



Current Issues Brief  
No. 5 2001–02

## Refugee Law—Recent Legislative Developments

ISSN 1440-2009

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Published by the Department of the Parliamentary Library, 2001

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Refugee Law—Recent Legislative Developments

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Law and Bills Digest Group  
18 September 2001

## Acknowledgments

The author would like to thank Professor John McMillan of the Australian National University for his assistance in preparing this Current Issues Brief.

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## Major Issues

In what may be the last two sitting weeks of the 39th Parliament, the Government will be responding to the outcome of the Full Federal Court decision in *Ruddock v Vadarlis*. This is the appeal from the decision of Justice North which has led to the preparation of this Current Issues Brief. The summary of decision was delivered on 17 September 2001 and full judgement expected on 18 September 2001.

Issues before the Parliament in these two crucial sitting weeks include the Government's proposal to excise Christmas Island and Ashmore Reef, and more recently, Cocos Island from the migration zone. The purpose behind these proposals is to prevent persons arriving by way of sea from being able to apply for protection visas under Australian law. Christmas Islanders are calling on the United Nations to intervene in the Federal Government's plans to make changes to the migration zone under the *Migration Act 1958*.

Following the Government's concern as to the interpretations of the courts in refugee law, the Migration Legislation Amendment Bill (No. 6) 2001 is listed for debate to bring a definition of 'persecution' within the *Migration Act 1958*. The Government wishes to address this as it is critical of the 'increasingly broad interpretations' being given by the courts to Australia's protection obligations under the Refugees Convention and Protocol.

Further the Parliament will be considering in debate and possible legislation the ability of Australia to control its borders. This issue has been highlighted by the introduction on 29 August 2001 of the Border Control Protection Bill 2001 which failed to pass the Senate on the same day and by the Federal Court decision of *MIMA v VCCL*. In the latter, one of the issues was the existence of an executive or prerogative power to expel persons from Australian territorial waters in the absence of any statutory authority to do so. Justice North found this not to be the case. In overturning North J's decision, the majority of the Full Court held that the Commonwealth was acting within its executive power under section 61 of the Constitution in the steps it took to prevent the landing of the rescuees.

The issue of detention was also a major argument before the Federal Court and will continue to be of interest to Parliament. Justice North found that the rescuees on board the Tampa had been detained and therefore ordered their return to Australia. There are existing provisions in the migration laws for the detention of persons, and mandatory detention for people who arrive in Australia unlawfully, but the Commonwealth had not sought to rely on the statutory regime in its arguments before the Court. A majority of the Full Federal Court have overturned this aspect of Justice North's decision and concluded

that the rescuees were not detained by the Commonwealth or their freedom restricted by anything that the Commonwealth did.

Finally Parliament will be considering the related issues associated with people smugglers who provide the boats and crew to bring the boat people to Australia.



## Introduction

Over the past decade a large number of amendments have been made to the *Migration Act 1958* for the purposes of restricting onshore access to Australia's humanitarian migration program. The measures which have been proposed include enhanced border protection powers, restructuring of unlawful entry arrangements, mandatory detention of illegal non-citizens, codification of merits review and restriction or ouster of judicial review. A brief overview of legislation proposed between 1992 and 2001 is provided in Appendix 6.

More recent legislative proposals include targeted border protection powers, excision of areas from the migration zone for the purpose of protection visa applications and partial codification of the definition of refugee for the purpose of protection visa processing. The more recent proposed legislation is discussed below in this Current Issues Brief.

To some extent the measures have been and continue to be under threat from the courts. In gross terms there has been a battle between government policy setting and the rule of law. One academic commentator has spoken of 'ongoing conflict between ministers for immigration and the Federal Court involving public criticism of the judiciary by politicians and more subtle criticism of public policy by individual judges.'<sup>1</sup> It is in this context of action and reaction that the current legislative proposals are situated. In the wider context is an apparently exponential increase in the number of 'unauthorised arrivals by sea' and thus onshore applications for protection visas under the *Migration Act 1958*.

### The Tampa

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 *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'<sup>2</sup>); 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 1 September the Prime Minister announced that agreement had been reached between Australia, New Zealand and Nauru for processing of asylum claims and that arrangements were planned for transshipment through a 'third country' (Papua New Guinea).<sup>3</sup> Pursuant to this agreement the rescuees were removed from the *Tampa* to HMAS *Manoora*.

The applications were heard over the weekend and the following week. Initially an injunction prevented the rescuees from being removed from the *Tampa*. This was followed by an agreement between the parties that none of the rescuees would be removed from or required to leave the *Manoora*, except by consent for the purpose of transportation to a third country, until the proceedings, and any Full Federal Court appeal, were determined.<sup>4</sup>

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*.<sup>5</sup>

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 *Minister for Immigration and Multicultural Affairs v Vadarlis*,<sup>6</sup> a majority of Beaumont and French JJ 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 in relation to the rescuees constituted (unlawful) detention.

## Proposed Legislation

### Recent Proposals

#### Detention Powers

On 5 April 2001 the Minister for Immigration and Multicultural Affairs introduced the Migration Legislation Amendment (Immigration Detainees) Bill 2001. This Bill increased the penalty for escaping from immigration detention, made it an offence for immigration detainees to manufacture or possess weapons, established a regime for strip searching immigration detainees, and introduced security monitoring provisions governing visitors to detention centres. The strip search provisions were rejected by the Senate and the remainder passed (*Migration Legislation Amendment (Immigration Detainees) Act 2001*). The rejected provisions were modified and on 27 June they were reintroduced in the form of the Migration Legislation Amendment (Immigration Detainees) Bill (No. 2) 2001.

At the time of writing the Detainees Bill (No. 2) was still before Parliament.

#### Definition of 'Persecution'

On 28 August the Minister for Immigration and Multicultural Affairs introduced the Migration Legislation Amendment Bill (No. 6) 2001. Basically, this Bill seeks to address two separate and unrelated issues of concern, verifying the identity and claims made by unauthorised arrivals, and the interpretation given to the definition of 'refugee' and 'persecution' within the 1951 *Convention relating to the Status of Refugees*. Specifically, it defines some of the key phrases and concepts used in the definition of refugee, but not the majority. Those defined are 'persecution', the causal link 'by reason of', and one of the five 'Convention grounds' of persecution—'membership of a particular social group'. It also requires that conduct by a person once in Australia shall in normal circumstances be disregarded in considering whether the person has a 'well-founded fear of persecution'.

In the Second Reading Speech for the Bill, the Minister for Immigration and Multicultural Affairs stated that 'the domestic interpretation of our obligations has broadened out under cumulative court decisions so that Australia now provides protection visas in cases lying well beyond the bounds originally envisaged by the [Refugees Convention]'. These 'generous interpretations' he added 'encourage people who are not refugees to test their claims in Australia, adding to perceptions that Australia is a soft touch'.<sup>7</sup>

## Border Protection Provisions

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.<sup>8</sup> It would have permitted an officer to use reasonable means to issue the direction and to use reasonable means,<sup>9</sup> including reasonable force, to detain the ship and to take it or cause it to be taken outside the territorial sea.<sup>10</sup>

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,<sup>11</sup> that proceedings may not be commenced in *any* court to prevent a ship or a person from being removed<sup>12</sup> and that civil or criminal proceedings in relation to any resulting enforcement action may not be brought *per se*.<sup>13</sup> In general terms it provided that the Bill overrides any other law.<sup>14</sup> 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.<sup>15</sup>

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'<sup>16</sup> and would not necessarily resolve the legal issues surrounding *Tampa*.<sup>17</sup> Labor offered to support '*Tampa* specific legislation' which would involve a safe haven for the rescuees.<sup>18</sup> The Government countered with an offer to introduce a six month sunset clause.<sup>19</sup>

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 some of 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.

