
- (a) the non-citizen is a detainee; and
  - (b) Subdivision AI of Division 3 of this Part applies to the non-citizen; and
  - (c) either:
    - (i) the non-citizen has not been immigration cleared; or
    - (ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and
  - (d) either:
    - (i) the Minister has not given a notice under paragraph 91F(1)(a) to the non-citizen; or
    - (ii) the Minister has given such a notice but the period mentioned in that paragraph has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.
- (8) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:
- (a) the non-citizen is a detainee; and
  - (b) Subdivision AJ of Division 3 of this Part applies to the non-citizen; and



- (c) either:
  - (i) the Minister has not given a notice under subsection 91L(1) to the non-citizen; or
  - (ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.
- (9) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:
  - (a) the non-citizen is a detainee; and
  - (b) Subdivision AK of Division 3 of this Part applies to the non-citizen; and
  - (c) either:
    - (i) the non-citizen has not been immigration cleared; or
    - (ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and
  - (d) either:
    - (i) the Minister has not given a notice under subsection 91Q(1) to the non-citizen; or
    - (ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.
- (10) For the purposes of subsections (6) to (9), a valid application under section 137K for revocation of the cancellation of a visa is treated as though it were a valid application for a substantive visa that can be granted when the applicant is in the migration zone.
- (11) This section does not apply to an unauthorised maritime arrival to whom section 198AD applies.

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**Subdivision B—Regional processing**

**198AA Reason for Subdivision**

This Subdivision is enacted because the Parliament considers that:

- (a) people smuggling, and its undesirable consequences including the resulting loss of life at sea, are major regional problems that need to be addressed; and
- (b) unauthorised maritime arrivals, including unauthorised maritime arrivals in respect of whom Australia has or may have protection obligations under the Refugees Convention as amended by the Refugees Protocol, should be able to be taken to any country designated to be a regional processing country; and
- (c) it is a matter for the Minister and Parliament to decide which countries should be designated as regional processing countries; and
- (d) the designation of a country to be a regional processing country need not be determined by reference to the international obligations or domestic law of that country.

**198AB *Regional processing country***

- (1) The Minister may, by legislative instrument, designate that a country is a ***regional processing country***.
- (1A) A legislative instrument under subsection (1):
  - (a) may designate only one country; and
  - (b) must not provide that the designation ceases to have effect.
- (1B) Despite subsection 12(1) of the *Legislation Act 2003*, a legislative instrument under subsection (1) of this section commences at the earlier of the following times:
  - (a) immediately after both Houses of the Parliament have passed a resolution approving the designation;
  - (b) immediately after both of the following apply:

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- (i) a copy of the designation has been laid before each House of the Parliament under section 198AC;
  - (ii) 5 sitting days of each House have passed since the copy was laid before that House without it passing a resolution disapproving the designation.
- (2) The only condition for the exercise of the power under subsection (1) is that the Minister thinks that it is in the national interest to designate the country to be a regional processing country.
- (3) In considering the national interest for the purposes of subsection (2), the Minister:
- (a) must have regard to whether or not the country has given Australia any assurances to the effect that:
    - (i) the country will not expel or return a person taken to the country under section 198AD to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; and
    - (ii) the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by the definition of *refugee* in Article 1A of the Refugees Convention as amended by the Refugees Protocol; and
  - (b) may have regard to any other matter which, in the opinion of the Minister, relates to the national interest.
- (4) The assurances referred to in paragraph (3)(a) need not be legally binding.
- (5) The power under subsection (1) may only be exercised by the Minister personally.
- (6) If the Minister designates a country under subsection (1), the Minister may, by legislative instrument, revoke the designation.

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- (7) The rules of natural justice do not apply to the exercise of the power under subsection (1) or (6).
- (9) In this section, *country* includes:
  - (a) a colony, overseas territory or protectorate of a foreign country; and
  - (b) an overseas territory for the international relations of which a foreign country is responsible.

**198AC Documents to be laid before Parliament**

- (1) This section applies if the Minister designates a country to be a regional processing country under subsection 198AB(1).
- (2) The Minister must cause to be laid before each House of the Parliament:
  - (a) a copy of the designation; and
  - (b) a statement of the Minister's reasons for thinking it is in the national interest to designate the country to be a regional processing country, referring in particular to any assurances of a kind referred to in paragraph 198AB(3)(a) that have been given by the country; and
  - (c) a copy of any written agreement between Australia and the country relating to the taking of persons to the country; and
  - (d) a statement about the Minister's consultations with the Office of the United Nations High Commissioner for Refugees in relation to the designation, including the nature of those consultations; and
  - (e) a summary of any advice received from that Office in relation to the designation; and
  - (f) a statement about any arrangements that are in place, or are to be put in place, in the country for the treatment of persons taken to the country.
- (3) The Minister must comply with subsection (2) within 2 sitting days of each House of the Parliament after the day on which the designation is made.

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- (4) The sole purpose of laying the documents referred to in subsection (2) before the Parliament is to inform the Parliament of the matters referred to in the documents and nothing in the documents affects the validity of the designation. Similarly, the fact that some or all of those documents do not exist does not affect the validity of the designation.
- (5) A failure to comply with this section does not affect the validity of the designation.
- (6) In this section, **agreement** includes an agreement, arrangement or understanding:
  - (a) whether or not it is legally binding; and
  - (b) whether it is made before, on or after the commencement of this section.

**198AD Taking unauthorised maritime arrivals to a regional processing country**

- (1) Subject to sections 198AE, 198AF and 198AG, this section applies to an unauthorised maritime arrival who is detained under section 189.

Note: For when this section applies to a transitory person, see section 198AH.

- (2) An officer must, as soon as reasonably practicable, take an unauthorised maritime arrival to whom this section applies from Australia to a regional processing country.
- (2A) However, subsection (2) does not apply in relation to a person who is an unauthorised maritime arrival only because of subsection 5AA(1A) or (1AA) if the person's parent mentioned in the relevant subsection entered Australia before 13 August 2012.

Note 1: Under subsection 5AA(1A) or (1AA) a person born in Australia or in a regional processing country may be an unauthorised maritime arrival in some circumstances.

Note 2: This section does not apply in relation to a person who entered Australia by sea before 13 August 2012: see the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*.

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*Powers of an officer*

- (3) For the purposes of subsection (2) and without limiting that subsection, an officer may do any or all of the following things within or outside Australia:
- (a) place the unauthorised maritime arrival on a vehicle or vessel;
  - (b) restrain the unauthorised maritime arrival on a vehicle or vessel;
  - (c) remove the unauthorised maritime arrival from:
    - (i) the place at which the unauthorised maritime arrival is detained; or
    - (ii) a vehicle or vessel;
  - (d) use such force as is necessary and reasonable.
- (4) If, in the course of taking an unauthorised maritime arrival to a regional processing country, an officer considers that it is necessary to return the unauthorised maritime arrival to Australia:
- (a) subsection (3) applies until the unauthorised maritime arrival is returned to Australia; and
  - (b) section 42 does not apply in relation to the unauthorised maritime arrival's return to Australia.

*Ministerial direction*

- (5) If there are 2 or more regional processing countries, the Minister must, in writing, direct an officer to take an unauthorised maritime arrival, or a class of unauthorised maritime arrivals, under subsection (2) to the regional processing country specified by the Minister in the direction.
- (6) If the Minister gives an officer a direction under subsection (5), the officer must comply with the direction.
- (7) The duty under subsection (5) may only be performed by the Minister personally.

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- (8) The only condition for the performance of the duty under subsection (5) is that the Minister thinks that it is in the public interest to direct the officer to take an unauthorised maritime arrival, or a class of unauthorised maritime arrivals, under subsection (2) to the regional processing country specified by the Minister in the direction.
- (9) The rules of natural justice do not apply to the performance of the duty under subsection (5).
- (10) A direction under subsection (5) is not a legislative instrument.

*Not in immigration detention*

- (11) An unauthorised maritime arrival who is being dealt with under subsection (3) is taken not to be in **immigration detention** (as defined in subsection 5(1)).

*Meaning of officer*

- (12) In this section, **officer** means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

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

- (1) If the Minister thinks that it is in the public interest to do so, the Minister may, in writing, determine that section 198AD does not apply to an unauthorised maritime arrival.

Note: For specification by class, see the *Acts Interpretation Act 1901*.

- (1A) The Minister may, in writing, vary or revoke a determination made under subsection (1) if the Minister thinks that it is in the public interest to do so.
- (2) The power under subsection (1) or (1A) may only be exercised by the Minister personally.
- (3) The rules of natural justice do not apply to an exercise of the power under subsection (1) or (1A).

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- (4) If the Minister makes a determination under subsection (1) or varies or revokes a determination under subsection (1A), the Minister must cause to be laid before each House of the Parliament a statement that:
- (a) sets out the determination, the determination as varied or the instrument of revocation; and
  - (b) sets out the reasons for the determination, variation or revocation, referring in particular to the Minister's reasons for thinking that the Minister's actions are in the public interest.
- (5) A statement under subsection (4) must not include:
- (a) the name of the unauthorised maritime arrival; or
  - (b) any information that may identify the unauthorised maritime arrival; or
  - (c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person or any information that may identify that other person.
- (6) A statement under subsection (4) must be laid before each House of the Parliament within 15 sitting days of that House after:
- (a) if the determination is made, varied or revoked between 1 January and 30 June (inclusive) in a year—1 July in that year; or
  - (b) if the determination is made, varied or revoked between 1 July and 31 December (inclusive) in a year—1 January in the following year.
- (7) The Minister does not have a duty to consider whether to exercise the power under subsection (1) or (1A) in respect of any unauthorised maritime arrival, whether the Minister is requested to do so by the unauthorised maritime arrival or by any other person, or in any other circumstances.
- (8) An instrument under subsection (1) or (1A) is not a legislative instrument.



### **198AF No regional processing country**

Section 198AD does not apply to an unauthorised maritime arrival if there is no regional processing country.

### **198AG Non-acceptance by regional processing country**

Section 198AD does not apply to an unauthorised maritime arrival if the regional processing country, or each regional processing country (if there is more than one such country), has advised an officer, in writing, that the country will not accept the unauthorised maritime arrival.

Note: For specification by class, see the *Acts Interpretation Act 1901*.

### **198AH Application of section 198AD to certain transitory persons**

- (1) Section 198AD applies, subject to sections 198AE, 198AF and 198AG, to a transitory person if, and only if, the person is covered by subsection (1A) or (1B).
- (1A) A transitory person is covered by this subsection if:
  - (a) the person is an unauthorised maritime arrival who is brought to Australia from a regional processing country under section 198B for a temporary purpose; and
  - (b) the person is detained under section 189; and
  - (c) the person no longer needs to be in Australia for the temporary purpose (whether or not the purpose has been achieved).
- (1B) A transitory person (a *transitory child*) is covered by this subsection if:
  - (a) a transitory person covered by subsection (1A) gives birth to the transitory child while in Australia; and
  - (b) the transitory child is detained under section 189; and
  - (c) the transitory child is a transitory person because of paragraph (e) of the definition of *transitory person* in subsection 5(1).

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- (2) Subsection (1) of this section applies whether or not the transitory person has been assessed to be covered by the definition of *refugee* in Article 1A of the Refugees Convention as amended by the Refugees Protocol.

**198AHA Power to take action etc. in relation to arrangement or regional processing functions of a country**

- (1) This section applies if the Commonwealth enters into an arrangement with a person or body in relation to the regional processing functions of a country.
- (2) The Commonwealth may do all or any of the following:
- (a) take, or cause to be taken, any action in relation to the arrangement or the regional processing functions of the country;
  - (b) make payments, or cause payments to be made, in relation to the arrangement or the regional processing functions of the country;
  - (c) do anything else that is incidental or conducive to the taking of such action or the making of such payments.
- (3) To avoid doubt, subsection (2) is intended to ensure that the Commonwealth has capacity and authority to take action, without otherwise affecting the lawfulness of that action.
- (4) Nothing in this section limits the executive power of the Commonwealth.
- (5) In this section:
- action* includes:
- (a) exercising restraint over the liberty of a person; and
  - (b) action in a regional processing country or another country.
- arrangement* includes an arrangement, agreement, understanding, promise or undertaking, whether or not it is legally binding.

*regional processing functions* includes the implementation of any law or policy, or the taking of any action, by a country in connection with the role of the country as a regional processing country, whether the implementation or the taking of action occurs in that country or another country.

### **198AI Ministerial report**

The Minister must, as soon as practicable after 30 June in each year, cause to be laid before each House of Parliament a report setting out:

- (a) the activities conducted under the Bali Process during the year ending on 30 June; and
- (b) the steps taken in relation to people smuggling, trafficking in persons and related transnational crime to support the Regional Cooperation Framework during the year ending on 30 June; and
- (c) the progress made in relation to people smuggling, trafficking in persons and related transnational crime under the Regional Cooperation Framework during the year ending on 30 June.

### **198AJ Reports about unauthorised maritime arrivals**

- (1) The Minister must cause to be laid before each House of the Parliament, within 15 sitting days of that House after the end of a financial year, a report on the following:
  - (a) arrangements made by regional processing countries during the financial year for unauthorised maritime arrivals who make claims for protection under the Refugees Convention as amended by the Refugees Protocol, including arrangements for:
    - (i) assessing those claims in those countries; and
    - (ii) the accommodation, health care and education of those unauthorised maritime arrivals in those countries;
  - (b) the number of those claims assessed in those countries in the financial year;

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- (c) the number of unauthorised maritime arrivals determined in those countries in the financial year to be covered by the definition of *refugee* in Article 1A of the Refugees Convention as amended by the Refugees Protocol.
- (2) However, a report under this section need deal with a particular regional processing country in accordance with subsection (1) only so far as information provided by the country makes it reasonably practicable for the report to do so.
- (3) A report under this section must not include:
  - (a) the name of a person who is or was an unauthorised maritime arrival; or
  - (b) any information that may identify such a person; or
  - (c) the name of any other person connected in any way with any person covered by paragraph (a); or
  - (d) any information that may identify that other person.

**Subdivision C—Transitory persons etc.**

**198B Power to bring transitory persons to Australia**

- (1) An officer may, for a temporary purpose, bring a transitory person to Australia from a country or place outside Australia.
- (2) The power under subsection (1) includes the power to do any of the following things within or outside Australia:
  - (a) place the person on a vehicle or vessel;
  - (b) restrain the person on a vehicle or vessel;
  - (c) remove the person from a vehicle or vessel;
  - (d) use such force as is necessary and reasonable.
- (3) In this section, *officer* means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

**199 Dependants of removed non-citizens**

- (1) If:
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- (a) an officer removes, or is about to remove, an unlawful non-citizen; and
  - (b) the spouse or de facto partner of that non-citizen requests an officer to also be removed from Australia;
- an officer may remove the spouse or de facto partner as soon as reasonably practicable.
- (2) If:
- (a) an officer removes, or is about to remove an unlawful non-citizen; and
  - (b) the spouse or de facto partner of that non-citizen requests an officer to also be removed from Australia with a dependent child or children of that non-citizen;
- an officer may remove the spouse or de facto partner and dependent child or children as soon as reasonably practicable.
- (3) If:
- (a) an officer removes, or is about to remove, an unlawful non-citizen; and
  - (b) that non-citizen requests an officer to remove a dependent child or children of the non-citizen from Australia;
- an officer may remove the dependent child or children as soon as reasonably practicable.
- (4) In paragraphs (1)(a), (2)(a) and (3)(a), a reference to remove includes a reference to take to a regional processing country.

## Division 9—Deportation

### 200 Deportation of certain non-citizens

The Minister may order the deportation of a non-citizen to whom this Division applies.

### 201 Deportation of non-citizens in Australia for less than 10 years who are convicted of crimes

Where:

- (a) a person who is a non-citizen has, either before or after the commencement of this section, been convicted in Australia of an offence;
  - (b) when the offence was committed the person was a non-citizen who:
    - (i) had been in Australia as a permanent resident:
      - (A) for a period of less than 10 years; or
      - (B) for periods that, when added together, total less than 10 years; or
    - (ii) was a citizen of New Zealand who had been in Australia as an exempt non-citizen or a special category visa holder:
      - (A) for a period of less than 10 years as an exempt non-citizen or a special category visa holder; or
      - (B) for periods that, when added together, total less than 10 years, as an exempt non-citizen or a special category visa holder or in any combination of those capacities; and
  - (c) the offence is an offence for which the person was sentenced to death or to imprisonment for life or for a period of not less than one year;
- section 200 applies to the person.

## **202 Deportation of non-citizens upon security grounds**

(1) Where:

- (a) it appears to the Minister that the conduct (whether in Australia or elsewhere and either before or after the commencement of this subsection) of a non-citizen referred to in paragraph 201(b) constitutes, or has constituted, a threat to security; and
- (b) the Minister has been furnished with an adverse security assessment in respect of the non-citizen by the Organisation, being an assessment made for the purposes of this subsection;

then, subject to this section, section 200 applies to the non-citizen.

(2) Where:

- (a) subsection (1) applies in relation to a non-citizen;
- (b) the adverse security assessment made in respect of the non-citizen is not an assessment to which a certificate given in accordance with paragraph 38(2)(a) of the *Australian Security Intelligence Organisation Act 1979* applies; and
- (c) the non-citizen applies to the Tribunal for a review of the security assessment before the end of 30 days after the receipt by the non-citizen of notice of the assessment and the Tribunal, after reviewing the assessment, finds that the security assessment should not have been an adverse security assessment;

section 200 does not apply to the non-citizen.

(3) Where:

- (a) subsection (1) applies in relation to a non-citizen;
- (b) the adverse security assessment made in respect of the non-citizen is an assessment to which a certificate given in accordance with paragraph 38(2)(a) of the *Australian Security Intelligence Organisation Act 1979* applies; and
- (c) the Attorney-General has, in accordance with section 65 of that Act, required the Tribunal to review the assessment;

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section 200 does not apply to the non-citizen unless, following the receipt by the Attorney-General of the findings of the Tribunal, the Attorney-General advises the Minister that the Tribunal has confirmed the assessment.

- (4) A notice given by the Minister pursuant to subsection 38(1) of the *Australian Security Intelligence Organisation Act 1979* informing a person of the making of an adverse security assessment, being an assessment made for the purposes of subsection (1) of this section, shall contain a statement to the effect that the assessment was made for the purposes of subsection (1) of this section and that the person may be deported under section 200 because of section 202.
- (5) Despite subsection 29(7) of the *Administrative Appeals Tribunal Act 1975*, the Tribunal must not extend beyond the period of 28 days referred to in subsection 29(2) of that Act the time within which a person may apply to the Tribunal for a review of an adverse security assessment made for the purposes of subsection (1) of this section.
- (6) In this section:

*adverse security assessment*, *security assessment* and *Tribunal* have the same meanings as they have in Part IV of the *Australian Security Intelligence Organisation Act 1979*.

*Organisation* means the Australian Security Intelligence Organisation.

*security* has the meaning given by section 4 of the *Australian Security Intelligence Organisation Act 1979*.

### 203 Deportation of non-citizens who are convicted of certain serious offences

- (1) Where:
  - (a) a person who is a non-citizen has, either before or after the commencement of this subsection, been convicted in Australia of an offence;



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- (b) at the time of the commission of the offence the person was not an Australian citizen; and
  - (c) the offence is:
    - (i) an offence against section 24AA, 24AB, 25 or 26 of the *Crimes Act 1914*; or
    - (ia) an offence against Division 80 of the *Criminal Code*; or
    - (ii) an offence against section 6 of the *Crimes Act 1914* that relates to an offence mentioned in subparagraph (i) or (ia) of this paragraph; or
    - (iia) an offence against section 11.1 or 11.5 of the *Criminal Code* that relates to an offence mentioned in subparagraph (i) or (ia) of this paragraph; or
    - (iii) an offence against a law of a State or of any internal or external Territory that is a prescribed offence for the purposes of this subparagraph;
- then, subject to this section, section 200 applies to the non-citizen.
- (2) Section 200 does not apply to a non-citizen because of this section unless the Minister has first served on the non-citizen a notice informing the non-citizen that he or she proposes to order the deportation of the non-citizen, on the ground specified in the notice, unless the non-citizen requests, by notice in writing to the Minister, within 30 days after receipt by him or her of the Minister's notice, that his or her case be considered by a Commissioner appointed for the purposes of this section.
  - (3) If a non-citizen on whom a notice is served by the Minister under subsection (2) duly requests, in accordance with the notice, that his or her case be considered by a Commissioner appointed for the purposes of this section, the Minister may, by notice in writing, summon the non-citizen to appear before a Commissioner specified in the notice at the time and place specified in the notice.
  - (4) A Commissioner for the purposes of this section shall be appointed by the Governor-General and shall be a person who is or has been a Judge of a Federal Court or of the Supreme Court of a State or Territory, or a barrister or solicitor of the High Court or of the

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Supreme Court of a State or Territory of not less than 5 years' standing.

- (5) The Commissioner shall, after investigation in accordance with subsection (6), report to the Minister whether he or she considers that the ground specified in the notice under subsection (2) has been established.
- (6) The Commissioner shall make a thorough investigation of the matter with respect to which he or she is required to report, without regard to legal forms, and shall not be bound by any rules of evidence but may inform himself or herself on any relevant matter in such manner as he or she thinks fit.
- (7) Where a notice has been served on a non-citizen under subsection (2), section 200 does not apply to the non-citizen because of this section unless:
  - (a) the non-citizen does not request, in accordance with the notice, that his or her case be considered by a Commissioner;
  - (b) the non-citizen, having been summoned under this section to appear before a Commissioner, fails so to appear at the time and place specified in the summons; or
  - (c) a Commissioner reports under this section in relation to the non-citizen that he or she considers that the ground specified in the notice has been established.

**204 Determination of time for sections 201 and 202**

- (1) Where a person has been convicted of any offence (other than an offence the conviction in respect of which was subsequently quashed) the period (if any) for which the person was confined in a prison for that offence shall be disregarded in determining, for the purposes of section 201 and subsection 202(1), the length of time that that person has been present in Australia as a permanent resident or as an exempt non-citizen or a special category visa holder.

(2) In section 201 and subsection 202(1):

***permanent resident*** means a person (including an Australian citizen) whose continued presence in Australia is not subject to any limitation as to time imposed by law, but does not include:

- (a) in relation to any period before 2 April 1984—a person who was, during that period, a prohibited immigrant within the meaning of this Act as in force at that time; or
  - (b) in relation to any period starting on or after 2 April 1984 and ending on or before 19 December 1989—the person who was, during that period, a prohibited non-citizen within the meaning of this Act as in force in that period; or
  - (c) in relation to any period starting on or after 20 December 1989 and ending before the commencement of section 7 of the *Migration Reform Act 1992*—the person who was, during that period, an illegal entrant within the meaning of this Act as in force in that period; or
  - (d) in relation to any later period—the person who is, during that later period, an unlawful non-citizen.
- (3) For the purposes of this section:
- (a) a reference to a prison includes a reference to any custodial institution at which a person convicted of an offence may be required to serve the whole or a part of any sentence imposed upon him or her by reason of that conviction; and
  - (b) a reference to a period during which a person was confined in a prison includes a reference to a period:
    - (i) during which the person was an escapee from a prison; or
    - (ii) during which the person was undergoing a sentence of periodic detention in a prison.

## **205 Dependants of deportee**

(1) Where the Minister makes or has made an order for the deportation of a person who has a spouse or de facto partner, the Minister may,

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at the request of the spouse or de facto partner of that person,  
remove:

- (a) the spouse or de facto partner; or
- (b) the spouse or de facto partner and a dependent child or children;

of that person.

