

## **ECHOES OF THE OLD COUNTRIES OR BRAVE NEW WORLDS? LEGAL RESPONSES TO REFUGEES AND ASYLUM SEEKERS IN AUSTRALIA AND NEW ZEALAND**

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Article abstract

In spite of their colonial origins and their continuing ties with Great Britain and Europe, it is only recently that Australia and New Zealand have begun to think in global terms about immigration control and the challenges posed by asylum seekers. The experience of unauthorized migration in these two countries has been somewhat different. Nevertheless, both are now feeling the effects of the burgeoning industry of people smuggling. The closure of traditional migration routes throughout Europe brought about by the harmonization of laws and practice within the European Union may be one factor in the rise of unauthorized migration in the Asia Pacific region. While European laws and policies rarely rate a mention in the refugee discourse in this part of the world, the response to the mobile asylum seeker phenomenon reveals many resonances with the approaches adopted in the “old World” of the European Union – and, more recently, in the United States. This paper argues that, in Australia’s case, some “borrowings” from Europe and from North America have been inappropriate for this region. Far from evincing a commitment to global solutions and rationalized responses to humanitarian crises, the Australian initiatives suggest a country immersed in local concerns and self-interest. In spite of its tiny size and geographical isolation, the greater openness of New Zealand’s laws provides some interesting contrast material. Of equal interest, however, is the attention the world is beginning to pay to Australia’s asylum laws – most particularly those relating to the detention and removal of asylum seekers who come as unauthorized arrivals.

## ECHOES OF THE OLD COUNTRIES OR BRAVE NEW WORLDS? LEGAL RESPONSES TO REFUGEES AND ASYLUM SEEKERS IN AUSTRALIA AND NEW ZEALAND.

*Par Mary Crock\**

Malgré leurs origines coloniales et leur lien à la Grande-Bretagne et à l'Europe, ce n'est que récemment que l'Australie et la Nouvelle-Zélande ont réexaminé en termes globaux le contrôle de l'immigration et les défis engendrés par les demandeurs d'asile. Dans chacun de ces pays, l'expérience d'immigration non autorisée est quelque peu différente. Néanmoins, tous deux ressentent aujourd'hui les effets d'une grandissante industrie de trafiquants humains. L'augmentation des migrations non autorisées vers l'Asie Pacifique s'explique entre autres par la fermeture des routes traditionnelles à travers l'Europe, conséquence de l'harmonisation des lois et des pratiques à l'intérieur de l'Union européenne. Tandis que les lois et pratiques européennes sont rarement mentionnées dans le discours sur les réfugiés dans cette région du monde, la réaction au phénomène de mobilité des demandeurs d'asile révèle plusieurs ressemblances avec les approches adoptées sur le « vieux continent » de l'Union européenne. Plus récemment, cette réaction ressemble à l'approche véhiculée par les États-Unis. Cet article soutient que dans le cas australien, certains « emprunts » d'Europe et de l'Amérique du Nord se sont avérés inappropriés pour l'Australie. Loin de manifester un engagement à des solutions globales et de trouver des réponses rationnelles à la crise humanitaire, les initiatives australiennes laissent plutôt croire à un État centré sur lui-même et absorbé par ses propres intérêts. Malgré sa petite étendue et son isolation géographique, l'ouverture des lois néo-zélandaises représente un contraste intéressant. Toutefois, il faut noter également l'intérêt que plusieurs pays commencent à porter aux lois australiennes sur l'asile, et plus particulièrement celles relatives à la détention et aux renvois des demandeurs d'asile arrivés de façon non autorisée.

In spite of their colonial origins and their continuing ties with Great Britain and Europe, it is only recently that Australia and New Zealand have begun to think in global terms about immigration control and the challenges posed by asylum seekers. The experience of unauthorized migration in these two countries has been somewhat different. Nevertheless, both are now feeling the effects of the burgeoning industry of people smuggling. The closure of traditional migration routes throughout Europe brought about by the harmonization of laws and practice within the European Union may be one factor in the rise of unauthorized migration in the Asia Pacific region. While European laws and policies rarely rate a mention in the refugee discourse in this part of the world, the response to the mobile asylum seeker phenomenon reveals many resonances with the approaches adopted in the "old World" of the European Union – and, more recently, in the United States. This paper argues that, in Australia's case, some "borrowings" from Europe and from North America have been inappropriate for this region. Far from evincing a commitment to global solutions and rationalized responses to humanitarian crises, the Australian initiatives suggest a country immersed in local concerns and self-interest. In spite of its tiny size and geographical isolation, the greater openness of New Zealand's laws provides some interesting contrast material. Of equal interest, however, is the attention the world is beginning to pay to Australia's asylum laws – most particularly those relating to the detention and removal of asylum seekers who come as unauthorized arrivals.

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By lucky happenstance, the dreadful hardships of the forced migrations that pepper European history have few resonances in the experience of Australia and New Zealand. Early conflicts with their nations' first peoples aside<sup>1</sup>, neither Australia nor New Zealand has suffered the travails of full-scale war on its territory. The two island nations have also been spared the immigration control problems associated with land borders, or borders in close proximity to other states that are common in many countries around the world<sup>2</sup>. Even so, the South Pacific corner of the New World has been a keen participant in the discourse on refugees, having welcomed as migrants a significant number of the world's homeless and dispossessed<sup>3</sup>. Nor have the two countries escaped altogether the phenomena of mobile asylum seekers. Recent years have seen a rise in the number of refugee claimants coming into the region from troubled countries in South West Asia and the Middle East. It may well be that new "people smuggling" routes to Australia have been forged in response to tightening immigration controls in the European Union<sup>4</sup>. What is clear is that Australia and, to a lesser extent, New Zealand, are now receiving asylum seekers who in earlier times would have sought refuge more naturally in Europe or the United States.

With the September 11 attacks in America and engagement in a new war on terrorism, the fiftieth anniversary of the Convention relating to the Status of Refugees<sup>5</sup> passed in 2001 with little reason for celebration. Australia is physically removed from the momentous events in North America and the troubled areas in and around Afghanistan. Nevertheless, it has emerged as a fault line of sorts in debates about the future of the Refugee Convention. Even before the terrorists struck in September 2001, Australia was calling for the re-thinking of refugee protection

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<sup>1</sup> For an account of the early mistreatment of Aboriginal Australians see, for example, Henry Reynolds, *Frontier: Aborigines, Settlers and Land* (Sydney: George Allen & Unwin, 1987). On the Maori Wars in New Zealand, see, for example, Stephenson Percy Smith, *1840-1922: Maori Wars of the Nineteenth Century: the struggle of the Northern Against the Southern Tribes Prior to the Colonisation of New Zealand in 1840*. (Facsimile reprint of ed. published Christchurch, N.Z. : Whitcombe & Tombs, 2<sup>nd</sup> ed, 1984).

<sup>2</sup> In June 1999 the population of unlawful non-citizens in Australia there was estimated at 53,000. Of these, many extend their stay by a few days or weeks only before leaving voluntarily. In 1999 27% of the over-stayers had been in Australia for more than nine years, 34% between three and nine years, 12% between one and two years, and 26% for less than one year. See Fact Sheet 80, online: <http://www.immi.gov.au/facts/80o-stay.htm> (accessed 17 June 2001) New Zealand is home to around 15,000 illegal migrants. See online: [http://www.immigration.govt.nz/research\\_and\\_information/](http://www.immigration.govt.nz/research_and_information/) (accessed 17 June 2001)

<sup>3</sup> Australia and New Zealand are two of only 10 countries which accept refugees for resettlement under the auspices of UNHCR programs. Australia has taken in over 600,000 since the end of World War II: see online: <http://www.immi.gov.au/statistics/refugee.htm>. New Zealand also takes in a generous number each year relative to its small population base. See online: <http://www.refugee.org.nz/stats.htm>, #Table 34.

<sup>4</sup> See generally Prime Minister's Task Force on Coastal Surveillance, discussed in Australian Customs Service *Annual Report 1999-2000*. (Canberra, AGPS, 2000).

<sup>5</sup> The Refugee Convention was created in Geneva on 43 July 1951. (See Aust TS 1954 No. 5, 189 UNTS No. 2545, 137). See also the subsequent Protocol which was signed on 31 January 1967. It was ratified by Australia on 13 December 1973. (See, Aust TS 1973 No. 37, 606 UNTS No. 8791, 267). New Zealand ratified the Convention on 30 June 1960 and the Protocol on 6 August 1973. Hereafter "the Refugee Convention" and "the Protocol".

norms, arguing that the Convention is ill suited to the realities of modern refugee flows and the cause of wasteful practices and abusive behavior<sup>6</sup>. As explored below, it has since become something of an enfant terrible in refugee protection circles by moving unilaterally to stop the landing on its territory of all asylum seekers coming by boat. On 26 September 2001, the Australian Parliament passed no less than seven pieces of legislation that each impact negatively on the rights of refugees and asylum seekers in Australia. The changes appear to have deepened immeasurably the gulf that has opened up between Australia and its Pacific neighbor and erstwhile partner, New Zealand. They have left many people around the world wondering what on earth is going on in Oceania.

This article examines the laws and refugee determination procedures in Australia and New Zealand with a view to siting the two countries in the context of global refugee protection trends. While Australia's legislative initiatives find little exact parallels, they are not without precedent. As "Western" countries scramble to tighten border control and to increase scrutiny of immigrant communities, there is every reason to fear that Australia's harsh and intemperate stance could herald a chilling new era of rejection and abuse for the most vulnerable of the world.

As countries with long-standing and proud histories of resettling migrants and refugees, Australia and New Zealand have much to offer by way of experience to countries which are only now opening their doors to immigration. The two maintain links with key United Nations bodies that have responsibility for voluntary and involuntary migration<sup>7</sup>. In recent times, however, Australia has become increasingly strident in its complaints about asylum seekers and people smugglers. According to some reports, Australia is the only Western nation to send a Ministerial-level representative to meetings of the UNHCR Executive Committee<sup>8</sup>. There is evidence that other nations are taking an interest in what Australia has to say, with an increasing number of visits to Australia of foreign government delegates intent on learning more of the laws and practices in this region<sup>9</sup>.

This article begins by outlining briefly the extent to which Australia and New Zealand have become refugee-receiving states – albeit at a remove from the front-line of involuntary migration. In Part 2, an examination is made of the politico-

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<sup>6</sup> The arguments made by the Australian government are set out (and expanded) by Adrienne Millbank in "The Problem With the Refugee Convention" Research Paper 2000-2001, No 5 Office of Parliamentary Library, available online: <http://www.aph.gov.au/library/pubs/rp/2000-01/01RP05.htm>, (accessed 10 October 2001).

<sup>7</sup> As well as maintaining a presence at EXCom meetings of the UNHCR, Australia has had a representative on the UN Human Rights Committee for a number of years in the persons of Justice Elizabeth Evatt (retired 2000) and Professor Ivan Shearer (2000-present). The Deputy Chair of New Zealand's Refugee Status Review Authority, Rodger Haines QC, is a member of the UNHCR's 24 member panel of world experts for the purposes of the UNHCR 50<sup>th</sup> Anniversary Consultations. He is rightly acclaimed as a world authority on refugee law.

<sup>8</sup> See P. McGeough, "Global scorn for Ruddock refugee curbs" *The Sydney Morning Herald*, (9 July 2001), p 1, and "Australia in the dock over its treatment of refugees", p 7.

<sup>9</sup> In recent years Australia has hosted exploratory visits by high level officials from Israel, United States, England, Sweden, and Canada investigating issues relating to the treatment of refugees and asylum seekers.

legal foundations of the two countries and manner in which both process refugee claims. This part also examines the way in which administrative review operates, and the very different regimes whereby the courts of these two nations are empowered to review refugee decisions. The section concludes with an examination of legislative changes in Australia which occurred in September 2001 which have widened the gap between Australian and New Zealand refugee laws. Part 3 explores the apparent influence of European laws and strategies on refugee laws and practice in Australia and New Zealand.

Part 4 examines what has become known as the Tampa affair, when in August 2001 a Norwegian cargo boat named the Tampa picked up 433 asylum seekers from their sinking boat and brought them into Australian territorial waters. The Australian Government was adamant that they should not land, and now these asylum seekers are being processed in Nauru and New Zealand. When the Tampa incident is coupled with the restrictive legislation which Australia enacted immediately after the September 11 2001 attacks in America, it can be seen that Australia has markedly diverged from its Trans-Tasman cousin. This section examines the parallels between the policy changes instituted in Australia and the laws and practice of the United States of America in its repulsion of asylum seekers who arrive by boat.

Parts 5 and 6 examine respectively the ways in which Australia has diminished the entitlements and benefits granted to refugees and asylum seekers, and the regime whereby asylum seekers who come by boat are automatically held in detention until their claims are heard. Finally, in Part 7, I suggest some lessons which can and should be learned from the divergent experiences of these two culturally fraternal countries.

When viewed in its entirety, this chapter reflects on the parallels that are apparent between the antipodean developments described and the laws and practice in Europe and North America. In the rush to emulate the defenses of the old countries, it will be my contention that Australia has adopted as its own measures that are quite inappropriate for this part of the world. The calmer and more moderate approach taken by New Zealand to the advent of undocumented refugee claimants stands in sharp contrast. In practical terms, it is tiny New Zealand that emerges with the cleaner record when measured against the humanitarian goals of the Refugee Convention and Protocol. The arrival (actual and potential) of mobile asylum seekers has invoked alarm and defensive responses in both Australia and New Zealand. However, in recent times, the smaller of these two island nations has responded with more generosity and humanity than its larger neighbor. As explored below, it was ultimately through the generosity of New Zealand and the tiny Pacific Island Nauru that the impasse over the "Tampa" fugitives was resolved<sup>10</sup>.

