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No. 62 2001–02

**Border Protection (Validation and Enforcement
Powers) Bill 2001**

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

Bills Digest
No. 62 2001–02

Border Protection (Validation and Enforcement Powers) Bill
2001

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20 September 2001

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Border Protection (Validation and Enforcement Powers) Bill 2001

Date Introduced: 18 September 2001

House: House of Representatives

Portfolio: Immigration and Multicultural Affairs

Commencement: Royal Assent.

Purpose

- validate actions in relation to the *MV Tampa, Aceng* and any other vessel interdicted for immigration control purposes between 27 August 2001 and Royal Assent
- introduce mandatory minimum sentences for first and repeat offenders under the people smuggling provisions of the *Migration Act 1958*, and
- clarify and expand border protection powers, including search powers, under the *Migration Act 1958* and the *Customs Act 1901*.

Background

Border Protection #1

In 1999 amendments were passed to the *Migration Act 1958* and the *Customs Act 1901* to deal with people smuggling and some broader issues surrounding border protection.

People Smuggling

People smuggling was addressed by amendments to the *Migration Act 1958*.

The *Migration Legislation Amendment Act (No. 1) 1999* makes it an offence for a person to carry non-citizens to Australia without documentation.¹ It also makes it an offence for a person to organise or facilitate the bringing or coming to Australia of a group of 5 or more persons where s/he knows they would become illegal immigrants.² It is also an offence to present false or forged documents, to make false or misleading statements or to pass documents to help a group gain illegal entry into Australia.³ In addition, it is an offence for

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a person to make a false or misleading statement about his or her ability or power to influence a decision or to make a false or misleading statement about the effect of his or her actions on a particular decision.⁴ And it is an offence to enter an arrangement in which s/he undertakes for a reward that a particular decision will be made.⁵

Border Protection

Border protection was addressed by amendments to the *Migration Act 1958* and the *Customs Act 1901*.

The *Border Protection Legislation Amendment Act 1999* permits an Australian ship or a customs vessel to request to board a foreign ship within the 'territorial sea', 'contiguous zone' and, in limited circumstances, the 'high seas'. In the territorial sea the request may be made 'for the purposes of [the *Migration Act 1958* or *Customs Act 1901*]'.⁶ In the contiguous zone, it may be made in order to identify the ship or if the commander reasonably suspects that it 'is, will be or has been involved in a contravention, or an attempted contravention, in Australia of [the *Migration Act 1958* or *Customs Act 1901*]'.⁷ On the high seas a request may only be made if the commander reasonably suspects it is a 'mother-ship' that 'is being or was used in direct support of, or in preparation for, a contravention in Australia of [the *Migration Act 1958* or *Customs Act 1901*]',⁸ if it is registered with a country that has an arrangement with Australia⁹ or if it seems to be unregistered or flying the flags of two countries (a 'ship without nationality').¹⁰ A customs vessel may request to board a 'suspicious ship' within the 'exclusive economic zone'.¹¹

Where a request to board is ignored, the commander may pursue the foreign ship to 'any place outside the territorial sea of a foreign country'.¹² In the process, the officer may use any reasonable means consistent with international law including the use of necessary and reasonable force and, 'where necessary and after firing a gun as a signal, firing at or into the chased ship to disable it or compel it to be brought to for boarding'.¹³

Having boarded the ship in the 'territorial sea', an officer may search the ship, any goods found upon the ship and require any passenger to answer questions or produce documents. An officer may arrest a person s/he reasonably suspects has committed, is committing or attempting to commit, or is involved in the commission of, an offence against the *Migration Act 1958* or *Customs Act 1901* in Australia.¹⁴ A similar power exists over the 'contiguous zone' but may only be exercised in accordance with 'obligations of Australia under international law, including obligations under any treaty, convention or other agreement or arrangement between Australia and another country or other countries'.¹⁵

The officer may also detain a ship and bring it or cause it to be brought to a port if s/he reasonably suspects that the ship is, will be or has been involved in a contravention of the *Migration Act 1958* or *Customs Act 1901* in Australia.¹⁶ S/he may also detain a person aboard a detained ship and bring them or cause them to be brought within the 'migration zone'.¹⁷ On the high seas, but outside the territorial sea of other countries, s/he may exercise powers consistent with any arrangement 'which enables the exercise of Australian jurisdiction over ships of that country'¹⁸ and may search 'ships without nationality'.¹⁹

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Generally, these powers must be exercised by the commander of the ship or vessel. However, the boarding powers may be exercised by 'officers'. These 'officers' are defined as the crew of the Australian ship or customs vessel, members of the Australian Defence Force, and, for customs purposes, police officers.²⁰ Thus, there is no legislative power for these latter 'officers' to make requests to board, to chase and use force to board, etc.

In the context of the present Bill, it should be noted that there are few statutory powers to search people aboard ships²¹ and, while there are powers to detain and move ships, there is no express power to move people other than the power over persons aboard detained ships to bring them or cause them to be brought within the migration zone (subsection 245F(9)).

Border Protection #2

On 29 August the Prime Minister tabled the Border Protection Bill 2001. Essentially the Bill sought to put beyond doubt the domestic legal basis for actions taken in relation to foreign ships within the territorial sea of Australia. It sought to permit an 'officer' to direct the master of a ship or any person aboard any ship in any circumstance within the territorial sea to take it outside the territorial sea.²² It would have permitted an officer to use reasonable means to issue the direction and to use reasonable means,²³ including reasonable force, to detain the ship and to take it or cause it to be taken outside the territorial sea.²⁴

The Bill also sought to confine judicial review of the direction or enforcement action. It provided that the directions were not reviewable in any Australian court,²⁵ that proceedings may not be commenced in *any* court to prevent a ship or a person from being removed²⁶ and that civil or criminal proceedings in relation to any resulting enforcement action may not be brought *per se*.²⁷ In general terms it provided that the Bill overrides any other law.²⁸ It also sought to prevent visa applications from being made while a direction is in force, subject to a ministerial discretion to accept applications from specified individuals.²⁹

The Bill was rejected in the Senate. During the parliamentary debate and subsequently, the Opposition argued that the Bill was 'ill-considered, draconian and unconstitutional'³⁰ and would not necessarily resolve the legal issues surrounding *Tampa*.³¹ Labor offered to support '*Tampa* specific legislation' which would involve a safe haven for the rescuees.³² The Government countered with an offer to introduce a six month sunset clause.³³

The Tampa and The Federal Court

Background

On 26 August 2001, a routine surveillance flight by Coastwatch revealed the presence of a fishing boat approximately 80 nautical miles northwest of Christmas Island. The vessel was carrying 433 potential asylum seekers en route to Australia before it broke down. The following day Australian Search and Rescue (AusSAR) broadcast a call to any merchant ships in the vicinity to render assistance to the stricken vessel. A Norwegian freighter, the

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Tampa, responded to the call, intercepting the vessel and bringing its passengers aboard. The master of the *Tampa*, Captain Arne Rinnan, had intended to take the rescuees to a port in Indonesia but was requested by the passengers to proceed to Christmas Island. Before the *Tampa* reached Australia's territorial waters it was instructed to remain in the contiguous zone. On 28 August the *Tampa* issued a distress signal based on the fact that assistance had not been provided within 48 hours. On 29 August it proceeded into the territorial waters surrounding Christmas Island and was interdicted by 45 SAS members. The same day the Government introduced border protection legislation into Parliament.

On 31 August the Victorian Council for Civil Liberties Incorporated and Eric Vadarlis filed applications before North J in the Federal Court of Australia. The applicants sought a writ of *habeas corpus* (or an 'application for an order for release'³⁴); an injunction to restrain the expulsion of the rescuees from Australia; an order for mandamus compelling the executive to bring the rescuees into the migration zone pursuant to subsection 245F(9) of the *Migration Act 1958*; an order for mandamus compelling the executive to detain the rescuees pursuant to section 189 of the *Migration Act 1958*; and an injunction and order for mandamus to allow Mr Vadarlis to give legal advice to the rescuees.

On 7 September the HMAS *Warramanga* intercepted a second vessel bound for Ashmore Reef. It was boarded 'as a stateless vessel without a flag' and warned to turn around. Subsequently, the vessel was identified as an Indonesian fishing vessel, the *Aceng*. It was repeatedly boarded and the potential asylum seekers were transhipped to the *Manoora*.³⁵

On 11 September North J handed down his decision: *Victorian Council for Civil Liberties Incorporated v the Minister for Immigration and Multicultural Affairs*. He found that the applicants did not have standing to bring any of the applications, except in respect of the application for a writ of *habeas corpus*. On this issue he found that the rescuees had been unlawfully detained on the *Tampa* and ordered that they be brought to mainland Australia.