## Judicial Review

On 6 September the Minister for Immigration and Multicultural Affairs released the *Background Paper on Unauthorised Arrivals Strategy* on the Government's approach to irregular migration and people smuggling. The proposed measures included closer

cooperation with other countries to 'disrupt people smugglers and intercept their clients en route to their destination' and the development of 'appropriate reception arrangements' and processes for 'early assessment of the refugee status of the individual, the prompt removal of those who are not refugees, or who ... can access effective protection elsewhere'. In addition, the measures included 'the removal of additional benefits not required by the ... Convention'<sup>20</sup> to minimise the incentive for people to attempt illegal travel to Australia'.<sup>21</sup>

In legislative terms, proposed measures included 'legislation to prevent abuse of the judicial process to extend the stay of people who have no entitlement to be here' and 'legislation to protect the integrity of the Refugees Convention and to ensure that its definition is brought back to what it originally intended'.<sup>22</sup> Ostensibly, these measures are reflected in the Migration Legislation Amendment Bill (No. 6) 2001 and the Migration Legislation Amendment (Judicial Review) Bill 1998 [2001] which are discussed below.

### Excisions from Australian Territory

On 8 September the Prime Minister announced proposed legislation to be introduced in the Spring Sittings that would excise Christmas Island and Ashmore Reef from the 'migration zone'. He said that the effect would be that 'any arrivals at Christmas Island or Ashmore Islands ... will not be sufficient grounds for application for status under the Migration Act'. He thought, from a legal point of view, that the territories would 'technically become like Norfolk Island which has its own migration regime but ... is still a territory of Australia'. However, he indicated that '[t]here will still of course be our obligations under the refugee convention and those obligations continue to be fully met by Australia'.<sup>23</sup>

The announcement was endorsed by the Minister for Immigration and Multicultural Affairs who stated that '[s]imply arriving at Christmas Island or Ashmore Reef will no longer be an automatic entree into Australia' and that '[p]eople who come to either [territory] from now will be processed in accordance with the same criteria that would be used if they were on Nauru, if they were in Indonesia, if they presented their claims in Malaysia, if their claims were dealt with by the UNHCR in Pakistan and Iran'.<sup>24</sup>

### Past Proposals

Since 1992 a wide range of legislative measures have been proposed or enacted dealing with the arrival by boat of persons seeking asylum in Australia. These include measures requiring mandatory detention of unlawful non-citizens; restrictions on access to judicial review of migration and refugee decisions; increased powers in coastal surveillance and border control. While these are not recent developments, they are significant in the context of the circumstances surrounding the *Tampa*; *VCCL v MIMA*; and the proposed legislation.

## Mandatory Detention

Originally, the *Migration Act 1958* adopted an artificial distinction between unauthorised border arrivals (persons who arrive at the border without a visa and seek to enter Australia) and illegal entrants (persons who have entered Australia but subsequently have offended against Australia's immigration laws). The former were deemed not to have 'entered' Australia and were subject to 'turn around' provisions. Among the former, boat people were detained to prevent their entry and facilitate their deportation for a period of weeks or years. The latter were liable to be deported but could only be detained for 48 hours and then for periods of seven days with the permission of a magistrate.

Prior to May 1992 boat people were detained under section 88 of the *Migration Act 1958*. Section 88 authorised an officer to detain stowaways and any other persons whom s/he reasonably believed were 'seeking to enter Australia in circumstances in which the person would become an illegal entrant'. Section 88 was intended to allow detention until the vessel departed. However, it was thought that it would allow indefinite detention where departure was delayed, for example because the vessel was burned. This proposition was to be rejected later by the High Court in *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs*<sup>25</sup> (see below) and further undermined by the Federal Court in *Lek v Minister for Immigration, Local Government and Ethnic Affairs*.<sup>26</sup>

From May 1992 boat people were subject to specific mandatory detention provisions. Anticipating the outcome in *Lim's Case*, the Migration Amendment Act 1992 abolished the concept of deemed non-entry and introduced a requirement to detain 'designated persons' (i.e. boat people). A discretion continued in relation to illegal entrants and deportees (i.e. other persons unlawfully in Australia). The Act was introduced and passed on 5 May 1992 and commenced on 6 May,<sup>27</sup> in time to affect hearings in the Federal Court on the release of the plaintiffs on 7 May. It was expressed to be an 'interim measure' to target 'a specific class of persons', addressing 'the pressing requirements of the current situation'.<sup>28</sup>

The 'interim measure' was later formalised by the Migration Reform Act 1992 to include all 'unlawful non-citizens' (ie, persons present in Australia who do not have a valid visa).<sup>29</sup> Using the *Migration Amendment Act 1992* model, the amendments introduced by this Act required mandatory detention of all boat people, illegal entrants and deportees. The relevant provisions, sections 189<sup>30</sup> and 196,<sup>31</sup> commenced on 1 September 1994.<sup>32</sup>

As introduced, these provisions imposed a rigid mandatory detention regime which risked being in conflict with various obligations under international and possibly domestic law. In response to criticisms raised in a parliamentary committee inquiry, the Migration Regulations 1994 were amended to introduce some flexibility into the mandatory detention regime via the bridging visa.<sup>33</sup> The amendments commenced with the commencement of the *Migration Reform Act 1992* on 1 September 1994.

## Judicial Review

The Migration Legislation Amendment (Judicial Review) Bill 1998 [2001] inserts a privative clause in respect of judicial review of migration and refugee decisions under the *Migration Act 1958*. Effectively, judicial review would be limited to decisions involving costs associated with detention, removal or deportation; searches of persons or vessels; and the constitution and procedure of the Migration and Refugee Review Tribunals.

The Judicial Review Bill was introduced following various attempts to enact an effective privative clause to confine the range of decisions that may be subject to judicial review. The Explanatory Memorandum to the Judicial Review Bill notes that a privative clause has been interpreted to mean that 'a court can still review matters but the available grounds are confined to exceeding constitutional limits, narrow jurisdictional error or mala fides'.<sup>34</sup>

The relevant provisions were originally introduced along with other measures in 1997.<sup>35</sup> Following criticisms the provisions were excised and introduced in a separate Bill.<sup>36</sup> They were considered by the Senate Legal and Constitutional Legislation Committee. The majority report recommended that they be accepted without amendment. A minority report recommended they be rejected. The Bill was not passed before the 38th Parliament was prorogued and the separate Bill was reintroduced as the Judicial Review Bill in 1998.

The Judicial Review Bill is currently listed in the Draft Senate Legislative Program for Monday 17 September 2001. A comprehensive Bills Digest has been written on this Bill.<sup>37</sup>

## Border Protection [1999]

The issue of 'people smuggling' was addressed in 1999 by two sets of amendments to the *Migration Act 1958*. In July the *Migration Legislation Amendment Act (No. 1) 1999* was passed to create people smuggling and related offences. In November the *Border Protection Legislation Amendment Act 1999* was passed to expand Australia's capacity to board, search and detain ships and to detain persons aboard those ships at sea.

The *Migration Legislation Amendment Act (No. 1) 1999* makes it an offence for a person to carry non-citizens to Australia without documentation.<sup>38</sup> It also makes it an offence for a person to organise or facilitate the bringing or coming to Australia of a group of five or more persons where s/he know they would become illegal immigrants.<sup>39</sup> 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.<sup>40</sup> In addition, it is an offence for 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.<sup>41</sup> And it is an offence to enter an arrangement in which s/he undertakes for a reward that a particular decision will be made.<sup>42</sup>

The *Border Protection Legislation Amendment Act 1999* introduced Division 12A into the *Migration Act 1958*. Under this division an Australian ship may 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 Act'.<sup>43</sup> In the contiguous zone, it may be made if the commander wishes to identify the ship or if s/he reasonably suspect that it 'is, will be or has been involved in a contravention, or an attempted contravention, in Australia of the Act'.<sup>44</sup> In the exclusive economic zone and the high seas it may only be made if s/he reasonably suspects that 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 Act',<sup>45</sup> if it is registered with a country that has a relevant agreement or arrangement with Australia<sup>46</sup> or if it seems to be unregistered or flying the flags of two countries.<sup>47</sup> (This was the apparent power under which the *Aceng* was hailed and boarded.)