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<sup>10</sup> See Reuters, "New Zealand and Nauru will take refugees", *Globe and Mail* (Toronto), (1 September 2001), A14; and AFP, "Les réfugiés du Tampa dirigés vers Nauru et la Nouvelle-Zélande" *Le Soleil* (Québec City), (1 September 2001), A27.

## I. The Experience of Asylum Seekers in New Zealand and Australia

Unlike the countries that make up the European community, Australia and New Zealand are states that have been created through immigration. Formerly colonies of Great Britain, both still run formal immigration programs that are designed to enhance the population base of the two countries. In this context, both admit as migrants persons either they or the United Nations High Commissioner for Refugees (UNHCR) have identified as “refugees” or otherwise at risk of human rights abuse. At the same time, over the last thirty years, the two countries have also begun to receive on-shore asylum seekers: persons who arrive in the country without documentation and demand protection on the basis that they are refugees.

New Zealand is a country that is tiny in both geographical size and in population, with just under 4 million inhabitants. It has not experienced the same number of on-shore refugee claimants as Australia either *per capita* or in absolute terms. However, neither has it escaped altogether the phenomenon of mobile asylum seekers, with between 1,500 and 2,000 applications received each year<sup>11</sup>. While the issue of immigration is significant, the public concern in New Zealand seems to focus as much on the number of people leaving the country permanently as it does on the number of non-citizens seeking admission<sup>12</sup>.

Australia, with a population of approximately 18.5 million, has a significantly larger immigration intake each year. In 2000-2001, Australia set a target of 76,000 under its general immigration program, plus 12,000 places for refugees and other humanitarian entrants. The latter program is made up of: 4,000 *offshore* refugees; 4,300 *offshore* special humanitarian cases; 900 *offshore* entrants under what is known as “Special Assistance Category” and 2,000 *onshore* applicants recognized as refugees. Interestingly, just as a predominance of Australia’s skilled migrants come from Britain and Europe, so too do refugees and humanitarian cases from Europe dominate the refugee intake. In each of the last five years, refugees from Europe have accounted for almost half of the annual intake<sup>13</sup>. While the number of places for onshore refugees is not capped, every time a refugee claimant in Australia

<sup>11</sup> See above n 4.

<sup>12</sup> Note that the discourse on immigration in New Zealand is focussed heavily on net migration. See Peter Bushnell and Wai Kin Choy “Go West, Young Man, Go West?”, Treasury Working Paper 01/17 (see online: <http://www.treasury.govt.nz>).

<sup>13</sup> The intake for the last five years in Australia is as follows:

REGION	1996-97	1997-98	1998-99	1999-2000	2000-01
Africa	1,240	1,473	1,552	1,736	1,970
Americas	82	50	24	21	0
Asia	1,669	685	295	113	300
Europe	4,236	5,307	4,736	3,424	3,360
Middle East & S-W Asia	2,425	2,952	2,919	2,208	2,300
<b>TOTAL</b>	<b>9,652</b>	<b>10,467</b>	<b>9,526</b>	<b>7,502</b>	<b>8,000</b>

Source: DIMA Factsheet 40, 2 Nov 2000, online : [www.immi.gov.au/factsheets.html](http://www.immi.gov.au/factsheets.html).

gains recognition as a refugee, the government reduces the intake from overseas proportionately<sup>14</sup>.

Australia's experience of undocumented asylum seekers and of illegal migration generally has been modest in world terms. Over the 11 years between 1989 and January 2001, 10,224 unlawful non-citizens arrived in Australia by boat. Of these, 4,991 (or 49%) were recognized as refugees or granted entry on other grounds; 3,297 (or 32%) departed Australia; and 1,936 (or 19%) remained (mostly in detention) awaiting determination of their refugee claims. The 10,224 undocumented boat arrivals include 109 babies born in Australia. Over the same period of 11 years, some 8,202 arrived by plane without valid documentation.

Having said this, most asylum seekers in Australia come to the country on a valid visa as tourists, students or on other temporary visas. These people do not gain recognition as refugees at anything like the same rate as the undocumented "boat" and "plane" arrivals. The *combined* total of asylum seekers – namely those arriving with visas as well as those arriving without documentation – has averaged around 10,000 per annum over the last decade, with a peak in the early 1990s following the disturbances in mainland China which affected many Chinese students studying in Australia<sup>15</sup>. In 1998-1999 Australia's asylum statistics represented an intake of one asylum seeker for every 1,961 Australian residents. This compares with Switzerland with a ratio of 1: 156 residents; the Netherlands with 1: 394; Britain with 1:604; Germany with 1:760; Sweden with 1: 781; Canada with 1:980 and the United States with 1:3,172. New Zealand's asylum seeker - resident ratio approximates 1: 2,500.

The rate at which on-shore asylum seekers gain recognition as refugees in Australia and New Zealand is also modest in world terms. Over the ten years before 1999, "Western" refugee receiving countries have admitted as refugees an average of 26% of those seeking asylum. In contrast, Australia has recognized an average of 13% of claims and New Zealand 17.6 of claims<sup>16</sup>.

In short, Australia nor New Zealand could not be regarded as front-line refugee receiving states. Having said this, neither can it be said that the number of asylum seekers arriving in Australia by boat is negligible. Without denying the extreme nature of events in Australia in the second half of 2001, it is worth noting that the advent boat people – or asylum seekers arriving by sea – seems always to evoke exceptional responses from nation states<sup>17</sup>.

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<sup>14</sup> One effect of linking the on-shore and off-shore programs in this way has been the creation of tensions between refugee groups in Australia, as established communities blame the new comers for "stealing" the places of their relatives overseas. The tensions have been exacerbated by the government's constant reference to on-shore asylum seekers as "queue jumpers". See the position paper prepared by the Refugee Council of Australia, accessible at: <http://www.refugeecouncil.org.au/position01032000.htm>.

<sup>15</sup> See the graphs provided by the Refugee Council of Australia online: [www.refugeecouncil.org.au/](http://www.refugeecouncil.org.au/).

<sup>16</sup> See UNHCR Statistical Overview, 1999.

<sup>17</sup> The differential response to boat arrivals can be seen in many countries. The United States of America's program for interdicting boat arrivals, discussed below at n 109, is the first and most obvious example. However, other countries that have reacted to boat arrivals with special vehemence

## II. Coordinating Tactics and Diverging Responses: Refugee Determinations in Australia and New Zealand

### A. Some comments about legal and political structures in the two countries

Both Australia and New Zealand are constitutional democracies that maintain the Queen Elizabeth II (of England) as their Head of State. Australia differs from New Zealand in being a federation of states (like Canada and the United States of America) and in having somewhat different methods for electing its members of Parliament<sup>18</sup>. A further significant structural difference is that, unlike its near neighbor<sup>19</sup>, Australia does not have a Bill of Rights either embedded in its Constitution or otherwise enacted into its domestic law. Australia does have a statutory human rights regime, even if it has not enacted the actual terms of the major international human rights instruments<sup>20</sup>. It has also acceded to the First Optional Protocol of the International Covenant of Civil and Political Rights and to the Protocol of the Convention Against Torture and All Forms of Cruel, Inhuman and

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include New Zealand (see n 80, below) and Canada (see, for example, C. Wood, 'Seeking Freedom', *Maclean's*, (22 November 1999).

<sup>18</sup> The Federal legislature in Australia comprises two Houses of Parliament – a House of Representatives and a Senate. New Zealand, in contrast, has a single Parliament with only one chamber (its Legislative Council having been abolished in 1951). In Australia, lower house representatives are elected by compulsory ballot using a system of preferential vote in electorates determined according to population. Senators are elected on a state-wide franchise via proportional representation, with each state having 12 senators and each territory, two senators. See P.Lane, *Lane's Commentary on the Australian Constitution* 2<sup>nd</sup> ed (Sydney Law Book Company, 1997); and P. Hanks, *Constitutional Law in Australia* 2<sup>nd</sup> ed (Sydney: Butterworths, 1996).

In 1993 New Zealand adopted what is known as the Mixed Member Proportional System (or MMP System) of elections: see *Electoral Act 1993* (NZ). The government website describes the regime as follows:

Under the MMP system, MPs are elected in two ways, by electorate - general and Maori - and by lists nominated by registered political parties. Each registered elector has two votes - one for their electorate MP and one for a party list. Each registered party's total share of party votes decides its share of the 120 Parliamentary seats. For instance, if a party receives 55 percent of the party vote, it is entitled to hold 55 percent of the seats in the House of Representatives. The MPs who will hold these seats will be the electorate MPs who have been elected for that party in their local electorates, plus the number from the party list necessary to bring the total to 55 percent. It is possible, however, to be defeated as an electoral candidate but be elected via the list. This happened to a number of candidates at the 1996 General Election.

A party may win more electorate seats than the total number to which it is entitled, based on its share of the party's votes. In this case it will keep its 'overhang' seats and more than 120 MPs will be elected. See online: [http://210.48.6.245/directory/section3/elect\\_sys.htm](http://210.48.6.245/directory/section3/elect_sys.htm):. See also P. A. Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, Bookers, 2001).

<sup>19</sup> New Zealand has had a Bill of Rights since 1990. See *New Zealand Bill of «Rights Act 1990* (NZ) (amended in 1993 by the *Human Rights Act 1993* (NZ)). The legislation enacts the basic human rights set out in the International Covenant on Civil and Political Rights.

<sup>20</sup> See, for example, the website of the Human Rights and Equal Opportunity Commission, accessible at: <http://www.hreoc.gov.au>.



Degrading treatment. These latter gestures have opened the way for individuals present in Australia to make complaints to the Human Rights Committee and the Committee Against Torture, respectively<sup>21</sup>. In general, however, its legal system provides no direct mechanisms for enforcing human rights obligations assumed by the country under international refugee and humanitarian law<sup>22</sup>. Neither is there any kind of regional human rights body in the Oceania region to perform a supervisory role akin to that performed by the European Court of Human Rights or by the Inter-American Human Rights System.

The absence of a Bill of Rights in Australia has become significant in recent years because of judicial determinations that certain basic rights implicit in Australia's Constitution do not apply to non-citizens in Australia<sup>23</sup>. In essence, non-citizens wishing to challenge an adverse migration or refugee ruling must rely on the judicial remedies available under the migration legislation, or under the Australian Constitution itself<sup>24</sup>. In New Zealand, the existence of a Bill of Rights does not seem to have prompted any related court actions involving refugee claimants. Although a matter than must remain open to conjecture, it is conceivable nonetheless that the rights regime in that country could be playing a role in softening the public's response to refugees and asylum seekers generally.

## B. Refugee status processing

While the existence of immigration programs in New Zealand and Australia may have accustomed the two countries to the business of resettling migrants, such programs do not seem to have engendered a ready acceptance of *on shore* asylum seekers. Involuntary migrants elicit just as much alarm in Australia and New

<sup>21</sup> See H. Charlesworth, "Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights" (1991) 18 MULR 428; and S. Taylor, Australia's Implementation of its Non-Refoulement Obligations Under the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights (1994) 17 *UniNSW LJ* 432-74.

<sup>22</sup> Note that neither the Human Rights Committee nor the Committee Against Torture have power to do more than issue an Opinion on a government's behaviour. Neither does the lodgment of a complaint before these committees operate automatically to provide relief or maintain the status quo – for example, by preventing deportation or removal. See *ibid.* Both Australia and New Zealand subscribe to the "dualist" approach to international law, whereby the signature and ratification of an international instrument will have little effect unless the Australian Parliament enacts the terms of the instrument into domestic law. Cf, however, *Teoh v Minister for Immigration and Ethnic Affairs* (1995) 183 C.L.R., 273. See *Trick or Treaty? Commonwealth Power to Make and Implement Treaties – Report* (Canberra: Senate Legal and Constitutional Affairs Committee, 1996).

<sup>23</sup> See *Chu Kheng Lim v. Minister for Immigration and Ethnic Affairs* (1992) 176 C.L.R. 1; and M. Crock, *Immigration and Refugee Law in Australia* (Sydney, The Federation Press, 1998), 24. Compare, however, *Re Patterson; Ex parte Taylor* [2001] HCA 51 (6 September 2001). This case involved a long-term Australian resident and British national that the High Court was prepared to accord rights akin to those of Australian citizenship.

<sup>24</sup> See the discussion below at Part 2.4.

Zealand as they do in other countries<sup>25</sup>. As is the case in Europe, Australia and New Zealand have responded to undocumented arrivals by establishing elaborate procedures for determining refugee status. In Australia, special measures have also been taken to control the physical movement and work rights of asylum seekers.

New Zealand acceded to the Refugee Convention and its attendant Protocol a little later than Australia<sup>26</sup>. However, neither country moved to implement the Convention by establishing formal refugee determination procedures until 1978. In both instances procedures were introduced in response to the first experience in the region of mobile asylum seekers, in the form of boat people from Indochina following the end of the war in Vietnam<sup>27</sup>. The two countries established (non-statutory) committees to consider individual asylum claims and to make recommendations to the relevant government Minister for or against the grant of refugee status. These committees determined applications on the basis of written submissions alone; refugee claimants were not interviewed in most circumstances.