On 17 September the Full Bench of the Federal Court handed down its decision in relation to an appeal from the judgment of North J. In *Ruddock v Vadarlis*,³⁶ French J, with whom Beaumont J agreed, found that the Commonwealth had sufficient executive power to control the movement of the *Tampa* and that the rescuees had not been detained for the purposes of the *habeas corpus* writ. In dissent Black CJ found that the Commonwealth required specific legislative authority and that the actions constituted (unlawful) detention.

Issues

A key issue in the circumstances surrounding the *Tampa* and the *VCCL v MIMA* decision was the possibility that, upon their entry onto the mainland or territorial sea of Christmas Island, the rescuees might have access to protection visas and the judicial review system. A related issue was the need to promptly remove the *Tampa* from the territorial sea. Thus, a key issue in the circumstances surrounding the *VCCL v MIMA* decision and the Border Protection Bill 2001 was the power to control the movement of the ship and its passengers.

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The argument regarding the power to control the movement of the ship and passengers revolves around the issue of detention. Any power to control the movement of a ship or a person may, in the circumstances depending upon the level of control, involve detention. One of the findings made by North J in *VCCL v MIMA* was that the control exercised in relation to the rescuees on the *Tampa* and, by implication, the *Manoora* constituted detention for the purposes of the 'application for an order for release'. In short, North J rejected the argument that as the rescuees had brought the detention about by their own acts, or had some choice as to whether to leave the *Tampa* for Nauru or New Zealand, the control exercised over the ship and its passengers did not constitute detention. He stated that 'the distinction between partial and total restraint of freedom distracts the focus from the essential issue³⁷ being the 'effect of the restraint on the liberty of the person'.³⁸ In the totality of the circumstances, his Honour found that the control constituted detention.³⁹

A related issue, argued by Mr Vadarlis, the second applicant in *VCCL v MIMA*, was that the control exercised over the rescuees constituted 'immigration detention' for the purposes of the *Migration Act 1958* and that, on this basis, the rescuees were eligible to receive visa application forms, legal advice, etc. North J held that Mr Vadarlis did not have standing.⁴⁰

As indicated above, in the Full Federal Court decision, Beaumont and French JJ found that the control exercised in relation to the rescuees did not constitute detention. French J held that while there were practical constraints on the liberty of the rescuees, they 'derived from circumstances which did not come from any action on the part of the Commonwealth'.⁴¹ That is, the rescuees were unable to 'go elsewhere' from the *Tampa* primarily as a result of the circumstances surrounding their rescue and the seaworthiness of the *Tampa*. He noted that 'there is nothing to be gained by the use of such perjorative terms as "self-inflicted"'.⁴²

As a matter of domestic law, it might be assumed that ample power to control the movement of the *Tampa* and the rescuees would be available under:

- the powers introduced by the *Border Protection Legislation Amendment Act 1999*,
- the powers reflected in section 61 of the Constitution, or
- the measures proposed in the Border Protection Bill 2001.

The first proposition was not argued by the respondents in *VCCL v MIMA*. As indicated, the border protection provisions of 1999 allowed an officer to detain and move a ship if s/he reasonably suspected that it 'is, will be or has been involved in' a contravention of the Act. In addition, once the ship was detained, the provisions allowed the officer to 'detain any person who is found on the ship' and to 'bring them ... to the migration zone'. The applicants argued that no reasonable grounds existed for suspecting that the ship would be involved in a contravention of the Act (by attempting to offload the rescuees). Moreover, they argued that the express power to detain persons aboard a detained boat carried with it a duty to bring them into the migration zone. Perhaps in light of this argument, the respondents submitted that no actions were taken under the border protection provisions.

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The second proposition on executive power was rejected by North J. He found that it was a fundamental common law and constitutional principle that the executive does not have a free floating power to detain persons, including aliens. However, the respondents argued that there was a prerogative power to expel aliens from territorial waters and that this power carried with it a power to detain (non-resident) aliens for that purpose. This was rejected by North J on the basis that there was no distinction between resident and non-resident aliens,⁴³ that the prerogative was doubtful⁴⁴ and that, in any event, the prerogative had been overridden by the measures introduced by the border protection provisions.⁴⁵

As indicated above, on appeal, the majority found that the Commonwealth did have an executive power to detain aliens for border protection purposes. French J said '[i]n my opinion, the executive power of the Commonwealth, absent statutory extinguishment or abridgement, would extend to a power to prevent the entry of non-citizens and to do such things as are necessary to effect such exclusion'.⁴⁶ His conclusion was based on the accepted view that the power in section 61 'enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution'⁴⁷ and his own view that '[t]he power to determine who may come to Australia is so central to its sovereignty that it is not to be supposed that the Government of the nation would lack ... the ability to prevent people not part of the Australian community from entering'.⁴⁸ In expressing this view, he acknowledged that '[t]he Australian case law does not resolve the question before this Court'.⁴⁹ Broadly, the various authorities cited by the respondents had been decided in the context of statutory powers rather than purely executive powers.

In addition, Beaumont J expressed the view that the Federal Court was not invested with the power to issue a writ of *habeas corpus*⁵⁰ and, as a result, expressed doubt as to whether North J should have accepted that the respondents had standing on this issue.⁵¹ He also questioned the ability of North J to issue an order requiring not only that the rescuees be released but that they be brought to Australia.⁵² In any event, he queried whether a court ought to grant any discretionary relief on the basis that the rescuees had acted in bad faith by 'practically compelling [the] *Tampa* to divert from Indonesia to Christmas Island'.⁵³

The third proposition continues to be argued by academic and political commentators. On 11 September the Acting Prime Minister said of the Border Protection Bill in light of North J's decision '[m]y understanding is that it would have put the matter beyond doubt'.⁵⁴ By contrast, on the same day the Shadow Attorney-General stated that the Bill 'provided no lawful authority for the detention of those aboard the *Tampa*' and that the movement of the rescuees from the *Tampa* to the *Manoora* 'was not even contemplated by [it]'.⁵⁵ Later that day, two constitutional law experts publicly endorsed the latter interpretation.⁵⁶ The difference of opinion is the implication from the judgment that the control exercised over the rescuees constituted detention which required specific statutory authority and that a statutory power to detain a ship does not carry a power to detain persons aboard the ship.

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Border Protection #3

On 18 September the Minister for Immigration and Multicultural Affairs introduced the Border Protection (Validation and Enforcement Powers) Bill 2001. Broadly, this Bill seeks to address the issues left outstanding from the above discussion:

- validation of the actions taken in respect of the *Tampa* and the *Aceng*, and any other vessels interdicted before further border protection legislation is passed,
- the power to search, detain and move persons aboard ships that have been boarded and detained under the border protection provisions discussed above,
- the involvement of Australian Defence Force personnel and others in relation to requests to board ships, chasing, etc.

The Bill also seeks to set mandatory minimum sentences for people smuggling offences.

Main Provisions

Validation

Part 2 deals with validation of actions surrounding the *Tampa*, *Aceng* and other vessels.

Proposed sections 5 and 6 deem to be lawful any action taken by the Commonwealth, its officers or agents in relation to the *Tampa*, *Aceng* or other vessels interdicted during the 'validation period', or the period between 27 August 2001 and the date of Royal Assent. The validation applies to action in respect of the vessels and the persons on board.

Proposed section 7 provides that civil or criminal proceedings in relation to any resulting enforcement action may not be brought against the Commonwealth, its officers or agents. Moreover, it provides that such proceedings, including proceedings that were instituted before the measures commence, may not be continued in any court.

The proposed immunity is both wider and narrower than the immunity contained in the Border Protection Bill 2001. In the earlier provisions, the immunity extended to officers or agents but only where they acted 'in good faith'. No such limitation exists in this Bill. Conversely, the earlier provisions included 'privative'⁵⁷ and 'cover the field' clauses.⁵⁸ These clauses have been removed and the High Court's original jurisdiction is preserved.⁵⁹

Proposed section 8 provides for compensation for acquisition of property. 'Acquisition of property' has the same meaning as in paragraph 51(xxxi) of the Constitution. It is worth noting that the compensation must be 'reasonable' and no reference is made to the constitutional requirement that compensation be on 'just terms'. Broadly, this equates with a requirement that the compensation be timely and objectively fair in the circumstances.⁶⁰ It may be sufficient if the value is equal to a reasonable market price for the property.⁶¹

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Customs Act

Schedule 1 amends the *Customs Act 1901* to address the issues relating to power to search, detain and move persons and the use of military personnel in border protection.

