

## People Smuggling

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Section 232A of the *Migration Act* 1958 (organising bringing groups of non-citizens into Australia) has application to offences committed before 1 June 2010 as does s 233 (persons bringing non-citizens into Australia or harbouring illegal entrants). These offences have territorial effect beyond Australia's boundaries.<sup>1</sup> Section 232A provides for one offence which may be committed by organising or facilitating either the bringing or the coming to Australia or the entry or proposed entry into Australia of a group of non-citizens. There is no requirement that the group of non-citizens entered Australia.<sup>2</sup>

### **Organising bringing groups of non-citizens into Australia (prior to 1 June 2010) – s 232A Migration Act 1958**

#### ***Directions –***

The following directions may be given in respect of s 232A3 of the Migration Act:

**The defendant is charged that [...].**

**The offence is comprised of physical and fault (mental) elements<sup>4</sup>.**

**The elements of the offence which the prosecution must satisfy you 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 five or more people.**
- 2. The defendant *intended* (or meant) to facilitate the bringing [or coming or entry or proposed entry] of the group of five or more people to Australia.<sup>5</sup>**

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<sup>1</sup> See s 228A of the *Migration Act*, *R v Ahmad* ([2012](#)) 165 NTR 1; [\[2012\] NTCCA 1](#).

<sup>2</sup> *R v Ahmad* ([2012](#)) 165 NTR 1; [\[2012\] NTCCA 1](#).

<sup>3</sup> Section 232A of the *Migration Act* provides:

“232A Organising bringing groups of non-citizens into Australia

(1) A person who:

(a) organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of 5 or more people to whom subsection 42(1) applies; and

(b) does so reckless as to whether the people had, or have, a lawful right to come to Australia; is guilty of an offence punishable, on conviction, by imprisonment for 20 years or 2,000 penalty units, or both.

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

(2) 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.”

<sup>4</sup> The people smuggling offences are governed by Ch 2 of the *Criminal Code* 1995 (Cth). As to the physical and fault elements see No 89.3.

<sup>5</sup> *R v Ahmad* ([2012](#)) 165 NTR 1; [\[2012\] NTCCA 1](#) at [47]. The second element is the fault element relating to physical element one.

3. **At least five of the group were people to whom s 42(1) of the *Migration Act* applied;<sup>6</sup> that is they were not Australian citizens and that at the relevant time they did not have valid visas permitting them to enter Australia.**
4. **The defendant was reckless as to whether those people had a lawful right to come to Australia.**

#### *Non-citizens*

**That at least five of the people on the vessel were not Australian citizens and that at the relevant time they did not have valid visas permitting them to enter Australia is not in dispute.<sup>7</sup>**

#### *Organising or facilitating the bringing/coming/entry/proposed entry to Australia*

**To organise or facilitate the bringing or coming to Australia of people it is not necessary that the people actually entered Australia.<sup>8</sup>**

**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.<sup>9</sup>**

**“Organise” has its ordinary meaning of coordinate the activities, make arrangements or preparations or take responsibility for providing or arranging.<sup>10</sup>**

**“Facilitate” has its ordinary meaning of make easy or easier.<sup>11</sup>**

#### *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<sup>12</sup> that they be brought to Australia. That is that the defendant**

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<sup>6</sup> Prior to the repeal of s 232A of the *Migration Act*, s 42(1) provided that, subject to s 42(2), (2)(A) and (3), a non-citizen must not travel to Australia without a visa that is in effect.

<sup>7</sup> To the extent that s 232A by referring to “a group of 5 or more persons to whom s 42(1) applies” means that class of non-citizens travelling to Australia without a visa, proof of entry into Australia is not required: *R v Ahmad* (2012) 165 NTR 1; [2012] NTCCA 1. The defendant bears the evidential burden in relation to establishing that s 42(1) does not apply to a person because of s 42(2) or (2A) or regulations made under s 42(3): see s232A(2). As to the evidential burden, see s 13.3 of the *Criminal Code*.

<sup>8</sup> *R v Ahmad* (2012) 165 NTR 1; [2012] NTCCA 1.

<sup>9</sup> *R v Ahmad* (2012) 165 NTR 1; [2012] NTCCA 1 at [46].

<sup>10</sup> Oxford English Dictionary (online version, February 2013).

<sup>11</sup> Oxford English Dictionary (online version, February 2013).

<sup>12</sup> 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 232A(1)(a) the relevant

***intended (or meant)*<sup>13</sup> 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.<sup>14</sup>**

**The prosecution seeks to prove the requisite intention by asking that you draw inferences from the following [...].<sup>15</sup>**

*Reckless 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,<sup>16</sup> if:**

- 1. he is aware of a substantial risk as to whether the passengers had a lawful right to come to Australia<sup>17</sup> and,**
- 2. having regard to the circumstances known to the defendant, it is unjustifiable to take that risk.**

**Sections 233D – 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 s 232A, s 233, s 233A, s 233B, s 233C and s 234 of the *Migration Act*. It introduced new s 233A, s 233B, s 233C and also s 233D – s 233E, s 234A, s 236A and s 236B. These concern *inter alia* the offence of people smuggling simpliciter (s 233A), the

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fault element that applies is “intention”: see also *R v Razak* [2012] QCA 244, *R v Jufri*; *R v Nasir* [2012] QCA 248

<sup>13</sup> A person has “intention” with respect to conduct if he or she means to engage in that conduct: s 5.2(1) *Criminal Code* (Cth).

<sup>14</sup> See *DPP v PJ* (2012) 36 VR 402; [2012] VSCA 146 at [76], *R v Zainudin* (2012) 115 SASR 165; [2012] SASFC 133 at [57].