The parallel development in Australian and New Zealand asylum law continued into the 1980s as the highest courts in both countries came to confirm the procedural entitlements of refugee claimants either directly or by implication<sup>28</sup>. In both countries judicial rulings played a significant role in nudging the relevant legislatures towards statutory reform<sup>29</sup>. The directions taken by Australia and New Zealand in this reform process, however, have differed markedly since 1990. Australia has moved to tighten control of every facet of the refugee determination process, restricting the power of the courts to review refugee (and all migration) decisions. New Zealand, on the other hand, has left its refugee determination process squarely within the mainstream of its administrative law system. As noted earlier, New Zealand has had a Bill of Rights since 1990. While the situation of asylum seekers is unclear, there are at least some New Zealand jurists who believe that the Bill of Rights does operate to protect the procedural entitlements of refugee claimants<sup>30</sup>.

The laws and procedures governing refugee status determinations in Australia now bear little resemblance to those of its near neighbor. In both countries

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<sup>25</sup> For an account of the public reaction to recent refugee flows in Australia, see D. Corlett "Politics, Symbolism and the Asylum Seeker Issue" (2000) 23 *UNSW L.J.* at 13. On the New Zealand response, see below, n 80.

<sup>26</sup> See above n 5.

<sup>27</sup> Australia received 55 boats carrying 2,087 Vietnamese nationals between 1976 and 1978. See Andreas Schloenhardt "Australia and the Boat People: 25 years of Unauthorized Arrivals" (2000) 23 *UNSW L.J.* at 33, 36.

<sup>28</sup> In the New Zealand context, see *Benipal v. Ministers for Foreign Affairs and Immigration* [1988] 2 NZ L.R. 222 (CA). In Australia, see *Kioa v. West* (1985) 159 C.L.R. 550; and *Chan Yee Kin v. Minister for Immigration and Ethnic Affairs* (1989) 169 C.L.R. 379.

<sup>29</sup> See Roger Haines QC "An Overview of Refugee Law in New Zealand: Background and Current Issues" paper presented to Inaugural Meeting of International Association of Refugee Law Judges, 10 March 2000. Available online: <http://www.refugee.org.nz/IARLJ3-00Haines.html>. (accessed 17 June 2001). See also Crock, above n 23, chs 7 and 13.

<sup>30</sup> See Hon Justice Baragwanath "Judicial Review and Administrative Law Issues Arising in Refugee Law Cases in New Zealand", available online: <http://www.refugee.org.nz>.

a special refugee unit within the relevant Government Departments makes initial status determinations. However, there are significant differences in both the law governing the way determinations are made and the mechanisms available to challenge decisions.

In the case of New Zealand, the resonances with North American and European Union law and practice are found in the general commitment to the norms of refugee protection, “due process” and relatively transparent determination procedures. Asylum procedures were given a statutory footing in New Zealand in 1999. In that year the *Immigration Amendment Act 1999* (NZ) inserted a new Part VIA into the *Immigration Act 1987* (NZ)<sup>31</sup>. The changes did not affect the existing (basic) refugee determination structures. Initial refugee status decisions continue to be made by “refugee status officers”<sup>32</sup>. However, the amendments made in 1999 provided for the annexation to the Migration legislation of the Refugee Convention<sup>33</sup>. Rodger Haines QC has noted that while there is no express provision incorporating the terms of the Convention into New Zealand domestic law, the situation is less than clear. One view may be that the text has been annexed only for information. Haines, however, suggests that the Convention may have a binding effect, drawing attention to the fact that the new legislation requires refugee decision makers to “act in a manner that is consistent with New Zealand’s obligations under the Refugee Convention”<sup>34</sup>. In administrative terms the Refugee Convention is not only a mandatory consideration, it is the benchmark against which refugee decisions are to be measured. In this sense, the Convention has become incorporated into New Zealand law, albeit by an indirect route. The *non-refoulement* obligations of the Refugee Convention have been expressly incorporated into New Zealand law<sup>35</sup>.

While references are made to the UN definition of refugee in Australia’s legislation<sup>36</sup>, no other aspects of this Convention or of any other human rights instruments are incorporated into Australian law. Australia does not have a Bill of Rights. Where the Australian High Court has found that some fundamental rights can be implied from the nature and form of the Australian Constitution, the same Court has ruled that such implied rights do not apply to non-citizens who are not privy to the Constitutional pact<sup>37</sup>.

The New Zealand laws set the Refugee Convention provisions as clear standards for decision makers at all levels of the determination process from initial determination through to judicial review<sup>38</sup>. Europeans will see parallels in the strong

<sup>31</sup> See also the *Immigration (Refugee Processing) Regulations 1999* (NZ), SR 285 of 1999. For an account of the changes, see Haines, above n 29.

<sup>32</sup> See *Immigration Act 1987*, ss 129E-129M.

<sup>33</sup> See *Immigration Act 1987*, s 129D(2) and Schedule 6.

<sup>34</sup> See *Immigration Act 1987*, s 129D(1).

<sup>35</sup> See *Immigration Act, 1987*, S 129X.

<sup>36</sup> See, for example, *Migration Act, 1958*, s 36 and *Migration (1994) Regulations* (Cth), Sch 2, cl 866. See Crock, above, n 23 at ch 7.

<sup>37</sup> See *Chu Kheng Lim v. Minister for Immigration and Ethnic Affairs* (1992) 172 C.L.R., 1.

<sup>38</sup> Note that New Zealand Courts have not always invoked the Convention as sacrosanct – especially if there is any hint of conflict with the security of the country. See, for example, the comments of Cooke JA in *D v. Minister for Immigration* [1991] 2 N.Z.L.R. 673 (CA). His Honour observed that if the

human rights base of the New Zealand laws. In contrast, Australian law now makes refugee status subject to the immigration Minister's "satisfaction"<sup>39</sup>. Australia's *Migration Act* provides for the grant of a protection visa where the Minister "is satisfied" that a claimant meets the definition of refugee set out in the Refugee Convention. The use of this form of words means that when a court examines a refugee ruling, its task is not to assess whether the definition of refugee has been correctly interpreted and applied in all the circumstances of a case. Rather, its role is to determine whether there was *any evidence* upon which the Minister (acting through his officer or through the appellate body) could reach the decision made. In practical terms, the distinction is one that acts as a considerable constraint on the ability of a court to review refugee decisions<sup>40</sup>.

Australia's refugee determination system has been described elsewhere and is too complex to detail here<sup>41</sup>. In broad terms, however, a raft of measures have been introduced in Australia to both restrict access to asylum procedures and to constrain the rights of asylum seekers in the process. For example, immigration officials handling *initial* asylum claims have no statutory obligation to either inform asylum seekers of their rights to seek protection or to grant claimants an oral hearing<sup>42</sup>. At time of writing only 10% of refugee claimants in Australia (and not in detention) are granted an interview at first instance<sup>43</sup>. Australia's legislative measures delimiting "due process" for asylum seekers appear to find little in common with either EU practice or in the North American context. They find no equivalent in New Zealand.

For asylum seekers who arrive in Australia without a visa and who are therefore subject to mandatory detention, the initial screening process is done without giving applicants access to legal advice<sup>44</sup>. The contrast with New Zealand in these cases could not be starker. Undocumented arrivals are interviewed at point of arrival and more often than not issued with a work permit or other temporary permit on the

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emergency procedures introduced in New Zealand during the Gulf War lead to the refoulement of individuals found by the Immigration Service to be refugees, the Court of Appeal would have no objection.

<sup>39</sup> Note that changes were made to the Migration legislation in 1992 in response to the decision of the High Court in *Chan Yee Kin v. Minister for Immigration and Ethnic Affairs* (1989) 169 C.L.R. 379 which some Parliamentarians saw as unhelpful and an example of judicial activism. Note that in *Chan's* case the High Court overruled a refugee decision made by the Minister on the ground that the Minister's decision was legally "unreasonable". See the discussion in Crock, above n 23 at p 134.

<sup>40</sup> The significance of this legislative formula was brought out by the High Court in *Wu Shan Liang. v Minister for Immigration and Ethnic Affairs* (1996) 185 C.L.R., 259.

<sup>41</sup> See Crock, above n 23, at ch 7.

<sup>42</sup> The *Migration Act*, 1958 provides that non-citizens in immigration detention have a right to legal advice with respect to their detention *upon request*: s 256. However, the legislation stipulates that officials have no duty to provide detainees with application forms or advice about the options available to them: s 193 (2).

<sup>43</sup> For a critique of this practice, see Senate Legal and Constitutional References Committee *A Sanctuary Under Review: Australia's Refugee and Humanitarian Program* (Canberra, 2000), pp 72-74.

<sup>44</sup> On this issue, see Human Rights and Equal Opportunity Commission, *Human Rights Violations at Port Hedland Immigration Detention Centre*, online: [http://www.hreoc.gov.au/human\\_rights/asylum\\_seekers/index.html](http://www.hreoc.gov.au/human_rights/asylum_seekers/index.html) (accessed 17 June 2001). The Commission also comments on this practice in other reports also available at this site. See also the criticisms of this practice made by the Senate Legal and Constitutional References Committee, above n 43, at pp 76-85.

spot and given direction to an open reception centre or hostel. The asylum seeker is also given instructions regarding the choice of a lawyer who is authorized in turn to provide 16 hours of legally aided assistance in preparing and presenting the refugee claim<sup>45</sup>.

The difference between Australia and New Zealand's processing of asylum applications grew exponentially with the passage on 26 September of the *Migration Legislation Amendment Act* (No 6) 2001 (Austl). This includes provisions that allow interviewing officers to force asylum seekers interviewed in "immigration clearance" (or point of arrival) to swear or affirm a statement that their claims were true in fact. The legislation then provides that where an applicant changes their story or where "the Minister" (vis, the immigration officer) has "reason to believe" that a sworn statement is "not sincere", the Minister "may draw any reasonable inference unfavorable to the applicant's credibility". The provision spells out that the Minister may form his or her opinion on the basis of "the manner in which the applicant complied with the request" for a sworn statement, or "the applicant's demeanor in relation to compliance with the request"<sup>46</sup>.

Apart from the inherent uncertainty in the formula prescribed in these provisions<sup>47</sup>, the laws' lack of sensitivity to the situation of the refugee claimant at point of first contact with the government authority of a country of asylum is breathtaking. That refugees will lie and/or give the appearance of being flustered in situations where they are unsure of themselves and of the motives of their interrogators is so common as to be a fact of life in asylum claims<sup>48</sup>. The likelihood that an individual will lie is heightened in situations where they are interviewed without the aid of a lawyer or any other *trusted* advisor who can tell them what to expect and what is expected of them. Refugees are by definition people who are desperate and in fear of their lives. Those who come with the assistance of people smugglers and without a valid visa start from a base where the asylum seeker's focus has been on the end to be achieved rather than on the (legal) means to that end<sup>49</sup>.

<sup>45</sup> The author is indebted to Rodger Haines QC and to legal practitioners, Deborah Manning and Jeanne Donald for their accounts of the New Zealand procedures in action. See New Zealand Immigration Service Operational Manual, Border Policy, Chapter 7, para Y7.1 and Y7.5. See also *E v. Attorney General* [2000]3 N.Z.L.R. 257 (CA) which confirms that the power to issue permits at the airport is discretionary and that there is no presumption in favour of grant.

<sup>46</sup> See Migration Legislation Amendment Act (No 6) 2001, Schedule 1, s 5, introducing s 91V of the *Migration Act*.

<sup>47</sup> It is my view that a legal challenge could be mounted as to their constitutionality because of the uncertain operation of a formula based on personal assessments of a person's demeanour, which carries with it the penalties implicit in a finding of adverse credibility. See, for example, *King Gee Clothing Co Pty Ltd v. Commonwealth* (1945) 71 C.L.R. 184. Cf *Communist Party of Australia v Commonwealth* (1950) 83 C.L.R. 1.

<sup>48</sup> See, for example, W. Kalin "Troubled Communication: Cross-Cultural Misunderstanding in the Asylum Hearing" (1986) 20 *International Migration Review* 230; and S. Legomsky "The New Techniques for Dealing with High Volume Asylum Systems" (1996) 81 *Iowa L. R.* 671.

<sup>49</sup> On this point, see the comments made by Gummow and Hayne JJ in *Abebe v Minister for Immigration and Multicultural Affairs* (1999) 197 C.L.R. 510, at para 191, where he said:

"... the fact that an applicant for refugee status may yield to temptation to embroider an account of his or her history is hardly surprising. It is necessary always to bear in mind that an applicant for refugee status is, on one view of events, engaged in an often desperate battle for freedom, if not life itself."

Given Australia's avowed commitment to refugee protection, the credibility provisions of Act No 6 are extraordinary. The provisions will almost certainly increase the risk that Australian officials will fail in their international legal obligations to identify and offer protection from *refoulement* to persons who meet the Refugee Convention definition of refugee.