Items 1 and 5 seek to empower military personnel in relation to the making of requests to board ships and the movement or destruction of ships that have been detained.

Item 2 extends the areas to which an officer may move a detained ship. Currently, where a ship is detained it may be brought 'to a port, airport or other place'. **Item 2** would extend this to encompass the bringing of boats within the territorial sea or contiguous zone. Where a foreign ship has been detained after a request to board in the territorial sea,⁶² contiguous zone⁶³ or high seas⁶⁴ it may be brought from any place, depending on the circumstances but including the high seas, into the territorial sea or contiguous zone.

Item 3 repeals and replaces subsection 185(3A) which deals with the power to detain persons on board detained ships.

Proposed subsection 185(3AAA) deals with the issue in *VLLC v MIMA* that detention of a ship implicitly involves detention of persons on board that ship. It deems that any detention of a person resulting from detention from a ship is 'not unlawful'. It also confers a civil and criminal immunity on the Commonwealth, its officers and agents.

Proposed subsection 185(3A) deals with the argument in *VLLC v MIMA* that the express power to detain persons aboard a detained boat carried with it a duty to bring them into the migration zone. It permits such persons to be taken to 'a place outside Australia'. There may be live questions in international law regarding the authority under which foreign persons may be removed beyond the territorial sea or contiguous zone of Australia. In the absence of consent, this might be characterised as the unlawful exercise of a personal jurisdiction over those persons. In particular, there may be an issue in relation to persons who are detained on board ships interdicted in the exclusive economic zone or high seas. The issue arises due to the disjunction between the permission or tacit permission that may arise in relation to ships covered by an arrangement or ships without nationality and the permission that would arguably be required in relation to the persons on board those ships.

Proposed subsection 185(3AA) complements **proposed subsection 185(3A)**. It provides an express power to move persons for the purposes of **proposed subsection 185(3A)**. The power has an unlimited geographical jurisdiction. That is, it may be exercised 'within or outside Australia'. As above, this may create a live issue at international law.

Proposed section 185(3AB) confers civil and criminal immunity on the Commonwealth, its officers and agents in relation to action taken under **proposed subsection 185(3AA)**. Significantly, the immunity is limited by a requirement that the action must be taken 'in good faith' and must involve 'no more force that [is necessary and reasonable]'.

Proposed section 185AA deals with searches of persons on board ships detained under subsection 185(3) or persons moved pursuant to **proposed subsection 185(3A)**. The

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amendments allow what is sometimes called an ordinary search to be carried out. That is, strip searching is not permitted (**proposed section 185AA(4)**). Personal searches can be carried out by officers and other persons.

Proposed subsection 185AA(2) spells out the purposes for which a new section 185AA search can be carried out—that is, to discover whether the person has a weapon or thing that might be used to inflict injury or assist in an escape. Such items, if found, can be removed by the officer (**proposed section 185AA(3)**).

Proposed section 185AA contains some safeguards for the person being searched. For instance, the person conducting the search must be of the same sex as the detainee, and an officer or other person who conducts such a search ‘must not use more force, or subject a person to greater indignity, than is reasonably necessary in order to conduct the search’.

The search regime in **proposed section 185AAA** is akin to that in section 252 of the *Migration Act 1958*. However, it lacks some of the safeguards present in the other similar regime under section 219L of the *Customs Act 1901*. For example, there is no requirement that an officer have reasonable grounds for suspecting that a person is carrying a weapon.

Proposed section 185AB provides for the return of persons to detained ships, provided the relevant officer or agent ‘is satisfied that it is safe to return the person to the ship’. As with **proposed subsection 185(3AA)** there is an unlimited geographical jurisdiction.

Migration Act

Schedule 2 amends the Migration Act 1958 to canvass the issues discussed above, along with other issues arising out of *VLLC v MIMA*.

Item 1 addresses the argument in *VLLC v MIMA* that detention under the border control provisions amounts to ‘immigration detention’ for the purposes of the *Migration Act 1958*.

Item 2 inserts **proposed section 7A** to expressly preserve any aspects of powers reflected in section 61 of the Constitution that may be affected by the new measures. Thus, the Commonwealth retains its inherent executive power to expel foreign ships and persons.

Item 5 inserts **proposed section 233B** which prohibits a court from making an order under section 19B of the *Crimes Act 1914* except in relation to minors. Section 19B permits a court to dismiss charges or discharge an offender without conviction where the personal attributes or background of the offender, the seriousness of the offence or the existence of extenuating circumstances make it ‘inexpedient to inflict any punishment [or] any nominal punishment’, or ‘expedient to release the offender on probation’.

Item 5 inserts **proposed section 233C**, a related provision, which introduces minimum mandatory custodial sentences for (adult) people smuggling offenders. A first offence is subject to a minimum prison term of 5 years. The minimum for repeat offenders is 8 years. Significantly, there are no comparable provisions in any other Commonwealth legislation.

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The remaining provisions broadly duplicate the proposed amendments to the *Customs Act 1901*.

Concluding Comments

It was suggested in the Main Provisions section of this Digest that there may be live issues in international law relating to the proposed powers with respect to persons on board ships.

Australia's Maritime Jurisdiction

In describing Australia's maritime jurisdiction, a distinction can be drawn among what may be called *prescriptive*, *enforcement* and *adjudicative* powers. Within this distinction a further distinction can be drawn between *physical* and *personal* jurisdiction:⁶⁵

- *prescriptive powers*: The common law gives the Commonwealth a power to enact laws having an extraterritorial effect. The Constitution also gives the Commonwealth a power to enact laws with respect to matters that are external to Australia.
- *enforcement powers*: International law gives Australia a jurisdiction to enforce its laws within a prescribed distance of its coast arising out of its territorial sovereignty and 'sovereign rights' recognised in international law (*physical jurisdiction*). It also recognises a jurisdiction to enforce laws upon its own citizens or own ships arising out of the nexus between a sovereign nation and its citizens (*personal jurisdiction*).
- *adjudicative powers*: International law generally recognises a jurisdiction to prosecute offenders located within Australia where there is a sufficient link between Australia and the alleged criminal conduct. The principles are generally recognised in common law.

These distinctions are not always rigidly followed in international law or constitutional law. However, they do provide a useful template for considering jurisdictional issues.

Prescriptive Powers

At common law, it is generally accepted that the States and the Commonwealth may enact laws having an extraterritorial effect so as to secure 'peace, order and good government'.⁶⁶ Thus, the Commonwealth has a power to control overseas acts of its citizens,⁶⁷ and the States and the Commonwealth have the power to control overseas acts of foreigners where they come within the physical limits of Australia.⁶⁸ There need only be a link between the subject matter of a statutory offence and the enacting government.⁶⁹ Similarly, under the Constitution, the Commonwealth has the power to enact legislation dealing with matters, things, circumstances and persons outside Australia, provided there is sufficient connexion between Australia and the matters, etc to which the law relates.⁷⁰ The power is not confined to laws that are consistent with the general requirements of international law,⁷¹ or

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with the legislative competence recognised by international law.⁷² Although, there may be a presumption that a statute will not interfere with the sovereignty of other nations.⁷³

Enforcement Powers

The 1982 *United Nations Convention on the Law of the Sea* ('UNCLOS') gives Australia certain rights over foreign ships that enter into the maritime zones:

- *Internal Waters*: a country may enforce laws with respect to any issue within its internal waters. It may arrest any person or investigate any crimes committed within the internal waters (except vessels and persons subject to sovereign immunity).⁷⁴
- *Territorial Sea*: foreign ships generally have a right of 'innocent passage' through the territorial sea. Equally, a criminal jurisdiction 'should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime' committed during passage through the territorial sea.⁷⁵ However, a state has a right of visit over ships entering the territorial sea (see below). It may also adopt laws and regulations to prevent infringement of its 'customs, fiscal, immigration or sanitary laws and regulations'.⁷⁶ It may arrest persons or investigate crimes aboard foreign ships passing through the territorial sea after leaving internal waters.⁷⁷ It may even exercise these powers in respect of crimes committed before the ship entered the territorial sea but only if it has entered the internal waters.⁷⁸ It may arrest persons or investigate crimes on board merchant ships and government ships operated for commercial purposes passing through the territorial sea where the consequences of the crime extend to the state or where the crime disturbs the 'peace of the country or the good order of the territorial sea'.⁷⁹ Acts that disturb the 'peace, etc.' of the coastal state include 'the loading or unloading of any commodity, currency or person' contrary to its immigration laws and regulations.⁸⁰
- *Contiguous Zone*: a state may exercise the control necessary to punish or prevent 'infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea'.⁸¹
- *Exclusive Economic Zone*: a state may exercise a limited jurisdiction over foreign ships whilst exercising its sovereign rights to 'explore, exploit, conserve and manage the living resources in the 'exclusive economic zone''.⁸² A state may arrest and detain foreign vessels for violations of fisheries laws and regulations but it may not imprison persons without a specific agreement with the 'flag state'.⁸³ A state may also exercise a jurisdiction over artificial islands (eg offshore installations) with respect to 'customs, fiscal, health, safety and immigration laws and regulations'.⁸⁴ It may establish safety zones around these installations up to 500m and exercise a limited jurisdiction to ensure the safety of structures and navigation.
- *Continental Shelf*: enforcement is limited to the exercise of sovereign rights 'for the purpose of exploring it and exploiting its [non-living] natural resources'.⁸⁵ The status of

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the waters above the shelf is unaffected⁸⁶ and there is no reference to criminal jurisdiction.

- *High Seas*: enforcement is limited to rights of 'hot pursuit' and 'visit'. The former allows warships to pursue and detain a foreign ship beyond the territorial sea or contiguous zone if they reasonably believe that it has violated the laws of the state.⁸⁷ The latter allows warships to board a foreign ship where there is reasonable ground to suspect that it is a 'ship without nationality',⁸⁸ or is engaged in piracy or slave trading.⁸⁹

Adjudicative Powers

International law recognises a jurisdiction where a valid nexus exists between the alleged criminal conduct and the state. The nexus will exist if the offence occurs or the offender is present within the territory ('territorial principle') and where the results of the conduct are felt within the territory ('extra-territorial principle'). It may also recognise a jurisdiction based on the offender's nationality ('nationality principle'), the victim's nationality ('passive personality principle') and the need to protect the interests of the state (the 'protective principle'), but there is a degree of uncertainty.⁹⁰ These powers are closely related to the enforcement powers above which deal with the 'territorial principle',⁹¹ the 'extra-territorial principle'⁹² and, to a limited extent, the 'protective principle'.⁹³

These principles are generally recognised in domestic jurisprudence, within the limits outlined above. So, for example, the common law explicitly recognises the categories of 'territorial jurisdiction'⁹⁴ and 'extra-territorial jurisdiction'.⁹⁵ Except in relation to the Commonwealth, it would not ordinarily recognise the 'passive personality principle'.⁹⁶ Neither would it ordinarily recognise the 'protective principle', although there have been cases in which, having recognised an extraterritorial jurisdiction over a principal offence, it has recognised a jurisdiction over inchoate offences, such as attempt and conspiracy. This has occurred on the basis that intended results or the intended victim were within the territory and it was necessary to protect 'peace, order and good government'.⁹⁷ More recently it has recognised a wider extraterritorial jurisdiction over ordinary and inchoate offences where there is a 'real and substantial link' between the offence and the territory. This approach has been adopted in Canada in relation to overseas offences⁹⁸ and has recently been endorsed in Australia in relation to interstate offences.⁹⁹ (But there may be doubt as to whether this approach would or should apply to international offences.¹⁰⁰)

Compliance Issues

Clearly, most of the powers contained in the *Border Protection Legislation Amendment Act 1999*, the *Border Protection Bill 2001* and the *Border Protection (Validation and Enforcement Powers) Bill 2001* are drafted to be consistent with the above principles.

However, at least one academic commentator has implicitly suggested that the power to detain and remove foreign ships to places beyond Australia may be inconsistent with international law. In relation to the *Tampa* incident, Jean-Pierre Fonteyne, Senior Lecturer in International Law at the Australian National University, stated that '[f]orcibly sailing the

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Tampa back to international waters is not a feasible nor a legal proposition, as Australian officials would lose any basis of authority over the vessel the moment it left Australian waters, when control over the vessel would have to be returned to the captain'.¹⁰¹

This proposition is reflected in the requirements in UNCLOS and the *Border Protection Legislation Amendment Act 1999* that the power to board and detain foreign ships beyond the territorial sea and contiguous zone generally only arises in respect of 'mother-ships', ships covered by agreements or arrangements and 'ships without nationality'. In the first instance, it is a case of a general physical jurisdiction. In the second and third instances it is a case of a specific personal jurisdiction, which is an exception to general principles.

Moreover, may be arguable that the power to detain and move persons to places beyond Australia is also inconsistent with international law. While a physical jurisdiction may be exercised over ships within the territorial sea and contiguous zone (and mother-ships on the high seas), the limitations described by Jean-Pierre Fonteyne which apply to the ship would seem to apply to the passengers. Moreover, while a personal jurisdiction may be exercised over ships covered by agreements or arrangements or ships without nationality, that personal jurisdiction would not seem to extend to the passengers. For example, while Australia may be given a personal jurisdiction over ships by agreement with Indonesia, it would also need a jurisdiction over the passengers by agreement with their country.

It is worth noting that in the *Tampa* litigation, the parties agreed that no arguments would be made on the basis that 'the status of any alleged detention ... on board the ... *Manoora* is different to the status of any alleged detention on board the ... *Tampa*'.¹⁰² Thus, the parties effectively ignored any issues surrounding executive power beyond the territorial sea and the nature of the control exercised over persons removed to places outside Australia. In *Ruddock v Vadarlis*, French J acknowledged that his finding on the executive power to exclude did not address the wider issues associated with detention and movement of foreign persons offshore.¹⁰³ He also acknowledged that detention is a question of fact. Arguably, the judges may have decided differently if the focus had been on the *Manoora*. During the journey of the *Manoora* to Nauru, it might be argued, the Commonwealth acted beyond any executive power to expel aliens and unlawfully detained the rescuees. Clearly, this argument would be negated if this Bill becomes law.

Other Issues

Emerging International Law

Internationally, 'people smuggling' has become a hot topic in the context of pressure to control transnational organised crime. It has received the attention of the General Assembly,¹⁰⁴ the Secretary General,¹⁰⁵ the Economic and Social Council¹⁰⁶ and the International Maritime Organisation.¹⁰⁷ Countries have been urged to review their domestic legislative powers to deal with people smuggling offences.¹⁰⁸ In recognition of the connection between people smuggling and transnational crime, it is now the subject of a proposed protocol to a draft international convention on transnational organised crime.¹⁰⁹

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However, while the statements and draft protocol encourage States to exercise their jurisdiction to the fullest extent, they do not encourage States to exceed their jurisdiction under UNCLOS. Neither is there any suggestion that their jurisdiction will be enlarged. States are simply encouraged to exercise a *personal* jurisdiction over any of their citizens or ships involved in 'people smuggling' and to exercise a *physical* jurisdiction over foreign ships only insofar 'as is recognised under international law'.¹¹⁰

Ships Without Nationality

As indicated above, UNCLOS confers a right to board 'ships without nationality' on the high seas. However, UNCLOS is otherwise generally silent on these ships. There are suggestions that States may exercise a *personal* jurisdiction over such ships. This may be critical as these ships appear to be the common vehicle for people smuggling rackets and are likely to be targeted by any emerging international law on organised crime.¹¹¹

United States Analogy

Overview

In the United States, 'people smuggling' has long been an issue of concern and has been addressed by presidential directives and specific legislative amendments. As early as 1953 President Truman instructed the government to adopt a coordinated response to illegal immigration.¹¹² In 1981 President Reagan directed government agencies to interdict on the high seas vessels carrying would be illegal immigrants.¹¹³ President Bush gave a similar direction in 1992,¹¹⁴ as did President Clinton in 1993.¹¹⁵ In 1996 amendments were made to the Immigration and Nationality Act to increase penalties for people smuggling and to the Racketeer Influenced Corrupt Organizations Act to prescribe people smuggling and related offences as organised crime offences.¹¹⁶ In 1998 legislation was introduced to authorise the forfeiture of alien smuggling proceeds.¹¹⁷ The International Crime Control Strategy of 1998 suggests that the government is increasing its commitment to the issue.¹¹⁸