Having boarded a ship, an 'officer'<sup>48</sup> may exercise a range of powers over it and the crew. In Australia the officer may search the ship and make inquiries regarding 'a contravention, an attempted contravention or involvement in a contravention or attempted contravention of [the Migration Act], either in or outside Australia'.<sup>49</sup> The officer may arrest a person who s/he reasonably suspects has committed, is committing or attempting to commit, or is involved in the commission of, an offence in or outside Australia'.<sup>50</sup> Outside Australia the officer may search and inquire as above. However, s/he may only arrest a person that s/he reasonably suspects has committed, is committing or attempting to commit, or is involved in the commission of, an offence in Australia'.<sup>51</sup> Likewise s/he may also detain a ship and a person aboard a detained ship but only if s/he reasonably suspects that the ship 'is, will be or has been involved in a contravention in Australia'.<sup>52</sup> S/he may also detain a ship and bring it or cause it to be brought to a port or other place if s/he reasonably suspects that the ship 'is, will be or has been involved in a contravention in or outside Australia'. S/he may detain a person aboard a detained ship, separate them from the vessel, and bring them or cause them to be brought within the 'migration zone'.<sup>53</sup> On the high seas, but outside the territorial sea of other countries an officer may exercise powers consistent with any agreement or arrangement<sup>54</sup> and may at least search 'ships without nationality'.<sup>55</sup>

## Discussion

### The Tampa Case

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.



### Access to the Migration Act and Judicial System

The argument regarding access to protection visas is complex and relies on domestic and, to some extent, international law. In terms of domestic law, the argument is based on the fact that under the *Migration Act 1958*, one criterion for a protection visa is that the person is 'in Australia'. Under *Acts Interpretation Act 1901* 'Australia' includes the territorial sea. Thus, presence in the territorial sea, at least in theory, ought to sustain a claim for asylum. In terms of international law, the argument is based on a range of obligations arising under the 1951 *Convention relating to the Status of Refugees* and the 1967 *Protocol relating to the Status of Refugees*, the 1982 *Convention on the Law of the Sea* and the 1960 *Convention for the Safety of Life at Sea* and related customary law. Both issues are discussed in more detail below under the heading 'Excisions from Australian Territory'.

### Power to Control the Ship and Passengers

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 issue<sup>56</sup> being the 'effect of the restraint on the liberty of the person'.<sup>57</sup> In the totality of the circumstances, his Honour found that the control constituted detention.<sup>58</sup>

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.<sup>59</sup>

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'.<sup>60</sup> 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"'.<sup>61</sup>

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 submitting that no actions were taken under the border protection provisions.

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,<sup>62</sup> that the prerogative was doubtful<sup>63</sup> and that, in any event, the prerogative had been overridden by the measures introduced by the border protection provisions.<sup>64</sup>

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'.<sup>65</sup> 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'<sup>66</sup> 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'.<sup>67</sup> In expressing this view, he acknowledged that '[t]he Australian case law does not resolve the question before this Court'.<sup>68</sup> 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*<sup>69</sup> and, as a result, expressed doubt as to whether North J should have accepted that the respondents had standing on this issue.<sup>70</sup> 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.<sup>71</sup> 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'.<sup>72</sup>

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'.<sup>73</sup> 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]'.<sup>74</sup> Later that day, two constitutional law experts publicly endorsed the latter interpretation.<sup>75</sup> 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.

### Limits on Mandatory Detention

It is necessary to distinguish between criminal and administrative detention. The former is based on arrest and conviction and generally requires the exercise of judicial power. The latter is based on an administrative decision and is an exercise of executive power.<sup>76</sup>

It has been 'consistently recognized' that the power to make laws with respect to aliens 'includes not only the power to make laws providing for expulsion and deportation of aliens by the Executive' but extends to laws 'authorizing the Executive to restrain an alien in custody to the extent necessary to make the deportation effective'. It has been said that 'the power to deport is the complement of the power to exclude'<sup>77</sup> and that detention in this context 'is not imposed as punishment for being an immigrant'.<sup>78</sup>

The nexus between necessity and punishment was clearly articulated by the High Court in *Lim's Case*. The High Court affirmed the constitutionality of administrative detention under the *Migration Act 1958* at least where the detention is reasonably necessary for immigration processing. Brennan, Deane and Dawson JJ, with whom Mason CJ agreed, held that the provisions introduced by the *Migration Amendment Act 1992* would be valid:

... if the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered. On the other hand, if the detention which those sections require and authorize is not so limited, the authority which they purportedly confer upon the Executive cannot properly be seen as an incident of the executive powers to exclude, admit and deport an alien. In that event, they will be of a punitive nature and contravene Ch. III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts.<sup>79</sup>

The key issue for domestic law is that administrative detention which is characterised as punitive will contravene the constitutional requirement for separation of powers. In the

view of Brennan, Deane and Dawson JJ administrative detention will not be characterised as punitive if it is reasonably necessary for immigration processing. Moreover, in the words of McHugh J, a law permitting administrative detention 'cannot be so characterised if the purpose of the imprisonment is to achieve some legitimate non-punitive object'.<sup>80</sup>

The majority judges commented on the practical limits of reasonable necessity. They indicated that the various circumstances surrounding detention could impact upon a finding as to whether the detention was reasonably necessary for immigration processing. For example, in the view of Brennan, Deane and Dawson JJ various aspects of the regime, such as the initial time limit on detention, the requirement to deport or remove detainees as soon as practicable and the ability of detainees to unilaterally terminate their detention 'suffice to preclude a conclusion that the powers of detention which are conferred upon the Executive exceed what is reasonably capable of being seen as necessary for the purposes of ... the making and consideration of an entry application'.<sup>81</sup> By contrast, while McHugh J considered time limits he also gave special consideration to public administration. He noted that '[t]he appropriateness of the period of detention for the individual cannot be isolated from the administrative burden cast on the Department in investigating and determining the vast number of applications by persons claiming refugee status'.<sup>82</sup>

In the future, there may be further examination of the limits of reasonable necessity. While *Lim's Case* is authority for the proposition that legislation may authorise non-punitive administrative detention, to the extent that the majority judges considered the circumstances surrounding the immigration detention regime in 1992, it may not be authority for the constitutionality of immigration detention regime in 2001. Conceivably, the High Court may be asked to consider whether a regime which involves extended detention, accompanied by increased powers in relation to controlling movement and strip searches, is reasonably capable of being seen as necessary for immigration processing.

### Meaning of Persecution

Subsection 36(2) of the *Migration Act 1958* provides that *one* criterion for determining whether a person is eligible for a protection visa is that s/he is a 'non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol'. Under Art. 1 of the Convention Australia has protection obligations in respect of persons who 'owing to well-founded fear of being *persecuted* for reasons of race, religion, nationality, membership of a particular social group or political opinion' has fled their country and is unable or unwilling (owing to such fear) to return.

It is clear that a 'well-founded fear of persecution' has a subjective as well as an objective element.<sup>83</sup> A fear of persecution may be 'well-founded' though it is statistically 'unlikely to occur'. It is sufficient if there is a 'real chance that the applicant will be persecuted'.<sup>84</sup>

The key issue is that the actions are based on the reasons listed in Art. 1. Persecution 'does not encompass those fleeing generalised violence or internal turmoil' and, moreover, 'mass

movements of persons fleeing civil war or other armed conflicts, military occupation, natural disasters and bad economic conditions are outside the Convention'.<sup>85</sup> It is a 'serious punishment or penalty' or 'significant detriment or disadvantage' which is 'non-random', 'discriminatory' or part of 'selective harassment' or 'systematic conduct'<sup>86</sup> directed against a person either individually or as a member of a group on one of the grounds in Art. 1.

A wide range of acts and threats are contemplated by the definition. They obviously include threat to life or freedom. According to the cases, they may also include loss of employment, denial of access to professions<sup>87</sup> or services such as education, health care, housing and food<sup>88</sup> and restrictions on freedom of speech, assembly, worship or movement.<sup>89</sup> Indeed, there may be no limit to the classes or categories of actions which may amount to persecution,<sup>90</sup> although discriminatory acts which are 'appropriate and adapted to achieving some legitimate object of the country' will not amount to persecution.<sup>91</sup> Thus, under China's one child policy laws imposing penalties on parents were laws of general application whereas laws imposing penalties on children born in breach of that regime were persecutory.<sup>92</sup>

Acts or threats need not be perpetrated by the state, provided it is unable or unwilling to offer protection. Nor do they need to be repeated, provided they are *non-random*.