- (2) Where the Minister makes or has made an order for the deportation of a person who does not have a spouse or de facto partner but who does have a dependent child or children, the Minister may, at the person's request, remove a dependent child or children of the person.

**206 Deportation order to be executed**

- (1) Where the Minister has made an order for the deportation of a person, that person shall, unless the Minister revokes the order, be deported accordingly.
- (2) The validity of an order for the deportation of a person shall not be affected by any delay in the execution of that order.

## **Division 10—Costs etc. of removal and deportation**

### **207 Interpretation**

In this Division:

*carrier*, in relation to an unlawful non-citizen, means a controller of the vessel on which the non-citizen was last brought to Australia.

*controller*, in relation to a vessel, means the master, owner, agent or charterer of the vessel.

*costs* means the fares and other costs to the Commonwealth of transporting:

- (a) a non-citizen; and
- (b) a custodian of the non-citizen;

from Australia to the place outside Australia to which the non-citizen is removed or deported.

### **210 Removed or deported non-citizen liable for costs of removal or deportation**

Subject to section 212, a non-citizen who is removed or deported, other than an unlawful non-citizen who came to Australia on a criminal justice visa, is liable to pay the Commonwealth the costs of his or her removal or deportation.

### **212 Costs of removed or deported spouses, de facto partners and dependants**

- (1) If:
  - (a) 2 persons are spouses or de facto partners of each other; and
  - (b) either:
    - (i) they are both removed or deported; or
    - (ii) one of them is deported and the other is removed;

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each of them is liable to pay the Commonwealth the costs of their removals, their deportations, or the deportation and removal.

(2) If:

- (a) 2 persons are spouses or de facto partners of each other; and
- (b) either:
  - (i) they are both removed or deported; or
  - (ii) one is deported and the other is removed; and
- (c) their dependent child, or dependent children, within the meaning of the regulations are also removed;

then:

- (d) the child or children are not liable to pay the Commonwealth the costs of the child's or children's removal; and
- (e) the persons are liable to pay the Commonwealth those costs.

(3) If:

- (a) a non-citizen is removed or deported; and
- (b) the non-citizen either:
  - (i) does not have a spouse or de facto partner; or
  - (ii) does not have a spouse, or a de facto partner, who is deported or removed; and
- (c) the non-citizen has a dependent child, or dependent children, within the meaning of the regulations who are removed;

then:

- (d) the child or children are not liable to pay the Commonwealth the costs of their removal; and
- (e) the non-citizen is liable to pay the Commonwealth those costs.

**213 Carriers may be liable for costs of removal and deportation**

(1) If a non-citizen who enters Australia:

- (a) is required to comply with section 166 (immigration clearance); and
- (b) either:
  - (i) does not comply; or

- (ii) on complying, is detained under section 189 as an unlawful non-citizen;

then, as soon as practicable after the Secretary or Australian Border Force Commissioner becomes aware that paragraphs (a) and (b) apply to the non-citizen, the Secretary or Australian Border Force Commissioner may give a carrier of the non-citizen a written notice requiring the carriers of the non-citizen to pay the costs of the non-citizen's removal, or deportation, from Australia should that happen.

- (2) The notice is to:
- (a) give particulars of the calculation of the costs; and
  - (b) state that an account for the costs will be given to at least one of the carriers of the non-citizen when they have been incurred.
- (3) If a notice is given, each carrier of the non-citizen is liable to pay the Commonwealth the costs described in the notice and for which an account is given.

#### **214 Non-citizens and carriers jointly liable**

If, under this Division, 2 or more persons are liable to pay the Commonwealth the costs of a non-citizen's removal or deportation they are jointly and severally liable to pay those costs.

#### **215 Costs are debts due to the Commonwealth**

Without limiting any other provision of this Act, costs payable by a person to the Commonwealth under this Division may be recovered by the Commonwealth as a debt due to the Commonwealth in a court of competent jurisdiction.

#### **216 Use of existing ticket for removal or deportation**

- If:
- (a) a non-citizen is to be removed or deported; and

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- (b) the non-citizen or another person holds a ticket for the conveyance of the non-citizen from a place within Australia to a place outside Australia;

the Secretary or Australian Border Force Commissioner may, on behalf of the ticket holder arrange (with or without the ticket holder's consent) for the ticket to be applied for or towards the conveyance of the non-citizen.

**217 Vessels required to convey certain removees**

- (1) If a person covered by subsection 193(1) is to be removed, the Secretary or Australian Border Force Commissioner may give the controller of the vessel on which the person travelled to and entered Australia written notice requiring the controller to transport the person from Australia.
- (2) Subject to section 219, the controller must comply with the notice within 72 hours of the giving of the notice or such further time as the Secretary or Australian Border Force Commissioner allows.
- Penalty: 100 penalty units.
- (3) An offence against subsection (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

**218 Vessels required to convey deportees or other removees**

- (1) Subject to section 217, if a person is to be removed or deported, the Secretary or Australian Border Force Commissioner may give the controller of a vessel or vessels a written notice requiring the controller to transport the person from Australia to a destination of the vessel or one of the vessels specified in the notice.
- (2) Subject to sections 219 and 220, the controller must comply with the notice within 72 hours of the giving of the notice or such further time as the Secretary or Australian Border Force Commissioner allows.

Penalty: 100 penalty units.



- (3) An offence against subsection (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

### **219 Exemption from complying**

It is a defence to a prosecution for an offence against section 217 or 218 of failing to comply with a notice to transport a non-citizen if the defendant proves:

- (a) that the defendant was prevented from complying with the notice because of stress of weather or other reasonable cause; or
- (b) the defendant gave reasonable notice to the Secretary or Australian Border Force Commissioner of the person's willingness to receive the non-citizen on board a specified vessel at a specified port on a specified day within 72 hours of the giving of the notice for removal or deportation, but the non-citizen was not made available at that port on that date for boarding the vessel.

Note: A defendant bears a legal burden in relation to the matters in this section (see section 13.4 of the *Criminal Code*).

### **220 Waiver of requirement**

- (1) If:
  - (a) a notice has been given under section 218 requiring the transport of an unlawful non-citizen to a country; and
  - (b) the government of that country notifies the Minister that the non-citizen would not be permitted to enter that country;the Minister is to give the controller written notice revoking the notice under that section.
- (2) The revocation of a notice does not prevent another notice under section 218 or affect any liability for costs.

### **221 Cost of removal under notice**

- (1) If:

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(a) the controller of a vessel is given a notice under section 218 to transport a non-citizen; and  
(b) the controller was a carrier of the non-citizen; and  
(c) paragraphs 213(1)(a) and (b) apply to the non-citizen;  
then the Commonwealth is not liable for the costs of transporting the non-citizen.

(2) If:

(a) the controller of a vessel is given a notice under section 218 to transport a non-citizen; and  
(b) subsection (1) does not apply;

then:

(c) the Commonwealth is liable to pay the controller's costs of the transport; and  
(d) sections 210 to 216 apply to the transport and those costs.

**222 Orders restraining certain non-citizens from disposing etc. of property**

(1) Where, on an application by the Secretary or Australian Border Force Commissioner relating to property of a non-citizen, a court is satisfied that:

(a) the non-citizen is liable, or may, on deportation or removal, become liable, to pay the Commonwealth an amount under section 210 or 212; and  
(b) if the court does not make an order under this subsection there is a risk that the Commonwealth will not be able to recover the whole or a part of any amount that the non-citizen is, or becomes, liable to pay to the Commonwealth under section 210 or 212;

the court may make an order restraining any dealing with the property, or such part of the property as is specified in the order.

(2) The Secretary or Australian Border Force Commissioner may apply to a court for an order under subsection (1) in respect of:

(a) any of a non-citizen's property that is in Australia; or  
(b) specified property of a non-citizen that is in Australia.

- (3) Where an application is made for an order under subsection (1), the court may, before considering the application, grant an interim order, being an order of the kind applied for that is expressed to have effect pending the determination of the application.
- (4) An order under subsection (1) has effect for the period specified in the order.
- (5) A court may rescind, vary or discharge an order made by it under this section.
- (6) A court may suspend the operation of an order made by it under this section.
- (7) An order under subsection (1) may be made subject to such conditions as the court thinks fit and, without limiting the generality of this, may make provision for meeting, out of the property or a specified part of the property to which the order relates, either or both of the following:
- (a) the non-citizen's reasonable living expenses (including the reasonable living expenses of the non-citizen's dependants (if any));
  - (b) reasonable legal expenses incurred by the non-citizen in relation to a matter arising under this Act.
- (8) A person shall not contravene an order under this section.
- Penalty: Imprisonment for 2 years.
- (8A) Subsection (8) does not apply if the person has a reasonable excuse.
- Note: A defendant bears an evidential burden in relation to the matter in subsection (8A) (see subsection 13.3(3) of the *Criminal Code*).
- (9) In this section:
- court*** means a court of competent jurisdiction.

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*property* means real or personal property of every description, whether tangible or intangible, that is situated in Australia, and includes an interest in any such real or personal property.

**223 Secretary or Australian Border Force Commissioner may give direction about valuables of detained non-citizens**

- (1) This section applies in relation to a person who has been detained.
- (2) Where the Secretary or Australian Border Force Commissioner is satisfied that:
  - (a) the detainee is an unlawful non-citizen or a deportee;
  - (b) the detainee is liable, or may, on deportation or removal, become liable, to pay the Commonwealth an amount under section 210 or 212; and
  - (c) if the Secretary or Australian Border Force Commissioner does not give a notice under this section there is a risk that the Commonwealth will not be able to recover the whole or a part of any amount that the detainee is, or becomes, liable to pay to the Commonwealth under section 210 or 212;the Secretary or Australian Border Force Commissioner may, in writing, notify the detainee that his or her valuables are liable to be taken under this section.
- (3) Where the Secretary or Australian Border Force Commissioner gives a notice under subsection (2), subsections (4) to (13) apply.
- (4) The Secretary or Australian Border Force Commissioner shall cause a copy of the notice to be served on the detainee as prescribed.
- (5) At any time after a copy of the notice has been served on the detainee and while the notice remains in force, the Secretary or Australian Border Force Commissioner may take possession of any valuables that the Secretary or Australian Border Force Commissioner believes, on reasonable grounds, to belong to the detainee.
- (6) A copy of the notice may be served on:

- (a) any bank;
- (b) any other financial institution; or
- (c) any other person.

- (7) A bank or other financial institution served with a copy of the notice shall not, while the notice remains in force, without the written consent of the Secretary or Australian Border Force Commissioner, process any transaction attempted in relation to any account held by the detainee, whether alone or jointly with another person or other persons, and whether for his or her own benefit or as a trustee.

Penalty: \$30,000.

- (7A) An offence against subsection (7) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (8) Where a copy of the notice is served on a person, not being a bank or other financial institution, who owes a debt to the detainee, that first-mentioned person shall not, while the notice remains in force, without the written consent of the Secretary or Australian Border Force Commissioner, make any payment to the detainee in respect of that debt.

Penalty: Imprisonment for 2 years.

- (9) The notice stops being in force at the end of the third working day after it is given unless, before the end of that day, the Secretary or Australian Border Force Commissioner has applied to a court for an order confirming the notice.
- (10) A court shall, on application by the Secretary or Australian Border Force Commissioner, confirm the notice if and only if it is satisfied:
- (a) that the detainee is an unlawful non-citizen or a deportee;
  - (b) that the detainee is liable, or may, on deportation or removal, become liable, to pay the Commonwealth an amount under section 210 or 212; and

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- (c) that, if the court does not confirm the notice, there is a risk that the Commonwealth will not be able to recover the whole or a part of any amount that the detainee is, or becomes, liable to pay to the Commonwealth under section 210 or 212.
- (11) If the court confirms the notice, the court may make an order directing the Secretary or Australian Border Force Commissioner to make provision, whether by returning valuables to which the notice relates or otherwise, for the meeting of either or both of the following:
- (a) the detainee's reasonable living expenses (including the reasonable living expenses of the detainee's dependants (if any));
  - (b) reasonable legal expenses incurred by the detainee in relation to a matter arising under this Act.
- (12) If the notice is confirmed by the court, it remains in force for such period, not exceeding 12 months, as is specified by the court.
- (13) If the court refuses to confirm the notice, it thereupon stops being in force.
- (14) The Secretary or Australian Border Force Commissioner may issue to an officer a search warrant in accordance with the prescribed form.
- (15) A search warrant shall be expressed to remain in force for a specified period not exceeding 3 months and stops being in force at the end of that period.
- (16) An officer having with him or her a search warrant that was issued to him or her under subsection (14) and that is in force may, at any time in the day or night, and with such assistance, and using such reasonable force, as the officer thinks necessary:
- (a) enter and search any building, premises, vehicle, vessel or place in which the officer has reasonable cause to believe there may be found any valuables to which a notice in force under this section relates; and

- (b) may seize any such valuables found in the course of such a search.
- (17) An officer who has seized valuables under subsection (16) shall deal with those valuables in accordance with the directions of the Secretary or Australian Border Force Commissioner.
- (18) For the purposes of the exercise of his or her powers under subsection (16) an officer may stop any vehicle or vessel.
- (19) An officer who, in good faith, on behalf of the Secretary or Australian Border Force Commissioner or as a delegate of the Secretary or Australian Border Force Commissioner, does any act or thing for the purpose of the exercise of the power under subsection (5) to take possession of valuables is not liable to any civil or criminal action in respect of the doing of that act or thing.
- (20) In this section:

*court* means a court of competent jurisdiction.

*valuables* includes:

- (a) gold, jewellery, negotiable instruments, travellers cheques and cash; and
- (b) bank books and other documentary evidence of debts owed to the detainee.

## **224 Dealing with seized valuables**

- (1) Where the Secretary or Australian Border Force Commissioner takes possession of valuables pursuant to subsection 223(5), the provisions of this section have effect.
- (2) The Secretary or Australian Border Force Commissioner shall arrange for the valuables to be kept until they are dealt with in accordance with a provision of this section, and shall ensure that all reasonable steps are taken to preserve the valuables while they are so kept.

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- (3) The Secretary or Australian Border Force Commissioner shall arrange for the valuables to be returned to the person from whom they were taken if:
- (a) the authorising notice stops being in force;
  - (b) the notified detainee:
    - (i) is granted a visa; or
    - (ii) stops being a deportee;
  - (c) the notified detainee is not, when the authorising notice is given, liable to pay an amount to the Commonwealth under section 210 or 212, and does not, within 6 months after the giving of that notice, become so liable; or
  - (d) all amounts that the notified detainee is or becomes liable to pay to the Commonwealth under section 210 or 212 are paid to the Commonwealth.
- (4) If, when the Secretary or Australian Border Force Commissioner takes possession of valuables, the notified detainee is liable under section 210 or 212 to pay an amount to the Commonwealth, the Secretary or Australian Border Force Commissioner shall, unless he or she is required to arrange for the return of the valuables because of paragraph (3)(d):
- (a) apply the valuables towards the payment of the amount owed to the Commonwealth; and
  - (b) return any surplus to the person from whom the valuables were taken.
- (5) If, while valuables are being kept pursuant to subsection (2), the notified detainee becomes liable under section 210 or 212 to pay an amount to the Commonwealth, the Secretary or Australian Border Force Commissioner shall, unless he or she is required to arrange for the return of the valuables because of paragraph (3)(d):
- (a) apply the valuables towards the payment of the amount owed to the Commonwealth; and
  - (b) return any surplus to the person from whom the valuables were taken.



(6) In this section:

***notified detainee*** means the person served with the notice under section 223.

***authorising notice*** means the notice pursuant to which the Secretary or Australian Border Force Commissioner took possession of the valuables.

## Division 11—Duties of masters in relation to crews

### 225 Production of identity documents and mustering of crew

- (1) This section applies to a vessel, other than a vessel of the regular armed forces of a government recognised by the Commonwealth, which has entered Australia from overseas.
- (2) On the arrival of a vessel at a port, an officer may require the master of the vessel to muster the vessel's crew in the presence of the officer.
- (3) An officer may require the master of a vessel to muster the vessel's crew in the presence of the officer before the vessel departs from a port.
- (4) An officer may require a member of the crew of a vessel to produce his or her identity documents to the officer for inspection.
- (5) A person must not fail to comply with a requirement made under this section.

Penalty: \$4,000.

- (6) Subsection (5) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (6) (see subsection 13.3(3) of the *Criminal Code*).

- (7) An offence against subsection (5) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

### 226 Production of identity documents by persons on board resources installation

- (1) This section applies to a resources installation that has been brought into Australian waters from a place outside the outer limits of Australian waters for the purpose of being attached to the Australian seabed.

- (2) On the arrival of a resources installation at the place where it is to be attached to the Australian seabed, an officer may require the person in charge of the installation to muster, in the presence of the officer, all of the people on board the installation.
- (3) An officer may require the person in charge of a resources installation to muster, in the presence of the officer, all of the people on board the installation before the installation is detached from the Australian seabed for the purpose of being taken to a place outside the outer limits of Australian waters.
- (4) An officer may require a person on board a resources installation that is attached to the Australian seabed or to another resources installation that is so attached to produce to the officer for inspection the person's identity documents.
- (5) A person must not fail to comply with a requirement made under this section.
- Penalty: \$4,000.
- (6) Subsection (5) does not apply if the person has a reasonable excuse.
- Note: A defendant bears an evidential burden in relation to the matter in subsection (6) (see subsection 13.3(3) of the *Criminal Code*).
- (7) An offence against subsection (5) is an offence of strict liability.
- Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

### **227 Production of identity documents by persons on board sea installation**

- (1) This section applies to a sea installation that has been brought into Australian waters from a place outside the outer limits of Australian waters for the purpose of being installed in an adjacent area or in a coastal area.
- (2) On the arrival of a sea installation at its proposed location, an officer may require the person in charge of the installation to

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muster, in the presence of the officer, all of the people on board the installation.

- (3) An officer may require the person in charge of a sea installation to muster, in the presence of the officer, all of the people on board the installation before the installation is detached from its location for the purpose of being taken to a place outside the outer limits of Australian waters.
- (4) An officer may require a person on board a sea installation that is installed in an adjacent area or in a coastal area to produce to the officer for inspection the person's identity documents.
- (5) A person must not fail to comply with a requirement made under this section.

Penalty: \$4,000.

- (6) Subsection (5) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (6) (see subsection 13.3(3) of the *Criminal Code*).

- (7) An offence against subsection (5) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

**228 Master to report absences**

- (1) Where a member of the crew of a vessel, other than a vessel of the regular armed forces of a government recognized by the Commonwealth, that has entered Australia from overseas was on board the vessel at the time of its arrival at a port and is absent from the vessel at the time of its departure from the port, the master of the vessel shall, at that departure, deliver to an officer a written report:
- (a) specifying the name of the member; and
  - (b) stating:

- (i) that the member was a member of the crew of the vessel on board the vessel at the time of its arrival at that port; and
- (ii) that the member is absent from the vessel at the time of its departure from that port; and
- (c) stating whether the member left the vessel at that port with leave or without leave.

Penalty: \$4,000.

- (2) An offence against subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

## **Division 12—Offences etc. in relation to entry into, and remaining in, Australia**

### **Subdivision A—People smuggling and related offences**

#### **228A Application of Subdivision**

This Subdivision applies in and outside Australia.

#### **228B Circumstances in which a non-citizen has no lawful right to come to Australia**

- (1) For the purposes of this Subdivision, a non-citizen has, at a particular time, no lawful right to come to Australia if, at that time:
  - (a) the non-citizen does not hold a visa that is in effect; and
  - (b) the non-citizen is not covered by an exception referred to in subsection 42(2) or (2A); and
  - (c) the non-citizen is not permitted by regulations under subsection 42(3) to travel to Australia without a visa that is in effect.
- (2) To avoid doubt, a reference in subsection (1) to a non-citizen includes a reference to a non-citizen seeking protection or asylum (however described), whether or not Australia has, or may have, protection obligations in respect of the non-citizen because the non-citizen is or may be a refugee, or for any other reason.

#### **229 Carriage of non-citizens to Australia without documentation**

- (1) The master, owner, agent, charterer and operator of a vessel on which a non-citizen is brought into Australia on or after 1 November 1979 each commit an offence against this section if the non-citizen, when entering Australia:
  - (a) is not in possession of evidence of a visa that is in effect and that permits him or her to travel to and enter Australia; and
  - (b) does not hold a special purpose visa; and

- (c) is not eligible for a special category visa; and
  - (d) does not hold an enforcement visa; and
  - (e) is a person to whom subsection 42(1) applies.
- (1A) A person commits an offence if:
- (a) the person is a master, owner, agent, charterer or operator of an aircraft; and
  - (b) the person brings a non-citizen into Australia by air on the aircraft; and
  - (c) the non-citizen is the holder of a maritime crew visa that is in effect.
- (2) A person who commits an offence against this section is liable, upon conviction, to a fine not exceeding \$10,000.
- (3) An offence against subsection (1) or (1A) is an offence of absolute liability.
- Note: For **absolute liability**, see section 6.2 of the *Criminal Code*.
- (4) For the purposes of subsection (1), the defendant bears an evidential burden in relation to establishing that subsection 42(1) does not apply to a person because of subsection 42(2) or (2A) or regulations made under subsection 42(3).
- Note: For **evidential burden**, see section 13.3 of the *Criminal Code*.
- (5) It is a defence to a prosecution for an offence against subsection (1) in relation to the bringing of a non-citizen into Australia on a vessel if it is established:
- (a) that the non-citizen was, when he or she boarded or last boarded the vessel for travel to Australia, in possession of evidence of a visa that was in effect and that permitted him or her to travel to and enter Australia, being a visa that:
    - (i) did not appear to have been cancelled; and
    - (ii) was expressed to continue in effect until, or at least until, the date of the non-citizen's expected entry into Australia;

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- (b) that the master of the vessel had reasonable grounds for believing that, when the non-citizen boarded or last boarded the vessel for travelling to and entering Australia, the non-citizen:
    - (i) was eligible for a special category visa; or
    - (ii) was the holder of a special purpose visa; or
    - (iii) would, when entering Australia, be the holder of a special purpose visa; or
    - (iv) was the holder of an enforcement visa; or
    - (v) would, when entering Australia, be the holder of an enforcement visa; or
  - (c) that the vessel entered Australia from overseas only because of:
    - (i) the illness of a person on board the vessel;
    - (ii) stress of weather; or
    - (iii) other circumstances beyond the control of the master.
- (5A) It is a defence to a prosecution for an offence against subsection (1A) in relation to the bringing of a non-citizen into Australia on an aircraft if it is established that:
- (a) the non-citizen was, when he or she boarded or last boarded the aircraft for travel to Australia, in possession of evidence of another class of visa that was in effect and that permitted him or her to travel to and enter Australia, being a visa that:
    - (i) did not appear to have been cancelled; and
    - (ii) was expressed to continue in effect until, or at least until, the date of the non-citizen's expected entry into Australia; or
  - (b) the aircraft entered Australia from overseas only because of:
    - (i) the illness of a person on board the aircraft; or
    - (ii) stress of weather; or
    - (iii) other circumstances beyond the control of the master.
- (6) A defendant bears a legal burden in relation to the matters in subsection (5) or (5A).