The Immigration and Nationality Act makes it an offence for a person to bring an illegal immigrant into the United States¹¹⁹ or to assist another person in doing so.¹²⁰ It is an offence to prepare or present false or forged documents for the purpose of assisting an illegal immigrant to enter the United States.¹²¹ The Illegal Immigration Reform and Immigration Responsibility Act includes both types of offences as 'racketeer offences' (organised crime offences) within the Racketeer Influenced Corrupt Organizations Act.¹²²

As indicated, in 1981 President Reagan issued directions, in accordance with the Immigration and Nationality Act,¹²³ allowing the US Coast Guard to interdict 'people smuggling' vessels on the high seas. The authority specifically targeted US ships, ships of foreign nations with whom previous arrangements had been made for boarding and 'ships without nationality'.¹²⁴ Also, as indicated, President Bush issued similar directions in 1992. They targeted also US ships, foreign ships subject to previous arrangements and 'ships without nationality'.¹²⁵ Also, as indicated, in 1993 President Clinton issued directions

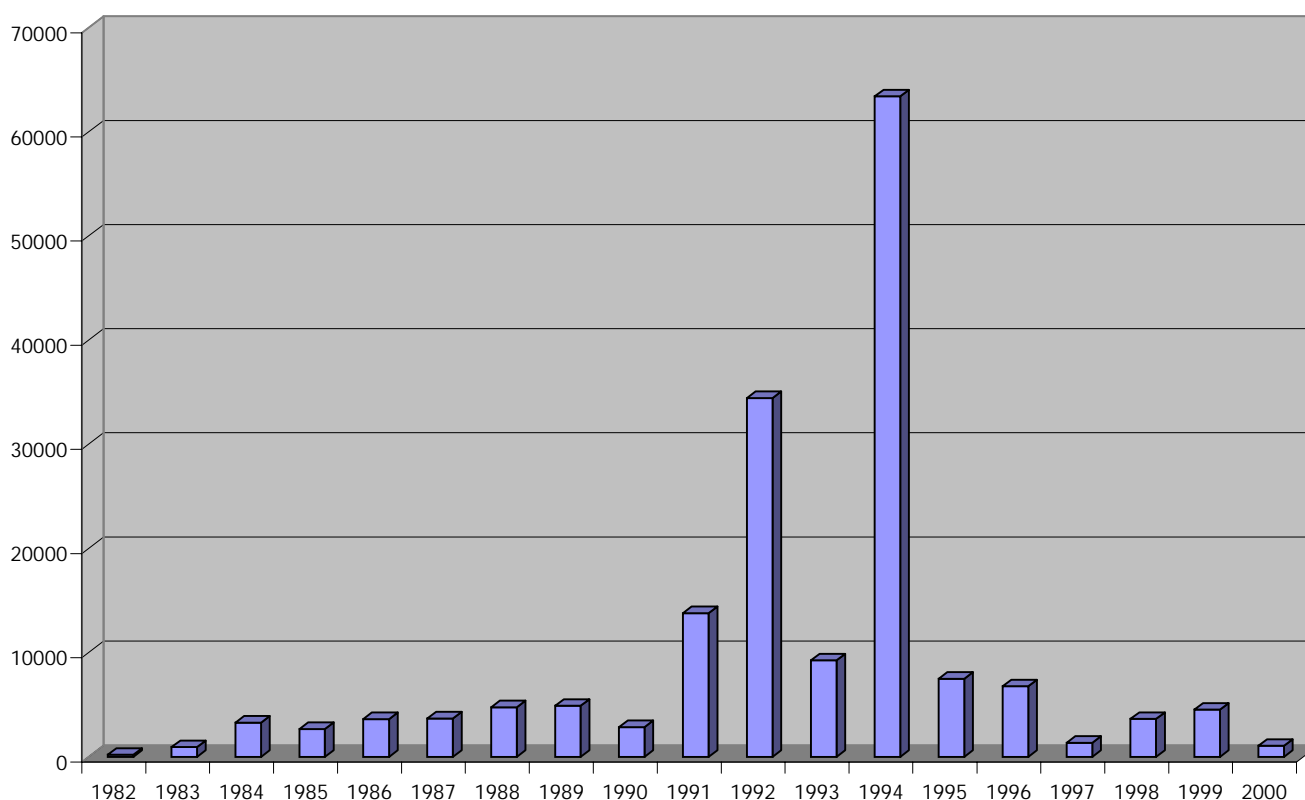
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providing for the offshore processing of illegal immigrants.¹²⁶ Following these directions a significant number of illegal migrants were interdicted at sea (see following graph).

Illegal Migrants Interdicted at Sea (US Coast Guard 1982-2000)¹²⁷



Onshore and Offshore Asylum Seekers

There is a distinction between illegal immigrants who are interdicted offshore and those who apply within the territory of the United States. The distinction is between immigrants who are 'seeking admission' and those who are 'in and admitted to the United States'.

Originally, the *Immigration and Nationality Act* provided for a single process which applied to persons who were 'in the United States'. Under amendments made in 1996,¹²⁸ a person who is not 'in and admitted to the United States' is treated as an 'applicant for admission'. An 'applicant for admission' is a person who arrives at a port-of-entry without proper entry documents or is interdicted at sea. The Act also allows the Attorney-General to designate particular aliens as 'applicants' in some circumstances even if they are in the United States. All such applicants are liable to 'expedited removal'.

If applicants do not indicate that they intend to apply for asylum, they are removed 'without further hearing or review'. Otherwise, they interviewed as to whether they have a

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'credible fear of persecution'. If they fail they must be removed 'without further hearing or review'.¹²⁹ If they succeed they must be detained pending a final determination regarding their 'credible fear of persecution'. In theory, most if not all illegal immigrants, whether interdicted offshore or apprehended within the United States, could be deemed to be 'applicants for admission'. However, in practice all illegal immigrants who make it to United States territory are processed under the regular refugee determination system.

Illegal immigrants who are interdicted offshore are taken to a third country or a United States 'trust territory' for processing. These places include Guantanamo in Cuba, the Mariana Islands and Midway, but not Guam or the Virgin Islands which form part of the United States.¹³⁰ As at 1998, the United States was negotiating with Mexico to reach an agreement allowing assessment within Mexican waters and repatriation via Mexico.

It is difficult to get accurate information on agreements between the United States and processing countries or countries of origin. However, it is understood that in several cases, 'jurisdiction' over foreign ships in international waters has been exercised under the *Safety of Life at Sea* (SOLAS) regulations established by the International Maritime Organisation. Otherwise, jurisdiction has been obtained by consent in individual cases.

Search Powers

A number of types of personal search are provided for in Commonwealth statutes. In ascending level of intrusiveness, these include ordinary searches, frisk searches (also known as pat down searches), strip searches (also known as external searches) and internal searches (also known as body cavity searches).¹³¹ In general, the greater the level of intrusiveness the greater the amount of protection afforded the person who is to be searched.

An 'ordinary search' is defined in the Crimes Act as a search of a person or items in their possession which may include requiring the person to remove outer garments and then examining those garments.¹³²

A 'frisk search' is defined in the Crimes Act as a search of the person that involves running hands over the person's outer garments and examining anything worn or carried by the person that is easily and voluntarily removed by that person.¹³³

A 'strip search' is defined in the Crimes Act as a search of a person or items in their possession which may include requiring the person to remove all or some of their clothing and examining the person's body (but not body cavities) and garments.¹³⁴ The expression 'external search' is used in the *Customs Act 1901* instead of the expression 'strip search' for a search of the body of, or anything worn or possessed by a person.¹³⁵

An 'internal search' is defined in the Customs Act as 'an examination (including an internal examination) of the person's body to determine whether the person is internally concealing a substance or thing, and includes the recovery of any substance or thing suspected on reasonable grounds to be so concealed'.¹³⁶

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Mandatory Sentencing

The ultimate object of criminal law is to protect the community from crime. But there are many other relevant considerations. Community protection is a primary consideration in sentencing,¹³⁷ but it will be weighed against the personal characteristics and circumstances of the offence and the offender.¹³⁸ The common law does not sanction arbitrary detention. It requires proportionality between the period of detention and the gravity of the crime.¹³⁹ Neither does it sanction preventative detention. It does not accept excessive periods of detention for the sole purpose of protecting the community from repeat offenders.¹⁴⁰ Indeed, imprisonment is generally considered a sentence of last resort¹⁴¹ and a court will generally strive to impose the minimum sentence necessary to protect the community.¹⁴²