However, the actions must be causally linked to the reasons listed in Art. 1. Thus, while a farmer may be the subject of violent discrimination by a particular rival clan in Somalia, it may not be persecution on the basis of race because the rival clan discriminated against *all* non-clan members rather than merely the clan to which the farmer belonged.<sup>93</sup> At the same time, the reasons listed in Art. 1 need not be the *sole* cause of the persecution.<sup>94</sup> Thus, a person may commit a minor offence, but the punishment may be persecution because its existence or severity is based on the offender's membership of a particular social group.<sup>95</sup>

It is often assumed that acts or threats must be *motivated* by the reasons listed in Art. 1. The assumption is probably based on statements in the Federal Court that persecution involves 'an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation ... for the infliction of harm'<sup>96</sup> and in the High Court that the causal connection requirement 'serves to identify the motivation for the infliction of the persecution and the objectives sought to be attained by it'.<sup>97</sup> On this basis, attention has turned to the subjective intentions of the persecutors rather than the subjective and objective fears of the victim. However, it seems clear that 'an element of attitude' and 'motivation' do not imply malice,<sup>98</sup> and nor are they intended to equate with *mens rea* or intention in a direct sense. Arguably, subjective motivation is irrelevant.<sup>99</sup>

One area of difficulty for the Federal Court and High Court has been persecution based on 'membership of a social group'. The issue is whether a social group must have a prior and independent existence or whether it may be ascertained by reference to the persons or groups of persons who are the target or focus of the persecution. It is clear that 'a shared fear of persecution [is not] sufficient to constitute a particular social group'.<sup>100</sup> Thus, while the parents who desired a second child were subject to persecution in China, they did not

form a 'particular social group' for the purposes of the Convention.<sup>101</sup> At the same time, a second child born in that regime could be subject of persecution because they form a 'particular social group' being those children specifically targeted by the one child policy.<sup>102</sup>

Reacting to this issue and other issues, the Minister for Immigration and Multicultural Affairs said when introducing the Migration Legislation Amendment Bill (No. 6) 2001:

In the absence of clear legislative guidance, the domestic interpretation of our obligations has broadened out under cumulative court decisions so that Australia now provides protection visas in cases lying well beyond the bounds originally envisaged by the convention. These generous interpretations ... encourage people who are not refugees to test their claims in Australia, adding to perceptions that Australia is a soft touch.<sup>103</sup>

Under the Migration Legislation Amendment Bill (No. 6) 2001 'persecution' must involve 'serious harm to the person' that 'involves systematic and discriminatory conduct'.<sup>104</sup> 'Serious harm' must involve some serious physical assault, harassment or ill-treatment or some other significant discrimination which threatens the persons capacity to subsist.<sup>105</sup> More significantly perhaps, under the Bill the causal link would only be satisfied where the reason listed in Art. 1 is 'the essential and significant reason' for the persecution.<sup>106</sup>

### **The Validity of the Privative Clause<sup>107</sup>**

The proposed privative clause in the Migration Legislation Amendment (Judicial Review) Bill 1998 [2001] would apply both to the High Court and the Federal Court. However, the clause is arguably of greater significance to the High Court than the Federal Court. Generally, Parliament may determine the judicial review jurisdiction of the Federal Court. However, the judicial review jurisdiction of the High Court is constitutionally entrenched. It has 'original jurisdiction' in all matters 'in which a writ of mandamus or prohibition or injunction is sought against an officer of the Commonwealth' (section 75(v)) and these writs essentially confer the core remedies available to a judicial review court. However, while the jurisdiction is entrenched it may be circumvented by a privative clause. At the same time, as at least two judges have noted, '[t]he distinction between what laws are and what laws are not consistent with section 75(v) is admittedly an elusive one'.<sup>108</sup>

In Australia, privative clauses date back to 1904, when the Commonwealth attempted to virtually eliminate the High Court's jurisdiction to review decisions of the Arbitration Court. The Court unequivocally stated that the privative clause had no effect at all on the Court's constitutional rights to judicial review,<sup>109</sup> sparking a political and judicial debate for the next forty years as to the Parliament's ability to circumscribe judicial review.<sup>110</sup>

A key legal difficulty of privative clauses is that they are based on an apparent contradiction. Parliament passes a law establishing the limits within which a decision maker is empowered to make a decision. If a privative clause is made applicable to that decision, there is very little scope for a court to check whether these legislative limits have

been respected. Two issues arise: firstly, the initial legislative limits on an action may become meaningless; and secondly, a court's role (including the role of the High Court) in reviewing the lawfulness of administrative decisions is, to a large extent, frustrated.<sup>111</sup>

In the 1945 High Court *Hickman* case,<sup>112</sup> Dixon J proposed a complex formula to overcome these problems. The '*Hickman* principle' states that the contradictory intention of privative clauses may be resolved if, rather than reading privative clauses at face value as direct limits on the review powers of a court, they are read as indirect grants of legal authority to a decision-maker. Thus, the definition of a valid decision is expanded beyond what is overtly defined as a valid decision in the relevant Act or the common law.

In accordance with the separation of powers doctrine, this expanded jurisdiction of decision-makers has not been interpreted as being completely unfettered. As the '*Hickman* principle' is one of statutory construction, fetters will arise from the reading of the specific legislation as a whole.<sup>113</sup> In *Hickman*, the clause was interpreted as subject to various limits or 'savings provisions'.<sup>114</sup> In a recent case, the High Court also affirmed that the legislation as a whole could be interpreted so that the privative clause did not protect a constraint on the decision-maker regarded as being of fundamental importance.<sup>115</sup>

Two sets of issues arise regarding the privative clause in the Judicial Review Bill. First, while it is modelled on the privative clause considered and affirmed in *Hickman* it differs in some key respects. In proposed subsection 474(1) of the Judicial Review Bill, as in the *Hickman* provision, relevant decisions 'shall not be challenged, appealed against, reviewed, quashed or called into question in any court' and are 'not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account'. However, proposed subsection 474(1) also provides that the decisions are 'final and conclusive'. Moreover, proposed subsection 474(6) provides that '[s]ubject to the requirements of the Constitution' the section should 'be construed in a way that gives full effect to its natural and ordinary meaning' and 'not be construed in a way that would limit its operation'. It has been argued that if the 'final and operative' requirement was given its 'natural and ordinary meaning' it would deprive the High Court of jurisdiction contrary to section 75(v). Second, as a related issue, any attempt to make an administrative decision binding and conclusive may offend against the requirement for the separation of powers.<sup>116</sup>

In the report of the Senate Legal and Constitutional Legislation Committee the members of the minority stated that the privative clause 'defeats the purposes for which the Federal Court of Australia was, in part, established, namely as a court designed to relieve the burden on the High Court arising from the handling of immigration law cases'.<sup>117</sup> It also commented that the proposed amendments were contrary to the desired trend 'towards access to justice and the expression of clearer Commonwealth law'.<sup>118</sup>

Reflecting the complexity discussed above, Minister Ruddock has noted that 'the precise limits of privative clauses may need examination by the High Court'.<sup>119</sup>

## Excisions from Australian Territory

The Prime Minister and Minister for Immigration and Multicultural Affairs have both foreshadowed legislation to excise Christmas Island and Ashmore Reef from the migration zone. The effect, or intended effect, would be that arrival in these territories 'will not be sufficient grounds for application for status under the Migration Act'. It is difficult to comment in advance on proposed legislation, but various observations may be made.

The key issue is that one current criterion for a protection visa is that the applicant is 'in Australia'. 'Australia' is not defined in the *Migration Act 1958*. The *Acts Interpretation Act 1901* establishes a general presumption that a reference to 'Australia', when used in a geographical sense, 'includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands, but does not include any other external Territory'.<sup>120</sup> Moreover, the *Migration Act 1958* applies to 'prescribed Territory' which 'means the Coral Sea Islands Territory, the Territory of Cocos (Keeling) Islands, the Territory of Christmas Island and the Territory of Ashmore and Cartier Islands'.<sup>121</sup> Conversely, the Act defines the migration zone as 'the area consisting of the States, the Territories ... [and the sea within a port]'.<sup>122</sup> Thus, prima facie, the ambit of the 'migration zone' is irrelevant to asylum claims.