### **230 Carriage of concealed persons to Australia**

- (1) The master, owner, agent and charterer of a vessel each commit an offence against this section if an unlawful non-citizen is concealed on the vessel when it arrives in the migration zone.
- (1A) The master, owner, agent and charterer of a vessel each commit an offence against this section if:
- (a) a person is concealed on the vessel when it arrives in Australia; and
  - (b) the person would, if in the migration zone, be an unlawful non-citizen.
- (1B) An offence against subsection (1) or (1A) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (2) Subsection (1) does not apply if the master of the vessel:
- (a) as soon as it arrives in the migration zone, gives notice to an officer that the non-citizen is on board; and
  - (b) prevents the non-citizen from landing without an officer having had an opportunity to question the non-citizen.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

- (2A) Subsection (1A) does not apply if the master of the vessel:
- (a) as soon as it arrives in Australia, gives notice to an officer that the person is on board; and
  - (b) prevents the person from leaving the vessel without an officer having had an opportunity to question the person.

Penalty: \$10,000.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2A) (see subsection 13.3(3) of the *Criminal Code*).

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**231 Master of vessel to comply with certain requests**

- (1) The master of a vessel arriving in Australia must comply with any request by an authorised officer to:
- (a) give the authorised officer a list of all persons on the vessel and prescribed particulars of each of them; or
  - (b) gather together those persons or such of them as are specified by the officer; or
  - (c) make sure of the disembarkation from the vessel of those persons or such of them as are specified by the officer.
- (2) If:
- (a) a person is on a vessel that has arrived in Australia; and
  - (b) that person's name is not on a list of persons on the vessel given under subsection (1);
- the person is taken, for the purposes of section 230, to have been concealed on the vessel when it arrived.

**232 Penalty on master, owner, agent and charterer of vessel**

- (1) Where:
- (a) a non-citizen:
    - (i) enters Australia on a vessel; and
    - (ii) because he or she is not the holder of a visa that is in effect, or because of section 173, becomes upon entry an unlawful non-citizen; and
    - (iii) is a person to whom subsection 42(1) applies; or
  - (b) a removee or deportee who has been placed on board a vessel for removal or deportation leaves the vessel in Australia otherwise than in immigration detention under this Act;
- the master, owner, agent and charterer of the vessel are each taken to commit an offence against this Act punishable by a fine not exceeding 100 penalty units.
- (1A) An offence against subsection (1) is an offence of absolute liability.

Note: For *absolute liability*, see section 6.2 of the *Criminal Code*.

- (1B) For the purposes of paragraph (1)(a), the defendant bears an evidential burden in relation to establishing that subsection 42(1) does not apply to a person because of subsection 42(2) or (2A) or regulations made under subsection 42(3).

Note: For *evidential burden*, see section 13.3 of the *Criminal Code*.

- (2) It is a defence to a prosecution for an offence against subsection (1) in relation to the entry of a non-citizen to Australia on a vessel if it is established:
- (a) that the non-citizen was, when he or she boarded or last boarded the vessel for travel to Australia, in possession of evidence of a visa that was in effect and that permitted him or her to travel to and enter Australia, being a visa that:
    - (i) did not appear to have been cancelled; and
    - (ii) was expressed to continue in effect until, or at least until, the date of the non-citizen's expected entry into Australia; or
  - (b) that the master of the vessel had reasonable grounds for believing that, when the non-citizen boarded or last boarded the vessel for travelling to and entering Australia, the non-citizen:
    - (i) was eligible for a special category visa; or
    - (ii) was the holder of a special purpose visa; or
    - (iii) would, when entering Australia, be the holder of a special purpose visa; or
    - (iv) was the holder of an enforcement visa; or
    - (v) would, when entering Australia, be the holder of an enforcement visa; or
  - (c) that the vessel entered Australia from overseas only because of:
    - (i) the illness of a person on board the vessel; or
    - (ii) stress of weather; or
    - (iii) other circumstances beyond the control of the master.
- (3) A defendant bears a legal burden in relation to the matters in subsection (2).

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**233A Offence of people smuggling**

- (1) A person (the *first person*) commits an offence if:
- (a) the first person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of another person (the *second person*); and
  - (b) the second person is a non-citizen; and
  - (c) the second person had, or has, no lawful right to come to Australia.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

- (2) Absolute liability applies to paragraph (1)(b).

Note: For absolute liability, see section 6.2 of the *Criminal Code*.

- (3) For the purposes of this Act, an offence against subsection (1) is to be known as the offence of people smuggling.

**233B Aggravated offence of people smuggling (danger of death or serious harm etc.)**

- (1) A person (the *first person*) commits an offence against this section if the first person commits the offence of people smuggling (the *underlying offence*) in relation to another person (the *victim*) and either or both of the following apply:
- (b) in committing the underlying offence, the first person subjects the victim to cruel, inhuman or degrading treatment (within the ordinary meaning of that expression);
  - (c) in committing the underlying offence:
    - (i) the first person's conduct gives rise to a danger of death or serious harm to the victim; and
    - (ii) the first person is reckless as to the danger of death or serious harm to the victim that arises from the conduct.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

Note: Sections 236A and 236B limit conviction and sentencing options for offences against this section.

- (2) There is no fault element for the physical element of conduct described in subsection (1), that the first person commits the underlying offence, other than the fault elements (however described), if any, for the underlying offence.
- (3) To avoid doubt, the first person may be convicted of an offence against this section even if the first person has not been convicted of the underlying offence.
- (4) In this section:

*serious harm* has the same meaning as in the *Criminal Code*.

### **233C Aggravated offence of people smuggling (at least 5 people)**

- (1) A person (the *first person*) commits an offence if:
  - (a) the first person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of at least 5 persons (the *other persons*); and
  - (b) at least 5 of the other persons are non-citizens; and
  - (c) the persons referred to in paragraph (b) who are non-citizens had, or have, no lawful right to come to Australia.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

Note: Sections 236A and 236B limit conviction and sentencing options for offences against this section.

- (2) Absolute liability applies to paragraph (1)(b).

Note: For absolute liability, see section 6.2 of the *Criminal Code*.

- (3) If, on a trial for an offence against subsection (1), the trier of fact:
  - (a) is not satisfied that the defendant is guilty of that offence; and
  - (b) is satisfied beyond reasonable doubt that the defendant is guilty of the offence of people smuggling;

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the trier of fact may find the defendant not guilty of an offence against subsection (1) but guilty of the offence of people smuggling, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

**233D Supporting the offence of people smuggling**

- (1) A person (the *first person*) commits an offence if:
- (a) the first person provides material support or resources to another person or an organisation (the *receiver*); and
  - (b) the support or resources aids the receiver, or a person or organisation other than the receiver, to engage in conduct constituting the offence of people smuggling.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

- (2) Subsection (1) does not apply if the conduct constituting the offence of people smuggling relates, or would relate, to:
- (a) the first person; or
  - (b) a group of persons that includes the first person.
- (3) To avoid doubt, the first person commits an offence against subsection (1) even if the offence of people smuggling is not committed.

**233E Concealing and harbouring non-citizens etc.**

- (1) A person (the *first person*) commits an offence if:
- (a) the first person conceals another person (the *second person*); and
  - (b) the second person is a non-citizen; and
  - (c) the first person engages in the conduct with the intention that the second person will enter Australia in contravention of this Act.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

- (2) A person (the *first person*) commits an offence if:
- (a) the first person conceals another person (the *second person*);  
and
  - (b) the second person is an unlawful non-citizen or a deportee;  
and
  - (c) the first person engages in the conduct with the intention of preventing discovery by an officer of the second person.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

- (3) A person (the *first person*) commits an offence if:
- (a) the first person harbours another person (the *second person*);  
and
  - (b) the second person is an unlawful non-citizen, a removee or a deportee.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

#### **234 False documents and false or misleading information etc. relating to non-citizens**

- (1) A person shall not, in connexion with the entry, proposed entry or immigration clearance, of a non-citizen (including that person himself or herself) into Australia or with an application for a visa or a further visa permitting a non-citizen (including that person himself or herself) to remain in Australia:
- (a) present, or cause to be presented, to an officer or a person exercising powers or performing functions under this Act a document which is forged or false;
  - (b) make, or cause to be made, to an officer or a person exercising powers or performing functions under this Act a statement that, to the person's knowledge, is false or misleading in a material particular; or
  - (c) deliver, or cause to be delivered, to an officer or a person exercising powers or performing functions under this Act, or otherwise furnish, or cause to be furnished for official

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purposes of the Commonwealth, a document containing a statement or information that is false or misleading in a material particular.

- (2) A person shall not transfer or part with possession of a document:
- (a) with intent that the document be used to help a person, being a person not entitled to use it, to gain entry, or to remain in, Australia or to be immigration cleared; or
  - (b) where the person has reason to suspect that the document may be so used.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

**234A Aggravated offence of false documents and false or misleading information etc. relating to non-citizens (at least 5 people)**

- (1) A person must not, in connection with:
- (a) the entry or proposed entry into Australia, or the immigration clearance, of a group of 5 or more non-citizens (which may include that person), or of any member of such a group; or
  - (b) an application for a visa or a further visa permitting a group of 5 or more non-citizens (which may include that person), or any member of such a group, to remain in Australia;

do any of the following:

- (c) present, or cause to be presented, to an officer or a person exercising powers or performing functions under this Act a document that the person knows is forged or false;
- (d) make, or cause to be made, to an officer or a person exercising powers or performing functions under this Act a statement that the person knows is false or misleading in a material particular;
- (e) deliver, or cause to be delivered, to an officer or a person exercising powers or performing functions under this Act, or otherwise give, or cause to be given, for official purposes of the Commonwealth, a document containing a statement or



information that the person knows is false or misleading in a material particular.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

Note: Sections 236A and 236B limit conviction and sentencing options for offences against this section.

- (2) A person must not transfer or part with possession of a document or documents:
- (a) with the intention that the document or documents be used to help a group of 5 or more people, none of whom are entitled to use the document or documents, or any member of such a group, to gain entry into or remain in Australia, or to be immigration cleared; or
  - (b) if the person has reason to suspect that the document or documents may be so used.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

Note: Sections 236A and 236B limit conviction and sentencing options for offences against this section.

### **235 Offences in relation to work**

- (1) If:
- (a) the temporary visa held by a non-citizen is subject to a prescribed condition restricting the work that the non-citizen may do in Australia; and
  - (b) the non-citizen contravenes that condition;
- the non-citizen commits an offence against this section.

Note: Subdivision C of this Division also contains offences relating to work by a non-citizen in breach of a visa condition.

- (2) For the purposes of subsection (1), a condition restricts the work that a non-citizen may do if, but not only if, it prohibits the non-citizen doing:
- (a) any work; or

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- (b) work other than specified work; or
  - (c) specified work.
- (3) An unlawful non-citizen who performs work in Australia whether for reward or otherwise commits an offence against this subsection.
- Note: Subdivision C of this Division also contains offences relating to work by an unlawful non-citizen.
- (4) If:
- (a) there is a criminal justice certificate or a criminal justice stay warrant about a non-citizen; and
  - (b) the person does any work within the meaning of subsection 160(2), in Australia, whether for reward or otherwise;
- then without limiting the operation of any other provision of this Act, the person commits an offence against this subsection.
- (4A) Subsection (4) does not apply to a non-citizen who holds a criminal justice stay visa, but this subsection does not affect the operation of subsection (1).
- Note: A defendant bears an evidential burden in relation to the matters in subsection (4A) (see subsection 13.3(3) of the *Criminal Code*).
- (4B) An offence against subsection (1), (3) or (4) is an offence of strict liability.
- Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (5) The penalty for an offence against subsection (1), (3) or (4) is a fine not exceeding \$10,000.
- (6) For the purposes of this section, a reference in a visa, and the reference in subsection (3), to the performance of any work in Australia by a person, shall each be read as not including a reference to the performance by the person of any work of a prescribed kind or of work in prescribed circumstances.
- (7) To avoid doubt, for the purposes of this section, a reference in a visa, and the reference in subsection (3), to the performance of any work in Australia by a person, does not refer to engaging in:

- (a) an activity in which a person who is a detainee in immigration detention voluntarily engages where the activity is of a kind approved in writing by the Secretary for the purposes of this paragraph; or
- (b) an activity in which a person who is a prisoner in a prison or remand centre of the Commonwealth, a State or a Territory engages as a prisoner; or
- (c) an activity in which a person engages in compliance with:
  - (i) a sentence passed, or an order made, under subsection 20AB(1) of the *Crimes Act 1914* (community service orders etc.); or
  - (ii) a community service order, a work order, a sentence of periodic detention, an attendance centre order, a sentence of weekend detention, an attendance order, or a similar sentence or order, passed or made under the law of a State or Territory.

### **236 Offences relating to visas**

- (1) A person commits an offence if:
  - (a) the person uses a visa with the intention of:
    - (i) travelling to Australia; or
    - (ii) remaining in Australia; or
    - (iii) identifying himself or herself; and
  - (b) the visa is a visa that was granted to another person.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

- (2) A person commits an offence if:
  - (a) the person has a visa in his or her possession or under his or her control; and
  - (b) the visa is a visa that was not granted to the person.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

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- (3) Subsection (2) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

- (4) The fault element for paragraph (2)(a) is intention.

Note: Section 5.2 of the *Criminal Code* defines *intention*.

**236A No discharge without conviction for certain offences**

The court may only make an order under section 19B of the *Crimes Act 1914* (discharge of offenders without conviction) in respect of a charge for an offence against section 233B, 233C or 234A if the person charged was aged under 18 when the offence was alleged to have been committed.

Note: See also section 236D, which relates to age.

**236B Mandatory minimum penalties for certain offences**

- (1) This section applies if a person is convicted of an offence against section 233B, 233C or 234A.
- (2) This section does not apply if it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed.
- (3) The court must impose a sentence of imprisonment of at least:
- (a) if the conviction is for an offence against section 233B—8 years; or
  - (b) if the conviction is for a repeat offence—8 years; or
  - (c) in any other case—5 years.
- (4) The court must also set a non-parole period of at least:
- (a) if the conviction is for an offence to which paragraph (3)(a) or (b) applies—5 years; or
  - (b) in any other case—3 years.
- (5) A person's conviction for an offence is for a *repeat offence* if:

- (a) in proceedings after the commencement of this section (whether in the same proceedings as the proceedings relating to the offence, or in previous proceedings), a court:
    - (i) has convicted the person of another offence, being an offence against section 233B, 233C or 234A of this Act; or
    - (ii) has found, without recording a conviction, that the person has committed another such offence; or
  - (b) in proceedings after the commencement of the *Border Protection (Validation and Enforcement Powers) Act 2001* (whether in the same proceedings as the proceedings relating to the offence, or in previous proceedings), a court:
    - (i) has convicted the person of another offence, being an offence against section 232A or 233A of this Act as in force before the commencement of this section; or
    - (ii) has found, without recording a conviction, that the person has committed another such offence.
- (6) In this section:

*non-parole period* has the same meaning as it has in Part IB of the *Crimes Act 1914*.

### **236C Time in immigration detention counts for sentencing etc.**

- (1) This section applies to the court when imposing a sentence on, or setting a non-parole period for, a person convicted of an offence against this Subdivision.
- (2) The court must take into account any period that the person has spent in immigration detention during the period:
  - (a) starting when the offence was committed; and
  - (b) ending when the person is sentenced for the offence.

Note: This enables the court to take into account time spent while not in punitive detention.

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- (3) Neither section 236B nor this section prevents section 16E of the *Crimes Act 1914* from applying to the imposition of the sentence or the setting of the non-parole period.

Note: Section 16E of the *Crimes Act 1914* applies State law to aspects of sentencing for federal offences, subject to specified exceptions.

**236D Burden and standard of proof in relation to age**

If, in proceedings relating to an offence against this Subdivision:

- (a) the defendant claims to have been aged under 18 at the time the offence was alleged to have been, or was, committed, and
- (b) the prosecution disputes this claim;

the prosecution bears the burden of proving, on the balance of probabilities, that the defendant was aged 18 or over at that time.

**236E Evidentiary certificates in proceedings for offences**

*Issuing a certificate*

- (1) A written certificate may be issued under this subsection if an authorisation authorises the exercise of maritime powers in relation to a vessel or aircraft (the ***target vessel or aircraft***). The certificate may be issued by:
- (a) the authorising officer who gave the authorisation; or
  - (b) a maritime officer who boards the target vessel or aircraft in accordance with the authorisation.

Note: For definitions for this section, see subsection (6).

*Certificate is prima facie evidence of the matters in it*

- (2) The certificate is to be received in proceedings for an offence against this Subdivision as prima facie evidence of the matters stated in the certificate.

*Matters that can be specified in a certificate*

- (3) The certificate may specify one or more of the following:

- (a) the location of the target vessel or aircraft during the exercise of those maritime powers;
  - (b) the location, during the exercise of those maritime powers, of a Commonwealth ship or Commonwealth aircraft from which the exercise of those maritime powers was directed or coordinated;
  - (c) the contents of any list of passengers on board the target vessel or aircraft, or passenger cards relating to passengers on board the target vessel or aircraft;
  - (d) the number of passengers on board the target vessel or aircraft;
  - (e) the number of crew on board the target vessel or aircraft;
  - (f) details about anything a maritime officer did under subsection 64(1), or section 66, of the *Maritime Powers Act 2013* (about securing things) in the exercise of those maritime powers;
  - (j) any other matter prescribed under subsection (5).
- (4) Subsection (2) does not apply to so much of the certificate as specifies whether a person is the master, owner, agent or charterer of the target vessel or aircraft.
- (5) The Minister may, by legislative instrument, prescribe other matters that may be specified in a certificate issued under subsection (1).

*Definitions*

- (6) In this section:

***authorisation*** has the same meaning as in the *Maritime Powers Act 2013*.

***authorising officer*** has the same meaning as in the *Maritime Powers Act 2013*.

***Commonwealth aircraft*** has the same meaning as in the *Maritime Powers Act 2013*.

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*Commonwealth ship* has the same meaning as in the *Maritime Powers Act 2013*.

*maritime powers* has the same meaning as in the *Maritime Powers Act 2013*.

**236F Evidentiary certificates—procedural matters**

- (1) A certificate issued under subsection 236E(1) must not be admitted in evidence in proceedings for an offence unless:
  - (a) the person charged with the offence; or
  - (b) a lawyer who has appeared for the person in those proceedings;has, at least 28 days before the certificate is sought to be so admitted, been given a copy of the certificate together with notice of the intention to produce the certificate as evidence in the proceedings.
- (2) If, under section 236E, a certificate is admitted in evidence in proceedings for an offence, the person charged with the offence may require the person who signed the certificate to be:
  - (a) called as a witness for the prosecution; and
  - (b) cross-examined as if the person who signed the certificate had given evidence of the matters stated in the certificate.
- (3) However, subsection (2) does not entitle the person charged to require the person who signed the certificate to be called as a witness for the prosecution unless:
  - (a) the prosecutor has been given at least 21 days' notice of the person's intention to require the person who signed the certificate to be so called; and
  - (b) the court, by order, allows the person charged to require the person who signed the certificate to be so called.
- (4) Any evidence given in support, or in rebuttal, of a matter stated in a certificate issued under subsection 236E(1) must be considered on its merits, and the credibility and probative value of such



evidence must be neither increased nor diminished by reason of this section.

### **Subdivision B—Offences relating to abuse of laws allowing spouses etc. of Australian citizens or of permanent residents to become permanent residents**

#### **237 Reason for Subdivision**

This Subdivision was enacted because:

- (a) under the regulations, a person satisfies a criterion for certain visas that give, or might lead to, authorisation for the person's permanent residence in Australia if the person is the spouse or de facto partner of, and has a genuine and continuing relationship, involving a shared life to the exclusion of all others with, either an Australian citizen or a permanent resident of Australia; and
- (c) some persons attempt to get permanent residence under the regulations by:
  - (i) entering into a married relationship that is not intended to be a genuine and continuing relationship involving a shared life to the exclusion of all others; or
  - (ii) pretending to be a de facto partner of another person.

#### **238 Interpretation**

In this Subdivision:

*crit***erion** includes part of a criterion.

*preliminary visa*, means a visa that is usually applied for by persons applying, or intending to apply, for a permanent visa.

*stay visa* means:

- (a) a permanent visa; or
- (b) a preliminary visa.

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**239 Application of Subdivision**

- (1) This Subdivision applies in and outside Australia.
- (2) This Subdivision applies to marriages solemnized outside Australia as well as those solemnized in Australia.

**240 Offence to arrange marriage to obtain permanent residence**

- (1) A person must not arrange a marriage between other persons with the intention of assisting one of those other persons to get a stay visa by satisfying a criterion for the visa because of the marriage.
- (2) Subsection (1) applies whether or not the intention is achieved.
- (3) It is a defence to an offence against subsection (1) if the defendant proves that, although one purpose of the marriage was to assist a person to get a stay visa, the defendant believed on reasonable grounds that the marriage would result in a genuine and continuing marital relationship.

Penalty: \$100,000 or imprisonment for 10 years, or both.

Note: A defendant bears a legal burden in relation to the matter in subsection (3) (see section 13.4 of the *Criminal Code*).

**241 Offence to arrange pretended de facto relationship to obtain permanent residence**

- (1) If a person knows or believes on reasonable grounds that 2 other persons are not de facto partners of each other, the person must not make arrangements that make, or help to make, it look as if those other persons are such de facto partners with the intention of assisting one of those other persons to get a stay visa by appearing to satisfy a criterion for the visa because of being such de facto partners.
- (2) Subsection (1) applies whether or not the intention is achieved.

Penalty: \$100,000 or imprisonment for 10 years, or both.

**243 Offences relating to application for permanent residence  
because of marriage or de facto relationship**

- (1) A person must not apply for a stay visa on the basis of satisfying a criterion for the visa because of being the spouse or de facto partner of another person if, at the time of the application, the applicant does not intend to live permanently with the other person in a married relationship (within the meaning of subsection 5F(2)) or de facto relationship (within the meaning of subsection 5CB(2)), as appropriate.
- (2) A non-citizen in Australia convicted of an offence under subsection (1) becomes an unlawful non-citizen.
- (3) A person must not nominate an applicant for a stay visa on the basis of the applicant satisfying a criterion for the visa because of being the spouse or de facto partner of the person if, at the time of the application, the person does not intend to live permanently with the applicant in a married relationship (within the meaning of subsection 5F(2)) or de facto relationship (within the meaning of subsection 5CB(2)), as appropriate.

Penalty: Imprisonment for 2 years.

**245 Offences of making false or unsupported statements**

- (1) A person must not make a statement, or give information, in writing, to an officer in relation to the consideration for the purposes of this Act or the regulations of any of the following questions:
  - (a) whether or not other persons are in a married relationship (within the meaning of subsection 5F(2));
  - (b) whether or not other persons are in a de facto relationship (within the meaning of subsection 5CB(2)) with one another;if:
  - (d) the person knows that the statement or information is false or misleading in a material particular; and

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- (e) the statement is made, or the information is given, in a document that describes, and shows the penalty for, an offence against this subsection.

Penalty: Imprisonment for 12 months.

- (3) A person must not make a statement, or give information, in writing, to an officer in relation to the consideration for the purposes of this Act or the regulations of any of the following questions:
  - (a) whether or not other persons are in a married relationship (within the meaning of subsection 5F(2));
  - (b) whether or not other persons are in a de facto relationship (within the meaning of subsection 5CB(2)) with one another;if:
  - (d) the statement or information is false or misleading in a material particular; and
  - (e) the person making the statement, or giving the information, did not make appropriate inquiries to satisfy himself or herself that the statement or information was neither false nor misleading; and
  - (f) the statement is made, or the information is given, in a document that describes, and shows the penalty for, an offence against this subsection.

Penalty: \$12,000.