The common law principles are underscored by a number of international instruments. For example, the *International Covenant on Civil and Political Rights* (ICCPR)¹⁴³ prohibits arbitrary detention¹⁴⁴ and require that sentences must be reviewable by appellate courts.¹⁴⁵

It has been argued that mandatory detention laws offend the separation of powers. The argument is that by prescribing sentences, parliament is interfering with the judicial discretion and thereby undermining the independence and integrity of the judiciary. The separation of powers doctrine is not enshrined in State and Territory constitutions and, while there has been some recent speculation, has no real application to State courts.¹⁴⁶ However, the argument has been raised in relation to the Northern Territory Supreme Court on the basis that it operates under some constitutional peculiarities.¹⁴⁷ To date, the High Court refused to hear the argument¹⁴⁸ and its strength has recently been undermined in *Re The Governor, Goulburn Correctional Centre; Ex parte Eastman*.¹⁴⁹

Endnotes

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- 1 Section 229.
 - 2 Section 232A.
 - 3 Section 233A. Also sections 22, 23 and 234.
 - 4 Section 334.
 - 5 Section 335.
 - 6 *Migration Act 1958*, subsection 245B(2); *Customs Act 1901*, subsection 184A(2). If the request is made by the commander of a customs vessel, the request 'may be made for the purposes of an Act prescribed by the regulations consistently with [the 1982 *United Nations Convention on the Law of the Sea*]: subsection 184A(2). The *Fisheries Management Act 1991* is prescribed for the purpose of this provision. It is prescribed under reg. 167 the Customs Regulations 1926, which was inserted by item 1 of the Customs Amendment Regulations 1999 (No. 5), No. 323 of 1999, of 15 December 1999.

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- 7 *Migration Act 1958*, subsection 245B(4), *Customs Act 1901*, subsection 184A(4). Again, the request 'may be made for the purposes of an Act prescribed by the regulations consistently with [the 1982 *United Nations Convention on the Law of the Sea*]'.
- 8 *Migration Act 1958*, section 245B(5); *Customs Act 1901*, section 184A(5).
- 9 *Migration Act 1958*, section 245B(6); *Customs Act 1901*, section 184A(8).
- 10 *Migration Act*, proposed s 245B(7); *Customs Act 1901*, section 184A(9).
- 11 That is, ships which the master reasonably suspects 'is, will be or has been involved in a contravention, or an attempted contravention, in Australia's exclusive economic zone of an Act prescribed by the regulations consistently with UNCLOS': *Customs Act 1901*, subsection 184A(6).
- 12 *Migration Act 1958*, subsection 245C(1), *Customs Act 1901*, subsection 184B(1).
- 13 *Migration Act 1958*, subsection 245C(6); *Customs Act 1901*, subsection 184B(6).
- 14 *Migration Act 1958*, paragraph 245F(3)(f); *Customs Act 1901*, paragraph 185(2)(d). Again, the request 'may be made for the purposes of an Act prescribed by the regulations consistently with [the 1982 *United Nations Convention on the Law of the Sea*]'.
- 15 *Migration Act 1958*, subsection 245F(4); *Customs Act 1901*, subsection 185(2A).
- 16 *Migration Act 1958*, paragraph 245F(8)(c); *Customs Act 1901*, subsection 185(3).
- 17 *Migration Act 1958*, subsection 245F(9); *Customs Act 1901*, subsection 185(3A).
- 18 *Migration Act 1958*, subsection 245G(4); *Customs Act 1901*, subsection 185A(4).
- 19 *Migration Act 1958*, subsection 245G(6); *Customs Act 1901*, subsection 185A(6).
- 20 *Migration Act 1958*, subsection 245F(18); *Customs Act 1901*, subsection 185(5).
- 21 Section 252 of the *Migration Act 1958* permits searches of a person's clothing and possessions where they have been detained aboard a detained vessel within the territorial sea. Such searches may only be done for the purposes of finding out whether s/he has a weapon or a document or thing that may be evidence for grounds for cancelling the person's visa. Section 219L of the *Customs Act 1901* permits frisk searches of persons who have been detained aboard a detained vessel within the territorial sea where an officer reasonably suspects that the person is carrying prohibited goods or weapons: subsections 219L(1A) and (1B).
- 22 **Proposed subsection 4(1).**
- 23 **Proposed subsection 4(3).**
- 24 **Proposed section 5.**
- 25 **Proposed subsection 4(2).**
- 26 **Proposed section 8.**
- 27 **Proposed section 7.**
- 28 **Proposed section 10.**
- 29 **Proposed section 9.**

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- 30 Robert McClelland, MP, 'Government Declares Own Bill Unconstitutional', Press Release, 31 August 2001.
- 31 Robert McClelland, MP, 'Ministers Wrong on Border Protection Bill', *Press Release*, 2 September 2001; Robert McClelland, MP, 'Border Protection Bill Would Not Have Stopped Court Action', *Press Release*, 4 September 2001; Kim Beazley, MP, *Transcript of Doorstop Interview, South Perth*, 4 September 2001.
- 32 Kim Beazley, MP, *Transcript of Doorstop Interview, Parliament House*, 30 August 2001.
- 33 Kim Beazley, MP, *Transcript of Doorstop Interview, Parliament House*, 30 August 2001.
- 34 *Victorian Council for Civil Liberties Incorporated v the Minister for Immigration and Multicultural Affairs* [2001] FCA 1297, para 50.
- 35 John Howard, MP, *Transcript of Doorstop Interview, Sydney Airport*, 8 September 2001.
- 36 [2001] FCA 1329.
- 37 *VCCL v MIMA*, per North J, at para. 63.
- 38 *VCCL v MIMA*, per North J, at para. 83.
- 39 The key finding was contained in the body of the judgment and repeated in the covering statement: 'In my view the evidence of the respondents' actions in the week following 26 August demonstrate that they were committed to retaining control of the fate of the rescuees in all respects. The respondents directed where the MV Tampa was allowed to go and not to go. They procured the closing of the harbour so that the rescuees would be isolated. They did not allow communication with the rescuees. They did not consult with them about the arrangements being made for their physical relocation or future plans. After the arrangements were made the fact was announced to them, apparently not in their native language, but no effort was made to determine whether the rescuees desired to accept the arrangements. The respondents took to themselves the complete control over the bodies and destinies of the rescuees. The extent of the control is underscored by the fact that when the arrangements were made with Nauru, there had been no decision as to who was to process the asylum applications there or under what legal regime they were to be processed. Where complete control over people and their destiny is exercised by others it cannot be said that the opportunity offered by those others is a reasonable escape from the custody in which they were held. The custody simply continues in the form chosen by those detaining the people restrained': *VCCL v MIMA*, per North J, at para. 81.
- 40 *VCCL v MIMA*, per North J, at para. 161.
- 41 *Ruddock v Vadarlis*, per French J, at para. 213.
- 42 *Ruddock v Vadarlis*, per French J, at para. 212.
- 43 *VCCL v MIMA*, per North J, at para. 117.
- 44 *VCCL v MIMA*. North J referred to a statement by Barton J in *Robetelmes v Brenan* (1906) 4 CLR 395 that '[t]he question today is one of statutory authority' (at p. 415); a similar statement by Davies J in *Mayer v Minister for Immigration and Ethnic Affairs* (1984) 4 FCR 312; and by a statement in Harry Street and Rodney Brazier, *de Smith Constitutional and*