The credibility provisions are not the only extraordinary aspects of Act No 6. The Act also narrows previous jurisprudential understandings of the two concepts of "persecution"<sup>50</sup> and "particular social group"<sup>51</sup> in Australia and introduce a new concept of what might be termed essentiality in refugee claims. New section 91R(1)(a) provides that fear of persecution will only be a basis for refugee status if the "essential and significant reason or reasons" for the persecution feared is or are comprised within one or more of the 5 Convention reasons<sup>52</sup>. This Act would seem to run counter to the generally accepted notion that where persecution for one of the Convention reasons is found, refugee claimants should be given the benefit of the doubt and should be afforded protection.

### C. Administrative Review

The Australian system will have more resonances for Europeans and North Americans at the appellate level. The administrative review body for asylum seekers in Australia is the Refugee Review Tribunal, a statutory body that is nominally independent of the immigration Minister and his Department<sup>53</sup>. This body was established in 1993 to provide a forum for the hearing of refugee appeals and provides one of the first examples of Australian borrowing from Europe. The Tribunal operates in a manner that is vaguely reminiscent of the inquisitorial courts that are common in Civil Law countries. Tribunal Members ask questions of applicants,

<sup>50</sup> For example, the definition of persecution in s 91R of the *Migration Act* 1958 would require a refugee to be in fear of "serious harm" (as defined) and "systematic and discriminatory conduct". In *Chan Yee Kin v. Minister for Immigration and Ethnic Affairs* (1989) 169 C.L.R. 379, the High Court took a much broader approach. See Crock, above n 23, at ch 7.

<sup>51</sup> See s 91S, which spells out that family members cannot claim to be a member of a particular social group because of their association with a relative who is a refugee. This provision would have an obvious and immediate impact on women asylum seekers, whose fear of persecution is often based on the persecution suffered by a male relative, or on a political opinion imputed to them because of their association with a male relative.

<sup>52</sup> Namely, race, religion, nationality, membership of a particular social group or political opinion. See Refugee Convention, Art. 1A (1).

<sup>53</sup> The independence of the Tribunal has been questioned because of the process for appointing members. Not only are members appointed by the Immigration Minister; appointments have been for short-terms and on at least one occasion the Minister has issued warnings to members that they would not be reappointed if they persisted in taking too liberal a view of the Refugee Convention. See *The Canberra Times*, 27 December 1996, Article and Editorial, at 14. At the time of the reappointment process in 1997, the recognition rate for refugee claims in the tribunal plummeted from 17% to less than 3%. See evidence supplied by Mr Mark Sullivan, Deputy Secretary of the Department, to the Senate Legal and Constitutional Legislation Committee. See that Committee's report: *Consideration of Migration Legislation Amendment Bill (No 4) 1997*, Minority Report, at 45-46. The Minister has also been criticized for appointing senior members of his Department to the Tribunal on temporary secondments: See Senate Legal Constitutional References Committee, above n 35, at p 173, rec. 5.6.

controlling who gives evidence and in respect of what matters. Applicants have a right to an interpreter, but (unlike persons appearing before similar European courts) have no right to be represented by a lawyer or other adviser. Hearings are conducted in private and members are obliged by law to ensure that any matters capable of identifying an applicant are deleted before any judgment is made public. Appeals to the Tribunal are only available if an application is made within 28 days of an applicant being notified that her or his refugee claim has been refused. There is no discretion to extend this time limit. In 1997, the legislation was amended to impose a “post application fee” of \$AUD1,000 on persons who fail to gain recognition as refugees before this tribunal. The change was made ostensibly to deter frivolous refugee appeals, but seems to have had no impact on the number of refugee claims<sup>54</sup>.

In New Zealand, refugee appeals are heard by the Refugee Status Appeals Authority, a body that has retained its name, although it has had its powers enhanced with the conferral in 1999 of the powers of a Commission of Inquiry<sup>55</sup>. There are many subtle differences between this body and Australia’s Refugee Review Tribunal. To begin with the New Zealanders allow applicants to be represented by a lawyer and are eligible for legal aid<sup>56</sup>. Their legislation requires Authority members to have qualifications equivalent to those required to be a full judge in Australia (legal qualifications or equivalent of 5 years standing)<sup>57</sup>. The Authority operates in a way that ensures that all information held by it is made available to applicants before a hearing<sup>58</sup>. In Australia the Refugee Review Tribunal is obliged only to provide information that is *adverse* and *personal* to an applicant<sup>59</sup>.

#### D. Judicial Review

One of the greatest differences between the New Zealand and Australian systems is in the number of judicial review applications that are taken from the decisions of the two appellate authorities. It is a measure of the trust of the New Zealanders in their courts that no attempt has been made to quarantine the appeals body from the judicial review of its legal and factual findings relative to New Zealand’s international legal obligations. Decisions made by the New Zealand Authority are said to be “final”, although they can be reviewed on grounds of error of law<sup>60</sup>. Access to judicial review is limited only to the extent that actions must be

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<sup>54</sup> See *Migration (1994) Regulations*, reg 31B. This operates as a debt payable to the Commonwealth that is noted in the failed refugee claimant’s immigration record. Although relatively few failed claimants pay the fee, the debt will stand as a barrier to future admission should the person wish to re-enter Australia at a later date.

<sup>55</sup> See *Immigration Act 1987*, s 129N(1) and Schedule 3C para 7.

<sup>56</sup> Note that the New Zealand legal aid system does not generally allow for the funded assistance of non-New Zealand citizens and residents. However, an exception has been made for refugee claimants since 1999: see *Legal Services Act 2000* (NZ), ss 7(1)(j),(k) and (l) and 10(1).

<sup>57</sup> See *Immigration Act 1987*, s 129N.

<sup>58</sup> The primacy of the rules of natural justice is acknowledged in the policy manual published by the New Zealand Immigration Service. See *Malkit Singh v. Attorney-General Court of Appeal*, Wellington CA252/99; [2000] N.Z.A.R. 136.

<sup>59</sup> See *Migration Act 1958*, s 424A.

<sup>60</sup> See *Immigration Act 1987*, s 129Q(5).

commenced within three months of a decision being made. Applications can only be made after that time with the leave of the High Court and in "special circumstances"<sup>61</sup>.

According to Roger Haines QC, only 46 judicial review applications involving decisions of the Refugee Status Appeals Authority were filed in the High Court between 1992 and 1999. Of these only 17 cases resulted in a remittal and rehearing of the application either by consent or by court order<sup>62</sup>. In Australia, review applications from decisions of the Refugee Review Tribunal dominate the work of the Federal Court<sup>63</sup>. Before Australia's High Court, there has also been an astonishing increase in the number of applications for the judicial review of refugee decisions. If a major class action is taken into account, there are currently over 4,000 refugee applicants with cases before this Court<sup>64</sup>.

The curious state of affairs in Australia has been brought about by a series of legislative changes and by a collective failure in the country's policy makers to understand either the nature or the causes of the phenomenon that is occurring. In 1994, amendments to the *Migration Act* 1958 lead to a drastic curtailment in the power of the Federal Court to review immigration and refugee decisions. Since 1 September 1994 the Federal Court has been unable to provide a judicial remedy in migration cases for any of the "broad" errors of law. These are errors involving matters of due process, relevancy or reasonableness or proportionality. Put simply, the Federal Court could do little more than check to see that an administrator had complied with the terms of the Migration Act<sup>65</sup>. Applications for review under Part 8 of the Migration Act had to be lodged within 28 days of an adverse ruling, and could only be made if an applicant has first exhausted her or his right to appeal to the Refugee Review Tribunal<sup>66</sup>.

After the High Court of Australia upheld the constitutionality of the changes made in 1994, it was faced with a deluge of applications for judicial review made in the original (constitutional) jurisdiction of that court. In recent times the Court has even begun to experience applications by unrepresented litigants<sup>67</sup>. Given that the High Court of Australia has but seven justices, charged with deciding the most

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<sup>61</sup> See *Immigration Act* 1987, s 146A(1).

<sup>62</sup> See Haines, above n 29.

<sup>63</sup> See the information in the Department of Immigration's Fact Sheet No 86, available online: <http://www.immi.gov.au/facts/86litig.htm> (accessed 20 June 2001). For an account of Australia's court and tribunal system, see Mary Crock and Ron McCallum "Australia's Federal Courts: Their Origins, Structures and Jurisdiction" (1995) 46 South Carolina L.R. 719-760.; and James Crawford *Australian Courts of Law*, 3rd ed (Melbourne: Oxford UP, 1993).

<sup>64</sup> See *Herijanto v Refugee Review Tribunal & Ors* High Court, No S97/1998. This case is due to be heard later in 2301.

<sup>65</sup> For an analysis of these provisions, see Mary Crock "Necessary Reform or Overkill?: Part 8 of the Migration Act and the Judicial Review of Migration Decisions" (1996) 18 *Sydney L.R.* 267.

<sup>66</sup> See *Migration Act* 1958 (Cth), s 476(2). Note that the 28 day for judicial review runs concurrently with the 28 days allowed for tribunal appeals. Accordingly, a failure to appeal to the tribunal will also result in loss of the ability to appeal to the Federal Court under Part 8.

<sup>67</sup> See the comments of J. Kirby in *Re Refugee Review Tribunal; Ex parte HB* [2001] H.C.A. 34 (8 June 2001)



significant constitutional and appellate issues in the country, the present state of affairs is little short of disastrous.

On 26 September 2001, Part 8 of the Migration Act was repealed and replaced by what Australians refer to as a “privative clause” regime: that is, a scheme that excludes the judicial review of decisions in all but exceptional circumstances. Provisions were also introduced that purport to impose inflexible time limits of 35 days on applications to the High Court, and that ban representative or class actions in any courts in migration and refugee cases<sup>68</sup>. In the United States, privative clause provisions are known as “court stripping” measures<sup>69</sup>. On the face of Australia’s new laws, most migration related decisions would be “privative clause decisions”. Refugee decisions would also be caught because they are covered by the terms of the migration legislation. Where a privative clause decision is reviewable by the Migration Review Tribunal (MRT) or the Refugee Review Tribunal (RRT), or is subject to the exercise of one of the Minister’s residual discretions, judicial review is now excluded. The central privative clause reads as follows:

Section 474: A privative clause decision:

- (a) is final and conclusive; and
- (b) shall not be challenged, appealed against, reviewed, quashed or called in question in any court; and
- (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.<sup>70</sup>

The privative clause limits the powers of all Australian courts to intervene – including the High Court of Australia to the extent that such constraint is possible under the Australian Constitution<sup>71</sup>. To restrict access to the High Court entirely a constitutional amendment would be required<sup>72</sup>. Nevertheless, High Court authority suggests that such clauses can be effective to narrow the scope of judicial review

<sup>68</sup> See *Migration Legislation Amendment Act (No 1) 2001* (Austl), s 4, inserting Part 8 A into the Migration Act 1958.

<sup>69</sup> For an account of the emerging jurisprudence on provisions in US law limiting access to the courts in migration cases, see Gerald Neuman “Jurisdiction and the Rule of Law After the 1996 Immigration Act” 113 *Harvard L. R.* 1963-1998 (2000).

<sup>70</sup> The new provisions amending the *Migration Act 1958* (Austl) were inserted by the Migration (Judicial Review) Act 2001 (Austl).

<sup>71</sup> See the Second Reading Speech of Mr. Ruddock: Australian House of Representatives *Hansard*, 25 June 1997.

<sup>72</sup> This is because s 75(v) of the Constitution invests the High Court with original jurisdiction whenever a remedy is sought against an officer of the Commonwealth. This would include a Tribunal member. The High Court also has original jurisdiction where any issue is raised that involves an international treaty to which Australia is a party: s 75(i). For a recent case on point, see *Re East & Ors; Ex parte Nguyen* [1998] H.C.A. 73 (3 December 1998). As ss 75(i) and (v) are constitutional grants of jurisdiction, it is beyond the power of the Parliament to withdraw any matter from the grant of jurisdiction or to abrogate or qualify the grant. See *Waterside Workers’ Federation of Australia v Gilchrist, Watt and Sanderson Ltd* (1924) 34 C.L.R. 482; *Australian Coal and Shale Employees’ Federation v Aberfield Coal Mining Co Ltd* (1942) 66 C.L.R. 161. See also *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 C.L.R. 168 per Mason CJ.

provided that three criteria are met. The protected decision must constitute a bona fide attempt to exercise the power conferred on the decision maker; it must relate to the subject matter of the legislation, and it must be reasonably capable of reference to the power given to the body<sup>73</sup>. This is known as the *Hickman* principle<sup>74</sup>.

In practice the provisions operate as rules of statutory construction<sup>75</sup>. It is said that they operate to expand the validity of acts done by a repository of power by deeming everything that they do to be within the law<sup>76</sup>. Provided the purported exercise of the power is a bona fide attempt to exercise the power, it relates to the subject matter of the legislation; and it is reasonably capable of reference to the power given to the body purporting to exercise it, the exercise of power will be deemed to be lawful<sup>77</sup>.

Australia is not alone in taking legislative action to limit access to judicial review in immigration and refugee cases<sup>78</sup>, although there are few countries where the constraints in curial review have been so severe. It remains to be seen how the courts will respond to the constraints of the new privative clause regime. The Australian Parliament's power to legislate with respect to immigration and aliens in Australia is broad indeed and is not tempered by a Bill of Rights or any other overriding mechanism of human rights protection. In this context the potential for the privative clause regime to impact heavily on the courts' ability to intervene in immigration and refugee cases is very great.