A *subsidiary* issue is that an unlawful non-citizen must be detained if they 'enter Australia'. To 'enter Australia' is defined as meaning 'to enter the migration zone'.<sup>123</sup> This definition is expressly not intended to alter the meaning of 'in Australia' or the application of the Act to any parts of Australia outside the migration zone.<sup>124</sup> Thus, prima facie, the 'migration zone' is only relevant to unlawful entry, immigration detention, etc.

On this basis, the proposed amendment would need to focus on the application of the Act to external territories, to confine the meaning of 'in Australia' for the purposes of protection visas or to tie the protection visa criteria to presence in the 'migration zone'. Simply removing a reference to Christmas Island and Ashmore Reef from the *Migration Act 1958* would exclude both territories but would not get around the *Acts Interpretation Act 1901* because it would not express the 'contrary intention' needed for this purpose.<sup>125</sup> Simply confining the definition of 'in Australia' or 'migration zone' may have unintended consequences in relation to people smuggling offences, visa conditions, deportation, etc.

Perhaps the most straightforward mechanism would be to amend the criteria for protection such that presence is required within the 'migration zone', with the caveat that, for protection visa purposes this does not include Christmas Island or Ashmore Reef. This would seem to have the effect that arrival within Christmas Island and Ashmore Reef, or within the territorial sea of Australia, would not be 'sufficient grounds for application for status under the Migration Act'. The real issue is its other legal or practical effects.

As the Prime Minister has acknowledged, any such of these proposed amendments would not address the issue of Australia's obligations under international law. Under the *Convention relating to the Status of Refugees* of 28 July 1951 and the *Protocol relating to the Status of Refugees* of 31 January 1967 Australia is obliged not to 'refoule' (not to expel



or return) persons who have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion to a place in which their life or freedom would be threatened on account of these reasons.<sup>126</sup> Australia is also obliged not to expel a refugee *lawfully* in its territory 'save on the grounds of national security or public order',<sup>127</sup> and only in accordance with 'due process of law'.<sup>128</sup>

Whether these obligations can 'continue to be fully met by Australia' is unclear. These obligations would have a complex application to Australia in respect of the proposed amendment(s) above. It seems clear that the non-refoulement obligation would prevent any attempt to remove any refugees from Christmas Island and return them to a place of persecution. But, having removed the ability of people to apply for protection visas, we may have effectively removed the administrative machinery for determining refugee status under the *Migration Act 1958*. In this context, one academic suggested in response to the proposed excision that there was 'no way whatsoever [that the proposed legislation] can be in accordance with international legality' and argued, in colourful language, that '[t]he government has gone completely bananas, they've gone bonkers'.<sup>129</sup>

In announcing the proposed legislation, both the Prime Minister and the Minister for Immigration and Multicultural Affairs suggested that any future Christmas Island arrangements would work similarly to those on Norfolk Island. In a number of respects, the Norfolk Island regime is not comparable with any amendment to exclude Christmas Island. The most obvious difference is that Christmas Island does not have a body with legislative powers. Nor may it have the machinery to give effect to a similar regime. It is also worth noting that while the Norfolk Island migration regime permits the expulsion of aliens it does not contain any arrangements for dealing with asylum applications.

## Appendix 1 International Law Maritime Boundaries

A convenient guide to Australia's maritime boundaries is given by the *United Nations Convention on the Law of the Sea* (UNCLOS):<sup>130</sup>

- *Internal Waters*: sea on the landward side of the 'territorial baseline'.<sup>131</sup>
- *Territorial Sea*: sea within 12 nautical miles (nm)<sup>132</sup> of the 'territorial baseline'.<sup>133</sup>
- *Contiguous Zone*: sea between 12 and 24 nm of the 'territorial baseline'.<sup>134</sup>
- *Exclusive Economic Zone*: sea to 200 nm of the 'territorial baseline'.<sup>135</sup>
- *Continental Shelf*: seabed and subsoil up to 350 nm<sup>136</sup> (or as agreed between two state parties to UNCLOS with 'opposite or adjacent coasts').<sup>137</sup>

For completeness it is worth mentioning various zones created under domestic law:

- *Adjacent Areas*: areas of sea adjacent to each State and the Northern Territory. (Outer limits are prescribed in regulations under the *Seas and Submerged Lands Act 1973*.<sup>138</sup>)
- *Migration Zone*: includes land above the low watermark and sea within the limits of a port in a State or Territory but does not include the sea within a State or Territory or the 'territorial sea' of Australia.<sup>139</sup> It includes Christmas Island and Ashmore Reef.<sup>140</sup>

The relevant zones are represented in the following diagram and indicative map.

**Figure 1: Maritime Zones Recognised under International Law**<sup>141</sup>

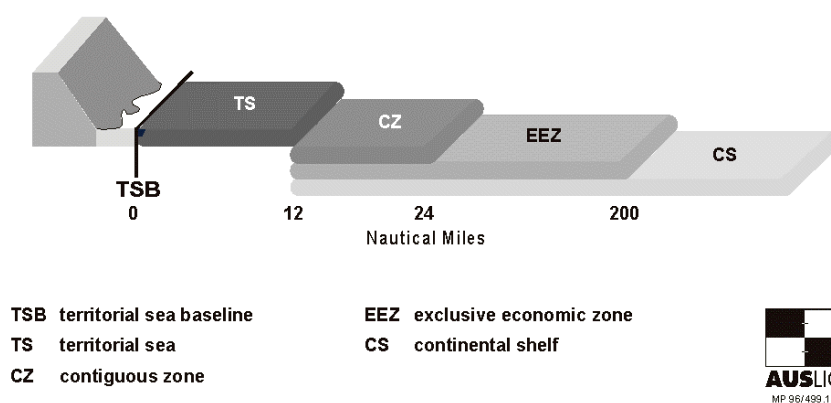
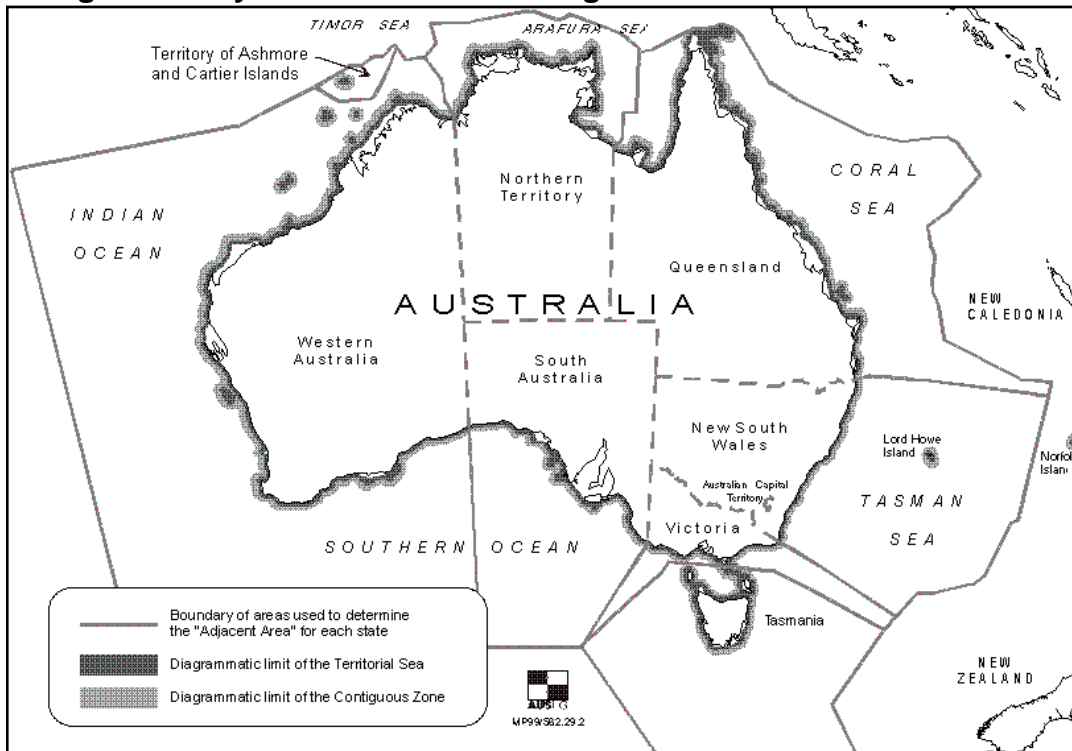