**Subdivision C—Offences and civil penalties in relation to work by non-citizens**

**245AA Overview**

- (1) This Subdivision creates offences, and provides for civil penalties, to deal with the following situations:
  - (a) where a person allows an unlawful non-citizen to work, or refers an unlawful non-citizen for work;

- (b) where a person allows a non-citizen to work, or refers a non-citizen for work, in breach of the non-citizen's visa conditions.
- (2) This Subdivision uses a number of terms that are defined in the following sections:
  - (a) section 14 (defines ***unlawful non-citizen***);
  - (b) section 245AG (defines ***work*** and ***allows*** to work);
  - (c) section 245AH (defines ***exploited***).
- (3) To avoid doubt, section 245AF sets out some circumstances in which this Subdivision does not apply.
- (4) Section 235 also contains offences relating to work by an unlawful non-citizen and a non-citizen in breach of a visa condition.

### **245AB Allowing an unlawful non-citizen to work**

- (1) A person (the ***first person***) contravenes this subsection if:
  - (a) the first person allows, or continues to allow, another person (the ***worker***) to work; and
  - (b) the worker is an unlawful non-citizen.
- (2) Subsection (1) does not apply if the first person takes reasonable steps at reasonable times to verify that the worker is not an unlawful non-citizen, including (but not limited to) either of the following steps:
  - (a) using a computer system prescribed by the regulations to verify that matter;
  - (b) doing any one or more things prescribed by the regulations.

#### *Offence*

- (3) A person commits an offence if the person contravenes subsection (1). The physical elements of the offence are set out in that subsection.

Penalty: 2 years imprisonment.

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Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

- (4) For the purposes of subsection (3), the fault element for paragraph (1)(b) is knowledge or recklessness by the first person.

*Civil penalty provision*

- (5) A person is liable to a civil penalty if the person contravenes subsection (1).

Civil penalty: 90 penalty units.

Note: It is not necessary to prove a person's state of mind in proceedings for a civil penalty order (see section 486ZF).

- (6) A person who wishes to rely on subsection (2) in proceedings for a civil penalty order bears an evidential burden in relation to the matter in that subsection.

**245AC Allowing a lawful non-citizen to work in breach of a work-related condition**

- (1) A person (the *first person*) contravenes this subsection if:
- (a) the first person allows, or continues to allow, another person (the *worker*) to work; and
  - (b) the worker is a lawful non-citizen; and
  - (c) the worker holds a visa that is subject to a work-related condition; and
  - (d) the worker is in breach of the work-related condition solely because of doing the work referred to in paragraph (a).
- (2) Subsection (1) does not apply if the first person takes reasonable steps at reasonable times to verify that the worker is not in breach of the work-related condition solely because of doing the work referred to in paragraph (1)(a), including (but not limited to) either of the following steps:
- (a) using a computer system prescribed by the regulations to verify that matter;
  - (b) doing any one or more things prescribed by the regulations.

*Offence*

- (3) A person commits an offence if the person contravenes subsection (1). The physical elements of the offence are set out in that subsection.

Penalty: 2 years imprisonment.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

- (4) For the purposes of subsection (3), the fault element for paragraphs (1)(b), (c) and (d) is knowledge or recklessness by the first person.

*Civil penalty provision*

- (5) A person is liable to a civil penalty if the person contravenes subsection (1).

Civil penalty: 90 penalty units.

Note: It is not necessary to prove a person's state of mind in proceedings for a civil penalty order (see section 486ZF).

- (6) A person who wishes to rely on subsection (2) in proceedings for a civil penalty order bears an evidential burden in relation to the matter in that subsection.

**245AD Aggravated offences if a person allows, or continues to allow, another person to work**

*Allowing an unlawful non-citizen to work*

- (1) A person (the **first person**) commits an offence if:
- (a) the first person allows, or continues to allow, another person (the **worker**) to work; and
  - (b) the worker is an unlawful non-citizen; and
  - (c) the worker is being exploited; and
  - (d) the first person knows of, or is reckless as to, the circumstances mentioned in paragraphs (b) and (c).

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Penalty: 5 years imprisonment.

Note: See section 245AH for when a person is being *exploited*.

*Allowing a lawful non-citizen to work in breach of a work-related condition*

- (2) A person (the **first person**) commits an offence if:
- (a) the first person allows, or continues to allow, another person (the **worker**) to work; and
  - (b) the worker is a lawful non-citizen; and
  - (c) the worker holds a visa that is subject to a work-related condition; and
  - (d) the worker is in breach of the work-related condition solely because of doing the work referred to in paragraph (a); and
  - (e) the worker is being exploited; and
  - (f) the first person knows of, or is reckless as to, the circumstances mentioned in paragraphs (b), (c), (d) and (e).

Penalty: 5 years imprisonment.

Note: See section 245AH for when a person is being *exploited*.

**245AE Referring an unlawful non-citizen for work**

- (1) A person (the **first person**) contravenes this subsection if:
- (a) the first person operates a service, whether for reward or otherwise, referring other persons to third persons for work; and
  - (b) the first person refers another person (the **prospective worker**) to a third person for work; and
  - (c) at the time of the referral, the prospective worker is an unlawful non-citizen.
- (2) Subsection (1) does not apply if the first person takes reasonable steps at reasonable times before the referral to verify that the prospective worker is not an unlawful non-citizen, including (but not limited to) either of the following steps:



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- (a) using a computer system prescribed by the regulations to verify that matter;
- (b) doing any one or more things prescribed by the regulations.

*Offence*

- (3) A person commits an offence if the person contravenes subsection (1). The physical elements of the offence are set out in that subsection.

Penalty: 2 years imprisonment.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

- (4) For the purposes of subsection (3), the fault element for paragraph (1)(c) is knowledge or recklessness by the first person.

*Civil penalty provision*

- (5) A person is liable to a civil penalty if the person contravenes subsection (1).

Civil penalty: 90 penalty units.

Note: It is not necessary to prove a person's state of mind in proceedings for a civil penalty order (see section 486ZF).

- (6) A person who wishes to rely on subsection (2) in proceedings for a civil penalty order bears an evidential burden in relation to the matter in that subsection.

**245AEA Referring a lawful non-citizen for work in breach of a work-related condition**

- (1) A person (the *first person*) contravenes this subsection if:
  - (a) the first person operates a service, whether for reward or otherwise, referring other persons to third persons for work; and
  - (b) the first person refers another person (the *prospective worker*) to a third person for work; and

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- (c) at the time of the referral:
- (i) the prospective worker is a lawful non-citizen; and
  - (ii) the prospective worker holds a visa that is subject to a work-related condition; and
  - (iii) the prospective worker will be in breach of the work-related condition solely because of doing the work in relation to which he or she is referred.
- (2) Subsection (1) does not apply if the first person takes reasonable steps at reasonable times before the referral to verify that the prospective worker will not be in breach of the work-related condition solely because of doing the work in relation to which he or she is referred, including (but not limited to) either of the following steps:
- (a) using a computer system prescribed by the regulations to verify that matter;
  - (b) doing any one or more things prescribed by the regulations.

*Offence*

- (3) A person commits an offence if the person contravenes subsection (1). The physical elements of the offence are set out in that subsection.

Penalty: 2 years imprisonment.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

- (4) For the purposes of subsection (3), the fault element for paragraph (1)(c) is knowledge or recklessness by the first person.

*Civil penalty provision*

- (5) A person is liable to a civil penalty if the person contravenes subsection (1).

Civil penalty: 90 penalty units.

Note: It is not necessary to prove a person's state of mind in proceedings for a civil penalty order (see section 486ZF).

- (6) A person who wishes to rely on subsection (2) in proceedings for a civil penalty order bears an evidential burden in relation to the matter in that subsection.

**245AEB Aggravated offences if a person refers another person to a third person for work**

*Referring an unlawful non-citizen for work*

- (1) A person (the **first person**) commits an offence if:
- (a) the first person operates a service, whether for reward or otherwise, referring other persons to third persons for work; and
  - (b) the first person refers another person (the **prospective worker**) to a third person for work; and
  - (c) at the time of the referral, the prospective worker is an unlawful non-citizen; and
  - (d) the prospective worker will be exploited in doing that work, or any other work, for the third person; and
  - (e) the first person knows of, or is reckless as to, the circumstances mentioned in paragraphs (c) and (d).

Penalty: 5 years imprisonment.

Note: See section 245AH for when a person will be **exploited**.

*Referring a lawful non-citizen for work in breach of a work-related condition*

- (2) A person (the **first person**) commits an offence if:
- (a) the first person operates a service, whether for reward or otherwise, referring other persons to third persons for work; and
  - (b) the first person refers another person (the **prospective worker**) to a third person for work; and
  - (c) at the time of the referral:
    - (i) the prospective worker is a lawful non-citizen; and

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- (ii) the prospective worker holds a visa that is subject to a work-related condition; and
- (iii) the prospective worker will be in breach of the work-related condition solely because of doing the work in relation to which he or she is referred; and
- (d) the prospective worker will be exploited in doing the work in relation to which he or she is referred, or in doing any other work, for the third person; and
- (e) the first person knows of, or is reckless as to, the circumstances mentioned in paragraphs (c) and (d).

Penalty: 5 years imprisonment.

Note: See section 245AH for when a person will be *exploited*.

**245AF Circumstances in which this Subdivision does not apply**

To avoid doubt, this Subdivision does not apply where:

- (a) a detainee in immigration detention voluntarily engages in an activity of a kind approved in writing by the Secretary for the purposes of this paragraph; or
- (b) a prisoner in a prison or remand centre of the Commonwealth, a State or a Territory engages in an activity as a prisoner; or
- (c) a person engages in an activity in compliance with:
  - (i) a sentence passed, or an order made, under subsection 20AB(1) of the *Crimes Act 1914* (community service orders etc.); or
  - (ii) a community service order, a work order, a sentence of periodic detention, an attendance centre order, a sentence of weekend detention, an attendance order, or a similar sentence or order, passed or made under the law of a State or Territory.

**245AG Meaning of *work* and *allows to work***

- (1) In this Subdivision:

**work** means any work, whether for reward or otherwise.

- (2) In this Subdivision, a person **allows** a person to work if, and only if:
- (a) the first person employs the second person under a contract of service; or
  - (b) the first person engages the second person, other than in a domestic context, under a contract for services; or
  - (ba) the first person participates in an arrangement, or any arrangement included in a series of arrangements, for the performance of work by the second person for:
    - (i) the first person; or
    - (ii) another participant in the arrangement or any such arrangement; or
  - (c) the first person bails or licenses a chattel to the second person or another person with the intention that the second person will use the chattel to perform a transportation service; or
  - (d) the first person leases or licenses premises, or a space within premises, to the second person or another person with the intention that the second person will use the premises or space to perform sexual services within the meaning of the *Criminal Code* (see the Dictionary to the *Criminal Code*); or
  - (e) the prescribed circumstances exist.
- (3) In paragraph (2)(d):

**premises** means:

- (a) an area of land or any other place, whether or not it is enclosed or built on; or
- (b) a building or other structure; or
- (c) a vehicle or vessel.

### **245AH Meaning of *exploited***

For the purposes of this Subdivision, a person is **exploited** if the person is subjected to **exploitation** within the meaning of the *Criminal Code* (see section 271.1A of the *Criminal Code*).

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**245AJ Criminal liability of executive officers of bodies corporate**

- (1) An executive officer of a body corporate commits an offence if:
  - (a) the body commits an offence (the *work-related offence*) against this Subdivision; and
  - (b) the officer knew that, or was reckless or negligent as to whether, the work-related offence would be committed; and
  - (c) the officer was in a position to influence the conduct of the body in relation to the work-related offence; and
  - (d) the officer failed to take all reasonable steps to prevent the work-related offence being committed.
- (2) An offence against subsection (1) is punishable on conviction by a pecuniary penalty not exceeding one-fifth of the maximum pecuniary penalty that a court could impose on the body corporate for the work-related offence.

*Reasonable steps to prevent the offence*

- (3) In determining whether the executive officer of the body corporate failed to take all reasonable steps to prevent the work-related offence being committed by the body, a court must have regard to:
  - (a) what action (if any) the officer took towards ensuring that the body's employees, agents and contractors had a reasonable knowledge and understanding of the requirements to comply with this Subdivision, insofar as those requirements affected the employees, agents or contractors concerned; and
  - (b) what action (if any) the officer took when he or she became aware that the body was committing the work-related offence.
- (4) Subsection (3) does not limit subsection (1).

*Definition*

- (5) In this section:

*executive officer* of a body corporate means:

  - (a) a director of the body corporate; or

- (b) the chief executive officer (however described) of the body corporate; or
- (c) the chief financial officer (however described) of the body corporate; or
- (d) the secretary of the body corporate.

### **245AK Civil liability of executive officers of bodies corporate**

- (1) An executive officer of a body corporate contravenes this subsection if:
- (a) the body contravenes (the *work-related contravention*) a civil penalty provision in this Subdivision; and
  - (b) the officer knew that, or was reckless or negligent as to whether, the work-related contravention would occur; and
  - (c) the officer was in a position to influence the conduct of the body in relation to the work-related contravention; and
  - (d) the officer failed to take all reasonable steps to prevent the work-related contravention.

#### *Civil penalty provision*

- (2) An executive officer of a body corporate is liable to a civil penalty if the officer contravenes subsection (1).

Civil penalty: 90 penalty units.

Note: Section 486ZF (which provides that a person's state of mind does not need to be proven in proceedings for a civil penalty order) does not apply in relation to this subsection.

#### *Reasonable steps to prevent the contravention*

- (3) In determining whether the executive officer of the body corporate failed to take all reasonable steps to prevent the work-related contravention by the body, a court must have regard to:
- (a) what action (if any) the officer took towards ensuring that the body's employees, agents and contractors had a reasonable knowledge and understanding of the requirements to comply

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with this Subdivision, insofar as those requirements affected the employees, agents or contractors concerned; and

- (b) what action (if any) the officer took when he or she became aware that the body was engaging in the work-related contravention.

- (4) Subsection (3) does not limit subsection (1).

*Definitions*

- (5) In this section:

**executive officer** of a body corporate means:

- (a) a director of the body corporate; or
- (b) the chief executive officer (however described) of the body corporate; or
- (c) the chief financial officer (however described) of the body corporate; or
- (d) the secretary of the body corporate.

**negligent**: an executive officer of a body corporate is **negligent** as to whether a work-related contravention would occur if the officer's conduct involves:

- (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
- (b) such a high risk that the work-related contravention would occur;

that the conduct merits the imposition of a pecuniary penalty.

**reckless**: an executive officer of a body corporate is **reckless** as to whether a work-related contravention would occur if:

- (a) the officer is aware of a substantial risk that the work-related contravention would occur; and
- (b) having regard to the circumstances known to the officer, it is unjustifiable to take the risk.



### **245AL Contravening civil penalty provisions**

- (1) This section applies if a civil penalty provision in this Subdivision provides that a person contravening another provision of this Subdivision (the *conduct rule provision*) is liable to a civil penalty.
- (2) For the purposes of this Act, the person is taken to contravene the civil penalty provision if the person contravenes the conduct rule provision.

### **245AM Geographical scope of offence and civil penalty provisions**

#### *Offences*

- (1) Section 15.2 of the *Criminal Code* (extended geographical jurisdiction—category B) applies to an offence against this Subdivision.

#### *Contraventions of civil penalty provisions*

- (2) An order must not be made against a person in civil proceedings relating to a contravention by the person of a civil penalty provision in this Subdivision unless:
  - (a) the person's conduct that allegedly contravenes the provision occurs:
    - (i) wholly or partly in Australia; or
    - (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
  - (b) the person's conduct that allegedly contravenes the provision occurs wholly outside Australia and, at the time of the alleged contravention, the person is:
    - (i) an Australian citizen; or
    - (ii) a resident of Australia; or
    - (iii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; or
  - (c) all of the following conditions are satisfied:

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- (i) the person's conduct allegedly contravenes the provision because of section 486ZD (the ***ancillary contravention***);
- (ii) the conduct occurs wholly outside Australia;
- (iii) the conduct constituting the primary contravention to which the ancillary contravention relates occurs, or is intended by the person to occur, wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship.

*Defences relating to contraventions of civil penalty provisions*

- (3) In civil proceedings relating to a primary contravention by a person, it is a defence if:
  - (a) the conduct constituting the alleged primary contravention occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and
  - (b) the person is neither:
    - (i) an Australian citizen; nor
    - (ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and
  - (c) there is not in force in:
    - (i) the foreign country where the conduct constituting the alleged primary contravention occurs; or
    - (ii) the part of the foreign country where the conduct constituting the alleged primary contravention occurs; a law of that foreign country, or a law of that part of that foreign country, that provides for a pecuniary or criminal penalty for such conduct.
- (4) In civil proceedings relating to a contravention (the ***ancillary contravention***) by a person of a civil penalty provision in this Subdivision because of section 486ZD, it is a defence if:
  - (a) the conduct constituting the alleged ancillary contravention occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and

- (b) the conduct (the ***primary conduct***) constituting the primary contravention to which the ancillary contravention relates occurs, or is intended by the person to occur, wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and
  - (c) the person is neither:
    - (i) an Australian citizen; nor
    - (ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and
  - (d) there is not in force in:
    - (i) the foreign country where the primary conduct occurs or is intended by the person to occur; or
    - (ii) the part of the foreign country where the primary conduct occurs or is intended by the person to occur; a law of that foreign country, or a law of that part of that foreign country, that provides for a pecuniary or criminal penalty for the primary conduct.
- (5) A defendant bears an evidential burden in relation to the matter in subsection (3) or (4).

*Attorney-General's consent needed for certain proceedings*

- (6) Civil proceedings relating to a contravention of a civil penalty provision in this Subdivision must not be commenced without the Attorney-General's written consent if:
- (a) the conduct constituting the alleged contravention occurs wholly in a foreign country; and
  - (b) at the time of the alleged contravention, the person alleged to have contravened the provision is neither:
    - (i) an Australian citizen; nor
    - (ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

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*When conduct taken to occur partly in Australia*

- (7) For the purposes of this section, if a person sends a thing, or causes a thing to be sent:
- (a) from a point outside Australia to a point in Australia; or
  - (b) from a point in Australia to a point outside Australia;
- that conduct is taken to have occurred partly in Australia.
- (8) For the purposes of this section, if a person sends, or causes to be sent, an electronic communication:
- (a) from a point outside Australia to a point in Australia; or
  - (b) from a point in Australia to a point outside Australia;
- that conduct is taken to have occurred partly in Australia.

*Definitions*

- (9) In this section:

***Australian aircraft*** has the same meaning as in the *Criminal Code*.

***Australian ship*** has the same meaning as in the *Criminal Code*.

***electronic communication*** has the same meaning as in the *Criminal Code*.

***foreign country*** has the same meaning as in the *Criminal Code*.

***point*** has the same meaning as in section 16.2 of the *Criminal Code*.

***primary contravention*** means a contravention of a civil penalty provision in this Subdivision other than because of section 486ZD.

***resident of Australia*** has the same meaning as in the *Criminal Code*.

### **245AN Charge and trial for an aggravated offence**

- (1) If the prosecution intends to prove an offence against subsection 245AD(1) or (2), the charge must allege that the worker referred to in that subsection has been exploited.
- (2) If the prosecution intends to prove an offence against subsection 245AEB(1) or (2), the charge must allege that the prospective worker referred to in that subsection has been or will be exploited:
  - (a) in doing the work in relation to which the prospective worker was referred; or
  - (b) in doing other work for the person to whom the prospective worker was referred.
- (3) On a trial for an offence against section 245AD, the trier of fact may find the defendant not guilty of that offence but guilty of an offence against section 245AB or 245AC if:
  - (a) the trier of fact is not satisfied that the defendant is guilty of an offence against section 245AD; and
  - (b) the trier of fact is satisfied that the defendant is guilty of an offence against section 245AB or 245AC; and
  - (c) the defendant has been accorded procedural fairness in relation to that finding of guilt.
- (4) On a trial for an offence against section 245AEB, the trier of fact may find the defendant not guilty of that offence but guilty of an offence against section 245AE or 245AEA if:
  - (a) the trier of fact is not satisfied that the defendant is guilty of an offence against section 245AEB; and
  - (b) the trier of fact is satisfied that the defendant is guilty of an offence against section 245AE or 245AEA; and
  - (c) the defendant has been accorded procedural fairness in relation to that finding of guilt.

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**245AO Treatment of partnerships**

- (1) This Subdivision, and any other provision of this Act to the extent that it relates to this Subdivision, apply to a partnership as if it were a person, but with the changes set out in this section.
- (2) An offence against this Subdivision that would otherwise be committed by a partnership is taken to have been committed by each partner in the partnership, at the time the offence is committed, who:
  - (a) did the relevant act; or
  - (b) aided, abetted, counselled or procured the relevant act; or
  - (c) was in any way knowingly concerned in, or party to, the relevant act (whether directly or indirectly or whether by any act of the partner).
- (3) A civil penalty provision in this Subdivision that would otherwise be contravened by a partnership is taken to have been contravened by each partner in the partnership, at the time of the conduct constituting the contravention, who:
  - (a) engaged in the conduct; or
  - (b) aided, abetted, counselled or procured the conduct; or
  - (c) was in any way knowingly concerned in, or party to, the conduct (whether directly or indirectly or whether by any act of the partner).

**245AP Treatment of unincorporated associations**

- (1) This Subdivision, and any other provision of this Act to the extent that it relates to this Subdivision, apply to an unincorporated association as if it were a person, but with the changes set out in this section.
- (2) An offence against this Subdivision that would otherwise be committed by an unincorporated association is taken to have been committed by each member of the association's committee of management, at the time the offence is committed, who:
  - (a) did the relevant act; or

- (b) aided, abetted, counselled or procured the relevant act; or
  - (c) was in any way knowingly concerned in, or party to, the relevant act (whether directly or indirectly or whether by any act of the member).
- (3) A civil penalty provision in this Subdivision that would otherwise be contravened by an unincorporated association is taken to have been contravened by each member of the association's committee of management, at the time of the conduct constituting the contravention, who:
- (a) engaged in the conduct; or
  - (b) aided, abetted, counselled or procured the conduct; or
  - (c) was in any way knowingly concerned in, or party to, the conduct (whether directly or indirectly or whether by any act of the member).

### **Subdivision D—Offences and civil penalties in relation to sponsored visas**

#### **245AQ Definitions**

In this Subdivision:

***benefit*** includes:

- (a) a payment or other valuable consideration; and
- (b) a deduction of an amount; and
- (c) any kind of real or personal property; and
- (d) an advantage; and
- (e) a service; and
- (f) a gift.

***executive officer*** of a body corporate means:

- (a) a director of the body corporate; or
- (b) the chief executive officer (however described) of the body corporate; or
- (c) the chief financial officer (however described) of the body corporate; or

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(d) the secretary of the body corporate.

***sponsor class*** means a prescribed class of sponsor.

***sponsored visa*** means a visa of a prescribed kind (however described).

***sponsorship-related event*** means any of the following events:

- (a) a person applying for approval as a sponsor under section 140E in relation to a sponsor class;
- (b) a person applying for a variation of a term of an approval as a sponsor under section 140E in relation to a sponsor class;
- (c) a person becoming, or not ceasing to be, a party to a work agreement;
- (d) a person agreeing to be, or not withdrawing his or her agreement to be, an approved sponsor in relation to an applicant or proposed applicant for a sponsored visa;
- (e) a person making a nomination under section 140GB in relation to a holder of, or an applicant or proposed applicant for, a sponsored visa, or including another person in such a nomination;
- (f) a person not withdrawing a nomination made under section 140GB in relation to a holder of, or an applicant or proposed applicant for, a sponsored visa;
- (g) a person applying under the regulations for approval of the nomination of a position in relation to the holder of, or an applicant or proposed applicant for, a sponsored visa, or including another person in such a nomination;
- (h) a person not withdrawing the nomination under the regulations of a position in relation to the holder of, or an applicant or proposed applicant for, a sponsored visa;
- (i) a person employing or engaging, or not terminating the employment or engagement of, a person to work in an occupation or position in relation to which a sponsored visa has been granted, has been applied for or is to be applied for;
- (j) a person engaging, or not terminating the engagement of, a person to undertake a program, or carry out an activity, in



relation to which a sponsored visa has been granted, has been applied for or is to be applied for;

- (k) the grant of a sponsored visa;
- (l) a prescribed event.