Australia's Constitution may not contain the same guarantees as pertain elsewhere. Nevertheless, if the experience in America is any guide, individual judges are likely to strain to find ways to correct what they perceive to be plain legal errors and/or gross instances of injustice<sup>79</sup>.

It is a measure of Australia's introspection that few in Australia are aware of the gulf that now separates Australian and New Zealand experience of asylum claims and litigation. The raw statistical data suggests that Australia could profit from a study of New Zealand practices, because New Zealand is plainly doing something right to achieve such a low rate of judicial review applications. In this context, it is

<sup>73</sup> See *R v. Hickman; Ex parte Fox and Clinton* (1945) 70 C.L.R. 598 at 615.

<sup>74</sup> The *Hickman* principle has been cited with approval time and time again. See for example: *R. v. Commonwealth Rent Controller; Ex parte National Mutual Life Assoc of Australasia Ltd.*, (1947) 75 C.L.R. 361; *R. v. Central Reference Board; Ex parte Thiess (Repairs) Pty Ltd.*, (1948) 77 C.L.R. 123; *Bank of New South Wales v. Commonwealth* (1948) 76 C.L.R. 1 at 175; *R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Grant.*, (1950) 81 C.L.R. 27; *R. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Amalgamated Engineering Union.*, (1967) 118 C.L.R. 219; and *R. v. Coldham; Ex parte Australian Workers' Union.*, (1983) 153 C.L.R. 415.

<sup>75</sup> *Deputy Commissioner of Taxation v. Richard Walter Pty Ltd.*, (1995) 183 C.L.R.168; *R. v. Coldham; Ex parte Australian Workers' Union.*, (1983) 153 C.L.R. 415 at 418 per Mason ACJ and Brennan J.

<sup>76</sup> *O'Toole v. Charles David Pty Ltd.*, (1991) 171 C.L.R. 232 at 275.

<sup>77</sup> *Deputy Commissioner of Taxation v. Richard Walter Pty Ltd.*, (1995) 183 C.L.R.168 per Brennan J.

<sup>78</sup> On the US laws, for example, see L. B. Benson, "Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings" (1997) 29(4) Connecticut Law Review 1411.

<sup>79</sup> *Supra* note 69.

sadly ironic that Australia seems to have paid scant attention to its near neighbour, but has fixed its sights firmly on Europe and the restrictive practices that have developed there to control refugee flows. In the result, Australia's laws have become increasingly complex – its Act and regulations dwarf the equivalent New Zealand legislation in both volume and complexity. As will be seen, many of the changes have had little effect on refugee flows: the primary achievement has been to cast over the country's refugee laws a punitive veil and a pervasive aura of mean spiritedness.

### III. European Influences: Constraints on Making Asylum Claims

As a small nation in close proximity to Australia, New Zealand has paid close attention to both Australia's experience of refugee claims and to relevant legislative developments. For example, major legislative reforms relating to refugee claims in the two countries appear to have been made at similar times. All the same, New Zealand appears to have made a conscious decision not to follow its larger neighbor in its borrowings from European Union laws and policies. From a European perspective, it is the divergence rather than the convergence in the responses of the two countries that is most striking. Of equal interest is the extent to which Australia's adoption of measures used first in Europe appears to be more political than practical in effect.

New Zealand's immigration laws place no restrictions on the ability of non-citizens in its territory to seek asylum – although it has mimicked its neighbour in erecting obstacles to entry in the form of visa requirements<sup>80</sup>. Australia, on the other hand, has imposed a series of restrictions on the lodging of asylum claims, many of them reminiscent of provisions introduced first in the European context. Most notable are the measures instituted in Europe to prevent asylum seekers from forum shopping, requiring claimants to lodge their application for refugee status in the first country in Europe where they set foot<sup>81</sup>. Australia's measures have been introduced progressively and in response to different “waves” of refugee claimants.

Australia first introduced “safe third country” provisions in 1994, in response to the arrival by boat of asylum seekers from Southern China and from camps in Indonesia and Malaysia set up after the war in Vietnam to house fugitives from that conflict. Many of the boat people from this period shared a common characteristic: they were past or present fugitives from Vietnam. Although the reasons for their flight to Australia varied, all were or had been subject to arrangements made by the UNHCR under a multi-nation agreement known as the Comprehensive Plan of

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<sup>80</sup> See New Zealand's *Immigration (Transit Visas) Regulations* 1999 (SR 172 of 1999) which nationals from virtually every refugee producing country in the world to obtain a visa, should they wish to visit or transit through New Zealand.

<sup>81</sup> For a commentary on the European agreements, see R. Byrne and A. Shacknove, “The Safe Third Country Notion in European Asylum Law” (1996) 9 *Harvard Human Rights Journal* 185. See also N. A. Abell, “The Compatibility of Readmission Agreements with the 1951 Convention relating to the Status of Refugees” (1999) 11 *International Journal of Refugee Law* 60.

Action. Amendments to the *Migration Act* 1958 operated to preclude asylum claims by these people in the absence of permission from the immigration Minister, acting personally. The provisions prevented the re-assessment in Australia of persons “screened out” under refugee determination processes established under the Comprehensive Plan of Action. They also allowed for the designation of countries deemed to be “safe” for the purpose of precluding asylum claims by certain types of people. The first country to be so designated was the Peoples’ Republic of China – with respect to Sino-Vietnamese resettled in China after the Vietnam War. The effect of the changes was that the number of undocumented boat arrivals entering the refugee determination process in the mid 1990s dropped almost overnight from 100% to 14.8%. In other words, a large percentage of would-be asylum seekers from South East Asia were barred from the determination process<sup>82</sup>.

These early safe third country provisions can be seen to some extent as a response to a regional problem arising out of an initiative aimed at resolving the status of fugitives from Vietnam by either finalizing resettlement or returning those involved to Vietnam. It was not until 1999 that Australia introduced the full panoply of restrictive measures for asylum seekers, widening ever further the gap between the refugee laws of Australia and New Zealand<sup>83</sup>. This time the impetus for the changes was quite different and the changes themselves were less defensible.

In late 1999 a growth in the number of unauthorized boat arrivals led both the Australian and New Zealand Parliaments to enact legislation aimed at reducing people smuggling - or “alien” smuggling as the New Zealanders describe those non-citizens who pay criminal operatives to bring them into the country without valid documents. In New Zealand, the focus of the legislative change was on the power to detain unauthorized arrivals pending the finalization of refugee claims involving a group of people<sup>84</sup>. In Australia, the *Border Protection Legislation Act* 1999 (Austl) gave Australian authorities sweeping new powers to pursue ships thought to be carrying illegal migrants, together with powers to board and search ships and aircraft<sup>85</sup>. The laws permit persons apprehended on the way to Australia to be brought to the mainland and detained as unlawful non-citizens, pending consideration of any asylum claims.

<sup>82</sup> See *Migration Act* 1958, ss 91A-91H. See also *Supra*. Note 27 at pp 50-51; and S. Taylor, “Australia’s ‘safe third country’ provisions: Their impact on Australia’s fulfillment of its *non-refoulement* obligations” (1996) 15 University of Tasmania Law Review 196.

<sup>83</sup> See the *Border Protection Act* 1999 (Austl), discussed below.

<sup>84</sup> See *Immigration Act* 1987 (NZ), s 128(13B). For a discussion of the changes made, see Haines note 29.

<sup>85</sup> Customs officers are now permitted to carry and use firearms and other defence equipment. Other changes enable the forfeiture, seizure and disposal of ships and aircraft used in contravention of immigration laws. The law also allows ships to be moved or destroyed if they are unseaworthy or pose a serious risk to navigation, quarantine, safety, public health, property or the environment. See *Migration Act* (1958) (Cth), Part 2, Div 13A. See Department of Immigration and Multicultural Affairs *Protecting the Borders*, On-line publication available at <http://www.immi.gov.au/illegals/border2000/>. See also P. Mathew, “Safe From Whom? The Safe Third Country Concept Finds a Home in Australia” Unpublished Conference paper, *Workshop on the Refugee Convention 50 Years On: Globalisation and International Law*, Monash University, Melbourne, June 8-9 2001. Paper in possession of the author.

The most important changes made in 1999, however, were those regarding the ability of detainees to access Australia's asylum procedures. The amendments provide that Australia is "taken not to have protection obligations" to any 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.<sup>86</sup>

Although non-refoulement exceptions are made in sub-sections 36(4)-(6) of the *Migration Act* 1958, s 36(3) operates independently of any provisions requiring the designation of safe third countries by government regulation. While the Federal Court has ruled that s 36(3) only operates to bar people with a *right* to enter another country (rather than mere permission), the provision does not stipulate that the third country in question be a signatory to the Refugee Convention. Indeed, there is no requirement that the "safe" country in question make any kind of provision for refugees. The only provisoes are that the returnee does not face either persecution or refoulement for a Convention reason in or by the third country<sup>87</sup>.

Other provisions introduced by the 1999 legislation block asylum claims from persons holding nationality of a country in which the person *could gain protection*. They also permit the return of an asylum seeker to any country where the asylum seeker has spent a continuous period of 7 days or more. Again, the legislation makes exceptions where countries of former residence are either not safe or are not considered to have adequate asylum procedures. In the latter context, the Minister is empowered to make declarations that certain countries have effective asylum procedures<sup>88</sup>. The problem with this mechanism lies in the potential for declarations about the safety of particular countries to be affected by political favoritism based on diplomatic, trade or security interests, rather than on humanitarian factors. When immigration officers deport asylum seekers believing that they have protection in a third country, there is no opportunity for refugee lawyers and the courts to intervene if it is suspected that the country is not safe.

In September 2001, the concept that Australia should not offer protection to anyone who could have sought protection elsewhere was extended to cover all the visa subclasses in its offshore refugee and humanitarian program. The offshore visas now all contain provisions that privilege applicants registered with the UNHCR or who are applying from countries where there is no possibility of gaining effective protection. A stay of seven days in a country where protection *could be* available is now enough to disqualify these people from the grant of a visa. Persons who cannot meet the UNHCR/no alternative protection criteria can only be considered if the

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<sup>86</sup> *Supra* note 82 s 36(3).

<sup>87</sup> *Ibid.* s 36(4) and (5).

<sup>88</sup> *Ibid.* Part 2, Div 3AK.

Minister permits an application in the exercise of a non-reviewable discretion. Again, this narrowing of “official” avenues can only operate to encourage people to turn to the people smugglers in places where access to UNHCR is impossible or impractical. Alarming, provisions to similar effect also constrain the ability of persons now in Australia on temporary protection visas to gain permanent refugee protection in Australia<sup>89</sup>.

The amendments to the Australian laws in both 1999 and 2001 came in response to a rise in the number of asylum seekers arriving by boat from countries in the Middle East, transiting through Indonesia. The apparent opening of new people smuggling routes has brought to Australia the largest concentration of asylum seekers who are genuine refugees ever seen in this part of the world. Of the claims made by fugitives from Afghanistan, for example, almost 100% have been determined to be refugees, while asylum seekers from Iraq are being recognized at a rate of 92%. These statistics underscore the practical shortcomings of the 1999 changes. Australia has embarked on diplomatic initiatives in Jordan and Pakistan to encourage those countries to accept asylum seekers who may have spent time in those countries. It has launched publicity campaigns in the Middle East warning potential asylum seekers from making the hazardous journey to Australia<sup>90</sup> - some of which have been embarrassingly at odds with campaigns designed to attract business migrants. It has also funded UNHCR to process the asylum claims of would-be boat people intercepted in Indonesia<sup>91</sup>. The reality is that Australia will find it difficult, if not impossible, to return asylum seekers to the transit countries which have neither the international obligation nor (more importantly) the inclination to re-admit these people.

Europe’s safe third country laws have created the phenomenon of “refugees in orbit”, whereby some refugees will not receive protection anywhere because each country argues that the refugees are safe elsewhere, and so refuses to offer protection<sup>92</sup>. At least in the European context, individual asylum seekers are dealing with countries in geographical proximity, most of which have similar systems of law and are subject to a consistent legislative network for the protection of basic human rights. This is not the case in the region immediately surrounding Australia, where only 12 countries are signatories to the Refugee Convention and Protocol. In many instances, return of the human cargo delivered by the people smugglers is a practical

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<sup>89</sup> All of the changes described in this paragraph were introduced by the *Migration Amendment (Excision from Migration Zone)(Consequential Provisions) Act 2001* (Austl).

<sup>90</sup> See Ministerial Press Statement MPS 155/1999, dated 29 October 1999. On the dangers of the voyage to Australia, see MPS 132/2000, dated 13 December 2000; and MPS 138/2000, dated 22 December 2000. All Press releases are available at [http://www.minister.immi.gov.au/media\\_releases/media01/index01.htm](http://www.minister.immi.gov.au/media_releases/media01/index01.htm)

<sup>91</sup> See P. Mares “Moving the barriers off-shore: cooperation with Indonesia reduces the number of ‘boat people’ arriving in Australia”, 6/08/01 15:32:00 Asia Pacific Features, ABC Radio. Transcript available at: <http://www.abc.net.au/ra/asiapac/default.htm>, accessed 2 January 2002. See further the discussion in Part 4, below.

<sup>92</sup> See, for example, Dunstan, “Playing Human Pinball: The Amnesty International United Kingdom Section Report on UK Home Office ‘Safe Third Country’ Practice” (1995) 7 *IJRL* 606.

impossibility anyway because the transit countries will refuse admission to non-citizens who had no authorization to pass through their territory in the first place.