Figure 2: Key Maritime Zones Recognised under Domestic Law<sup>142</sup>



## Appendix 2 Australia's Maritime Jurisdiction

A distinction can be drawn among what may be called '*prescriptive*', '*enforcement*' and '*adjudicative*' powers and between '*physical*' and '*personal*' jurisdiction.<sup>143</sup>

- *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*), and
- *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'.<sup>144</sup> Thus, the Commonwealth has a power to control overseas acts of its citizens,<sup>145</sup> and the States and the Commonwealth have the power to control overseas acts of foreigners where they come within the physical limits of Australia.<sup>146</sup> There need only be a link between the subject matter of a statutory offence and the enacting government.<sup>147</sup> Similarly, under the Australian 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.<sup>148</sup> The power is not confined to laws that are consistent with the requirements of international law,<sup>149</sup> or with the legislative competence recognised by international law.<sup>150</sup> There may be a presumption that a statute will not interfere with the sovereignty of other nations.<sup>151</sup>

## Enforcement Powers

The *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).<sup>152</sup>
- *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.<sup>153</sup> 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'.<sup>154</sup> It may arrest persons or investigate crimes aboard foreign ships passing through the territorial sea after leaving internal waters.<sup>155</sup> 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.<sup>156</sup> 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'.<sup>157</sup> 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.<sup>158</sup>
- *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'.<sup>159</sup>
- *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''.<sup>160</sup> 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'.<sup>161</sup> 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'.<sup>162</sup> 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'.<sup>163</sup> The status of the waters above the shelf is unaffected<sup>164</sup> 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.<sup>165</sup> The latter allows warships to board a foreign ship where there is reasonable ground to suspect that it is a 'ship without nationality',<sup>166</sup> or is engaged in piracy or slave trading.<sup>167</sup>

### 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.<sup>168</sup> These powers are closely related to the enforcement powers above which deal with the 'territorial principle',<sup>169</sup> the 'extra-territorial principle'<sup>170</sup> and, to a limited extent, the 'protective principle'.<sup>171</sup>

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'<sup>172</sup> and 'extra-territorial jurisdiction'.<sup>173</sup> Except in relation to the Commonwealth, it would not ordinarily recognise the 'passive personality principle'.<sup>174</sup> 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'.<sup>175</sup> 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 offences<sup>176</sup> and has recently been endorsed in Australia in relation to interstate offences.<sup>177</sup> (But there may be doubt as to whether this approach would or should apply to international offences.)<sup>178</sup>

## Appendix 3 Safety of Life at Sea v Territorial Sovereignty

### Innocent Passage

The concept of 'innocent passage' is somewhat ambiguous. Under UNCLOS, 'innocent passage' must be *innocent* in the sense that it must be 'not prejudicial to the peace, good order or security of the coastal state'.<sup>179</sup> It must also be *passage* in the sense that it must be 'continuous and expeditious',<sup>180</sup> although stopping and anchoring is accepted if they are 'incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress'.<sup>181</sup>

However, this simplified description belies more complex views regarding the meaning of 'innocence' in international customary law. O'Connell gives four models of 'innocence':

- passage is innocent if no act is done which threatens the coastal state
- passage is innocent if no act is done which threatens the interests of the coastal state
- passage is not innocent if a ship carries persons or goods dangerous to the coastal state, and
- passage is not innocent if acts are done which arouse the concern of the coastal state

UNCLOS simply adopts the above formulation, based on prejudice to peace, order and security and continuous and expeditious passage, and goes on to require that passage must 'take place in conformity with this Convention and with other rules of international law' and lists certain activities that do not constitute innocent passage.

O'Connell suggests that the composite definition 'is a gloss which conceals the doctrinal differences, which are nonetheless imported into the text by the reference to passage taking place in conformity with "other rules of international law"'.<sup>182</sup> Moreover, the reference to 'peace, good order or security' makes jurisdiction and innocence 'the reverse and obverse of each other' such that 'the way is opened to enlarge the control exercised by the coastal state over passing shipping beyond that allowed in customary law'.<sup>183</sup>

UNCLOS provides that a coastal state may 'take the necessary steps in its territorial sea to prevent passage which is not innocent'.<sup>184</sup> Churchill and Lowe indicate that while there is no *express* right to exclude foreign ships 'this right undoubtedly exists in customary law'.<sup>185</sup>

A key issue in the present context is the range of circumstances that may be considered to constitute a disturbance of the 'peace and good order' and the interpretation given to the relevant jurisdictional limitations in UNCLOS. UNCLOS states that a criminal jurisdiction 'should not be exercised on board a foreign ship passing through the territorial sea'.<sup>186</sup> The

history of the relevant provision in the convention suggests that it is not intended to be a prohibition but an appeal for caution, given the uncertainty that may surround the nature of crimes that disturb the 'peace' and 'good order' of the territorial sea or the coastal state.<sup>187</sup> This view seems to have been adopted in the United States and the United Kingdom.<sup>188</sup>

## Distress

As indicated, UNLCOS appears to permit stopping and anchoring within the territorial sea where that is 'rendered necessary by *force majeure* or distress' or 'for the purpose of rendering assistance to persons ... in danger or distress'. State practice appears to support a right of entry to designated international ports for foreign ships in distress seeking safety. It is generally presumed that 'the ports of every State must be open to foreign vessels and can only be closed when the vital interests of the State so require'. But it may be 'very doubtful whether this presumption has acquired the status of a right in customary law'.<sup>189</sup> Moreover, it is unclear how this presumption sits with the apparently enlarged control given to states in the exercise of jurisdiction over foreign ships within the territorial sea.

Over time various international conventions have addressed the obligation to rescue persons and ships in distress at sea.<sup>190</sup> However, while they tend to support the existence of the general presumption above, they have not addressed the issue of disembarkation. Moreover, they have not given any guidance as to how the obligation to rescue is to be balanced against territorial sovereignty particularly in relation to asylum seekers. This situation has led the United Nations High Commission for Human Rights to note that:

While ... there is a clear duty for ships' masters, their owners and their Governments to rescue asylum-seekers at sea, there is no obligation under international law for the flag State of a rescuing vessel to grant durable asylum to rescued refugees. It is, of course, correct that by boarding a vessel, the refugee comes under the jurisdiction of the flag State which is considered to exercise jurisdiction over the ship on the high seas. There is, however, no valid legal basis for considering that by boarding a vessel a refugee has entered the territory of the State exercising jurisdiction over the ship.<sup>191</sup>



## Appendix 4 Australia's International Refugee Obligations

Traditionally, international law viewed asylum as an act of grace by states.<sup>192</sup> It recognised diplomatic asylum, involving a permission by the protecting state to shelter a refugee in its diplomatic premises. It also recognised territorial asylum, involving a refusal by the protecting state to extradite or deport a refugee from its territory. Both these forms of asylum were voluntary and neither derogated from a state's territorial sovereignty.

However, international law has come to recognise asylum as somewhat of a right of refugees. Under the *Convention relating to the Status of Refugees* of 28 July 1951 and the *Protocol relating to the Status of Refugees* of 31 January 1967 Australia is obliged not to expel or return persons who have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion to a place in which their life or freedom would be threatened on account of these reasons.<sup>193</sup> Australia is also obliged not to expel a refugee *lawfully* in its territory 'save on the grounds of national security or public order',<sup>194</sup> and only in accordance with 'due process of law'.<sup>195</sup> Australia acceded to the *Convention relating to the Status of Refugees* on 22 January 1954 and it acceded to the *Protocol relating to the Status of Refugees* on 13 December 1973.<sup>196</sup>

It is perhaps significant to note that, at the time of accession to the Convention, Australia made a reservation rejecting the obligations relating to expulsion.<sup>197</sup> It withdrew the reservation over a decade later after the General Assembly adopted the Protocol.