<sup>15</sup> See No 24.4 as to the drawing of inferences. See No 46.1 as to circumstantial evidence.

<sup>16</sup> “Recklessness” is defined in s 5.4(1) of the *Criminal Code Act* 1995 (Cth) 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.” Section 232A(1)(b) of the *Migration Act* identifies the relevant circumstance for the purpose of s 5.4 of the *Code* as being the absence of “a lawful right to come to Australia” in a group of five or more people to whom s 42(1) of the *Migration Act* applies.

<sup>17</sup> Awareness of the precise visa status of a particular passenger is not decisive: *R v Razak* [2012] QCA 244 at [22]. See also *R v Jufri*; *R v Nasir* [2012] QCA 248 at [15], 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.

aggravated offence of people smuggling involving exploitation or danger of death or serious harm etc (s 223B), the aggravated offence of people smuggling at least 5 people (s 223C), 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.<sup>18</sup>

### **Aggravated offence of people smuggling (at least 5 people) – s 233C Migration Act 1958<sup>19</sup>**

#### **Directions –**

The following directions may be given in respect of s 233C of the *Migration Act* aggravated offence of people smuggling at least 5 people:

**The defendant is charged that [...].**

**The offence is comprised of physical and fault (mental) elements.<sup>20</sup>**

**The elements of the offence which the prosecution must satisfy you 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.**

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<sup>18</sup> 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](#); [\[2012\] SASFC 133](#)).

<sup>19</sup> “S 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;

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.”

<sup>20</sup> The people smuggling offences are governed by Ch 2 of the *Criminal Code* 1995 (Cth). As to the physical and fault elements see No 89.3.

2. The defendant *intended* (or meant) to facilitate the bringing [or coming or entry or proposed entry] of that group of persons to Australia.<sup>21</sup>
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.

#### *Non-citizens*

The prosecution must prove that at least five of the group were non-citizens; that is persons who are not Australian citizens.<sup>22</sup> It is not necessary for the prosecution to show that the defendant had any awareness of their status as such.<sup>23</sup>

#### *Organising or facilitating the bringing/coming/entry/proposed entry to Australia*

To organise or facilitate the bringing or coming to Australia of people it is not necessary that the people actually entered Australia.<sup>24</sup>

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.<sup>25</sup>

“Organise” has its ordinary meaning of coordinate the activities, make arrangements or preparations or take responsibility for providing or arranging.<sup>26</sup>

“Facilitate” has its ordinary meaning of make easy or easier.<sup>27</sup>

#### *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<sup>28</sup> that they be brought to Australia. That is that the defendant

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<sup>21</sup> The second element is the fault element relating to physical element one.

<sup>22</sup> See s 5 *Migration Act*.

<sup>23</sup> Because absolute liability applies to this physical element, no fault element has to be established (s 233C(2)). Accordingly, the defence of mistake of fact is unavailable: s 6.2(2) *Criminal Code*; *DPP v PJ* ([2012](#)) [36 VR 402](#); [\[2012\] VSCA 146](#) at [17]. See s 6.2 of the *Criminal Code*.

<sup>24</sup> *R v Ahmad* ([2012](#)) [165 NTR 1](#); [\[2012\] NTCCA 1](#).

<sup>25</sup> *R v Ahmad* ([2012](#)) [165 NTR 1](#); [\[2012\] NTCCA 1](#) at [46].

<sup>26</sup> Oxford English Dictionary (online version, February 2013).

<sup>27</sup> Oxford English Dictionary (online version, February 2013).

<sup>28</sup> 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

***intended (or meant)*<sup>29</sup> 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.<sup>30</sup>**

**The prosecution seeks to prove the requisite intention by asking that you draw inferences from the following [...].<sup>31</sup>**

*Reckless as to lawful right*

**The prosecution must prove beyond reasonable doubt that the defendant was reckless<sup>32</sup> as to whether those passengers had a lawful right to come to Australia.**

**In this context, a defendant is reckless,<sup>33</sup> if:**

- 1. he is aware of a substantial risk as to whether the passengers had a lawful right to come to Australia<sup>34</sup> and,**
- 2. having regard to the circumstances known to the defendant, it is unjustifiable to take that risk.**

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element. Because no fault element is specified for the conduct described in s 233(C) the relevant fault element that applies is “intention”: see also *R v Razak* [2012] QCA 244.

<sup>29</sup> A person has “intention” with respect to conduct if he or she means to engage in that conduct: s 5.2(1) *Criminal Code* (Cth).

<sup>30</sup> See *DPP v PJ* (2012) 36 VR 402; [2012] VSCA 146 at [76], *R v Zainudin* (2012) 115 SASR 165; [2012] SASCFC 133 at [57].

<sup>31</sup> See No 24.4 as to the drawing of inferences. See No 89.3 as to circumstantial evidence.

<sup>32</sup> Section 233C(1)(c) contains a single physical element, being “a circumstance in which conduct...occurs”: see s 4.1(1)(c) *Criminal Code*, *DPP v PJ* (2012) 36 VR 402; [2012] VSCA 146 at [18]. Section 233C 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.

<sup>33</sup> “Recklessness” is defined in s 5.4(1) of the *Criminal Code Act 1995* (Cth) 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.” Section 233C(1)(c) of the *Migration Act* identifies the relevant circumstance for the purpose of s 5.4 of the *Code* as being the absence of “a lawful right to come to Australia” in a group of five or more people.

<sup>34</sup> Awareness of the precise visa status of a particular passenger is not decisive. See *R v Razak* [2012] QCA 244 at [22]; *R v Jufri*; *Rv Nasir* [2012] QCA 248 at [15], 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.