For this reason, there are grounds for believing that the raft of measures introduced in 1999 were designed for political ends, as much as for their potential to deflect asylum claims. Put simply, the government wanted to be seen to be “tough” on asylum seekers. The same is true of the changes made in September 2001, although these are likely to have a much more immediate and sinister impact on asylum seekers and applicants for humanitarian assistance. With similar posturing a feature of the re-election of the Blair Labor government in England in 2001, there is a depressing sameness in the politics generated by the phenomenon of mobile asylum seekers<sup>93</sup>.

#### IV. The Deflection Of Asylum Seekers: The Tampa Affair<sup>94</sup>

Nowhere was the politics of the asylum issue more apparent in Australia than in late August 2001 with the crisis that evolved around the rescue at sea of 433 asylum seekers who were saved by the Norwegian cargo vessel, “the Tampa”, when their boat began to sink. The Australian Prime Minister decided to take a stand on the vessel so as to send out a strong message that Australia was not a “soft touch” and that it would not tolerate people flouting its regular immigration laws so as to gain admission into the country. The Prime Minister’s intervention carried all the hallmarks of what Opposition leader Kim Beazley labelled “wedge politics”<sup>95</sup>. Public opinion in Australia – if nowhere else in the world – was firmly behind the Prime Minister, prompting Mr Beazley to concur in the initial decision to refuse entry. Ironically, while the Labor Party in Australia saw their political interests in concurring with the stance taken by the government, the Labour Party in Norway saw political mileage in advocating in favor of Norway assisting the asylum seekers. The same is true of the governments in New Zealand and Nauru – and East Timor – all of whom offered to take the fugitives<sup>96</sup>. The incident was a graphic illustration of the moral gulf that now separates Australia and New Zealand in refugee matters.

<sup>93</sup> This point is made by Ruud Lubbers, UN High Commissioner for Refugee. See “Don’t Kick Refugee Just to Score Points” *The Australian* Wednesday 20 June 2001, at 13.

<sup>94</sup> The following material includes material taken from M. Crock and B. Saul, *Freedom Seekers: Refugees, Asylum Seekers and the Law* (Sydney: The Federation Press, forthcoming December 2001), Chapter 4.

<sup>95</sup> Commonwealth Parliamentary Debates, *Hansard*, House of Representatives, 29 August 2001.

<sup>96</sup> This incident received wide media coverage around the world, with almost universal condemnation outside Australia of the government’s stance. See, for example, Marcus Gee “None is Too Many” *Globe and Mail*, Thursday August 30, p A9; and Editorial, “Australia sets Callous Example”, *Toronto Star*, 1 September 2001, p K6. See also Reuters, “New Zealand and Nauru will take refugees”, *Globe and Mail*, 1 September 2001, p A14; and AFP, “Les réfugiés du Tampa dirigés vers Nauru et la Nouvelle-Zélande” *Le Soleil* 1 September 2001, p A27. The arrangements with Nauru were brokered in a deal that involved the payment to Nauru of at least AUD\$14 million for a new generator, a new sports oval, cancellation of hospital debts in Australia and the provision of scholarships for Nauruan children wishing to study abroad. See Patrick Barkham, “Paradise lost awaits asylum seekers,” *The Guardian*, Sept. 11, 2001, at 3.

Amid the blaze of publicity that surrounded the dramatic refusal to land the “Tampa” asylum seekers, legal actions were instituted in the Federal Court of Australia by the Victorian Council for Civil Liberties and by a private Solicitor, Eric Vardarlis<sup>97</sup>. The applicants asked the Court to order that the rescuees be brought into Australia’s migration zone; that they be told of their rights under the Migration Act; and that they be permitted to make refugee claims. The applicants also sought the release of the rescuees from unlawful detention (“habeas corpus”), since they were detained on the ship without any legislative basis. The Court gave leave to Amnesty International and the Human Rights and Equal Opportunity Commission to intervene as friends of the court (“amicus curiae”).

Justice North of the Federal Court made an interim order preventing Australia from moving the rescuees. However, this was lifted on 3 September when an agreement was reached to allow the rescuees to be transferred to the Australian troop ship, the HMAS Manoora. By that stage, negotiations brokered by the UN had resulted in agreements by Nauru and New Zealand to take the asylum seekers in exchange for financial compensation from Australia. (An offer to take the people was considered, but not accepted, by East Timor!) All the parties agreed that it was in the best interests of the rescuees for the Manoora to begin the voyage towards northeast Australia. Indeed, the vessel ultimately headed straight for Nauru. Another boat was intercepted en route and had its asylum seekers transferred to the Manoora.

The Tampa rescuees were steaming towards Papua New Guinea as the case went to trial before Justice North. The judge found that the applicants did not have the right to ask the court for orders about the rights of the rescuees under the Migration Act. He ruled that the applicants’ inability to get direct instructions from the rescuees was fatal to this part of the action. (With the Special Air Service (SAS) Commandoes in control of the Tampa and the owners of the vessel unable or unwilling to act as intermediaries, none of the litigants was allowed to speak or otherwise communicate with the rescuees). In the event, the case turned on two main issues. The first related to the custody of the rescuees and whether they were in “immigration detention”. The second concerned the nature of the government’s powers to detain and expel non-citizens in these circumstances. Justice North found for the applicants on both of these points. He held that the rescuees were being detained by the SAS troops, and that the detention and proposed expulsion were not actions supported by Australian law.

When the case was appealed to the Full Federal Court, two of the three appeal judges found in favor of the government<sup>98</sup>. Justice French decided that the Commonwealth had the legal authority to board the Tampa because of the nature of the executive power vested in it by s 61 of the Australian Constitution. He ruled that

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<sup>97</sup> See *Victorian Council for Civil Liberties Incorporated v. Minister for Immigration and Multicultural Affairs*; *Eric Vardarlis v. Minister for Immigration and Multicultural Affairs*, [2001] F.C.A. 1297, Unreported, Federal Court of Australia, North J, 11 September 2001. On Appeal, see *Ruddock v. Vardarlis*, [2001] F.C.A. 1329, Unreported, Full Federal Court of Australia, 17 and 18 September 2001.

<sup>98</sup> See *Ruddock v. Vardarlis*, [2001] F.C.A. 1329, Unreported, Full Federal Court of Australia, 17 and 18 September 2001.



the power to expel non-citizens was part of the *unwritten* executive power of government that is an implied part of national sovereignty. He held that such powers are only displaced if there is clear legislation that covers the field. He ruled further that the actions taken by the SAS did not constitute immigration detention of the rescuees: what they did was “incidental to the objective of preventing a landing and maintaining as well the security of the ship”. Justice Beaumont agreed with Justice French, but went further, ruling that the Court could not release the rescuees from unlawful detention because the rescuees had no legal entitlement to enter Australia.

In dissent, Chief Justice Black held that the Commonwealth’s actions in boarding the Tampa *did* constitute the detention of the rescuees. He ruled that such action could only be lawful if supported by federal legislation. The Chief Justice found that issues relating to entry and exit from Australia were fully governed by the Migration Act. This left no room for unwritten Executive or prerogative powers to make the government’s actions lawful. He argued persuasively that under our democratic form of government, Parliament should define the extent of executive action which affects civil liberties of individuals. It is significant that the four Federal Court judges who considered the Tampa case were split two against two, with the most senior judge, the Chief Justice of the Federal Court, ruling in favor of the asylum seekers. An appeal to the High Court of Australia was considered by the lawyers challenging the Government, although legislation introduced into Parliament, discussed below, rendered such an appeal futile. The government also signaled its intention to seek costs orders against the applicants in the case, punishing the applicants for pursuing a public interest action designed to prevent the government abusing public power.

The first decision (by Justice North) in the Tampa case was handed down on 11 September 2001, a few hours before terrorists simultaneously hijacked four planes in North America, crashing into the Pentagon in Washington DC and obliterating the World Trade Centre in New York. The disaster could not have come at a worse time for Australia’s boat people, many of whom are Afghani nationals. Within what now seems like hours of the attacks, commentators began to implicate Afghanistan’s brutal Taliban government and the elusive terrorist Osama Bin Laden in the attacks. If the Tampa rescuees incited any public sympathy before 11 September, there was a hardening in attitude as pictures of the devastation in New York were played and replayed on Australian television. The fugitives were transformed overnight (quite unfairly) from victims to potential terrorists. Not surprisingly, when Australians were asked “Do boat people increase the risk of terrorism?”, a resounding majority of those polled answered “yes”. Few seemed to heed Opposition leader Kim Beazley’s remarks that most terrorists would clearly prefer plane travel to the hazards of leaky boats piloted by unscrupulous people smugglers.

In Parliament, the Tampa affair spawned a rash of legislative measures that can only be described as a knee-jerk response to unfolding events. Shortly after the SAS soldiers boarded the Tampa, the Prime Minister introduced a Bill into Parliament designed to permit an “officer” to direct any ship within Australia’s territorial sea to leave the territorial sea. The proposed law would have permitted officers to use

“reasonable force” to remove the boats and included sweeping clauses blocking court review or any civil actions for the recovery of damages. The Bill was rejected by the Labor Opposition and defeated in the Senate, and rightly so in the opinion of many commentators. A number of experts thought that, in any event, the Bill would not have done anything to legitimize the actions taken in boarding the Tampa<sup>99</sup>.

The government introduced a more considered, but just as draconian Bill on 18 September that was opposed only by the Democrats, the Greens and independent Senator Brian Harradine. The *Border Protection (Validation and Enforcement Powers) Act 2001* (Austl) has no precedent in Australian law. It retrospectively validates any action taken by the Commonwealth in relation to the Tampa, the Aceng and other ships stopped between 27 August and the date of Royal Assent to the Act. It also prevents the commencement *or continuance* of any civil or criminal proceedings challenging actions covered by the legislation. In spite of this measure, the applicant Vardalis has appealed against the Full Federal Court’s decision in the Tampa case. The High Court agreed to hear the case and, in due course, it will rule on the constitutionality of this attempt to stop judicial oversight of the Tampa affair<sup>100</sup>.

In America, the passage by congress of *retroactive* legislation is permitted constitutionally: the draconian measures passed in 1996 are examples where this has occurred<sup>101</sup>. Such laws can operate to change the future consequences of actions taken before the creation of legislation. Retrospective enactments, on the other hand, operate to change the legal status of past actions, by deeming *legal* acts that were *illegal* at the time they were committed. While frowned upon by the Australian courts, retrospective legislation is not precluded by the Australian Constitution.

The *Border Protection Act* also confers extraordinary powers on “officers” to search, detain and move persons aboard ships that have been pursued, boarded and detained by Australian authorities. Unlike the earlier Bill, there is no requirement that officers boarding a ship act in “good faith”. The legislation is not limited to actions taken within Australia’s territorial sea, nor is any deference made to the constraints on extra-territorial operations imposed by the UN Convention on the Law of the Sea (UNCLOS)<sup>102</sup>. Some commentators have suggested that the new laws are in breach of Australia’s international legal obligations because they authorize Australian “officers” to operate outside of Australia’s territorial jurisdiction<sup>103</sup>. What is clear is that the legislation goes beyond what has been proposed by the United Nations to

<sup>99</sup> See the discussion of this Bill by N. Hancock “Border Protection (Validation and Enforcement Powers) Bill 2001 (Austl)” Bills Digest No 62 2001-2, p 3, and notes 55 and 56 (Available at <http://www.aph.gov.au/library/pubs/bd/2001-02/02bd062.htm>) See also the same author’s Current Issues Brief, available at <http://www.aph.gov.au/library/pubs/cib/2001-02/02cib05.htm>.

<sup>100</sup> Leave to appeal to the High Court was granted by Hayne J and the case set down for hearing on 14 December 2001.

<sup>101</sup> See the discussion in L. Benson, note 78.

<sup>102</sup> *UN Convention on the Law of the Sea* (1982). See generally D. O’Connell, *The International Law of the Sea* (2 vols) (Oxford: Clarendon Press, 1984).

<sup>103</sup> See generally, N. Hancock, note 78. For a discussion of the extent and nature of Australia’s powers at sea, see I. Shearer in S. Blay, R. Piotrowicz and B.M. Tsmenyi, *Public International Law: An Australian Perspective* (Melbourne: Oxford University Press, 1997) at 162-164.

combat people smuggling. The Draft Protocol against the Smuggling of Migrants by Land, Air and Sea (supplementing the Draft Convention against Transnational Organized Crime) encourages states to exercise their jurisdiction fully to combat people smuggling<sup>104</sup>. However, the draft Protocol does not advise states to exceed their jurisdiction. Nor are there any moves to expand the maritime jurisdiction of states under international law.

The search and seizure powers in this legislation are complemented by arguably the most specifically “anti-terrorist” measure in the package of immigration Acts passed on 26 September. The amending Act identified as “Act 5” overrides domestic privacy legislation to enable people (including “travel agents”) to disclose information about “any matter that involves the departure from the migration zone of any person”<sup>105</sup>.

Other measures in the *Border Protection Act* are even more extreme. In response to the issue raised in the Tampa litigation, the Act actually confirms the power of the Executive to act outside of any legislative authority. New section 7A of the Migration Act reads: “The existence of a statutory power 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”. In referring to “persons”, the Act makes no distinction between citizens and foreigners. The Act also introduces mandatory sentences for people convicted of people smuggling offences. Adult offenders are liable for five years gaol, and eight years for repeat offences. Once again, there are no precedents for the measures enacted. These provisions could well be the subject of constitutional challenge.