## Appendix 5 International Law Relating to Detention

### International Law

The 'legality' of mandatory detention under international law has been widely canvassed.<sup>198</sup> It has been argued that mandatory detention is contrary to the prohibition on unnecessarily restricting the movement of and/or penalising bona fide asylum seekers in the *Convention Relating to the Status of Refugees* (Refugee Convention) (Article 31). Also, it has been argued that it is contrary to the prohibitions on cruel, inhuman and degrading punishment in the *International Covenant on Civil and Political Rights* (ICCPR) (Article 7) and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) (Article 16). It has also been argued that it is contrary to the prohibition on arbitrary detention in the ICCPR (Article 9(1)) and the *Convention on the Rights of the Child* (CROC) (Article 37). A wide range of other prohibitions and requirements are cited as being relevant to the mandatory detention of asylum seekers.<sup>199</sup>

The key issue appears to be the prohibition on unnecessary or arbitrary detention. As above, there is a nexus between arbitrariness and reasonable necessity. Thus, in *Alphen v The Netherlands* (1990), the Human Rights Committee (HRC), the treaty body responsible for the ICCPR, noted that detention could be arbitrary notwithstanding that it was lawful as the concept included 'elements of inappropriateness, injustice and lack of predictability'. The HRC stated that detention 'must not only be lawful but *reasonable* in all the circumstances' and, in addition, 'must be *necessary* in all the circumstances, for example, to prevent flight, interference with evidence, or the recurrence of crime.'<sup>200</sup> In [A v Australia](#) (1997)<sup>201</sup> the HRC commented specifically on the *Migration Amendment Act 1992*. As in *Lim's Case*, the HRC clearly articulated a nexus between necessity and arbitrariness.<sup>202</sup>

In July 2000, in response to Australia's Combined 3<sup>rd</sup>/4<sup>th</sup> Periodic Report under the ICCPR, the HRC reiterated the concerns it raised in *A v Australia* and urged Australia to 'reconsider its policy of mandatory detention of "unlawful non-citizens" with a view to instituting alternative mechanisms of maintaining an orderly immigration process'.<sup>203</sup>

## Appendix 6 Overview of Proposed Migration Amendments

Some key areas of change to the *Migration Act 1958* include: restriction of merits and judicial review of decisions under the Act and Regulations; regulation of migration agents; migration fees and charges; assurances of support and other conditions for entry relating to social security/health; regulation of education for overseas students; detention of illegal non-citizens; and clarification of border protection powers.

### 1991

<i>Bill</i>	<i>Description of Purpose (from Bills Digest)</i>
<a href="#">Immigration (Education) Amendment Bill 1991</a>	To expand the range of persons eligible for English tuition courses under the Adult Migrant Education Program and citizenship tuition courses and to arrange for language training and related services to be provided to non-government organisations
<a href="#">Migration Amendment Bill 1991</a>	To introduce a new category of entrant [unprocessed person] and a regime for dealing with such entrants, including where they may be sent and other amendments which relate to the period of grace, entry visas, the grounds under which a non-citizen may become an illegal entrant, and the character or conduct of applicants for visa or entry permits
<a href="#">Migration Amendment Bill (No.2) 1991</a>	To create new offences for abuse of the migration laws in relation to immigration due to marriage or de-facto relationships; increase the information gaining powers in relation to people the Minister believes are illegal immigrants; and to allow visas/entry permits not to be issued if such an issue would exceed the allowable number of visas/entry permits that has been determined by the Minister as allowable in a particular class.
<a href="#">Migration Amendment Bill (No.3) 1991</a>	To prevent the grant of a visa or entry permit unless an assurance of support has been given.
<a href="#">Migration Amendment Bill (No.4) 1991</a>	To make a number of largely non-contentious and technical amendments relating to the review of a points assessment; additional applications for an entry permit by illegal entrants; and endorsements of visa or entry permits under section 20 of the <i>Migration Act 1958</i> .
<a href="#">Migration (Health Services) Charge Bill 1991</a>	To impose a charge on certain visa and entry permit applicants in respect of which an assurance of support is required.

**1992**

<i>Bill</i>	<i>Description of Purpose (from Bills Digest)</i>
<a href="#">Immigration (Education) Charge Bill 1992</a>	To introduce charges for newly arrived immigrants and recent arrivals in respect of English language classes.
<a href="#">Migration Laws Amendment Bill 1992</a>	To allow the Minister to determine the maximum number of visas of a specified class/es that may be granted in a specified financial year.
<a href="#">Migration Laws Amendment Bill (No.2) 1992</a>	To introduce fees for those attending English language courses and to oblige the government to provide 510 hours of tuition in English to certain visa applicants (see Immigration (Education) Charge Bill 1992)
<a href="#">Migration (Offences and Undesirable Persons) Amendment Bill 1992</a>	To allow the Minister to refuse permission for people to enter or remain in Australia on the basis of their character or conduct
Migration Reform Bill 1992 (no Digest available)	<p>To simplify existing terminology by abolishing the distinction between visas and entry permits, introducing a distinction between 'lawful and non-lawful citizens' to replace the existing 'unprocessed', 'prohibited', 'designated', 'illegal' and 'legal non-citizens' distinctions, codification of procedures for dealing with applications.</p> <p>To extend review rights and require the Department to advise applicants of their review rights,</p> <p>To introduce codes of procedure for decision making, increase powers of cancellation of visas, impose restrictions controlling entry, departure, detention, removal and recovery of costs of detention, limitations of discretion in decision making.<sup>204</sup></p> <p>To confine judicial review in the Federal Court to 'judicially reviewable decisions', excluding decisions that are immediately reviewable by the IRT and RRT but including final decisions of those tribunals, and to confine the grounds of review to the following: required procedures not observed; purported decision made without jurisdiction; decision not authorised by the Act or Regulations; decision an improper exercise of power;<sup>205</sup> decision involved error of law whether or not the error appears on the record of the decision; decision induced or affected by fraud or actual bias; and no evidence to justify the decision. The grounds would exclude: breach of the rules of natural justice or that the decision involved an exercise of power so unreasonable that no reasonable person could have so exercised the power.<sup>206</sup></p>

**1993**

<i>Bill</i>	<i>Description of Purpose (from Bills Digest)</i>
<a href="#">Immigration (Guardianship of Children) Amendment Bill 1993</a>	To preclude the Minister for Immigration and Ethnic Affairs from assuming the guardianship of certain non- citizen children who enter Australia for adoption in a declared State or Territory.
<a href="#">Migration Amendment ('Points' System) Bill 1993</a>	To simplify the operation of the points test and pool system relating to people seeking entry to Australia under the Concessional Family and Independent Entrant visa classes.

**1994**

<i>Bill</i>	<i>Description of Purpose (from Bills Digest)</i>
<a href="#">Migration Legislation Amendment Bill 1994</a>	To establish three new classes of visas (special purpose visas, absorbed person visas, and ex-citizen visas). Other amendments are largely of an administrative/technical nature.
<a href="#">Migration Legislation Amendment Bill (No.2) 1994</a>	To retrospectively provide a legal basis for the detention of certain people who arrived in Australia by boat without authorisation, and may have been detained unlawfully.
<a href="#">Migration Laws Amendment Bill (No. 3) 1994</a>	To provide for the retrospective legality of the detention of certain persons who arrived in Australia by boat without valid entry permission between 1989 and 1992.
<a href="#">Migration Legislation Amendment Bill (No. 4) 1994</a>	To provide that entrants who have previously been assessed overseas for refugee status will not be required to be reassessed by Australian authorities.
<a href="#">Migration Legislation Amendment Bill (No. 5) 1994</a>	To provide: that, although an applicant may be assisted by another person (including a lawyer) the assistant cannot, unless there are exceptional circumstances, present arguments to, or address, the Immigration Review Tribunal (IRT); for the Minister to cancel an investment-linked visa; for the Remuneration Tribunal to determine the remuneration of members of the IRT and the Refugee Review Tribunal (RRT); and for the indexation of fees in relation to English language courses imposed under the <i>Immigration (Education) Act 1971</i> .
<a href="#">Migration Agents Registration (Applications) Levy Amendment Bill 1994</a>	To enable automatic indexation of the migration agents registration ( <b>application</b> ) levy payable under the <i>Migration Agents Registration (Application) Levy Act 1992</i> .

