

203. People Smuggling

203.1 Legislation

[Last reviewed: March 2025]

Migration Act 1958 (Cth)

[Part 2, Division 12, Subdivision A](#) - People smuggling and related offences

203.2 Commentary

[Last reviewed: March 2025]

The people smuggling offences are contained in Part 2, Division 12, Subdivision A of the *Migration Act 1958* (Cth). Chapter 2 of the *Criminal Code* (Cth), which sets out the general principles of criminal responsibility, applies to all offences in the *Migration Act* pursuant to s 4A. As to physical and fault elements under the *Criminal Code* (Cth), see **Chapter 197 – Proof Of Mental And Physical Elements in Commonwealth Offences**.

Sections 233A – 233E, 234A, 236A, 236B of the Migration Act (post 1 June 2010)

The *Anti-People Smuggling and Other Measures Act 2010* (Cth), which commenced on 1 June 2010, repealed former s 232A, s 233, s 233A, s 233B, s 233C and s 234 of the *Migration Act 1958* (Cth). It introduced new s 233A, s 233B, s 233C, s 233D, s 233E, s 234A, s 236A and s 236B. These sections concern, inter alia, the offence of people smuggling simpliciter (s 233A), the aggravated offence of people smuggling involving exploitation or danger of death or serious harm etc (s 233B), the aggravated offence of people smuggling at least 5 people (s 233C), the offence of supporting another in people smuggling (s 233D), the offence of concealing and harbouring non-citizens, etc (s 233E), and the aggravated offence of false documents and false or misleading information etc. relating to non-citizens (at least 5 people) (s 234A).

These offences have territorial effect beyond Australia's boundaries. See s 228A of the *Migration Act*, see *R v Ahmad* ([\(2012\) 165 NTR 1](#); [2012] NTCCA 1, *R v Zainudin* ([\(2012\) 115 SASR 165](#); [\[2012\] SASCFC 133](#)).

Section 233A – Offence of people smuggling

Section 233A provides for an offence which may be committed by organising or facilitating the bringing or the coming to Australia, or the entry or proposed entry into Australia, of a second person, who is a non-citizen and who has, or had, no lawful right to come to Australia. There is no requirement that the non-citizen entered Australia (*R v Ahmad* ([\(2012\) 165 NTR 1](#); [2012] NTCCA 1). Absolute liability applies to whether or not the person is a non-citizen.

Section 5.6 of the *Criminal Code* 1995 (Cth) provides that if the law creating an offence does not specify a fault element for a physical element that consists only of conduct, 'intention' is the fault element for that physical element. Because no fault element is specified for the conduct described in s 233A(1)(a), the relevant fault element that applies is 'intention' (see also *R v Razak* [\[2012\] QCA 244](#), *R v Jufri*; *R v Nasir* [\[2012\] QCA 248](#)). A person has 'intention' with respect to conduct if they mean to engage in that conduct: *Criminal Code*, s 5.2(1).

Section 233A(1)(c) contains the physical element that the second person had, or has, no lawful right to come to Australia. This is a circumstance in which conduct occurs: *Criminal Code*, s 4.1(1)(c) (see also *DPP v PJ* [\(2012\) 36 VR 402](#); [\[2012\] VSCA 146](#), [18]). Section 233A makes no provision for a fault element with respect to this physical element, nor does it provide for strict or absolute liability. Accordingly, under s 5.6(2) of the *Criminal Code*, recklessness is the fault element for this physical element.

'Recklessness' is defined in s 5.4(1) of the *Criminal Code* as follows: '[a] person is reckless with respect to a circumstance if (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.'

Awareness of the precise visa status of a particular passenger is not decisive (*R v Razak* [\[2012\] QCA 244](#), [22]). See also *R v Jufri*; *R v Nasir* [\[2012\] QCA 248](#), [15], where Fraser JA stated that while it may readily be accepted that the reference to a 'lawful right to come to Australia' assumes the existence of an Australian law which, at least in some circumstances, makes it unlawful for a person to enter Australia', it does not follow that the prosecution must necessarily prove that the defendant knew anything about the Australian visa system or had any knowledge of the content of Australian law.

Section 233C - Aggravated offence of people smuggling (at least 5 people)

The offence in s 233C largely replicates the elements in s 233A, though requires the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of at least 5 persons, at least 5 of whom are non-citizens and had, or have, no lawful right to come to Australia. As in s 233A, absolute liability applies to whether or not these persons are non-citizens, while recklessness is the fault element for whether they had, or have, no lawful right to come to Australia.

Section 233C(3) states that if the trier of fact is not satisfied beyond reasonable doubt of the Defendant's guilt of the s 233C offence, but is satisfied of the Defendant's guilt for the s 233A offence, then the trier of fact may find the defendant not guilty of s 233C but guilty of s 233A. The Defendant must, however, have been accorded procedural fairness in relation to that finding of guilt.