**245AR Prohibition on asking for or receiving a benefit in return for the occurrence of a sponsorship-related event**

- (1) A person (the *first person*) contravenes this subsection if:
  - (a) the first person asks for, or receives, a benefit from another person; and
  - (b) the first person asks for, or receives, the benefit in return for the occurrence of a sponsorship-related event.
- (2) To avoid doubt, the first person contravenes subsection (1) even if the sponsorship-related event does not occur.
- (3) Subsection (1) does not apply if the benefit is a payment of a reasonable amount for a professional service that has been provided, or is to be provided, by the first person or a third person.

Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code*).

*Offence*

- (4) A person commits an offence if the person contravenes subsection (1). The physical elements of the offence are set out in that subsection.

Penalty: Imprisonment for 2 years or 360 penalty units, or both.

*Civil penalty provision*

- (5) A person is liable to a civil penalty if a person contravenes subsection (1).

Civil penalty: 240 penalty units.

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- (6) A person who wishes to rely on subsection (3) in proceedings for a civil penalty order bears an evidential burden in relation to the matter in that subsection.

Note: It is not necessary to prove a person's state of mind in proceedings for a civil penalty order (see section 486ZF).

**245AS Prohibition on offering to provide or providing a benefit in return for the occurrence of a sponsorship-related event**

- (1) A person (the *first person*) contravenes this subsection if:
- (a) the first person offers to provide, or provides, a benefit to another person (the *second person*); and
  - (b) the first person offers to provide, or provides, the benefit in return for the occurrence of a sponsorship-related event.

Civil penalty: 240 penalty units.

- (2) To avoid doubt, the first person contravenes subsection (1) even if the sponsorship-related event does not occur.
- (3) Subsection (1) does not apply if the benefit is a payment of a reasonable amount for a professional service that has been provided, or is to be provided, by the second person or a third person.
- (4) A person who wishes to rely on subsection (3) in proceedings for a civil penalty order bears an evidential burden in relation to the matter in that subsection.

Note: It is not necessary to prove a person's state of mind in proceedings for a civil penalty order (see section 486ZF).

**245AT Criminal liability of executive officers of bodies corporate**

- (1) An executive officer of a body corporate commits an offence if:
- (a) the body commits an offence (the *sponsorship-related offence*) against this Subdivision; and

- (b) the officer knew that, or was reckless or negligent as to whether, the sponsorship-related offence would be committed; and
- (c) the officer was in a position to influence the conduct of the body in relation to the sponsorship-related offence; and
- (d) the officer failed to take all reasonable steps to prevent the sponsorship-related offence being committed.

Penalty: 360 penalty units.

- (2) In determining whether the executive officer of the body corporate failed to take all reasonable steps to prevent the sponsorship-related offence being committed by the body, a court must have regard to:
  - (a) what action (if any) the officer took towards ensuring that the body's employees, agents and contractors had a reasonable knowledge and understanding of the requirements to comply with this Subdivision, insofar as those requirements affected the employees, agents or contractors concerned; and
  - (b) what action (if any) the officer took when he or she became aware that the body was committing the sponsorship-related offence.
- (3) Subsection (2) does not limit subsection (1).

### **245AU Civil liability of executive officers of bodies corporate**

- (1) An executive officer of a body corporate contravenes this subsection if:
  - (a) the body contravenes (the *sponsorship-related contravention*) a civil penalty provision in this Subdivision; and
  - (b) the officer knew that, or was reckless or negligent as to whether, the sponsorship-related contravention would occur; and
  - (c) the officer was in a position to influence the conduct of the body in relation to the sponsorship-related contravention; and

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- (d) the officer failed to take all reasonable steps to prevent the sponsorship-related contravention.

Note: Section 486ZF (which provides that a person's state of mind does not need to be proven in proceedings for a civil penalty order) does not apply in relation to a contravention of this subsection.

*Civil penalty provision*

- (2) An executive officer of a body corporate is liable to a civil penalty if the officer contravenes subsection (1).

Civil penalty: 240 penalty units.

*Reasonable steps to prevent the contravention*

- (3) In determining whether the executive officer of the body corporate failed to take all reasonable steps to prevent the sponsorship-related contravention by the body, a court must have regard to:
- (a) what action (if any) the officer took towards ensuring that the body's employees, agents and contractors had a reasonable knowledge and understanding of the requirements to comply with this Subdivision, insofar as those requirements affected the employees, agents or contractors concerned; and
  - (b) what action (if any) the officer took when he or she became aware that the body was engaging in the sponsorship-related contravention.
- (4) Subsection (3) does not limit subsection (1).

*Definitions*

- (5) In this section:

**negligent**: an executive officer of a body corporate is **negligent** as to whether a sponsorship-related contravention would occur if the officer's conduct involves:

- (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and

(b) such a high risk that the sponsorship-related contravention would occur;

that the conduct merits the imposition of a pecuniary penalty.

**reckless**: an executive officer of a body corporate is **reckless** as to whether a sponsorship-related contravention would occur if:

- (a) the officer is aware of a substantial risk that the sponsorship-related contravention would occur; and
- (b) having regard to the circumstances known to the officer, it is unjustifiable to take the risk.

### **245AV Contravening civil penalty provisions**

- (1) This section applies if a civil penalty provision in this Subdivision provides that a person contravening another provision of this Subdivision (the **conduct rule provision**) is liable to a civil penalty.
- (2) For the purposes of this Act, the person is taken to contravene the civil penalty provision if the person contravenes the conduct rule provision.

### **245AW Geographical scope of offence and civil penalty provisions**

#### *Offences*

- (1) Section 15.2 of the *Criminal Code* (extended geographical jurisdiction—category B) applies to an offence against this Subdivision.

#### *Contraventions of civil penalty provisions*

- (2) An order must not be made against a person in civil proceedings relating to a contravention by the person of a civil penalty provision in this Subdivision unless:
  - (a) the person's conduct that allegedly contravenes the provision occurs:
    - (i) wholly or partly in Australia; or

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- (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
- (b) the person's conduct that allegedly contravenes the provision occurs wholly outside Australia and, at the time of the alleged contravention, the person is:
  - (i) an Australian citizen; or
  - (ii) a resident of Australia; or
  - (iii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; or
- (c) all of the following conditions are satisfied:
  - (i) the person's conduct allegedly contravenes the provision because of section 486ZD (the ***ancillary contravention***);
  - (ii) the conduct occurs wholly outside Australia;
  - (iii) the conduct constituting the primary contravention to which the ancillary contravention relates occurs, or is intended by the person to occur, wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship.

*Defences relating to contraventions of civil penalty provisions*

- (3) In civil proceedings relating to a primary contravention by a person, it is a defence if:
  - (a) the conduct constituting the alleged primary contravention occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and
  - (b) the person is neither:
    - (i) an Australian citizen; nor
    - (ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and
  - (c) there is not in force in:
    - (i) the foreign country where the conduct constituting the alleged primary contravention occurs; or

- (ii) the part of the foreign country where the conduct constituting the alleged primary contravention occurs; a law of that foreign country, or a law of that part of that foreign country, that provides for a pecuniary or criminal penalty for such conduct.
- (4) In civil proceedings relating to a contravention (the ***ancillary contravention***) by a person of a civil penalty provision in this Subdivision because of section 486ZD, it is a defence if:
- (a) the conduct constituting the alleged ancillary contravention occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and
  - (b) the conduct (the ***primary conduct***) constituting the primary contravention to which the ancillary contravention relates occurs, or is intended by the person to occur, wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and
  - (c) the person is neither:
    - (i) an Australian citizen; nor
    - (ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and
  - (d) there is not in force in:
    - (i) the foreign country where the primary conduct occurs or is intended by the person to occur; or
    - (ii) the part of the foreign country where the primary conduct occurs or is intended by the person to occur; a law of that foreign country, or a law of that part of that foreign country, that provides for a pecuniary or criminal penalty for the primary conduct.
- (5) A defendant bears an evidential burden in relation to the matter in subsection (3) or (4).

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*Attorney-General's consent needed for certain proceedings*

- (6) Civil proceedings relating to a contravention of a civil penalty provision in this Subdivision must not be commenced without the Attorney-General's written consent if:
- (a) the conduct constituting the alleged contravention occurs wholly in a foreign country; and
  - (b) at the time of the alleged contravention, the person alleged to have contravened the provision is neither:
    - (i) an Australian citizen; nor
    - (ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

*When conduct taken to occur partly in Australia*

- (7) For the purposes of this section, if a person sends a thing, or causes a thing to be sent:
- (a) from a point outside Australia to a point in Australia; or
  - (b) from a point in Australia to a point outside Australia;
- that conduct is taken to have occurred partly in Australia.
- (8) For the purposes of this section, if a person sends, or causes to be sent, an electronic communication:
- (a) from a point outside Australia to a point in Australia; or
  - (b) from a point in Australia to a point outside Australia;
- that conduct is taken to have occurred partly in Australia.

*Definitions*

- (9) In this section:

***Australian aircraft*** has the same meaning as in the *Criminal Code*.

***Australian ship*** has the same meaning as in the *Criminal Code*.

***electronic communication*** has the same meaning as in the *Criminal Code*.

***foreign country*** has the same meaning as in the *Criminal Code*.



*point* has the same meaning as in section 16.2 of the *Criminal Code*.

*primary contravention* means a contravention of a civil penalty provision in this Subdivision other than because of section 486ZD.

*resident of Australia* has the same meaning as in the *Criminal Code*.

### **245AX Treatment of partnerships**

- (1) This Subdivision, and any other provision of this Act to the extent that it relates to this Subdivision, apply to a partnership as if it were a person, but with the changes set out in this section.
- (2) An offence against this Subdivision that would otherwise be committed by a partnership is taken to have been committed by each partner in the partnership, at the time the offence is committed, who:
  - (a) did the relevant act; or
  - (b) aided, abetted, counselled or procured the relevant act; or
  - (c) was in any way knowingly concerned in, or party to, the relevant act (whether directly or indirectly or whether by any act of the partner).
- (3) A civil penalty provision in this Subdivision that would otherwise be contravened by a partnership is taken to have been contravened by each partner in the partnership, at the time of the conduct constituting the contravention, who:
  - (a) engaged in the conduct; or
  - (b) aided, abetted, counselled or procured the conduct; or
  - (c) was in any way knowingly concerned in, or party to, the conduct (whether directly or indirectly or whether by any act of the partner).

**245AY Treatment of unincorporated associations**

- (1) This Subdivision, and any other provision of this Act to the extent that it relates to this Subdivision, apply to an unincorporated association as if it were a person, but with the changes set out in this section.
- (2) An offence against this Subdivision that would otherwise be committed by an unincorporated association is taken to have been committed by each member of the association's committee of management, at the time the offence is committed, who:
  - (a) did the relevant act; or
  - (b) aided, abetted, counselled or procured the relevant act; or
  - (c) was in any way knowingly concerned in, or party to, the relevant act (whether directly or indirectly or whether by any act of the member).
- (3) A civil penalty provision in this Subdivision that would otherwise be contravened by an unincorporated association is taken to have been contravened by each member of the association's committee of management, at the time of the conduct constituting the contravention, who:
  - (a) engaged in the conduct; or
  - (b) aided, abetted, counselled or procured the conduct; or
  - (c) was in any way knowingly concerned in, or party to, the conduct (whether directly or indirectly or whether by any act of the member).

## **Division 12A—Chasing, boarding etc. aircraft**

### **245A Definitions**

In this Division, unless the contrary intention appears:

**aircraft** includes aeroplanes, seaplanes, airships, balloons or any other means of aerial locomotion.

**Australian aircraft** means an aircraft that:

- (a) is an Australian aircraft as defined in the *Civil Aviation Act 1988*; or
- (b) is not registered under the law of a foreign country and is either wholly owned by, or solely operated by:
  - (i) one or more residents of Australia; or
  - (ii) one or more Australian nationals; or
  - (iii) one or more residents of Australia and one or more Australian nationals.

For the purposes of this definition, **Australian national** and **resident of Australia** have the same meanings as in the *Shipping Registration Act 1981*.

**Commonwealth aircraft** means an aircraft that is in the service of the Commonwealth and displaying the ensign or insignia prescribed for the purposes of the definition of **Commonwealth aircraft** in subsection 4(1) of the *Customs Act 1901*.

**goods** includes a document.

**this Act** includes regulations made under this Act.

### **245E Identifying an aircraft and requesting it to land for boarding**

*Application of section*

- (1) This section allows the commander of a Commonwealth aircraft to make requests of the pilot of another aircraft that:

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- (a) if the other aircraft is an Australian aircraft—is over anywhere except a foreign country; and
- (b) if the other aircraft is not an Australian aircraft—is over Australia.

*Requesting information to identify an aircraft*

- (2) If the commander cannot identify the other aircraft, the commander may:
  - (a) use his or her aircraft to intercept the other aircraft in accordance with the practices recommended in Annex 2 (headed “Rules of the Air”) to the Convention on International Civil Aviation done at Chicago on 7 December 1944 (that was adopted in accordance with that Convention); and
  - (b) request the pilot of the other aircraft to disclose to the commander:
    - (i) the identity of the other aircraft; and
    - (ii) the identity of all persons on the other aircraft; and
    - (iii) the flight path of the other aircraft; and
    - (iv) the flight plan of the other aircraft.

*Requesting aircraft to land for boarding*

- (3) The commander may request the pilot of the other aircraft to land it at the nearest proclaimed airport, or at the nearest suitable landing field, in Australia for boarding for the purposes of this Act if:
  - (a) the pilot does not comply with a request under subsection (2); or
  - (b) the commander reasonably suspects that the other aircraft is or has been involved in a contravention, or attempted contravention, of this Act.

Note: Section 245F gives power to board the aircraft and search it once it has landed.

*Means of making request*

- (4) Any reasonable means may be used to make a request under this section.

*Request still made even if pilot did not receive etc. request*

- (5) To avoid doubt, a request is still made under this section even if the pilot did not receive or understand the request.

*Pilot must comply with request*

- (6) The pilot of the other aircraft must comply with a request made under this section.

Penalty: Imprisonment for 2 years.

- (7) Subsection (6) does not apply if the pilot has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (7) (see subsection 13.3(3) of the *Criminal Code*).

## **245F Power to board and search etc. aircraft**

*Application of section to aircraft*

- (2) This section applies to an aircraft that has landed in Australia for boarding as a result of a request made under section 245E.

*Officer's powers*

- (3) An officer may:
- (a) board and search the aircraft; and
  - (b) search and examine any goods found on the aircraft; and
  - (c) secure any goods found on the aircraft; and
  - (d) require all persons found on the aircraft to answer questions, and produce any documents in their possession, in relation to the following:
    - (i) the aircraft and its flight, cargo, stores, crew and passengers;

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- (ii) the identity and presence of those persons on the aircraft;
  - (iii) a contravention, an attempted contravention or an involvement in a contravention or attempted contravention, either in or outside Australia, of this Act; and
- (e) copy, or take extracts from, any document:
- (i) found on the aircraft; or
  - (ii) produced by a person found on the aircraft as required under paragraph (d); and
- (f) arrest without warrant any person found on the aircraft if the officer reasonably suspects that the person has committed, is committing or attempting to commit, or is involved in the commission of, an offence, either in or outside Australia, against this Act.

*Help to search*

- (5) Without limiting the generality of paragraph (3)(a), an officer may use a dog to assist in searching the aircraft.

*Help to examine goods*

- (6) In the exercise of the power under paragraph (3)(b) to examine goods, the officer may do, or arrange for another officer or other person having the necessary experience to do, whatever is reasonably necessary to permit the examination of the goods.

*Examples of examining goods*

- (7) Without limiting the generality of subsection (6), examples of what may be done in the examination of goods include the following:
- (a) opening any package in which goods are or may be contained;
  - (b) using a device, such as an X-ray machine or ion scanning equipment, on the goods;
  - (c) if the goods are a document—reading the document either directly or with the use of an electronic device;

- (d) using a dog to assist in examining the goods.

*Power to detain and move aircraft*

- (8) An officer may detain the aircraft and bring it, or cause it to be brought, to a port, or to another place, that he or she considers appropriate if the officer reasonably suspects that the aircraft is or has been involved in a contravention, either in or outside Australia, of this Act.

*People on detained aircraft*

- (8A) If an officer detains an aircraft under this section, any restraint on the liberty of any person found on the aircraft that results from the detention of the 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 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 aircraft*

- (9) If an officer detains an aircraft under this section, the officer may:
- (a) detain any person found on the 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.

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*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).

*Use of necessary and reasonable force*

- (10) An officer may use such force as is necessary and reasonable in the exercise of a power under this section.

*Limit on use of force to board and search aircraft*

- (11) In boarding and searching the aircraft and searching or examining goods found on the aircraft, an officer must not damage the aircraft or goods by forcing open a part of the aircraft or goods unless:
- (a) the person (if any) apparently in charge of the aircraft has been given a reasonable opportunity to open that part or the goods; or
  - (b) it is not reasonably practicable to give that person such an opportunity.

This subsection has effect despite paragraphs (3)(a) and (b) and subsection (10).

*Limit on use of force to arrest or detain person on aircraft*

- (12) In arresting or detaining a person found on the aircraft, an officer:
- (a) must not use more force, or subject the person to greater indignity, than is necessary and reasonable to make the arrest or detention, or to prevent the person escaping after the arrest or detention; and
  - (b) must not do anything likely to cause the person grievous bodily harm unless the officer believes on reasonable grounds that doing the thing is necessary to protect life or prevent serious injury of another person (including the officer).



This subsection has effect despite paragraph (3)(f) and subsection (10).

*Limit on use of force to arrest fleeing person*

- (13) In arresting a person found on the aircraft who is fleeing to escape arrest, an officer must not do anything likely to cause the person grievous bodily harm unless:
- (a) the person has, if practicable, been called on to surrender and the officer believes on reasonable grounds that the person cannot be apprehended in any other way; or
  - (b) the officer believes on reasonable grounds that doing the thing is necessary to protect life or prevent serious injury of another person (including the officer).

This subsection applies in addition to subsection (12) and has effect despite paragraph (3)(f) and subsection (10).

*Complying with requirement by officer*

- (15) A person must not refuse or fail to comply with a requirement made by an officer under this section.

Penalty: 100 penalty units.

- (15A) Subsection (15) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (15A) (see subsection 13.3(3) of the *Criminal Code*).

- (15B) An offence against subsection (15) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

*Evidence may be used in prosecutions etc.*

- (16) To avoid doubt, if, when exercising powers under this section, an officer obtains evidence of the commission of an offence against a law of the Commonwealth, a State or a Territory, then that evidence may be used, or given to another body for use, in:
- (a) investigating the offence; or

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(b) proceedings for the prosecution for the offence.

However, this subsection does not override or limit the operation of a law of a State about the evidence that may be used in proceedings for the prosecution for an offence against a law of that State.

*Section not to limit officer's other powers*

- (17) This section does not limit the use by an officer of any other powers under this Act.

*Definition of officer*

- (18) In this section, **officer** means an officer within the meaning of section 5, and includes:
- (a) any person who is in command, or a member of the crew, of the aircraft from which the relevant request under section 245E was made; and
  - (b) a member of the Australian Defence Force.

*Interpretation*

- (19) In this section:
- (a) a reference to a person found on the aircraft includes a reference to a person suspected on reasonable grounds by an officer of having landed from or left the aircraft; and
  - (b) a reference to goods found on the aircraft includes a reference to goods suspected on reasonable grounds by an officer of having been removed from the aircraft.

**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 an 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

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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.

## **Division 12B—Reporting on passengers and crew of aircraft and ships**

### **245I Definitions**

(1) In this Division:

***approved fall-back reporting system*** means a system approved under section 245K.

***approved primary reporting system*** means a system approved under section 245J.

***approved primary reporting system for crew***, for an aircraft or ship of a kind to which this Division applies, means the system approved under section 245J for reporting on crew on an aircraft or ship of that kind.

***approved primary reporting system for passengers***, for an aircraft or ship of a kind to which this Division applies, means the system approved under section 245J for reporting on passengers on an aircraft or ship of that kind.

***arrival*** means:

- (a) in relation to an aircraft—the aircraft coming to a stop after landing; or
- (b) in relation to a ship—the securing of the ship for the loading or unloading of passengers, cargo or ship's stores.

***kind of aircraft or ship to which this Division applies*** means a kind of aircraft or ship specified in the regulations as a kind of aircraft or ship to which this Division applies.

Note: ***Kind*** has a meaning affected by subsection (2).

***operator*** of an aircraft or ship for a particular flight or voyage means:

- (a) the airline or shipping line responsible for the operation of the aircraft or ship for the flight or voyage; or

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- (b) if there is no such airline or shipping line, or no such airline or shipping line that is represented by a person in Australia—the pilot of the aircraft or the master of the ship.
- (2) For the purposes of this Division (and of regulations and approvals made for the purposes of provisions of this Division), a *kind* of aircraft or ship may be identified by reference to matters including all or any of the following:
  - (a) the type, size or capacity of the aircraft or ship;
  - (b) the kind of operation or service the aircraft or ship is engaged in on the flight or voyage to or from Australia;
  - (c) other circumstances related to the aircraft or ship or its use, or related to the operator of the aircraft or ship.

**245J Approval of primary reporting systems**

- (1) The Secretary must, for each kind of aircraft or ship to which this Division applies, by legislative instrument, approve a system for the purposes of reporting under this Division. The system may be an electronic system or a system requiring reports to be provided in documentary form.

Note 1: An approval under this subsection can be varied or revoked under subsection 33(3) of the *Acts Interpretation Act 1901*.

Note 2: It is anticipated that, ultimately, documentary systems will be phased out and all approved systems will be electronic systems.

- (2) Under subsection (1), the Secretary may, for a kind of aircraft or ship, approve a single system for reporting on both passengers and crew or may approve one system for reporting on passengers, and another system for reporting on crew.
- (2A) The information about passengers or crew that is to be reported by a system must be about:
  - (a) if the system is for reporting on passengers—passengers individually; or
  - (b) if the system is for reporting on crew—members of the crew individually; or

- (c) if the system is for reporting on both passengers and crew—passengers individually and members of the crew individually.
- (3) The instrument of approval of a system for reporting on passengers or crew must also specify the information (including personal identifiers) about passengers or crew that is to be reported by that system.

### **245K Approval of fall-back reporting systems**

- (1) The Secretary must, by legislative instrument, approve one or more systems as fall-back reporting systems. A system may be an electronic system or a system requiring reports to be provided in documentary form.

Note: An approval under this subsection can be varied or revoked under subsection 33(3) of the *Acts Interpretation Act 1901*.

- (1A) The information about passengers or crew that is to be reported by a system must be about:
  - (a) if the system is for reporting on passengers—passengers individually; or
  - (b) if the system is for reporting on crew—members of the crew individually; or
  - (c) if the system is for reporting on both passengers and crew—passengers individually and members of the crew individually.
- (2) The instrument of approval of a system must also specify the information (including personal identifiers) about passengers or crew that is to be reported by that system.

### **245L Obligation to report on persons arriving in Australia**

*Aircraft and ships to which section applies*

- (1) This section applies to an aircraft or ship of a kind to which this Division applies that is due to arrive at a place in Australia from a place outside Australia.