On the other side of the ledger, the Border Protection legislation allows for judicial review by the High Court and for the payment of compensation to persons who suffer economic loss as a result of the boarding and interdiction of a vessel. Put another way, the Act could look after the owners of the Tampa and of other innocent vessels interdicted by the Australian authorities.

Yet the new powers given to the Minister for Immigration are extraordinary. To prevent the use of Christmas Island and of the nearby reefs as delivery points for asylum seekers, the Parliament empowered the Minister to declare parts of Australia’s territory to be outside the “migration zone”. Under the *Migration Amendment (Excision from Migration Zone) Act 2001*, people coming ashore at Ashmore Reef, on the Keeling or Cocos Islands or on Christmas Island are now deemed *not* to have entered Australia’s migration zone. The legislation introduces the concepts of “excised offshore places” and “offshore entry persons”.

Australia’s new resolve to prevent boat people from entering its territory is a continuing drama. In October 2001, the Nauru government and UNHCR were apparently loath to accept any more asylum seekers in Nauru. As boats continued to arrive, it appeared from news reports that the Australian authorities operating on the

<sup>104</sup> 13 May 1999, A/AC.254/4/Add.1/Rev.1.

<sup>105</sup> See *Migration Legislation Amendment Act No 5 2001* (Austl)

high seas off Indonesia were simply refusing to allow boats past and into Australian waters. In early October 2001, the media carried accounts of asylum seekers, wearing life jackets, jumping and throwing their children overboard in the hope that the Australians would rescue them. Later reports suggested that the boat had been fired upon by Australian naval authorities prior to the boat being boarded by the Australians<sup>106</sup>. Still later, reports and a video emerged suggesting that the whole story was false. After the Federal election in November 2001 returned the Howard government to power, moves were made by the Opposition and minor parties in the Senate to institute a broad ranging inquiry into the affair<sup>107</sup>.

In the interim, the re-elected conservative government is adamant that it will maintain its hard line against asylum seekers arriving by boat. Boat people appended on Ashmore Reef and Christmas Island are no longer flown to mainland Australia for processing. Approaches are being made to a range of Pacific Island nations, using as a model the Nauru accord of aid packages and other payments in exchange for housing and processing asylum claims. The pressure being brought to bear on nations such as Papua New Guinea, Kiribati, Fiji, Tuvalu is reported to be the source of rising dissent in the region<sup>108</sup>.

Once again, real doubts exist as to whether Australia's current practices are in accordance with its international legal obligations. First, as noted earlier, Australia's ability to board foreign vessels outside of its maritime territory is limited at international law. Second, the Refugee Convention prohibits the return or *refoulement* of refugees either directly or indirectly to a place where they will face persecution. Interestingly, documents prepared for the Australian Parliament at the time the Border Protection Act was introduced were at pains to draw parallels between the Australian actions and moves by the United States to interdict illegal migrants emanating from Haiti and Cuba. Reference was made also to the establishment of holding and processing centres at Guantanamo Bay, the US-leased enclave in Cuba. The document made no reference to the many criticisms made of this program, or to the dreadful impact the interdictions had on the fugitives from Haiti, in particular<sup>109</sup>.

<sup>106</sup> See Senator Bob Brown, Media Release "Ruddock Unbelievable", Wednesday, 10 October 2001. Senator Brown suggests that the boat was fired on no less than 4 times before it was boarded by the Australians.

<sup>107</sup> See Kirsten Lawson "Senate may investigate treatment of boat people", *The Canberra Times*, November 12, 2001, accessible at: [http://canberra.yourguide.com.au/detail.asp?class=news&subclass=national&category=election%202001&story\\_id=106369&y=2001&m=11](http://canberra.yourguide.com.au/detail.asp?class=news&subclass=national&category=election%202001&story_id=106369&y=2001&m=11).

<sup>108</sup> Newsweek report suggested that the Foreign Minister of Papua New Guinea was sacked for opposing Australia's push to establish a "refugee market". See George Wehrfritz "Australia's refugee archipelago: Canberra diverts asylum seekers to remote holding camps in the South Pacific" *Newsweek*, November 12, 2001, accessible at: <http://www.msnbc.com/news/652501.asp>. See also "Tiny, sinking Tuvalu under pressure to take boat people", Australian Associated Press and Agence France Presse, November 13, 2001, accessible at: <http://www.smh.com.au/news/0111/13/national/national107.html>.

<sup>109</sup> See, for example, Symposium: "Refusing Refugees: Political and Legal Barriers to Asylum: Haitian Asylum Seekers: Interdiction and Immigrants' Rights" (1993) 26 *Cornell Int'l L. J.* 695. Note that the US Supreme Court upheld the legality of the interdiction program on the basis that neither US

Morally, Australia's stance has little to commend it. It is common knowledge that the vast majority of the Afghani and Iraqi asylum seekers are refugees in dire need of protection. There is no doubt that Australia is better equipped to offer protection than is Indonesia, the most recent transit country of most of the asylum seekers. The same is true with respect to transit countries such as Pakistan. Uncomfortable parallels can be found between Australia's behavior in repelling the boat people and what many Western countries did in refouling Jewish refugees before World War II<sup>110</sup>.

## V. The Entitlements of On-Shore Asylum Seekers and of Recognized Refugees

Australia's borrowings from Europe have not been confined to measures aimed at the deflection of asylum claims. It has also introduced a raft of measures that limit the nature of the protection given to refugees. In the European context, similar provisions seem to be used in countries where the protection of foreigners is tolerated as required by the Refugee Convention, but return is expected when circumstances in refugee's country of origin permit. The dissonance of the Australian provisions lies in the fact that the measures are not applied uniformly: not all persons recognized as refugees are afforded the same treatment.

The amendments to Australia's *Migration Act* 1958 in October 1999 effectively created two separate regimes for asylum seekers recognised as refugees. One applies to persons who enter the country on valid visas and provides for the immediate grant of permanent residence, with all the emoluments that flow from this status. These visa holders have immediate access rights to social security, education, settlement support, family reunion, work, language training and re-entry to Australia. The other regime is reserved for refugees who enter Australia unlawfully and allows for the grant of three year "temporary protection visas". Temporary visa holders are given basic income support and the right to work. They can also gain access to government-sponsored health care. However, they cannot leave the country without losing their right to live in Australia. Nor can they sponsor their families to join them – a restriction that many asylum seekers who have gone ahead as anchors for their families find unbearable. These temporary visa holders are also treated for educational purposes as overseas students, making them ineligible for education subsidies or for the 500 hours of English language training offered to other refugees.

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domestic law, nor the tenets of the Refugee Convention applied to extraterritorial actions taken by US marines. See *Sale v. Haitian Centers Council* 113 S Ct 2549 (1993). Justice Blackmun delivered a powerful dissent, following up with an article: see H. A. Blackmun "The Supreme Court and the Law of Nations" (1994) 104 *Yale L.J.* 39. See also the decision of the Inter-American Commission on Human Rights ordering the US to make reparations for breach of its international legal obligations: *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Report No. 51/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997). The case is available at: <http://www1.umn.edu/humanrts/cases/1996/unitedstates51-96.htm> (Accessed 01/01/02).

<sup>110</sup> See I. Abella and H. Troper, *None is Too Many*, (Toronto: Lester & Orpen Denny, 1986).

These changes have proved unpopular with Australia's State and Territory governments which have been left with the problem of caring for individuals who in the past have been accommodated within federal government programs<sup>111</sup>. The two-track system has also been widely criticized by Non-Government organizations on the ground that many features of the new system contravene Australia's international legal obligations. For example, it is arguable that the differential access to social security benefits contravenes the obligation in article 23 of the Refugee Convention to accord refugees the same treatment regarding "public relief and assistance" as Australian nationals receive. The ban on travel outside Australia could further violate article 28 of the Convention, which protects the freedom of movement of refugees.

Finally, it could be argued that the establishment of two systems constitutes the imposition of penalties on refugees due to their illegal entry, contrary to article 31 of the Refugee Convention. This is an argument that the Australian government rejects vigorously, saying that international law does not require more than the grant of temporary protection to refugees. The only problem with this official position is the fact that a distinction is made between refugees recognised in Australia *on the basis of the legality of their entry into the country*. The basis for the distinction would seem to be directly at odds with Article 31, if the word "penalty" is accepted to include a notion of lesser entitlement or constraint not otherwise applied.

At a practical level, there can be little doubt that the three-year visas will harm the refugees' prospects of settlement and create extra financial burdens on the Government. Temporary visa holders will have to be reassessed by the authorities after three years, creating an additional administrative burden. They will be required to demonstrate an ongoing fear of persecution, which is a real psychological barrier to the healing process crucial to refugee resettlement. In this respect the inability of the temporary visa holders to sponsor their families as migrants is most regrettable. International law may not require that refugees be *guaranteed* the right to family reunion. However, the family is recognised by the international community as the most fundamental unit in any society, deserving the highest level of protection. Family reunification is a crucial aspect of protecting the family unit when family members have been separated due to persecution. At another level, few refugees who remain separated from their closest family are able to settle into their new society effectively.

Australia has enacted other measures designed to deter asylum seekers, none of which finds parallel in New Zealand. For example, access to work rights is generally dependent on asylum seekers lodging a refugee claim within 45 days of arriving in Australia, although exceptions are made depending on a claimant's immigration status and the length of time taken to process the refugee claim<sup>112</sup>. As

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<sup>111</sup> All state and territory governments in Australia oppose the three-year temporary visa scheme, and a number of state governments have condemned the inadequacy of resettlement support for temporary visa holders, which is proving a stress for local charities.

<sup>112</sup> The relevant provisions are quite complex. Constraints are imposed on refugee claimants who are in Australia for more than 45 days in the 12 months immediately preceding the date on which a refugee claim is lodged. Persons who arrived on a valid visa and who apply after the 45 day period can seek

noted earlier, asylum seekers in New Zealand are granted a work permit more often than not upon arrival. If New Zealand's general practice is above reproach, Australia's restrictive laws again find depressing resonances in European laws and practices<sup>113</sup>.

## VI. The Detention Debate

There is one aspect of Australia's asylum laws and practice that bears little relation to developments in either Europe or New Zealand: the detention of asylum seekers. Although New Zealand introduced detention laws in 1999 that facilitate the detention of protection applicants, the operation of the New Zealand laws bear no resemblance to the practices adopted in Australia.

According to Rodger Haines QC, decisions to detain asylum seekers in New Zealand are generally met with adverse publicity, which may explain why the general practice is to release rather than detain. Having said this, there was at least one incident in recent times where a group of asylum seekers who arrived in New Zealand without documentation were taken into custody rather than issued with permits. The New Zealand Court of Appeal eventually upheld the detention (which by Australian standards was relatively short-lived anyway), rejecting arguments that procedural fairness required immigration officials to take a "presumptive" approach to the issue of temporary visas. The case is of particular interest because of the care taken by the Court in discussing the relationship between the New Zealand laws and guidelines on the detention of asylum seekers issued by the UNHCR<sup>114</sup>.

Australia developed a policy of detaining all persons who arrive in the country without authorization and who then seek admission in the late 1980s. It was only with the arrival of boat people from Cambodia, however, that the policy came to be translated into legislation mandating the detention of unauthorized arrivals<sup>115</sup>. In 1994, the law was changed again to make all non-citizens in Australia without a visa liable to detention and removal from the country<sup>116</sup>. The legislation appears to be universal on its face, but it is unequal in its operation. Detention is really only "mandatory" for undocumented arrivals<sup>117</sup>. Most unauthorized arrivals are taken into custody and are not released until they either qualify for a visa or leave the country. It

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permission to work if a decision is not made within 12 months. Further concessions are made for persons released from detention and who are able to demonstrate a compelling need to work. See the discussion in Crock, above n 23, Ch 7; and Savitri Taylor "Do On-Shore Asylum Seekers have Economic and Social Rights? Dealing with the Moral Contradictions of Liberal Democracy" (2001) 1 Melbourne Journal of International Law 71-97.

<sup>113</sup> See R. Cholewinski, "Economic and Social Rights of Refugees and Asylum Seekers in Europe" (2000) 14 Geo Immigr LJ 712.

<sup>114</sup> See *E v. Attorney General*, [2000] 3 NZLR 257 (C.A.). See also the commentary on the case at <http://www.refugee.org.nz/CourtOfAppeal/evag.htm>.

<sup>115</sup> See *Migration Act 1958*, Part 2, Div AK. M. Crock, *Protection or Punishment: The Detention of Asylum Seekers in Australia* (Sydney: The Federation Press, 1993).

<sup>116</sup> See *Migration Act 1958*, ss 189, 198.

<sup>117</sup> See s 72 of the *Migration Act 1958* (Cth) (the Act) and reg 2.20 *Migration Regulations 1994* (Cth).

is the asylum seekers who are most likely to spend a long time in detention even though exceptions are made for “eligible non-citizens”.

Those eligible for release are: children for whom release from detention is “in their best interests”; persons over 75 years of age; the spouses of Australian parties; and former victims of trauma or torture. In most cases, persons seeking release must show that adequate arrangements have been made to care for them upon release and that they will not abscond before the determination of their application. The problem in the case of the children is that it is rarely in their best interests to be separated from their parents<sup>118</sup>.