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- Amdinistrative Law*, 5th Edition, Penguin 1985 that '[w]hether the exclusion or expulsion of friendly aliens was permissible under the prerogative is doubtful' (at pp. 149–150).
- 45 *VCCL v MIMA*, per North J, at para. 122. . The basic rule is that 'where a statute, expressly or by necessary implication, purports to regulate wholly the area of a particular prerogative power or right, such power or right is, as to its exercise, governed by the provisions of the statute, which are to prevail in that respect' John Goldring, 'The Impact of Statutes on the Royal Prerogative; Australasian Attitudes as to the Rule in *Attorney General v De Keyser's Royal Hotel Ltd*', *Australian Law Journal*, Vol 48, p. 434 at p. 437. See also *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508; *Barton v Commonwealth* (1974) 131 CLR 477.
- 46 *Ruddock v Vadarlis*, per French J, at para. 193.
- 47 *Barton v The Commonwealth* (1974) 131 CLR 477, per Mason J, at p 498.
- 48 *Ruddock v Vadarlis*, per French J, at para. 193.
- 49 *Ruddock v Vadarlis*, per French J, at para. 194.
- 50 *Ruddock v Vadarlis*, per Beaumont J, at para. 101.
- 51 *Ruddock v Vadarlis*, per Beaumont J, at para. 107.
- 52 *Ruddock v Vadarlis*, per Beaumont J, at para. 104.
- 53 His Honour said: 'in order to persuade a court to grant any form of discretionary relief, the occupants would need to confront the principle, as Lord Scarman has explained, that it is wrong that a person should rely on his or her own unlawful act (here, in practically compelling MV Tampa to divert from Indonesia to Christmas Island) to secure an advantage which could not have been obtained if the person had acted lawfully (see *Shah and Akbarali v Brent London Borough Council* [1983] 2 AC 309 at 344)': *Ruddock v Vadarlis*, at para. 107.
- 54 John Anderson, MP, 'Anderson defends the Tampa case', Transcript of Interview, 7.30 Report, 11/09/01 at <http://www.abc.net.au/7.30/s363818.htm>.
- 55 Robert McClelland MP, 'Tampa Decision: Government Needs Lawful Basis For Holding Of Tampa Asylum Seekers', *Media Release*, 11/09/01
- 56 'I think George [Williams] and I make a principle of never agreeing on anything, but we certainly agree on this. It just doesn't seem that the Border Protection Act anticipated this particular problem. Whatever else it legalised, it didn't legalise detention, and therefore, going back to it on its own terms is not going to solve that particular problem' Professor Greg Craven, Transcript of Interview, *Lateline*, 11/09/01.
- 57 **Proposed subsection 4(2)** of the Border Protection Bill 2001 provided that '[a] direction ... must not be called into question, or challenged, in any proceedings in any court in Australia'.
- 58 **Proposed section 10** Border Protection Bill 2001 provided that '[t]his Act has effect in spite of any other law'.
- 59 **Proposed section 9** provides that nothing in Part 2 'is intended to affect the jurisdiction of the High Court under section 75 of the Constitution'.
- 60 *Peverill v Health Insurance Commission* (1991) 104 ALR 449.

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- 61 *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495.
- 62 That is, 'for the purposes of [the *Migration Act 1958* or *Customs Act 1901*]: *Migration Act 1958*, subsection 245B(2); *Customs Act 1901*, subsection 184A(2).
- 63 That is, in order to identify the ship or if the commander reasonably suspects that it 'is, will be or has been involved in a contravention, or an attempted contravention, in Australia of [the *Migration Act 1958* or *Customs Act 1901*]: *Migration Act 1958*, subsection 245B(4), *Customs Act 1901*, subsection 184A(4).
- 64 If the commander reasonably suspects it is a 'mother-ship' that 'is being or was used in direct support of, or in preparation for, a contravention in Australia of [the *Migration Act 1958* or *Customs Act 1901*]' (*Migration Act 1958*, section 245B(5); *Customs Act 1901*, section 184A(5)), if it is registered with a country that has an arrangement with Australia (*Migration Act 1958*, section 245B(6); *Customs Act 1901*, section 184A(8)) or if it seems to be unregistered or flying the flags of two countries (a 'ship without nationality') (*Migration Act 1958*, proposed s 245B(7); *Customs Act 1901*, section 184A(9)).
- 65 See generally D. O'Connell, *The International Law of the Sea Vol. II*, Clarendon Press, Oxford, 1984, Chapter 24 and Ivan Shearer in S. Blay, R. Piotrowicz and B.M. Tsamenyi, *Public International Law: An Australian Perspective*, Oxford University Press, Melbourne, 1997, pp 162-164.
- 66 *Croft v Dunphy* [1933] AC 156.
- 67 *Bonser v La Macchia* (1969) 122 CLR 177, per Windeyer J at 226.
- 68 *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1936) 56 CLR 337, per Dixon J at 375.
- 69 *Pearce v Florenca* (1976) 135 CLR 507 at 518.
- 70 This power draws from the external affairs power in s 51(xxix) of the Australian Constitution which was discussed in *Polyukovich v The Commonwealth* (1991) 172 CLR 501.
- 71 *Polities v The Commonwealth* (1945) 70 CLR 60 and *Fishwick v Cleland* (1960) 106 CLR 186.
- 72 *Horta v The Commonwealth* (1994) 181 CLR 183 at 195.
- 73 *R v Treacy* [1971] AC 537, per Diplock LJ at p 561; *Libman v The Queen* [1985] 2 SCR 178, per La Forest J at 208-214.
- 74 See generally *Halsbury's Laws of Australia*, 'Title 215 – Foreign Relations' [215-175].
- 75 Article 27(1).
- 76 Article 21.
- 77 Article 27(2).
- 78 Article 27(5).
- 79 Article 19(2).

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- 80 Article 19(2)(g).
- 81 Article 33.
- 82 Article 73(1).
- 83 Article 73(3). A 'flag state' is a ship's country of registration.
- 84 Article 60(2).
- 85 Article 77(1).
- 86 Article 78(1).
- 87 Article 111.
- 88 That is, it is not registered under the laws of another country.
- 89 Article 110.
- 90 See generally Shearer, *op cit*, pp 165-179; Matthew Goode, 'The Tortured Tale of Criminal Jurisdiction', *Melbourne University Law Review*, vol. 21(2), pp 411-459 at pp 413-414 ['Goode, 1997(b)']; and *Halsbury's Laws of Australia*, 'Title 215 – Foreign Relations' [215-380 and 215-385].
- 91 The power to arrest persons and investigate crimes within the 'internal waters' and 'territorial sea' (relating to the loading and unloading of commodities) are examples of the 'territorial principle'.
- 92 The power to arrest persons and investigate crimes within the 'territorial sea' (relating to disturbing the peace) is an example of the 'extra-territorial principle'.
- 93 The powers to prevent the infringement of immigration laws within the 'contiguous zone' and the 'exclusive economic zone' are examples of the 'protective principle'.
- 94 *Broken Hill South Ltd (Public Officer) v Commissioner of Taxation (NSW)* (1937) 56 CLR 337 per Dixon J at 375; *Mynott v Barnard* (1939) 62 CLR 68 per Latham CJ at 75 and Starke J at 89; *Helmert v Coppins* (1961) 106 CLR 156. See also *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1.
- 95 *Ward v R* (1980) 142 CLR 308.
- 96 *Lipohar v The Queen; Winfield v The Queen* [1999] HCA 65 (9 December 1999), per Kirby J, at para 178. This is because individuals do not have any particular status as residents of a State or Territory in contrast to the Commonwealth of Australia which is a unique legal entity having its own criminal jurisdiction and being recognised in international law.
- 97 *Liangsiriprasert v United States* [1991] 1 AC 225 at 251; *R v Manning* [1999] QB 980 at 1000; *Lipohar*, *op cit*, per Gleeson CJ at para 35; per Gaudron, Gummow and Hayne JJ at para 123; per Callinan J at para 269. Although the approach in *Liangsiriprasert* was criticised in Goode, 1997(b), p. 436 and *Lipohar*, *op cit*, per Kirby J, paras 175-176. The previous cases were *Board of Trade v Owen* per Tucker LJ, at 625-626 (conspiracy to defraud); *Department of Public Prosecutions v Doot* [1973] AC 807, per Wilberforce LJ at pp 817-818 and Salmon LJ at p. 832-833 (conspiracy to defraud); *DPP v Stonehouse* [1977] 2 All ER 909 (attempt). See also comments in *R v Hansford* (1974) 8 SASR 164, per Wells J at p. 195; *McNeilly v*

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The Queen (1981) 4 A Crim R 46; *R v Millar* [1970] 2 QB 54; *R v El-Hakkaoui* [1975] 2 All ER 146 discussed in Goode, 1997(b), op cit, at pp 433-436. Aside from *Liangsiriprasert* all of these cases could be viewed as examples of crimes where some element of the principal offence occurred within the territory.