203.3 Suggested Directions

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Section 233A – offence of people smuggling

(The following directions may be given in respect of s 233A):

The Defendant is charged that [...].

The offence of people smuggling is comprised of physical and fault elements.

The elements of the offence which the prosecution must satisfy you of beyond reasonable doubt are:

- 1. The Defendant organised or facilitated the bringing [or coming or entry or proposed entry] to Australia of another person.**
- 2. The Defendant *intended* [or meant] to facilitate the bringing [or coming or entry or proposed entry] of that person to Australia.**
- 3. That person was not an Australian citizen and, at the relevant time, did not have a lawful right to come to Australia.**
- 4. The Defendant was reckless as to whether that person had a lawful right to come to Australia.**

In relation to element 3, **that the person was not an Australian citizen and did not at the relevant time have a valid visa permitting [him/her] to enter Australia is not in dispute.**

Element 1: Organising or facilitating the [bringing/coming/entry/proposed entry] to Australia.

For this element, it is not necessary that the person actually entered Australia. Once the organisation or facilitation has occurred, the physical element of the crime is complete, regardless of whether the travel to Australia is undertaken or, if undertaken, is unsuccessful.

‘Organise’ has its ordinary meaning of coordinate the activities, make arrangements or preparations or take responsibility for providing or arranging. ‘Facilitate’ has its ordinary meaning of make easy or easier.

Element 2: Intention to [organise/facilitate]

The prosecution must prove that the conduct of the Defendant in [organising/facilitating] the bringing to Australia of the person was carried out with the intention that [he/she] be brought to Australia. That is, the Defendant *intended* [or meant] to [organise/facilitate] the [coming/bringing] to Australia of the person.

The prosecution is not required to show that the person entered Australia, but it must be proved that the Defendant knew that Australia was the ultimate destination.

The prosecution seeks to prove the requisite intention by asking that you draw inferences from the following: [refer to the relevant evidence].

Element 4: Recklessness as to lawful right

The prosecution must prove beyond reasonable doubt that the Defendant was reckless as to whether the person had a lawful right to come to Australia.

In this context, a Defendant is reckless if [he/she] was aware of a substantial risk as to whether the passengers had a lawful right to come to Australia; and **having regard to the circumstances known to the Defendant, it was unjustifiable to take that risk.**

Section 233C - Aggravated offence of people smuggling (at least 5 people)

(The following directions may be given in respect of s 233C):

The Defendant is charged that [...].

The offence is comprised of physical and fault elements.

The elements of the offence which the prosecution must satisfy you of beyond reasonable doubt are:

- 1. The Defendant organised or facilitated the bringing [or coming or entry or proposed entry] to Australia of a group of at least five persons.**
- 2. The Defendant *intended* [or meant] to facilitate the bringing [or coming or entry or proposed entry] of that group of persons to Australia.**
- 3. At least five persons are non-citizens.**
- 4. The Defendant was reckless as to whether those persons had a lawful right to come to Australia.**

Element 1: Organising or facilitating the [bringing/coming/entry/proposed entry] to Australia

For this element, it is not necessary that the people actually entered Australia. Once the organisation or facilitation has occurred, the physical element of the crime is complete, regardless of whether the travel to Australia is undertaken or, if undertaken, is unsuccessful.

‘Organise’ has its ordinary meaning of coordinate the activities, make arrangements or preparations or take responsibility for providing or arranging. ‘Facilitate’ has its ordinary meaning of make easy or easier.

Element 2: Intention to [organise/facilitate]

The prosecution must prove that the conduct of the Defendant in [organising/facilitating] the bringing to Australia of the passengers was carried out with the intention that they be brought to Australia. That is, the Defendant *intended* [or meant] to [organise/facilitate] the [coming/bringing] to Australia of the passengers.

The prosecution is not required to show that the passengers entered Australia, but it must be proved that the Defendant knew that Australia was the ultimate destination.

The prosecution seeks to prove the requisite intention by asking that you draw inferences from the following: [refer to the relevant evidence].

Element 3: Non-citizens

(If this element is in dispute): The prosecution must prove that at least five of the group were non-citizens; that is, persons who are not Australian citizens. It is not necessary for the prosecution to show that the Defendant had any awareness of their status as such.

Element 4: Recklessness as to lawful right

The prosecution must prove beyond reasonable doubt that the Defendant was reckless as to whether those passengers had a lawful right to come to Australia.

In this context, a Defendant is reckless if [he/she] **was** aware of a substantial risk as to whether the passengers had a lawful right to come to Australia; and having regard to the circumstances known to the Defendant, it **was** unjustifiable to take that risk.