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*Obligation to report on passengers and crew*

- (2) The operator of the aircraft or ship must, in accordance with this section:
- (a) report to the Department, using the approved primary reporting system for passengers, on each passenger who will be on board the aircraft or ship at the time of its arrival at the place in Australia; and
  - (b) report to the Department, using the approved primary reporting system for crew, on each member of the crew who will be on board the aircraft or ship at the time of its arrival at the place in Australia.

Note 1: This obligation must be complied with even if the information concerned is personal information.

Note 2: Section 245N contains an offence for failure to comply with this subsection.

*Information to be reported*

- (3) A report on passengers or crew under subsection (2) must include the information relating to those passengers or crew that is specified, as mentioned in subsection 245J(3), in relation to the relevant approved primary reporting system.

*Deadline for reporting—aircraft*

- (4) A report on passengers or crew on an aircraft must be given not later than:
- (a) if the flight from the last place outside Australia is likely to take not less than 3 hours—3 hours before the aircraft's likely time of arrival at the place in Australia; or
  - (b) if the flight from the last place outside Australia is likely to take less than 3 hours—one hour before the aircraft's likely time of arrival at the place in Australia.



*Deadline for reporting—ships*

- (5) A report on passengers or crew on a ship must be given not later than:
- (a) the start of the prescribed period before the ship's estimated time of arrival at the place in Australia; or
  - (b) if the journey is of a kind described in regulations made for the purposes of this paragraph—the start of the shorter period specified in those regulations before the ship's estimated time of arrival at the place in Australia.
- (5A) Regulations made for the purposes of paragraph (5)(b) may prescribe matters of a transitional nature (including prescribing any saving or application provisions) arising out of the making of regulations for those purposes.

**245LA Obligation to report on persons departing from Australia**

*Aircraft and ships to which section applies*

- (1) This section applies to an aircraft or ship of a kind to which this Division applies that is due to depart from a place in Australia on a flight or voyage to a place outside Australia (whether or not after calling at other places in Australia).

*Obligation to report on passengers and crew*

- (2) The operator of the aircraft or ship must, in accordance with this section:
- (a) report to the Department, using the approved primary reporting system for passengers, on each passenger who is on, or is expected to be on, the flight or voyage (including any part of the flight or voyage); and
  - (b) report to the Department, using the approved primary reporting system for crew, on each member of the crew who is on, or is expected to be on, the flight or voyage (including any part of the flight or voyage).

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Note 1: This obligation must be complied with even if the information concerned is personal information.

Note 2: Section 245N contains an offence for failure to comply with this subsection.

- (3) However, if:
- (a) on the flight or voyage, the aircraft or ship calls at one or more places in Australia before departing to the place outside Australia; and
  - (b) the regulations prescribe that a report under subsection (2) must only relate to the part of the flight or voyage that is from the last place in Australia to the place outside Australia;
- then the report must be on each passenger or crew member who is on, or is expected to be on, that part of the flight or voyage.

*Information to be reported*

- (4) A report on a passenger or crew member under subsection (2) must include the information relating to the passenger or crew member that is specified, as mentioned in subsection 245J(3), in relation to the relevant approved primary reporting system.

*Deadline for providing a report*

- (5) A report on a passenger or crew member under subsection (2) must be provided:
- (a) if the regulations prescribe a period or periods before the aircraft's or ship's departure from a place for the giving of a report under subsection (2) in relation to the passenger or crew member—not later than the start of that period or each of those periods; and
  - (b) if the regulations prescribe an event or events for the giving of a report under subsection (2) in relation to the passenger or crew member—at the time of that event or each of those events; and
  - (c) if the regulations prescribe a time or times for the giving of a report under subsection (2) in relation to the passenger or crew member—at that time or each of those times.

- (6) To avoid doubt, more than one report may be required to be provided under subsection (2) in relation to a passenger or crew member.

Note: For example, if regulations made for the purposes of subsection (5) prescribe a period of 48 hours before the aircraft's or ship's departure from a place on the flight or voyage and also prescribe an event of the passenger or crew member checking-in for the flight or voyage, then 2 reports would be required to be provided under this section in relation to the passenger or crew member.

### **245LB Dealing with information collected under this Division etc.**

#### *Collection of personal information*

- (1) The Department may collect information (including personal identifiers) in a report provided under this Division.

#### *Access to, and disclosure of, personal information*

- (2) The following provisions:
- (a) section 336D (which authorises access to identifying information);
  - (b) section 336E (other than subsection 336E(1)) and section 336F (which authorise disclosure of identifying information);
  - (c) a provision of an instrument made under section 336D or 336F;

apply to personal information (other than personal identifiers) collected under this Division in the same way as they apply to identifying information.

#### *Effect on interpretation*

- (4) This section does not, by implication, affect the interpretation of any other provision of this Act or an instrument made under this Act.

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**245M Approved fall-back reporting systems may be used in certain circumstances**

- (1) This section applies if:
  - (a) the approved primary reporting system for reporting on passengers or crew on an aircraft or ship is an electronic system; and
  - (b) either:
    - (i) the operator of the aircraft or ship cannot report on some or all of the passengers or crew (the *relevant passengers or crew*) using the approved primary reporting system because the system is not working; or
    - (ii) the Secretary permits the operator of the aircraft or ship to report on some or all of the passengers or crew (the *relevant passengers or crew*) using an approved fall-back reporting system.
- (2) Sections 245L and 245LA apply in relation to the relevant passengers or crew as if:
  - (a) the reference in subsections 245L(2) and 245LA(2) to the approved primary reporting system for passengers, or the approved primary reporting system for crew, were instead a reference to an approved fall-back reporting system; and
  - (b) the reference in subsections 245L(3) and 245LA(4) to the information that is specified, as mentioned in subsection 245J(3), in relation to the relevant approved primary reporting system were instead a reference to the information that is specified, as mentioned in subsection 245K(2), in relation to the approved fall-back reporting system that the operator uses in relation to the relevant passengers or crew.

**245N Offence for failure to comply with reporting obligations**

- (1) An operator of an aircraft or ship who intentionally contravenes subsection 245L(2) or 245LA(2) commits an offence punishable, on conviction, by a penalty not exceeding 120 penalty units.

- (2) An operator of an aircraft or ship who contravenes subsection 245L(2) or 245LA(2) commits an offence punishable, on conviction, by a penalty not exceeding 60 penalty units.

Note: See also paragraph 504(1)(jaa) (which deals with the payment of a penalty as an alternative to prosecution).

- (3) An offence against subsection (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (4) An operator of an aircraft or ship commits a separate offence under subsection (1) or (2) in relation to each passenger or member of the crew in relation to whom the operator contravenes subsection 245L(2) or 245LA(2).

## **Division 13—Examination, search, detention and identification**

### **246 Appointment of boarding stations**

- (1) The Governor-General may, by Proclamation, appoint a place in a port to be the boarding station for that port for the purposes of this Act.
- (2) Where a boarding station for a port is for the time being appointed or continued under the *Customs Act 1901-1957*, that boarding station shall be deemed to be appointed under this section as the boarding station for that port for the purposes of this Act.

### **247 Vessels to enter ports and be brought to boarding stations**

- (1) The master of a vessel which has entered Australia from overseas shall not suffer the vessel to enter any place other than a port.  
Penalty: 200 penalty units.
- (2) The master of a vessel (other than an aircraft) from overseas bound to or calling at a port:
  - (a) shall, if so required by the Secretary or Australian Border Force Commissioner, bring the vessel (other than an aircraft) to for boarding under this Act at the boarding station appointed for that port; and
  - (b) shall not move the vessel (other than an aircraft) from that boarding station until permitted to do so by the Secretary or Australian Border Force Commissioner.

Penalty: 200 penalty units.

- (2A) Subsection (2) does not apply if the master moves the vessel from the boarding station with the intention of leaving the port.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2A) (see subsection 13.3(3) of the *Criminal Code*).

- (3) The master of an aircraft from overseas arriving in Australia shall not suffer the aircraft to land at any other proclaimed airport until the aircraft has first landed:
- (a) at such proclaimed airport for which a boarding station is appointed as is nearest to the place at which the aircraft entered Australia; or
  - (b) at such other airport for which a boarding station is appointed as has been approved by the Secretary or Australian Border Force Commissioner, in writing, as an airport at which that aircraft, or a class of aircraft in which that aircraft is included, may land on arriving in Australia from overseas.

Penalty: 200 penalty units.

- (4) The master of an aircraft which is engaged on an air service or flight from a place overseas to a place in Australia:
- (a) shall not suffer the aircraft to land at a proclaimed airport for which a boarding station is not appointed;
  - (b) shall, as soon as practicable after the aircraft lands at a proclaimed airport, bring the aircraft for boarding to the boarding station appointed for that airport; and
  - (c) shall not move the aircraft from that boarding station until permitted to do so by the Secretary or Australian Border Force Commissioner.

Penalty: 200 penalty units.

- (5) It is a defence to a prosecution for an offence against subsection (1), (3) or (4) if the person charged proves that he or she was prevented from complying with the subsection by stress of weather or other reasonable cause.

Note: A defendant bears a legal burden in relation to the matters in subsection (5) (see section 13.4 of the *Criminal Code*).

- (5A) An offence against any of subsections (1) to (4) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

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- (6) While a vessel is at a boarding station, an officer may go and remain on board the vessel for the purposes of this Act.
- (7) The master of a vessel shall do all things reasonably required by an officer to facilitate the boarding of the vessel under this section and the performance by the officer of duties for the purposes of this Act.

Penalty for any contravention of this subsection: 100 penalty units.

- (8) An offence against subsection (7) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

**248 Exemption**

Where the Minister is satisfied that it is no longer necessary for the purposes of this Act that a provision of section 247 should continue to apply in relation to a vessel, the Minister shall, by writing under his or her hand, exempt the master of that vessel from liability to comply with that provision.

**249 Certain persons may be prevented from entering or landing**

- (1) An officer may:
- (a) prevent a person whom the officer reasonably suspects to be an unlawful non-citizen from leaving a vessel on which the person arrived in Australia; or
  - (b) prevent a removee or deportee from leaving a vessel on which he or she has been placed;

and may take such action and use such force as are necessary for that purpose.

- (1AA) An officer may prevent a person from leaving a vessel on which the person arrived in Australia if the officer reasonably suspects that the person:
- (a) is seeking to enter the migration zone; and
  - (b) would, if in the migration zone, be an unlawful non-citizen.



- (1A) To avoid doubt, and without limiting the generality of subsections (1) and (1AA), if a person of a kind referred to in paragraph (1)(a) or subsection (1AA) is on board a vessel (other than an aircraft), the actions that may be taken by an officer under subsections (1) and (1AA) include:
- (a) requiring the vessel to travel to a port; and
  - (b) requiring the person to remain on the vessel until it arrives at the port.
- (2) The master of a vessel may, in relation to persons on board the vessel, do all things which an officer is, under subsections (1) and (1AA), authorized to do.

## **250 Detention of suspected offenders**

- (1) In this section:

*suspect* means a non-citizen who:

- (a) travelled, or was brought, to the migration zone; and
  - (b) is believed by an authorised officer on reasonable grounds to have been on board a vessel (not being an aircraft) when it was used in connection with the commission of an offence against a law in force in the whole or any part of Australia.
- (2) For the purposes of section 189, an officer has a suspicion described in that section about a person if, but not only if, the person is a suspect.
- (3) A non-citizen detained because of subsection (2) may be kept in immigration detention for:
- (a) such period as is required for:
    - (i) the making of a decision whether to prosecute the suspect in connection with the offence concerned; or
    - (ii) instituting such a prosecution; and
  - (b) if such a prosecution is instituted within that period—such further period as is required for the purposes of the prosecution.

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- (4) Without limiting the generality of paragraph (3)(b), the period that is required for the purposes of a prosecution includes any period required for:
- (a) any proceedings in connection with the prosecution; and
  - (b) the serving of any custodial sentence imposed because of the prosecution; and
  - (c) the institution of, and any proceedings in connection with, any appeal from any decision in relation to the prosecution.
- (5) If the period for which a person may be kept in immigration detention under subsection (3) ends, he or she:
- (a) must, unless he or she has become the holder of a visa, that is in effect, to remain in Australia, be expeditiously removed from Australia under section 198; and
  - (b) may, at the direction of an authorised officer, continue to be detained under section 189 until so removed.

**251 Powers of entry and search**

- (1) An officer may at any time board and search a vessel if the officer reasonably suspects there is on board the vessel:
- (a) an unlawful non-citizen; or
  - (b) a person seeking to enter the migration zone who would, if in the migration zone, be an unlawful non-citizen.
- (2) The master of a vessel shall do all things reasonably required by an officer to facilitate the boarding and searching of the vessel by the officer under subsection (1).

Penalty: \$10,000.

- (2A) An offence against subsection (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (3) A reference in subsection (1) or (2) to a vessel includes a reference to an Australian resources installation and to an Australian sea installation.

- (4) The Secretary or Australian Border Force Commissioner may issue to an officer a search warrant in accordance with the prescribed form.
- (5) A search warrant shall be expressed to remain in force for a specified period not exceeding 3 months and ceases to be in force at the expiration of the specified period.
- (6) An officer having with him or her a search warrant issued to him or her under this section and remaining in force may, at any time in the day or night with such assistance as the officer thinks necessary, enter and search any building, premises, vessel, vehicle or place in which the officer has reasonable cause to believe there may be found:
- (a) an unlawful non-citizen, a removee or a deportee;
  - (b) a person to whom a temporary visa has been issued subject to a condition with respect to the work that is to be performed by that person;
  - (c) any document, book or paper relating to the entry or proposed entry into Australia of a person in circumstances in which that person:
    - (i) would have become a prohibited immigrant within the meaning of this Act as in force from time to time before the commencement of the *Migration Amendment Act 1983*; or
    - (ii) would have become a prohibited non-citizen within the meaning of this Act as in force from time to time after the commencement of the *Migration Amendment Act 1983* but before the commencement of section 4 of the *Migration Legislation Amendment Act 1989*; or
    - (iii) would have been an illegal entrant within the meaning of the Act as in force from time to time after the commencement of section 4 of the *Migration Legislation Amendment Act 1989* but before 1 September 1994; or

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- (iv) would have become, or would become, an unlawful non-citizen; or
  - (d) any passport or document of identity of, or any ticket for the conveyance from a place within Australia to a place outside Australia of an unlawful non-citizen, a removee or a deportee;  
and may seize any such document, book, paper, passport, document of identity or ticket, as the case may be, and impound and detain it for such time as the officer thinks necessary.
- (7) For the purposes of the exercise of his or her powers under this section an officer may stop any vessel or vehicle.
- (8) An officer may use such reasonable force as is necessary for the exercise of his or her powers under this section.

**252 Searches of persons**

- (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:
- (a) the person is detained in Australia; or
  - (b) the person is a non-citizen who has not been immigration cleared and an authorised officer has reasonable grounds for suspecting there are reasonable grounds for cancelling the person's visa.
- (2) The purposes 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 are as follows:
- (a) to find out whether 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 from immigration detention;
  - (b) to find out whether there is hidden on the person, in the clothing or in the property, a document or other thing that is, or may be, evidence for grounds for cancelling the person's visa.

- (3) An authorised officer may detain a person for the purpose of searching the person in accordance with this section.
- (4) If, in the course of a search under this section, a weapon or other thing referred to in paragraph (2)(a), or a document or other thing referred to in paragraph (2)(b), is found, an authorised officer:
- (a) may take possession of the weapon, document or other thing; and
  - (b) may retain the weapon, document or other thing for such time as he or she thinks necessary for the purposes of this Act.
- (5) This section does not authorise an authorised officer, or another person conducting a search pursuant to subsection (6) to remove any of the person's clothing, or to require a person to remove any of his or her clothing.
- (6) A search under this section of a person, and the person's clothing, shall be conducted by:
- (a) an authorised officer of the same sex as the person; or
  - (b) in a case where an authorised 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 authorised officer; and
    - (ii) agrees;to conduct the search.
- (7) An action or proceeding, whether civil or criminal, does not lie against a person who, at the request of an authorised officer, conducts a search under this section if the person acts in good faith and does not contravene subsection (8).
- (8) An authorised officer or other person who conducts a search under this section shall not use more force, or subject a person to greater indignity, than is reasonably necessary in order to conduct the search.

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- (9) To avoid doubt, a search of a person may be conducted under this section irrespective of whether a screening procedure is conducted in relation to the person under section 252AA or a strip search of the person is conducted under section 252A.

**252AA Power to conduct a screening procedure**

- (1) A screening procedure in relation to a detainee, other than a detainee to whom section 252F applies, may be conducted by an authorised officer, without warrant, to find out whether there is hidden on the detainee, in his or her clothing or in a thing in his or her possession a weapon, or other thing, capable of being used:
- (a) to inflict bodily injury; or
  - (b) to help the detainee, or any other detainee, to escape from immigration detention.
- (2) An authorised officer who conducts a screening procedure under this section must not use greater force, or subject the detainee to greater indignity, than is reasonably necessary in order to conduct the screening procedure.
- (3) This section does not authorise an authorised officer to remove any of the detainee's clothing, or to require a detainee to remove any of his or her clothing.
- (4) To avoid doubt, a screening procedure may be conducted in relation to a detainee under this section irrespective of whether a search of the detainee is conducted under section 252 or 252A.
- (5) In this section:
- conducting a screening procedure***, in relation to a detainee, means:
- (a) causing the detainee to walk, or to be moved, through screening equipment; or
  - (b) passing hand-held screening equipment over or around the detainee or around things in the detainee's possession; or

- (c) passing things in the detainee's possession through screening equipment or examining such things by X-ray.

**screening equipment** means a metal detector or similar device for detecting objects or particular substances.

### **252A Power to conduct a strip search**

- (1) A strip search of a detainee, other than a detainee to whom section 252F applies, may be conducted by an authorised officer, without warrant, to find out whether there is hidden on the detainee, in his or her clothing or in a thing in his or her possession a weapon, or other thing, capable of being used:
- (a) to inflict bodily injury; or
  - (b) to help the detainee, or any other detainee, to escape from immigration detention.

Note: Section 252B sets out rules for conducting a strip search under this section.

- (2) A **strip search** of a detainee means a search of the detainee, of his or her clothing or of a thing in his or her possession. It may include:
- (a) requiring the detainee to remove some or all of his or her clothing; and
  - (b) an examination of that clothing and of the detainee's body (but not of the detainee's body cavities).
- (3) A strip search of a detainee may be conducted by an authorised officer only if:
- (a) an officer suspects on reasonable grounds that there is hidden on the detainee, in his or her clothing or in a thing in his or her possession a weapon or other thing described in subsection (1); and
  - (b) the officer referred to in paragraph (a) suspects on reasonable grounds that it is necessary to conduct a strip search of the detainee to recover that weapon or other thing; and
  - (c) the strip search is authorised as follows:

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- (i) if the detainee is at least 18—the Secretary or Australian Border Force Commissioner, or an SES Band 3 employee in the Department (who is not the officer referred to in paragraphs (a) and (b) nor the authorised officer conducting the strip search), authorises the strip search because he or she is satisfied that there are reasonable grounds for those suspicions;
  - (ii) if the detainee is at least 10 but under 18—a magistrate orders the strip search because he or she is satisfied that there are reasonable grounds for those suspicions.
- (3A) An officer may form a suspicion on reasonable grounds for the purposes of paragraph (3)(a) on the basis of:
  - (a) a search conducted under section 252 (whether by that officer or another officer); or
  - (b) a screening procedure conducted under section 252AA (whether by that officer or another officer); or
  - (c) any other information that is available to the officer.
- (4) An authorisation of a strip search given for the purposes of paragraph (3)(c):
  - (a) may be given by telephone, fax or other electronic means; and
  - (b) must be recorded in writing, and signed by the person giving the authorisation, within one business day after it is given.
- (5) A failure to comply with paragraph (4)(b) does not affect the validity of a strip search conducted on the basis of that authorisation.
- (6) The power to authorise a strip search under paragraph (3)(c) cannot be delegated to any other person.
- (6A) A power conferred on a magistrate by this section is conferred on the magistrate in a personal capacity and not as a court or a member of a court.
- (6B) The magistrate need not accept the power conferred.



- (6C) A magistrate exercising a power under this section has the same protection and immunity as if he or she were exercising that power as, or as a member of, the court of which the magistrate is a member.
- (7) To avoid doubt, a strip search of a detainee may be conducted under this section irrespective of whether a search of the detainee is conducted under section 252 or a screening procedure is conducted in relation to the detainee under section 252AA.
- (8) In this section:

***business day*** means a day that is not a Saturday, Sunday or public holiday in the place where the authorisation is given.

***SES Band 3 employee*** means an SES employee with a classification of Senior Executive Band 3, and includes an SES employee who has been temporarily assigned duties that have been allocated a classification of Senior Executive Band 3.

### **252B Rules for conducting a strip search**

- (1) A strip search of a detainee under section 252A:
- (a) must not subject the detainee to greater indignity than is reasonably necessary to conduct the strip search; and
  - (b) must be conducted in a private area; and
  - (c) must be conducted by an authorised officer of the same sex as the detainee; and
  - (d) subject to subsections (2), (3) and (5), must not be conducted in the presence or view of a person who is of the opposite sex to the detainee; and
  - (e) subject to subsections (2), (3) and (5), must not be conducted in the presence or view of a person whose presence is not necessary for the purposes of the strip search; and
  - (f) must not be conducted on a detainee who is under 10; and
  - (g) if the detainee is at least 10 but under 18, or is incapable of managing his or her affairs—must be conducted in the presence of:

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- (i) the detainee's parent or guardian if that person is in immigration detention with the detainee and is readily available at the same place; or
  - (ii) if that is not acceptable to the detainee or subparagraph (i) does not apply—another person (other than an authorised officer) who is capable of representing the detainee's interests and who, as far as is practicable in the circumstances, is acceptable to the detainee; and
- (h) subject to subsection (4), if the detainee is at least 18, and is not incapable of managing his or her affairs—must be conducted in the presence of another person (if any) nominated by the detainee, if that other person is readily available at the same place as the detainee, and willing to attend the strip search within a reasonable time; and
- (i) must not involve a search of the detainee's body cavities; and
  - (j) must not involve the removal of more items of clothing, or more visual inspection, than the authorised officer conducting the search believes on reasonable grounds to be necessary to determine whether there is hidden on the detainee, in his or her clothing or in a thing in his or her possession a weapon or other thing described in subsection 252A(1); and
  - (k) must not be conducted with greater force than is reasonably necessary to conduct the strip search.
- (2) Paragraphs (1)(d) and (e) do not apply to a parent or guardian, or person present because of subparagraph (1)(g)(ii), if the detainee has no objection to that person being present.
- (3) Paragraphs (1)(d) and (e) do not apply to a person nominated by the detainee under paragraph (1)(h) to attend the strip search.
- (4) Neither:
- (a) a detainee's refusal or failure to nominate a person under paragraph (1)(h) within a reasonable time; nor
  - (b) a detainee's inability to nominate a person under that paragraph who is readily available at the same place as the

- detainee and willing to attend the strip search within a reasonable time;  
prevents a strip search being conducted.
- (5) A strip search of a detainee may be conducted with the assistance of another person if the authorised officer conducting the strip search considers that to be necessary for the purposes of conducting it. That person must not be of the opposite sex to the detainee unless:
- (a) the person is a medical practitioner; and
  - (b) a medical practitioner of the same sex as the detainee is not available within a reasonable time.
- (6) An action or proceeding, whether civil or criminal, does not lie against a person who, at the request of an authorised officer, assists in conducting a strip search if the person acts in good faith and does not contravene this section.
- (7) A detainee must be provided with adequate clothing if during or as a result of a strip search any of his or her clothing is:
- (a) damaged or destroyed; or
  - (b) retained under section 252C.