- 98 *Libman v The Queen* [1985] 2 SCR 178.
- 99 *Lipohar*, op cit, per Gleeson CJ at para 35; per Gaudron, Gummow and Hayne JJ at para 123; per Callinan J at para 269.
- 100 For example, in a recent discussion paper, the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General called for submissions on this issue on the basis that 'it can be argued that the quite extensive geographical extension to the criminal jurisdiction of a State and Territory advocated in this Discussion Paper are more clearly appropriate to intra Australian cases and not international cases': MCCOC, *Chapter 4: Damage and Computer Offences – Discussion Paper*, January 2000, p. 177: http://law.gov.au/publications/Model_Criminal_Code/damage.pdf [13/03/00].
- 101 Jean-Pierre Fonteyne, 'Australia's obligations quite clear', *The Canberra Times*, 31/08/01.
- 102 See paragraph 6 of the agreement contained in *Ruddock v Vadarlis*, per French J at para. 145.
- 103 His Honour said that the finding as to the power to exclude 'does not involve any conclusion about whether the Executive would in the absence of statutory authority have a power to expel non-citizens other than as an incident of the power to exclude': *Ruddock v Vadarlis*, at para. 193.
- 104 *Measures for prevention of the smuggling of aliens*, Resolution 51/62 of 12 December 1996.
- 105 *Oceans and the law of the sea, Report of the Secretary-General*, Document A/52/487, 20 October 1997; *Oceans and the law of the sea, Report of the Secretary-General*, Document A/53/456 5 October 1998; Unedited, advance text of the report of the Secretary-General to the 54th General Assembly on "Oceans and the law of the sea" (agenda item 40), United Nations A/54/... General Assembly Dist. General ... October 1999.
- 106 *Official Records of the Economic and Social Council*, 1998, Supplement No. 10 (E/1998/30), annex III.
- 107 International Maritime Organisation Assembly, Resolution A.867(20); Report of the 76th session of the IMO Legal Committee, October 1997, LEG 76/12
- 108 Ibid, Article 6.
- 109 Draft Protocol against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Draft Convention against Transnational Organized Crime, 13 May 1999, A/AC.254/4/Add.1/Rev.1.
- 110 'The measures which coastal States can take under the Convention to suppress this type of criminal activity include: exercising criminal jurisdiction on board a foreign ship passing through the territorial sea (article 27); punishing in the contiguous zone the infringement of immigration laws and regulations committed within a State's territory or territorial waters (article 33); exercising the right of hot pursuit of a foreign ship which has violated the immigration laws and regulations of the State (article 111); exercising the right of visit where

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- a ship is without nationality or conceals its true nationality (article 110); and enforcing the relevant provisions of the Convention in respect of seaworthiness': *Oceans and the law of the sea, Report of the Secretary-General*, Document A/53/456 5 October 1998, para 136.
- 111 'Usually the ships, many of them converted fishing vessels, that are used for illegally transporting migrants are not seaworthy, dangerously overcrowded and otherwise unsafe. Many of these vessels are without nationality': *Oceans and the law of the sea, Report of the Secretary-General*, Document A/53/456 5 October 1998, para 135.
- 112 Proclamation 3004, 'Control of persons leaving or entering the United States', January 17, 1953, 18 FR 489, 3 CFR, 1949-1953 Comp., p 180.
- 113 Proclamation 4865, 'High seas interdiction of illegal aliens', September 29, 1981, 46 FR 48107, 3 CFR, 1981 Comp., p 50. Executive Order 12324, 'Interdiction of illegal aliens', September 29, 1981, 46 FR 48109, 3 CFR, 1981 Comp., p 180.
- 114 Executive Order No.12807, 'Interdiction of Illegal Aliens', May 24 1992, <http://www.uscg.mil/hq/g-o/g-opl/mle/eo12807.pdf> [03/03/00]. This Executive Order replaced Executive Order 12324. It appears to be current as at 30 March 2000.
- 115 Presidential Decision Directive No. 9, June 18, 1993, op cit.
- 116 Illegal Immigration Reform and Immigration Responsibility Act, Title II: Enhanced Enforcement And Penalties Against Alien Smuggling; Document Fraud.
- 117 International Crime Control Act.
- 118 'The Administration plans to enhance border law enforcement through deployment of advanced detection and monitoring capabilities and investment of greater resources': *International Crime Control Strategy – June 1998*, Chapter 1 Introduction and Overview, at <http://www.fas.org/irp/offdocs/iccs/iccestoc.html>.
- 119 Section 273 (8 USC 1323).
- 120 Section 274 (8 USC 1324). The offence of aiding and abetting was inserted by the Illegal Immigration Reform and Immigration Responsibility Act.
- 121 Section 274C (8 USC 1324c). Increased penalties were inserted by the Illegal Immigration Reform and Immigration Responsibility Act.
- 122 Section 202 (18 USC 1961(1)).
- 123 Sections 212(f) and 215(a)(1) of the *Immigration and Nationality Act 1952* (8 U.S.C. 1182(f) and 1185(a)(1)) give the President authority, if s/he thinks it is in the national interest, to prescribe conditions or limitations or exceptions on the entry of aliens into the United States. The United States Code can be searched at: <http://www4.law.cornell.edu/uscode/>.
- 124 Executive Order 12324, section 2(b).
- 125 Executive Order 12807, section 2(b).
- 126 Presidential Decision Directive 9, June 18, 1993, op cit. The practice under these directions has been to interdict 'people smuggling' vessels at sea and process illegal immigrants outside the United States in places such as Guam or the island of Tinian in the Commonwealth of the Northern Mariana Islands: 'Statement of Bo Cooper, Acting General Counsel Immigration

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and Naturalization Service Department of Justice before the House Subcommittee on Immigration and Claims Committee on the Judiciary, on a hearing regarding Hr 1745, Hr 238 and Hr 945, Tuesday, May 18, 1999 at <http://www.house.gov/judiciary/coop0518.htm>.

127 Source: United States Coast Guard Office of Law Enforcement, 'Various Statistics', at <http://www.uscg.mil/hq/g-o/g-opl/mle/amiostats1.htm#cy> [10/4/00].

128 *Illegal Immigration Reform and Immigrant Responsibility Act* of 1996: <http://www4.law.cornell.edu/uscode/8/1225.text.html> [25/9/00].

129 Although there is provision for review on application by an immigration judge within 7 days.

130 For the purposes of the *Immigration and Nationality Act*.

131 There are also provisions the Crimes Act for forensic procedures.

132 Section 3C.

133 Section 3C.

134 Section 3C.

135 While the relevant provisions in the Customs Act do not refer to a person being required to remove some or all of their clothing, the power to conduct an external search is said to be equivalent to a power to strip search.

136 Section 4.

137 See generally *Halsbury's Laws of Australia*, 'Title 130 – Criminal Law' [130-17000].

¹³⁸ *Lowe v R* (1984) 154 CLR 606 at 612.

139 *Veen v R* (1979) 143 CLR 458; *Veen v R* (No 2) (1988) 164 CLR 465; *Hoare v R* (1989) 167 CLR 348.

140 *Veen v R* at 468 per Mason J, at 482-3 per Jacobs J; *Veen v R* (No 2) at 473; *Chester v R* (1988) 165 CLR 611, at 618.

141 See generally *Halsbury's Laws of Australia*, 'Title 130 – Criminal Law' [130-17050].

142 *ibid.*, [130-17000].

143 The ICCPR was adopted by the UN General Assembly in 1966 and came into operation in 1976. Australia signed it on 18 December 1972 and ratified it on 13 August 1980. Australia signed the First Optional Protocol on 25 September 1991. The First Optional Protocol came into effect on 1 December 1991.

144 ICCPR, Article 9(1).

145 ICCPR, Article 14(5).

146 The issue of separation of powers and the need for public confidence in the independence of State courts was discussed in *Kable v DPP (NSW)* (1996) 189 CLR 51. See also Peter Johnson and Hardcastle, 'State Courts: The Limits of Kable', 1998, *Sydney Law Review* 214.

147 The argument suggests that the doctrine is either implicit in the *Self Government Act* or that judicial power in the Northern Territory is exercised subject to the Commonwealth

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Constitution: See *Wynbyne v Marshall* (1997) 117 NTR 11 and the discussion in Martin Flynn, 'Fixing a sentence: Are there any constitutional limits?', *University of New South Wales Law Journal*, 22(1), 1999, pp 280-285, at p 283.

148 See the transcript of *Wynbyne v Marshall* D174/1997
[<http://www.austlii.edu.au/au/other/hca/transcripts/1997/D174/1.html>]
13 September, 1999.

149 [1999] HCA 44, 2 September, 1999.

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