A simple reading of Australia’s laws also does not reveal the nature of the detention centres. While detention facilities exist in many of the major cities, most of the unauthorized boat arrivals are kept in detention facilities in remote and inhospitable parts of the country: at Woomera in South Australia – a site famed for rocket launching in the 1950s and 60’s; at Curtin Airbase - in the scrub and red dust of the Kimberley region, 200 kilometers out of Broome in Western Australia; and at Port Hedland, another Western Australian town built to sustain workers in the iron ore mining industry. All three of these centres were noted for the crudity of the accommodation when they were set up; the heat in summer and the cold in winter. The centres in these areas, as in the cities, are now run by Australian Correctional Management, a private consortium owned by America’s Wackenhut Corporation.

The almost instantaneous effect of the changes to the protection visa system in 1999 was a sharp rise in the number of children arriving by boat – with and without parents. The message appears to have been well heard that anyone wishing to gain refuge for their family in Australia should bring their family with them. This change in the profile of the undocumented arrivals was reflected in due course in a similar change in the population of immigration detainees. In early 1999 children in detention represented about 5% of detainees. By the end of that year they accounted for close to 20% of the population in custody. As well as creating innate management problems for the government, the high number of children in custody as ensured a loud chorus of complaints about the legality and inhumanity of Australia’s laws and practices<sup>119</sup>.

In spite of a series of government<sup>120</sup> and other reports<sup>121</sup> into the Australian detention centres and their operation, the most effective agents of change have been

<sup>118</sup> On this point, see D. Hansen and M. Le Sueur, “Separating Mothers and Children: Australia’s Gendered Immigration Policy” (1996) 21 *Alternative Law Journal* 56.

<sup>119</sup> This was acknowledged by at least one member of the Labor Opposition in August 2001 during a debate over the Border Protection Bill 2001. Note that the cynical view expressed by the government is that asylum seeker parents are deliberately sending their children as unaccompanied asylum seekers in an attempt to work on the emotions of the Australian people. See the comments of Andrew Theophanous, MP, Commonwealth Parliamentary Debates, *Hansard*, House of Representative, 29 August 2001, 7.16 pm.

<sup>120</sup> See, for example, Philip Flood *Report of an Inquiry into Immigration Detention Centre Procedures*, 27<sup>th</sup> February 2001. Available at <http://www.minister.immi.gov.au/detention/flood.htm>. Reports have also been prepared by an External References Group (not made public), as well as by two Parliamentary Committees. See Joint Standing Committee on Migration *Asylum*,



the detainees themselves. There have been a series of riots and disturbances in the centres. Although met in each instance with threats from the government, the actions of the detainees have plainly been instrumental in changes made to the operation of the centres and to the processing of refugee claims. In 2000, for example, breakouts and hunger strikes at the Curtin detention centre near Broome in Western Australia lead to improvements in processing times and in better food and general amenities<sup>122</sup>. The disturbances in the centres could also be seen as a prime factor in the move in May 2001 to establish a trial project to parole women and children into group homes in the Woomera township<sup>123</sup>. Having said this, rioting in the detention centres also lead to the passage of harsh new laws providing for heavy goal terms of 3 and 5 years for persons convicted of “detention related offences”<sup>124</sup>. Further changes in September 2001 then facilitated the denial of refugee protection of such offenders<sup>125</sup>.

Australia’s detention regime has now reached a point where changes will have to be made. Reference has been made already to the project allowing women and children to reside in group-homes in Woomera, with rights to visit their menfolk in the detention centre. The government admits to spending \$104 per detainee, per day on detention, with a bill of AUD\$96 million in 1999-2000 for a total population of just of 8,000 detainees<sup>126</sup>. Critics allege that the government’s figures are probably a gross underestimate of the real cost to the country<sup>127</sup>. One commentator has put the

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*Border Control and Detention* (February 1994); \_\_\_ *Report on inspection of immigration detention centres throughout Australia* (August 1998); \_\_\_ *Not The Hilton: Immigration Detention Centres Inspection Report, September 2000*. Reports available at <http://www.aph.gov.au/house/committe/mig/reports.htm>.

See also Joint Standing Committee on Foreign Affairs, Defence and Trade, Human Rights Subcommittee *A Report on Visits to Immigration Detention Centres*, June 2001. This last report is the most radical of all the reports prepared and is most strident in its criticism of the detention regime. Available at <http://www.aph.gov.au/house/committee/jfad/IDCVisits/IDCindex.htm>. A full listing of all the reports into detention is provided at Appendix B of this report.

<sup>121</sup> See the reports listed and accessible at the website for the Human Rights and Equal Opportunity Commission: [http://www.hreoc.gov.au/human\\_rights/asylum\\_seekers/index.html](http://www.hreoc.gov.au/human_rights/asylum_seekers/index.html). The Federal Ombudsman also prepared two reports on immigration detention in March 2001. See the reports listed and accessible at the website: [http://www.ombudsman.gov.au/publications\\_information/reports\\_publications.htm](http://www.ombudsman.gov.au/publications_information/reports_publications.htm).

<sup>122</sup> These developments were noted by the author in the report prepared by herself and Human Rights Commissioner, Chris Sidoti in July 2000. The report can be accessed at: [http://www.hreoc.gov.au/human\\_rights/asylum\\_seekers/index.html#Curtin](http://www.hreoc.gov.au/human_rights/asylum_seekers/index.html#Curtin).

<sup>123</sup> See MPS 60/2001, dated 25 May 2001. Available at [http://www.minister.immi.gov.au/media\\_releases/media01/index01.htm](http://www.minister.immi.gov.au/media_releases/media01/index01.htm).

<sup>124</sup> See *Migration Legislation Amendment (Immigration Detainees) Act* 2001, Schedule 1, inserting ss 197A – 197C of the *Migration Act* 1958.

<sup>125</sup> See the definition of “serious Australian offences” and related provisions introduced by the *Migration Legislation Amendment Act (No 6)* 2001, s 5, inserting s 91U into the *Migration Act* 1958.

<sup>126</sup> See Joint Standing Committee on Foreign Affairs, Defence and Trade, above note 120, at p30.

<sup>127</sup> Note that the \$96 million cited by the Department does not include the costs of capital works or the costs relating to the long-distance processing of asylum claims the Joint Standing Committee on Foreign Affairs, Defence and Trade records the numbers held in detention in 1999-2000 as 8109 and in 2000-2001 as 8401. The report does not provide a breakdown of how long each person was held in detention, but it records that in the second quarter of 1999/2000 it took 228 days or 7.5 months to process applications by 80% of boat arrivals. Processing times have since fallen. See above note 53, at pp 72, 75-6. The Australian National Audit Office produced a report in 1997 which presents a breakdown of detention costs in the mid 1990s. See [www.anao.gov.au](http://www.anao.gov.au).

annual cost as high as \$370 million<sup>128</sup>. What is not known is the long term cost of the detention policy on the lives of those detained – the vast majority of whom will remain in Australia. At the very least the detained refugees are leaving the system with mixed emotions about the government which cut their keys to freedom.

For those engaged in the fight to overturn Australia's punitive and – in the case of the child detainees – plainly illegal<sup>129</sup> - detention regime, it is a matter of some alarm that Britain's Labor government began to show an interest in emulating the Australian system in early 2001<sup>130</sup>. If the fiscal cost of the Australian regime is not enough to persuade Europe and North America of the folly of the arrangements in this country, it is to be hoped that the risk of riots and more generalized civil unrest should prove disincentives to emulation.

## VII. The Way Ahead

If there is any message that will emerge clearly from the present study, it is that mobile refugees are now truly a global phenomenon. While a country like Australia stands out for the way it is handling the modest number of asylum seekers that arrive on its shore, there is also a disturbing sameness in the way governments all around the world are responding to the humanitarian challenge presented by refugees.

The divergence in the approaches taken by Australia and New Zealand to the issue of asylum seekers may reflect the difference in the immigration needs and experiences of the two countries. Regrettably, the drifting apart of the two nations has not been confined to asylum policy. Australia used to treat New Zealanders in

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<sup>128</sup> See Adrienne Millbank "The Problem With the Refugee Convention" Research Paper No 5 2000-2001, Office of Parliamentary Library, available at <http://www.aph.gov.au/library/pubs/rp/2000-01/01RP05.htm>, endnote 44. See also this author's more recent paper, "The Detention of Boat People" Current Issues Brief 8, 2000-01, available at <http://www.aph.gov.au/library/pubs/cib/2000-01/01cib08.htm>.

<sup>129</sup> The UN Convention on the Rights of the Child contains a raft of provisions that are violated by Australia's policy of mandatory detention. For example, article 22 provides that "refugee" children (including asylum seekers) should "receive appropriate protection and humanitarian assistance in the enjoyment of their (Convention) rights and also other human rights and humanitarian instruments to which the State Party is a party". This provision incorporates by reference all the protections against arbitrary detention in the International Covenant on Civil and Political Rights. Under Article 3, in all its actions towards children Australia must make their best interests "a primary consideration". Unaccompanied asylum seeker children must be afforded "special protection and assistance" by the government: Article 20. Article 39 requires Australia to "take all appropriate measures to promote physical and psychological recovery" of all children in the country who are victims of torture or any other form of cruel, inhuman or degrading treatment or punishment or of armed conflict regardless of their nationality. See the Detention Centre Guidelines developed by the Human Rights and Equal Opportunity Commission: [http://www.hreoc.gov.au/human\\_rights/asylum\\_seekers/index.html#migration](http://www.hreoc.gov.au/human_rights/asylum_seekers/index.html#migration) accessed 10 January 2002.

<sup>130</sup> See comments made by Mr Jack Straw in "An Effective Protection Regime for the Twenty-first Century", Speech to Institute for Public Policy Research, London, 6 February 2001; Alan Travis and Ian Black, "EU looks at Straw's idea to curb migrants", *The Guardian* (UK), 7 February 2001.

almost the same way as it treated its own citizens<sup>131</sup> - New Zealanders were granted free passage in Australia, with full rights to work and receive social security benefits. Since 1 March 2001, new arrivals from New Zealand have been denied access to social security unless they can access permanent residence through one of the standard migration categories<sup>132</sup>. For its part, New Zealand has not imposed reciprocal restrictions on Australian citizens and holders of Australian residence permits who live in New Zealand. It may come as no surprise that one factor in Australia's decision to sever these traditional ties was the decision of the New Zealand government to call an amnesty for illegal migrants in that country<sup>133</sup>. The perception seems to have been in Australia that persons given residence in New Zealand would immediately migrate to Australia under the former "Exempt Persons" scheme. With at least some of those eligible for the amnesty being asylum seekers, the move was seen in Australia as counter productive in the fight to prevent asylum seekers from acting in contravention of basic immigration laws.

From an European and North American perspective, it is interesting to observe the dialogues that are occurring between the old countries and the new. In 2000, Australia took its turn as Chair of the Inter-Governmental Consultation for Asylum. It has made regular contributions to UNHCR Executive Committee meetings and in recent times has been an active advocate for "reform" of UN Committee procedures involving refugee issues<sup>134</sup>. If Australia is aware of what is happening in Europe, all the evidence suggests that the rest of the world is also aware of what is happening in Australia. UN High Commissioner for Refugee, Ruud Lubbers explains the central dilemma:

In Pakistan, I visited the infamous Jalozi camp, where thousands of Afghans are crammed together in inhumane and unsanitary conditions. When this camp appears on television screens in industrialized countries, there is – rightly – shock, sympathy and condemnation. But when one of these Jalozi Afghans is found hiding under a Eurostar train or arrives in a wealthy country on a leaky fishing vessel, they will suddenly cease to be an object sympathy and fall into that sweeping category of people branded "bogus and illegal"...a modern day version of the plague-rat.<sup>135</sup>

<sup>131</sup> Note that provision is made in the Australian Constitution for the incorporation of New Zealand into the Australian Commonwealth. See covering clause 6 and the discussion in J. Quick and R. R. Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney: Angus & Robertson, 1901) at 228.

<sup>132</sup> Note that a two-year waiting period now applies to all migrants to Australia other than those admitted through the humanitarian component of Australia's intake program. The changes are outlined at: [http://www.immi.gov.au/legislation/lc0201\\_1.htm](http://www.immi.gov.au/legislation/lc0201_1.htm).

<sup>133</sup> See the expressions of concern at MPS 96/2000, dated 19 September 2000, accessible at: [http://www.minister.immi.gov.au/media\\_releases/media00/r00096.htm](http://www.minister.immi.gov.au/media_releases/media00/r00096.htm). In this Statement the Minister expresses his concern over New Zealand's decision to call an amnesty.

<sup>134</sup> See MPS 100/2000, dated 30 September 2000, accessible at [http://www.minister.immi.gov.au/media\\_releases/media00/r00100.htm](http://www.minister.immi.gov.au/media_releases/media00/r00100.htm).

<sup>135</sup> See Lubbers, above note 93.

Given the hard-edged and protectionist agenda of the governments involved in these high-level consultations, it does indeed behoove the academy to embrace the globalization of its discourse. Academics need to search out the commonalties in the domestic responses of different countries – if only to act as advocate for the much maligned asylum seeker. In the aftermath of the catastrophic events in America on September 11 2001, the need for nations to unite in reaffirming the fundamentals of refugee protection has never been greater.