**252C Possession and retention of certain things obtained during a screening procedure or strip search**

- (1) An authorised officer may take possession of and retain a thing found in the course of conducting a screening procedure under section 252AA or conducting a strip search under section 252A if the thing:
- (a) might provide evidence of the commission of an offence against this Act; or
  - (b) is forfeited or forfeitable to the Commonwealth.
- (2) A weapon or other thing described in subsection 252AA(1) or 252A(1) that is found in the course of conducting a screening procedure under section 252AA or a strip search under section 252A is forfeited to the Commonwealth.

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- (3) An authorised officer must not return a thing that is forfeited or forfeitable to the Commonwealth. Instead, the authorised officer must, as soon as practicable, give the thing to a constable (within the meaning of the *Crimes Act 1914*).
- (4) An authorised officer must take reasonable steps to return any other thing retained under subsection (1) to the person from whom it was taken, or to the owner if that person is not entitled to possess it, if one of the following happens:
  - (a) it is decided that the thing is not to be used in evidence;
  - (b) the period of 60 days after the authorised officer takes possession of the thing ends.
- (5) However, the authorised officer does not have to take those steps if:
  - (a) in a paragraph (4)(b) case:
    - (i) proceedings in respect of which the thing might provide evidence have been instituted before the end of the 60 day period and have not been completed (including an appeal to a court in relation to those proceedings); or
    - (ii) the authorised officer may retain the thing because of an order under section 252E; or
  - (b) in any case—the authorised officer is otherwise authorised (by a law, or an order of a court or a tribunal, of the Commonwealth or a State or Territory) to retain, destroy or dispose of the thing.

**252D Authorised officer may apply for a thing to be retained for a further period**

- (1) This section applies if an authorised officer has taken possession of a thing referred to in subsection 252C(4) and proceedings in respect of which the thing might provide evidence have not commenced before the end of:
  - (a) 60 days after the authorised officer takes possession of the thing; or

- (b) a period previously specified in an order of a magistrate under section 252E.
- (2) The authorised officer may apply to a magistrate for an order that the officer may retain the thing for a further period.
- (3) Before making the application, the authorised officer must:
  - (a) take reasonable steps to discover which persons' interests would be affected by the retention of the thing; and
  - (b) if it is practicable to do so, notify each person who the authorised officer believes to be such a person of the proposed application.

### **252E Magistrate may order that thing be retained**

- (1) The magistrate may order that the authorised officer who made an application under section 252D may retain the thing if the magistrate is satisfied that it is necessary for the authorised officer to do so:
  - (a) for the purposes of an investigation as to whether an offence has been committed; or
  - (b) to enable evidence of an offence to be secured for the purposes of a prosecution.
- (2) The order must specify the period for which the authorised officer may retain the thing.
- (3) A power conferred on a magistrate by this section is conferred on the magistrate in a personal capacity and not as a court or a member of a court.
- (4) The magistrate need not accept the power conferred.
- (5) A magistrate exercising a power under this section has the same protection and immunity as if he or she were exercising that power as, or as a member of, the court of which the magistrate is a member.

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**252F Detainees held in State or Territory prisons or remand centres**

- (1) This section applies to a detainee if:
  - (a) he or she is held in immigration detention in a prison or remand centre of a State or Territory; and
  - (b) a law of that State or Territory confers a power to search persons, or things in the possession of persons, serving sentences or being held in the prison or remand centre.
- (2) To the extent that the State or Territory law confers that power, or affects the exercise of that power, it applies to the detainee as though it were a law of the Commonwealth.
- (3) Sections 252AA and 252A of this Act do not apply to a detainee to whom this section applies.

**252G Powers concerning entry to a detention centre**

- (1) An officer may request that a person about to enter a detention centre established under this Act do one or more of the following:
  - (a) walk through screening equipment;
  - (b) allow an officer to pass hand-held screening equipment over or around the person or around things in the person's possession;
  - (c) allow things in the person's possession to pass through screening equipment or to be examined by X-ray.
- (2) **Screening equipment** means a metal detector or similar device for detecting objects or particular substances.
- (3) If an authorised officer suspects on reasonable grounds that a person about to enter a detention centre established under this Act has in his or her possession a thing that might:
  - (a) endanger the safety of the detainees, staff or other persons at the detention centre; or
  - (b) disrupt the order or security arrangements at the detention centre;

the authorised officer may request that the person do some or all of the things in subsection (4) for the purpose of finding out whether the person has such a thing. A request may be made whether or not a request is also made to the person under subsection (1).

- (4) An authorised officer may request that the person do one or more of the following:
- (a) allow the authorised officer to inspect the things in the person's possession;
  - (b) remove some or all of the person's outer clothing such as a coat, jacket or similar item;
  - (c) remove items from the pockets of the person's clothing;
  - (d) open a thing in the person's possession, or remove the thing's contents, to allow the authorised officer to inspect the thing or its contents;
  - (e) leave a thing in the person's possession, or some or all of its contents, in a place specified by the authorised officer if he or she suspects on reasonable grounds that the thing or its contents are capable of concealing something that might:
    - (i) endanger the safety of the detainees, staff or other persons at the detention centre; or
    - (ii) disrupt the order or security arrangements at the detention centre.
- (5) A person who leaves a thing (including any of its contents) in a place specified by an authorised officer is entitled to its return when the person leaves the detention centre.
- (6) However, if possession of the thing, or any of those contents, by the person is unlawful under a Commonwealth law or in the State or Territory in which the detention centre is located:
- (a) the thing or the contents must not be returned to the person; and
  - (b) an authorised officer must, as soon as practicable, give the thing or the contents to a constable (within the meaning of the *Crimes Act 1914*).

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- (7) A person who is about to enter a detention centre established under this Act may be refused entry if he or she does not comply with a request under this section.

**253 Detention of deportee**

- (1) Where an order for the deportation of a person is in force, an officer may, without warrant, detain a person whom the officer reasonably supposes to be that person.
- (2) A person detained under subsection (1) or (10) may, subject to this section, be kept in immigration detention or in detention as a deportee in accordance with subsection (8).
- (3) Where an officer detains a person under subsection (1) or (10), the officer shall forthwith inform the person of the reason for the detention and shall, if that person so requests, furnish to him or her, as soon as practicable, particulars of the deportation order.
- (4) If a person detained under this section (in this subsection called the *detained person*) claims, within 48 hours after the detention and while the detained person is in detention, that he or she is not the person in respect of whom the deportation order is in force, the person to whom the claim is made shall:
- (a) if that last-mentioned person is an officer—ask the detained person; or
  - (b) in any other case—cause an officer to ask the detained person;
- to make a statutory declaration to that effect, and, if the person detained makes such a declaration, the officer who asked him or her to make the declaration shall take him or her before a prescribed authority within 48 hours after the making of the declaration, or, if it is not practicable to take him or her before a prescribed authority within that time, as soon as practicable after the expiration of that period.
- (5) If a detained person who is required under subsection (4) to be brought before a prescribed authority within a particular period, is



not so brought before a prescribed authority, the person shall be released.

- (6) Where a person is brought before a prescribed authority under this section, the prescribed authority shall inquire into the question whether there are reasonable grounds for supposing that that person is a deportee and, if the prescribed authority is satisfied that there are such reasonable grounds, the prescribed authority shall, by writing under his or her hand, declare accordingly.
- (7) Where a prescribed authority makes a declaration in accordance with subsection (6), the detained person may be held in detention as a deportee in accordance with subsection (8), but otherwise the prescribed authority shall direct the release of that person and he or she shall be released accordingly.
- (8) A deportee may be kept in immigration detention or such detention as the Minister, Secretary or Australian Border Force Commissioner directs:
- (a) pending deportation, until he or she is placed on board a vessel for deportation;
  - (b) at any port or place in Australia at which the vessel calls after he or she has been placed on board; or
  - (c) on board the vessel until its departure from its last port or place of call in Australia.
- (9) In spite of anything else in this section, the Minister, Secretary or Australian Border Force Commissioner may at any time order the release (either unconditionally or subject to specified conditions) of a person who is in detention under this section.
- (10) An officer may, without warrant, detain a person who:
- (a) has been released from detention under subsection (9) subject to conditions; and
  - (b) has breached any of those conditions.
- (11) Nothing contained in, or done under, this section prevents the Supreme Court of a State or Territory or the High Court from ordering the release from detention of a person held in detention

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under this section where the Court finds that there is no valid deportation order in force in relation to that person.

**254 Removees and deportees held in other custody**

- (1) This section applies if a person is a removee or a deportee and is in the custody of an authority of the Commonwealth, a State or a Territory, otherwise than under this Act.
- (2) The Secretary or Australian Border Force Commissioner may give the person written notice:
  - (a) if the person is a deportee:
    - (i) stating that a deportation order has been made; and
    - (ii) setting out particulars of the deportation order; and
  - (b) if the person is a removee—stating that the person is to be removed; and
  - (c) in any case—stating that, from the time when the person would otherwise be entitled to be released from the custody referred to in subsection (1) (the *custody transfer time*), the person will be kept in immigration detention.
- (2A) If a removee is given notice under subsection (2):
  - (a) the authority who has custody of the removee immediately before the custody transfer time is taken from the custody transfer time to be an officer for the purposes of the application of Division 7 of Part 2 in relation to the removee; and
  - (b) the removee is taken from the custody transfer time to be detained by the authority in the capacity of such an officer in the exercise of the powers conferred by that Division.
- (3) If a deportee is given notice under subsection (2):
  - (a) the authority who has custody of the deportee immediately before the custody transfer time is taken from the custody transfer time to be an officer for the purposes of the application of subsection 253(1) in relation to the deportee; and

- (b) the deportee is taken from the custody transfer time to be detained by the authority in the capacity of such an officer in the exercise of the powers conferred by subsection 253(1); and
- (c) subsection 253(3) does not apply in relation to the deportee.

### **255 Prescribed authorities**

- (1) The Minister may appoint as a prescribed authority for the purposes of section 253 a person who is or has been a Judge of a Federal Court or of the Supreme Court of a State or Territory or a barrister or solicitor of the High Court or of the Supreme Court of a State of not less than 5 years' standing.
- (2) The Governor-General may arrange with the Governor-in-Council of a State for the performance by persons who hold office as Police, Stipendiary or Special Magistrates in that State of the functions of a prescribed authority under section 253.
- (3) Notice of an arrangement under subsection (2) shall be published in the *Gazette*.
- (4) Where an arrangement under subsection (2) is in force, a person who holds an office specified in the arrangement is a prescribed authority for the purposes of section 253.
- (5) A person who holds office as a Police, Stipendiary or Special Magistrate of a Territory is a prescribed authority for the purposes of section 253.
- (6) A prescribed authority shall make a thorough investigation of the matter which he or she is required to inquire into, without regard to legal forms, and shall not be bound by any rules of evidence but may inform himself or herself on any relevant matter in such manner as he or she thinks fit.

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**256 Person in immigration detention may have access to certain advice, facilities etc.**

Where a person is in immigration detention under this Act, the person responsible for his or her immigration detention shall, at the request of the person in immigration detention, give to him or her application forms for a visa or afford to him or her all reasonable facilities for making a statutory declaration for the purposes of this Act or for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention.

**257 Persons may be required to answer questions**

- (1) For the purpose of determining whether a person who is in immigration detention under this Act is an unlawful non-citizen, a removee or a deportee, an officer may put to that person such questions as the officer considers necessary and may move that person from place to place.
- (2) Where an officer puts a question to a person in accordance with subsection (1) after having informed that person that he or she is required to answer the question, that person shall not:
  - (a) refuse or fail to answer the question; or
  - (b) in answer to the question, make a statement which is false or misleading in a material particular.

Penalty: Imprisonment for 6 months.

- (2A) An offence against subsection (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (3) Where subsection (2) is applicable in relation to a question put to a person, that person is not excused from answering the question on the ground that the answer might tend to incriminate him or her, but the answer to the question shall not be used as evidence against that person in any proceedings other than proceedings under that subsection.

**257A Person may be required to provide personal identifiers**

- (1) Subject to subsection (3), the Minister or an officer may, in writing or orally, require a person to provide one or more personal identifiers for the purposes of this Act or the regulations.
- (2) Without limiting subsection (1), the purposes referred to in that subsection include any of the purposes referred to in subsection 5A(3).

*Only citizens entering Australia etc. may be required to provide personal identifiers*

- (3) If the Minister or officer knows or reasonably believes that a person is a citizen, the person must not be required to provide one or more personal identifiers under subsection (1) unless section 166, 170 or 175 applies in relation to the person.

*When requirement under subsection (1) must be made*

- (4) The Minister or an officer must require a person to provide one or more personal identifiers under subsection (1) if prescribed circumstances exist.

*How personal identifiers must be provided*

- (5) If a person is required to provide one or more personal identifiers under subsection (1), those personal identifiers must be:
  - (a) provided by way of one or more identification tests carried out by an authorised officer or an authorised system; or
  - (b) if another way is specified by the Minister or officer—provided in that specified way.

Note: If the types of identification tests that the authorised officer may carry out are specified under section 5D, then each identification test must be of a type so specified.

- (6) If paragraph (5)(b) applies, the person must comply with any requirements specified by the Minister or officer in providing one or more personal identifiers in the way specified under that paragraph.

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*Multiple requirements for personal identifiers may be made*

- (7) A person may be required to provide one or more personal identifiers under subsection (1):
- (a) more than once; and
  - (b) whether or not the person has previously complied with a requirement under this Act or the regulations to provide one or more personal identifiers.

*Other provisions not limited or otherwise affected*

- (8) This section does not limit, or otherwise affect, any other provision of this Act under which a personal identifier may be required, provided or presented.

**258 Minister may determine that specified persons are not to be required to provide personal identifiers etc.**

The Minister may determine, by legislative instrument, that:

- (a) a specified person, or a person included in a specified class of persons, must not be required to provide under section 257A:
  - (i) any personal identifiers; or
  - (ii) one or more specified kinds of personal identifiers; or
- (b) a specified person, or a person included in a specified class of persons, must not be required in specified circumstances to provide under section 257A:
  - (i) any personal identifiers; or
  - (ii) one or more specified kinds of personal identifiers.

**258A When detainees must not be required to provide personal identifiers under section 257A**

A person must not be required to provide a personal identifier under section 257A if:

- (a) the person is in immigration detention (but not only because he or she is detained for questioning detention (see section 192)); and

- (b) the person has, during that detention, provided a personal identifier of that type under Division 13AA.

**258B Information to be provided—authorised officers carrying out identification tests**

- (1) Before an authorised officer carries out an identification test on a person for the purposes of section 257A, the authorised officer must inform the person of such matters as are prescribed.
- (2) For the purposes of subsection (1), the authorised officer *informs* the person of a matter if the authorised officer informs the person of the matter, through an interpreter if necessary, in a language (including sign language or braille) in which the person is able to communicate with reasonable fluency.
- (3) The authorised officer may comply with this section by giving to the person, in accordance with the regulations, a form setting out the information specified in the regulations. However, the information must be in a language (including braille) in which the person is able to communicate with reasonable fluency.

**258D Regulations may prescribe manner for carrying out identification tests**

- (1) The regulations may prescribe the manner in which an identification test is to be carried out on a person under section 257A.
- (2) The regulations may prescribe the procedure and requirements that apply if a personal identifier is provided under section 257A by the person otherwise than by way of an identification test.

**258E General rules for carrying out identification tests**

An identification test that an authorised officer carries out under section 257A:

- (a) must be carried out in circumstances affording reasonable privacy to the person; and

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- (b) must not be carried out in the presence or view of a person whose presence is not necessary for the purposes of the identification test or required or permitted by another provision of this Act; and
- (c) must not involve the removal of more clothing than is necessary for carrying out the test; and
- (d) must not involve more visual inspection than is necessary for carrying out the test.

**258F Person must not be required to provide personal identifiers in a cruel, inhuman or degrading way etc.**

For the purposes of this Act, a requirement to provide a personal identifier, or the provision of a personal identifier, in a particular way under section 257A is not of itself taken:

- (a) to be cruel, inhuman or degrading; or
- (b) to be a failure to treat a person with humanity and with respect for human dignity.

However, nothing in this Act authorises the Minister or an officer to require a person to provide a personal identifier under section 257A in a cruel, inhuman or degrading way, or in a way that fails to treat the person with humanity and with respect for human dignity.

**258G Authorised officer may get help to carry out identification tests**

An authorised officer may ask another authorised officer or an officer to help him or her to carry out the identification test, and the other person may give that help.

**259 Detention of vessel for purpose of search**

- (1) The Secretary or Australian Border Force Commissioner may, by notice in writing to the master of a vessel which has arrived in Australia not more than one month before the date of the notice, order that the vessel remain at a port or place for a reasonable time



specified in the notice for the purpose of enabling a search of the vessel to be made in order to ascertain whether there are on the vessel any unlawful non-citizens or any persons seeking to enter Australia in circumstances in which they would become unlawful non-citizens.

- (2) The master of a vessel in respect of which an order is in force under this section shall not, during the time specified in the order, move the vessel without the consent of the Secretary or Australian Border Force Commissioner.

Penalty: \$20,000.

- (3) An offence against subsection (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

### **260 Detention of vessel pending recovery of penalty**

- (1) The Secretary or Australian Border Force Commissioner may, in writing, direct an officer to detain a vessel where, in the Secretary's or Australian Border Force Commissioner's opinion, the master, owner, agent or charterer of the vessel has been guilty of an offence against this Act.
- (2) Where a direction is given under subsection (1):
- (a) the officer specified in the direction may detain the vessel at the place where it is found or cause it to be brought to another place specified by the Secretary or Australian Border Force Commissioner and detain it at that place; and
  - (b) the Secretary or Australian Border Force Commissioner shall forthwith give notice of the detention to the master, owner, charterer or agent of the vessel.
- (3) For the purposes of the detention and other lawful dealings with the vessel, the officer specified in the direction is entitled to obtain such seizure warrant issued under Division 1 of Part XII of the *Customs Act 1901* or other aid as may be obtained under a law of the Commonwealth with respect to the seizure of vessels or goods.

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- (4) The detention of a vessel under this section shall cease if a bond with 2 sufficient sureties to the satisfaction of the Secretary or Australian Border Force Commissioner is given by the master, owner, agent or charterer of the vessel for the payment of any penalties that may be imposed in respect of the alleged offence.
- (5) If, while the vessel is detained under this section, default is made in payment of any penalties imposed in respect of an offence against this Act by the master, owner, agent or charterer of the vessel, the Secretary or Australian Border Force Commissioner may seize the vessel, and the like proceedings shall thereupon be taken for forfeiting and condemning the vessel as in the case of a vessel seized for breach of the *Customs Act 1901*, and the vessel shall be sold.
- (6) The proceeds of the sale shall be applied firstly in payment of the penalties referred to in subsection (5) and of all costs awarded in connexion with the proceedings in which the penalties were imposed or incurred in and about the sale and the proceedings leading to the sale, and the balance shall be payable to the owner and other persons having interests in the vessel before the condemnation and sale.
- (7) Division 13A does not limit the operation of this section.

**261 Disposal of dilapidated vessels etc.**

- (1) If a non-citizen who enters Australia:
  - (a) is required to comply with section 166 (immigration clearance); and
  - (b) either:
    - (i) does not comply; or
    - (ii) on complying, is detained under section 189;the Secretary or Australian Border Force Commissioner may, in writing, direct an officer to seize the vessel on which the non-citizen came to Australia.
- (2) If:

- (a) a vessel is seized under subsection (1) or section 261B; and
- (b) the vessel has not been forfeited and condemned under section 260 or condemned as forfeited under Division 13A; and
- (c) the vessel has not been ordered by a court to be delivered to a person or otherwise dealt with; and
- (d) the Secretary or Australian Border Force Commissioner is satisfied that the vessel is in such a poor condition that its custody or maintenance involves expense out of proportion to its value; and
- (e) a person other than the Commonwealth does not meet, or make arrangements that the Secretary or Australian Border Force Commissioner considers are satisfactory to meet, that expense;

the Secretary or Australian Border Force Commissioner may in writing, direct an officer to sell, destroy or otherwise dispose of the vessel.

- (3) The officer must comply with the direction.
- (4) The proceeds of a sale are to be applied firstly in payment of costs incurred by the Commonwealth in the custody or maintenance of the vessel, and in selling or disposing of the vessel, and, subject to subsection (5), the balance is to be paid to the owner and any other persons with interests in the vessel before its sale.
- (5) If:
  - (a) a person owes a debt to the Commonwealth under this Act; and
  - (b) an amount by way of the balance of the proceeds of a sale (the **balance amount**) is payable to the person under subsection (4);the Commonwealth may apply the balance amount in payment of the debt, and the debt is reduced accordingly. The amount applied must not exceed the amount of the debt.
- (6) Division 13A does not limit the operation of this section.

## **Division 13AA—Identification of immigration detainees**

### **Subdivision A—Provision of personal identifiers**

#### **261AA Immigration detainees must provide personal identifiers**

- (1) A non-citizen who is in immigration detention must (other than in the prescribed circumstances) provide to an authorised officer one or more personal identifiers.
- (1A) An authorised officer must not require, for the purposes of subsection (1), a person to provide a personal identifier other than any of the following (including any of the following in digital form):
  - (a) fingerprints or handprints of the person (including those taken using paper and ink or digital liveness scanning technologies);
  - (b) a measurement of the person's height and weight;
  - (c) a photograph or other image of the person's face and shoulders;
  - (d) the person's signature;
  - (e) any other personal identifier of a type prescribed for the purposes of this paragraph.

Note: Division 13AB sets out further restrictions on the personal identifiers that minors and incapable persons can be required to provide.

- (2) The one or more personal identifiers are to be provided by way of one or more identification tests carried out by the authorised officer in accordance with this Division.

Note: Subject to certain restrictions, section 261AE allows reasonable force to be used to carry out identification tests under this Division.

- (3) However, this Division does not apply to a non-citizen who:
  - (a) is in immigration detention only because he or she is detained under section 192; and

- (b) has provided a personal identifier in accordance with a requirement under section 257A.

**261AB Authorised officers must require and carry out identification tests**

- (1) The authorised officer must, other than in the circumstances prescribed for the purposes of subsection 261AA(1):
  - (a) require, in writing or orally, the non-citizen to provide one or more personal identifiers, of the type or types prescribed, by way of one or more identification tests carried out by the authorised officer; and
  - (b) carry out the one or more identification tests on the non-citizen.
- (2) However:
  - (a) if the types of identification tests that the authorised officer may carry out is specified under section 5D—each identification test must be of a type so specified; and
  - (b) each identification test must be carried out in accordance with Subdivision B; and
  - (c) unless the authorised officer has reasonable grounds to believe that the non-citizen is not a minor or an incapable person—each identification test must be carried out in accordance with the additional requirements of Division 13AB.

**261AC Information to be provided before carrying out identification tests**

- (1) Before carrying out an identification test, the authorised officer must:
  - (a) inform the non-citizen that the non-citizen may ask that an independent person be present while the identification test is carried out and that the test be carried out by a person of the same sex as the non-citizen; and

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- (b) inform the non-citizen of such other matters as are specified in the regulations.
- (2) For the purposes of subsection (1), the authorised officer *informs* the non-citizen of a matter if the authorised officer informs the non-citizen of the matter, through an interpreter if necessary, in a language (including sign language or braille) in which the non-citizen is able to communicate with reasonable fluency.
- (3) The authorised officer may comply with this section by giving to the non-citizen, in accordance with the regulations, a form setting out the information specified in the regulations. However, the information must be in a language (including braille) in which the non-citizen is able to communicate with reasonable fluency.

**Subdivision B—How identification tests are carried out**

**261AD General rules for carrying out identification tests**

An identification test under this Division:

- (a) must be carried out in circumstances affording reasonable privacy to the non-citizen; and
- (b) if the non-citizen so requests and it is practicable to comply with the request—must not be carried out in the presence or view of a person who is of the opposite sex to the non-citizen; and
- (c) must not be carried out in the presence or view of a person whose presence is not necessary for the purposes of the identification test or is not required or permitted by another provision of this Act; and
- (d) must not involve the removal of more clothing than is necessary for carrying out the test; and
- (e) must not involve more visual inspection than is necessary for carrying out the test; and
- (f) if the test is one of 2 or more identification tests to be carried out on the non-citizen—must be carried out at the same time as the other identification tests, if it is practicable to do so.

## **261AE Use of force in carrying out identification tests**

### *When use of force is permitted*

- (1) Subject to subsection (2) and section 261AF, an authorised officer, or a person authorised under section 261AG to help the authorised officer, may use reasonable force:
- (a) to enable the identification test to be carried out; or
  - (b) to prevent the loss, destruction or contamination of any personal identifier or any meaningful identifier derived from the personal identifier.

However, this section does not authorise the use of force against a minor or an incapable person, or if the personal identifier in question is a person's signature.

- (2) The officer or person must not use force unless:
- (a) the non-citizen required to provide the personal identifier in question has refused to allow the identification test to be carried out; and
  - (b) all reasonable measures to carry out the identification test without the use of force have been exhausted; and
  - (c) use of force in carrying out the identification test is authorised under subsection (4).

### *Applications for authorisation to use force*

- (3) An authorised officer may apply to a senior authorising officer (who is not an officer referred to in subsection (1)) for an authorisation to use force in carrying out the identification test.

### *Authorisation to use force*

- (4) The senior authorising officer may authorise the use of force in carrying out the identification test if he or she is reasonably satisfied that:
- (a) the non-citizen required to provide the personal identifier in question has refused to allow the identification test to be carried out; and

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- (b) all reasonable measures to carry out the identification test without the use of force have been exhausted.
- (5) An authorisation under subsection (4):
  - (a) may be given by telephone, fax or other electronic means; and
  - (b) must be recorded in writing, and signed by the person giving the authorisation, within one business day after it is given.
- (6) A failure to comply with paragraph (5)(b) does not affect the validity of an identification test carried out on the basis of that authorisation.
- (7) The power to give an authorisation under subsection (4) cannot be delegated to any other person.

*Definition*

- (8) In this section:  
*senior authorising officer* means an officer whom the Secretary or Australian Border Force Commissioner has authorised, or who is included in a class of officers whom the Secretary or Australian Border Force Commissioner has authorised, to perform the functions of a senior authorising officer under this section.

**261AF Identification tests not to be carried out in cruel, inhuman or degrading manner etc.**

For the purposes of this Act, the carrying out of the identification test is not of itself taken:

- (a) to be cruel, inhuman or degrading; or
- (b) to be a failure to treat a person with humanity and with respect for human dignity.

However, nothing in this Act authorises the carrying out of the identification test in a cruel, inhuman or degrading manner, or in a manner that fails to treat a person with humanity and with respect for human dignity.



**261AG Authorised officer may get help to carry out identification tests**

An authorised officer may ask another authorised officer or an officer to help him or her to carry out the identification test, and the other person may give that help.

**261AH Identification tests to be carried out by authorised officer of same sex as non-citizen**

If the non-citizen requests that the identification test be carried out by an authorised officer of the same sex as the non-citizen, the test must only be carried out by an authorised officer of the same sex as the non-citizen.

**261AI Independent person to be present**

The identification test must be carried out in the presence of an independent person if:

- (a) force is used in carrying out the identification test; or
- (b) both of the following apply:
  - (i) the non-citizen requests that an independent person be present while the identification test is being carried out;
  - (ii) an independent person is readily available at the same place as the non-citizen and is willing to attend the test within a reasonable time.

**261AJ Recording of identification tests**

- (1) An authorised officer may video record the carrying out of the identification test.
- (2) If the carrying out of the identification test is not video recorded, the authorised officer may decide that the identification test must be carried out in the presence of an independent person.

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**261AK Retesting**

*When retesting is permitted*

- (1) If:
- (a) an authorised officer has carried out an identification test (the **earlier test**) on a non-citizen in accordance with this Division (including a test authorised under subsection (4)); and
  - (b) either:
    - (i) a personal identifier that is provided as a result of the earlier test being carried out is unusable; or
    - (ii) an authorised officer or an officer is not satisfied about the integrity of that personal identifier;
- the officer who carried out the earlier test or another officer may require the non-citizen to provide the personal identifier again, and may carry out the test again in accordance with this Division, if:
- (c) the requirement is made while the earlier test is being carried out or immediately after it was carried out; or
  - (d) carrying out the test again is authorised under subsection (4).
- (2) If the non-citizen is required under subsection (1) to provide the personal identifier again, the non-citizen is taken, for the purposes of this Division, not to have provided the personal identifier as a result of the earlier test being carried out.

*Applications for authorisation to retest*

- (3) An authorised officer may apply for an authorisation to carry out the test again. The application is to be made to:
- (a) if the earlier test was not a test authorised under subsection (4)—a senior authorising officer (who is not an officer referred to in subsection (1)); or
  - (b) if the earlier test was a test authorised under subsection (4) by a senior authorising officer—the Secretary, Australian Border Force Commissioner or an SES Band 3 employee in the Department (who is not an officer referred to in subsection (1)).

*Authorisation to retest*

- (4) The senior authorising officer, Secretary, Australian Border Force Commissioner or SES Band 3 employee (as the case requires) may authorise the test to be carried out again if:
- (a) he or she is reasonably satisfied that the personal identifier that is provided as a result of the earlier test being carried out is unusable; or
  - (b) he or she is not reasonably satisfied about the integrity of that personal identifier.
- (5) An authorisation under subsection (4):
- (a) may be given by telephone, fax or other electronic means; and
  - (b) must be recorded in writing, and signed by the person giving the authorisation, within one business day after it is given.
- (6) A failure to comply with paragraph (5)(b) does not affect the validity of an identification test carried out on the basis of that authorisation.
- (7) The power to give an authorisation under subsection (4) cannot be delegated to any other person.

*Use of force*

- (8) An authorisation under subsection (4) does not authorise the use of force in carrying out an identification test.

Note: See section 261AE on the use of force in carrying out identification tests.

*Effect of refusing to authorise retesting*

- (9) If an application for an authorisation to carry out an identification test again on a non-citizen is refused, the non-citizen is taken, for the purposes of this Act, to have complied with any requirement under this Act to provide the personal identifier in question.

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*Definitions*

(10) In this section:

**senior authorising officer** means an officer (other than an SES Band 3 employee in the Department) whom the Secretary or Australian Border Force Commissioner has authorised, or who is included in a class of officers whom the Secretary or Australian Border Force Commissioner has authorised, to perform the functions of a senior authorising officer under this section.

**SES Band 3 employee** means an SES employee with a classification of Senior Executive Band 3, and includes an SES employee who has been temporarily assigned duties that have been allocated a classification of Senior Executive Band 3.

**Subdivision C—Obligations relating to video recordings of identification tests**

**261AKA Definitions**

In this Subdivision, unless the contrary intention appears:

**permitted provision**, of a video recording, has the meaning given by subsection 261AKD(2).

**provide**, in relation to a video recording, includes provide access to the recording.

**related document** means a document that contains information, derived from a video recording made under section 261AJ or from a copy of such a recording, from which the identity of the individual on whom the identification test in question was carried out is apparent or can reasonably be ascertained.

**video recording** means a video recording made under section 261AJ or a copy of such a recording, and includes a related document.

### **261AKB Accessing video recordings**

- (1) A person commits an offence if:
  - (a) the person accesses a video recording; and
  - (b) the person is not authorised under section 261AKC to access the video recording for the purpose for which the person accessed it.

Penalty: Imprisonment for 2 years, or 120 penalty units, or both.

- (2) This section does not apply if the access is through the provision of a video recording that is a permitted provision.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

### **261AKC Authorising access to video recordings**

- (1) The Secretary or Australian Border Force Commissioner may, in writing, authorise a specified person, or any person included in a specified class of persons, to access:
  - (a) all video recordings; or
  - (b) a specified video recording, or video recordings of a specified kind.
- (2) The Secretary or Australian Border Force Commissioner must specify in an authorisation under this section, as the purpose or purposes for which access is authorised, one or more of the following purposes:
  - (a) providing a video recording to another person in accordance with this Subdivision;
  - (b) administering or managing the storage of video recordings;
  - (c) making a video recording available to the person to whom it relates;
  - (d) modifying related documents in order to correct errors or ensure compliance with appropriate standards;
  - (e) any purpose connected with determining whether a civil or criminal liability has arisen from a person carrying out or helping to carry out an identification test under this Act;

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- (f) complying with laws of the Commonwealth or the States or Territories.
- (3) However, the Secretary or Australian Border Force Commissioner must not specify as a purpose for which access is authorised a purpose that will include or involve the purpose of:
  - (a) investigating an offence against a law of the Commonwealth or a State or Territory (other than an offence involving whether an identification test was carried out lawfully); or
  - (b) prosecuting a person for such an offence;if the identifying information in question relates to a personal identifier of a prescribed type.

**261AKD Providing video recordings**

- (1) A person commits an offence if:
  - (a) the person's conduct causes a video recording to be provided to another person; and
  - (b) the provision of the recording is not a permitted provision of the recording.

Penalty: Imprisonment for 2 years, or 120 penalty units, or both.

- (2) A *permitted provision* of a video recording is a provision of the recording that:
  - (a) is for the purpose of administering or managing the storage of video recordings; or
  - (b) is for the purpose of making the video recording in question available to the non-citizen to whom it relates; or
  - (c) is for the purpose of a proceeding, before a court, the Tribunal or another tribunal, or the Immigration Assessment Authority, relating to the non-citizen to whom the video recording in question relates; or
  - (d) is for any purpose connected with determining whether a civil or criminal liability has arisen from a person carrying out or helping to carry out an identification test under this Act; or

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- (e) is for the purpose of an investigation by the Information Commissioner under the *Privacy Act 1988* or the Ombudsman relating to carrying out an identification test; or
  - (f) is made to a prescribed body or agency for the purpose of the body or agency inquiring into the operation of provisions of this Act relating to carrying out an identification test; or
  - (g) takes place with the written consent of the non-citizen to whom the video recording in question relates.
- (3) However, a provision of a video recording is not a permitted provision of the recording if:
- (a) it constitutes a disclosure of identifying information relating to a personal identifier of a prescribed type; and
  - (b) it is for the purpose of:
    - (i) investigating an offence against a law of the Commonwealth or a State or Territory (other than an offence involving whether an identification test was carried out lawfully); or
    - (ii) prosecuting a person for such an offence.

**261AKE Unauthorised modification of video recordings**

A person commits an offence if:

- (a) the person causes any unauthorised modification of a video recording; and
- (b) the person intends to cause the modification; and
- (c) the person knows that the modification is unauthorised.

Penalty: Imprisonment for 2 years, or 120 penalty units, or both.

**261AKF Unauthorised impairment of video recordings**

A person commits an offence if:

- (a) the person causes any unauthorised impairment of:
  - (i) the reliability of a video recording; or
  - (ii) the security of the storage of a video recording; or

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- (iii) the operation of a system by which a video recording is stored; and
- (b) the person intends to cause the impairment; and
- (c) the person knows that the impairment is unauthorised.

Penalty: Imprisonment for 2 years, or 120 penalty units, or both.

**261AKG Meanings of *unauthorised modification* and *unauthorised impairment* etc.**

- (1) In this Subdivision:
  - (a) modification of a video recording; or
  - (b) impairment of the reliability of a video recording; or
  - (c) impairment of the security of the storage of a video recording; or
  - (d) impairment of the operation of a system by which a video recording is stored;by a person is unauthorised if the person is not entitled to cause that modification or impairment.
- (2) Any such modification or impairment caused by the person is not unauthorised merely because he or she has an ulterior purpose for causing it.
- (3) For the purposes of an offence under this Subdivision, a person causes any such unauthorised modification or impairment if the person's conduct substantially contributes to it.
- (4) For the purposes of subsection (1), if:
  - (a) a person causes any modification or impairment of a kind mentioned in that subsection; and
  - (b) the person does so under a warrant issued under the law of the Commonwealth, a State or a Territory;the person is entitled to cause that modification or impairment.

**261AKH Destroying video recordings**

A person commits an offence if:

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- (a) the person is the person who has day-to-day responsibility for the system under which a video recording is stored; and
- (b) the person fails physically to destroy the recording, and all copies of the recording, within 10 years after it was made.

Penalty: Imprisonment for 2 years, or 120 penalty units, or both.

## **Division 13AB—Identification of minors and incapable persons**

### **261AL Minors**

#### *Minors less than 15 years old*

- (1) A person who is less than 15 years old must not be required under Division 13AA of this Part to provide a personal identifier other than a personal identifier consisting of:
  - (a) a measurement of the person's height and weight; or
  - (b) the person's photograph or other image of the person's face and shoulders.

#### *Persons present while identification test is carried out*

- (5) If a person who is a minor provides a personal identifier, in accordance with a requirement under Division 13AA of this Part, by way of an identification test carried out by an authorised officer, the test must be carried out in the presence of:
  - (a) a parent or guardian of the minor; or
  - (b) an independent person.
- (6) However, if the Minister is the minor's guardian, the test must be carried out in the presence of an independent person other than the Minister.

### **261AM Incapable persons**

#### *Incapable persons*

- (1) A person who is an incapable person must not be required under Division 13AA of this Part to provide a personal identifier other than a personal identifier consisting of:
  - (a) a measurement of the person's height and weight; or
  - (b) the person's photograph or other image of the person's face and shoulders.

*Persons present while identification test is carried out*

- (4) If a person who is an incapable person provides a personal identifier, in accordance with a requirement under Division 13AA of this Part, by way of an identification test carried out by an authorised officer, the test must be carried out in the presence of:
- (a) a parent or guardian of the incapable person; or
  - (b) an independent person.

## **Division 13A—Automatic forfeiture of things used in certain offences**

### **Subdivision A—Automatic forfeiture**

#### **261A Forfeiture of things used in certain offences**

- (1) The following things are forfeited to the Commonwealth:
  - (a) a vessel used or involved in a contravention of this Act (where the contravention occurred in Australia), if the contravention involved:
    - (i) the bringing or coming to Australia of one or more persons who were, or upon entry into Australia became, unlawful non-citizens; or
    - (ii) the entry or proposed entry into Australia of one or more such persons;
  - (b) a vehicle or equipment:
    - (i) on a vessel described in paragraph (a) at the time of the contravention mentioned in that paragraph; or
    - (ii) used or involved in the contravention referred to in that paragraph.
- (2) Despite subsection (1), a vessel that:
  - (a) was used or involved in a contravention of this Act of a kind referred to in that subsection; and
  - (b) at the time of the contravention, was being used in the course of a regular public transport operation;is not forfeited to the Commonwealth if both the master and the owner of the vessel:
  - (c) did not know; and
  - (d) could not reasonably be expected to have known; that it was used or involved in the contravention.
- (3) In this section:

***regular public transport operation***, in relation to a vessel, means an operation of the vessel for the purpose of a service that:

- (a) is provided for a fee payable by persons using the service; and
- (b) is conducted in accordance with fixed schedules to or from fixed terminals over specific routes; and
- (c) is available to the general public on a regular basis.

### **Subdivision B—Seizure**

#### **261B Seizure of things used in certain offences**

- (1) An authorised officer may seize a thing in Australia, or may order an officer to seize a thing in Australia, if:
  - (a) the thing is forfeited under section 261A; or
  - (b) the authorised officer reasonably suspects that the thing is forfeited under section 261A.
- (2) If an officer is ordered by an authorised officer to seize a thing under subsection (1), the officer may seize the thing.

### **Subdivision C—Dealing with things seized as automatically forfeited**

#### **261C Application of this Subdivision**

This Subdivision sets out rules about a thing that an officer seizes under section 261B.

#### **261D Notice of seizure**

- (1) The officer must give written notice of the seizure of the thing to the owner of the thing. However, if the owner cannot be identified after reasonable inquiry, the officer must give the notice to the person in whose possession or custody or under whose control the thing was immediately before it was seized.

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- (2) If the officer cannot conveniently give the notice to the person referred to in subsection (1) in person, the officer may give written notice of the seizure of the thing by fixing the notice to a prominent part of the thing.
- (3) The notice must:
- (a) identify the thing; and
  - (b) state that the thing has been seized; and
  - (c) specify the reason for the seizure; and
  - (d) state that the thing will be condemned as forfeited unless:
    - (i) the owner of the thing, or the person who had possession, custody or control of the thing immediately before it was seized, gives the Secretary or Australian Border Force Commissioner, within 21 days, a claim for the thing; or
    - (ii) within 21 days, the Minister gives a written order that the thing is not to be condemned as forfeited; and
  - (e) specify the address of the Secretary or Australian Border Force Commissioner.

Note: Section 261F condemns the thing if it is not claimed within 21 days, unless the Minister gives an order that the thing is not to be condemned as forfeited. Section 261H condemns the thing if a claim is made, but the claimant does not get a court order supporting the claim, unless the Minister gives an order that the thing is not to be condemned as forfeited.

- (4) A claim under subparagraph (3)(d)(i) must:
- (a) be in writing; and
  - (b) be in English; and
  - (c) state an address for service on the person making the claim.

**261E Dealing with thing before it is condemned**

- (1) The Secretary or Australian Border Force Commissioner may, on behalf of the Commonwealth, cause the thing to be disposed of or destroyed if:
- (a) its custody or maintenance creates serious difficulties; or

- (b) the expenses of its custody or maintenance between its seizure and condemnation are likely to be greater than its value.
- (2) If the Secretary or Australian Border Force Commissioner causes the thing to be disposed of, the Secretary or Australian Border Force Commissioner may cause the disposal to be subject to specified conditions.

### **261F Thing condemned if not claimed in time**

- (1) By force of this subsection, the thing is condemned as forfeited to the Commonwealth 21 days after notice of seizure of the thing has been given under section 261D, unless:
  - (a) the following conditions are satisfied:
    - (i) within the 21 days, the owner of the thing or the person who had possession, custody or control of it immediately before it was seized gives the Secretary or Australian Border Force Commissioner a written claim for the thing;
    - (ii) the claim is in English;
    - (iii) the claim sets out an address for service on the person making the claim; or
  - (b) within the 21 days, the Minister gives a written order that the thing is not to be condemned as forfeited.

Note: Section 261I requires things condemned as forfeited to be dealt with in accordance with the Secretary's directions.

- (2) A person may claim the thing even if it is disposed of or destroyed before or after the claim.

### **261G Dealing with claim for thing**

- (1) If the thing is claimed under section 261F:
  - (a) an officer may retain possession of the thing whether or not any proceedings for the condemnation of the thing have been instituted; and

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- (b) the Minister may give a written order that the thing is not condemned as forfeited; and
- (c) unless an order has already been made under paragraph (b), the Secretary or Australian Border Force Commissioner may give the claimant a written notice stating that the thing will be condemned as forfeited unless:
  - (i) the claimant institutes proceedings against the Commonwealth within one month to recover the thing, or for a declaration that the thing is not forfeited; or
  - (ii) within one month, the Minister gives a written order that the thing is not condemned as forfeited.

Note 1: An officer may retain possession even if the Secretary or Australian Border Force Commissioner does not give notice. If so, the claimant will be able to recover the thing only if a court orders its release to the claimant.

Note 2: If the Secretary or Australian Border Force Commissioner does give the notice and the claimant institutes proceedings, whether the claimant recovers the thing will depend on the outcome of the proceedings.

- (2) The Secretary or Australian Border Force Commissioner may give the notice to the claimant by posting it prepaid as a letter to the last address of the claimant that is known to the Secretary or Australian Border Force Commissioner. If the Secretary or Australian Border Force Commissioner does so, the letter is taken to be properly addressed for the purposes of section 29 of the *Acts Interpretation Act 1901*.
- (3) Subsection (2) does not limit the ways in which the notice may be given.

Note: Sections 28A and 29 of the *Acts Interpretation Act 1901* explain how a notice can be given, and when it is taken to be given.

**261H What happens if thing is claimed**

- (1) This section applies if the Secretary or Australian Border Force Commissioner gives the claimant a notice under section 261G about instituting proceedings:



- (a) to recover the thing; or
  - (b) for a declaration that the thing is not forfeited.
- (2) If, within the period of one month after the notice is given:
- (a) the claimant does not institute such proceedings; and
  - (b) the Minister does not give a written order that the thing is not to be condemned as forfeited;
- the thing is condemned as forfeited to the Commonwealth immediately after the end of that period.
- (3) If the claimant institutes such proceedings within the period of one month after the notice is given, the thing is condemned as forfeited to the Commonwealth unless:
- (a) before the end of the proceedings, the Minister gives a written order that the thing is not to be condemned as forfeited; or
  - (b) at the end of the proceedings, there is:
    - (i) an order for the claimant to recover the thing; or
    - (ii) if the thing has been sold or disposed of—an order for the Commonwealth to pay the claimant an amount in respect of the thing; or
    - (iii) a declaration that the thing is not forfeited.
- (4) For the purposes of subsection (3), if the proceedings go to judgment, they end:
- (a) if no appeal against the judgment is lodged within the period for lodging such an appeal—at the end of that period; or
  - (b) if an appeal against the judgment is lodged within that period—when the appeal lapses or is finally determined.
- (5) Proceedings relating to the thing may be instituted or continued even if it is disposed of or destroyed.
- (6) If the court hearing the proceedings decides that it would have ordered that the thing be delivered to a person apart from the fact that the thing had been disposed of or destroyed, the court may make such orders as the court considers appropriate, including an order that the Commonwealth pay the person an amount equal to:

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- (a) if the thing has been sold before the end of the proceedings—the proceeds of the sale of the thing, less such costs incurred by the Commonwealth in respect of the thing as the court considers appropriate; or
- (b) if the thing has been disposed of (except by sale) or destroyed before the end of the proceedings—the market value of the thing at the time it was disposed of or destroyed, less such costs incurred by the Commonwealth in respect of the thing as the court considers appropriate.

**261I Dealing with thing after it is condemned**

If the thing is condemned as forfeited to the Commonwealth, the thing must be dealt with or disposed of in accordance with the directions of the Secretary.

**Subdivision D—Operation of Division**

**261J Operation of Division**

Sections 260 and 261 do not limit the operation of this Division.

**Subdivision E—Minister’s order that a thing not be condemned as forfeited**

**261K Minister’s order that a thing not be condemned**

- (1) A power of the Minister under this Division to give a written order that a thing is not to be condemned as forfeited must be exercised by the Minister personally.
- (2) The Minister does not have a duty to consider whether to exercise such a power in respect of any thing, whether the Minister is requested to do so by any person, or in any other circumstances.
- (3) If the Minister makes an order under this Division that a thing is not to be condemned as forfeited, he or she must cause to be laid before each House of the Parliament a statement that sets out:

- (a) the order; and
  - (b) the Minister's reasons for making the order.
- (4) A statement under subsection (3) is to be laid before each House of the Parliament within 15 sitting days of that House after:
- (a) if the order is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or
  - (b) if the order is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.