<a href="#">Migration Agents Registration (Renewal) Levy Amendment Bill 1994</a>	To enable automatic indexation of the migration agents registration ( <b>renewal</b> ) levy payable under the <i>Migration Agents Registration (Renewal) Levy Act 1992</i> .
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**1995**

<i>Bill</i>	<i>Description of Purpose (from Bills Digest)</i>
<a href="#">Migration Legislation Amendment Bill (No. 2) 1995</a>	To amend the Safe Third Country (STC) provisions in the <i>Migration Act 1958</i> to: invalidate applications for protection visas made by Vietnamese refugees presently resettled in the PRC between 30 December 1994 and the taking effect of Statutory Rule No.3 of 1995 (prescribing the PRC as a STC); and more generally, invalidate visa applications made during the 'transitional period' before the commencement of an agreement between Australia and a STC.
<a href="#">Migration Legislation Amendment Bill (No. 3) 1995</a>	To remove the fertility control policies of a foreign government as a grounds for inclusion in a 'particular social group' as defined in the 1951 Convention Relating to the Status of Refugees, as amended by the 1967 Protocol Relating to the Status of Refugees; and to stop repeat applications for protection visas.
<a href="#">Migration Legislation Amendment Bill (No. 4) 1995</a>	Essentially the same purpose as the (No. 3) Bill.
<a href="#">Migration Legislation Amendment Bill (No. 5) 1995</a>	To amend the <i>Migration Act 1958</i> to enable a person who has been held in detention for more than six months following a visa application to be declared, at the Minister's discretion, an 'eligible non-citizen' so that he or she may be released from detention; and the <i>Immigration (Education) Act 1971</i> to make it clear that the Commonwealth is not obliged to provide English tuition to certain successful visa applicants.
<a href="#">Administrative Decisions (Effect of International Instruments) Bill 1995</a>	To restore the situation which existed before <i>Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh</i> (1995) 183 CLR 273, in which if there were to be changes to procedural or substantive rights in Australian law resulting from adherence to a treaty, they would be made by parliamentary and not executive action.

**1996**

<i>Bill</i>	<i>Description of Purpose (from Bills Digest)</i>
<a href="#">Migration Legislation Amendment Bill (No. 1) 1996</a>	To extend the Migration Agents Registration Scheme by 12 months to 21 September 1997.
<a href="#">Migration Legislation Amendment Bill (No. 2) 1996</a>	To remove the statutory right of the Human Rights and Equal Opportunity Commission and the Commonwealth Ombudsman to initiate confidential contact with people held in immigration detention under s. 189 of the Act and to ensure that officers of the Department are under no duty to give visa applications to such detainees unless a request by the detainees is made.
<a href="#">Migration Legislation Amendment Bill (No. 3) 1996</a>	<p>to 'roll' the Health Services Charge and the English Education Charge into the one visa application fee. This is to be done by the amendment of the <i>Migration (Health Services) Charge Act 1991</i> and the <i>Immigration (Education) Charge Act 1992</i> (the Charge Act) so that applications for visas made after the commencement of the Migration (Visa Application) Charge Bill 1996 (anticipated to be proclaimed on 1 January 1997) will be subject to the one fee;</p> <p>amend the <i>Immigration (Education) Act 1971</i>, to sever the connection between this Act and the <i>Immigration (Education) Charge Act 1992</i>. This is necessitated by the 'rolling' of the English Education Charge into the visa application fee. In addition, amendments are being made to clarify that migrants have only one entitlement to 510 hours of English language tuition;</p> <p>amend the <i>Migration (Health Services) Charge Act 1991</i>, so that applications for visas made after the commencement of the Migration (Visa Application) Charge Bill 1996 are not subject to the Health Services Charge. (As indicated above, the charge will be incorporated into the visa application fee.);</p> <p>amend the power to make regulations under the <i>Migration Act 1958</i> to provide the Minister with greater flexibility to 'cap' various components of the Migration Program, including those parts of the Preferential Family category that are currently exempt from 'capping';</p> <p>repeal section 87 of the <i>Migration Act 1958</i> to remove the legislative exemption to the Minister's power to determine the maximum number of visas that may be granted within a financial year;</p> <p>implement a legislative exemption to the <i>Sex Discrimination Act 1984</i> to allow the Minister to prescribe a two-year cohabitation period in respect of applicants who apply offshore for migration on the basis of a de facto or interdependency relationship with an Australian citizen or lawful permanent resident. Married couples will not have to meet this requirement; and</p>

	amend section 21 of the <i>Australian Citizenship Act 1948</i> and the <i>Migration Act 1958</i> to enable the Minister to deprive a person of Australian citizenship where that citizenship was obtained as a result of 'migration-related fraud'.
<a href="#">Migration (Visa Application) Charge Bill 1996</a>	To impose a single visa application fee; and establish a 'visa application fee charge limit'; ie the maximum amount of visa application charge that may be prescribed by the regulations
<a href="#">Immigration (Education) Charge Amendment Bill 1996</a>	To amend the Immigration (Education) Charge Act 1992 (the Act): so that the Act will no longer apply to visa applications made after the commencement of the Migration (Visa Application) Charge Bill 1996 (expected to be 1 January 1997); in respect of migrants to whom the English Education Charge still applies; to raise the statutory ceiling of the charge to \$5,500; and to provide that the new statutory ceiling applies to visa applicants who, before the commencement of the Migration (Visa Application) Charge Bill 1996, have not received a notice of assessment for the English Education Charge in accordance with subsection 64(3) of the <i>Migration Act 1958</i> .
<a href="#">Environment, Sport and Territories Legislation Amendment Bill 1996</a>	To extend the application of the Migration Act 1958 to Ashmore Reef and Cartier Islands.

### 1997

<i>Bill</i>	<i>Description of Purpose (from Bills Digest)</i>
<a href="#">Migration Legislation Amendment Bill (No. 3) 1997</a>	To extend the Migration Agents Registration Scheme for six months to 21 March 1998
<a href="#">Migration Legislation Amendment Bill (No. 4) 1997</a>	To amalgamate the initial Departmental review of a Non-humanitarian visa decision with the next stage of the review process for such decisions, review by the Immigration Review Tribunal; and  To insert a 'privative clause', the aim of which is to narrow the possibility of judicial review by the Federal Court and the High Court by permitting administrative decisions subject to procedural defect and legal irregularity to be considered valid.
<a href="#">Migration Legislation Amendment Bill (No. 5) 1997</a>	To introduce a 'privative clause', a mechanism which will severely restrict access to judicial review of administrative decisions made under the <i>Migration Act 1958</i> ('the Act').
<a href="#">Migration Legislation Amendment (Migration Agents) Bill 1997</a>	To create a Migration Agents Registration Authority to administer the scheme for regulating the immigration assistance industry and related matters.



<a href="#"><u>Migration Agents Registration Renewal Charge Bill 1997</u></a>	To establish a system to determine registration charges for migration agents.
<a href="#"><u>Migration Agents Registration Application Charge Bill 1997</u></a>	To establish a system to determine registration charges for migration agents.
<a href="#"><u>Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1997</u></a>	To strengthen those provisions in the Act which provide for the refusal or cancellation of visas on character grounds
<a href="#"><u>Administrative Decisions (Effect of International Instruments) Bill 1997</u></a>	To restore the situation which existed before <i>Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh</i> (1995) 183 CLR 273, in which if there were to be changes to procedural or substantive rights in Australian law resulting from adherence to a treaty, they would be made by parliamentary and not executive action.

**1998**

<i>Bill</i>	<i>Description of Purpose (from Bills Digest)</i>
<a href="#">Migration Legislation Amendment Bill (No. 1) 1998</a>	<p>To merge the two tier review process for non-refugee visa decisions (Departmental review and review by the independent Immigration Review Tribunal) into a single review by the newly created external review body, the Migration Review Tribunal, and</p> <p>To provide a range of new procedures for the Migration Review Tribunal and the Refugee Review Tribunal, including empowering the Principal Member of the Refugee Review Tribunal to issue general directions to Tribunal members and granting both Principal Members the power to reconstitute a Tribunal during a hearing in specific circumstances.</p>
<a href="#">Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998</a>	<p>To strengthen those provisions in the Act which provide for the refusal or cancellation of visas on character grounds.</p>
<a href="#">Migration Legislation Amendment (Judicial Review) Bill 1998</a>	<p>To insert a 'privative clause', the aim of which is to severely restrict access to the Federal Court and the High Court judicial review of administrative decisions made under the <i>Migration Act 1958</i>.</p>
<a href="#">Migration (Visa Application) Charge Amendment Bill 1998</a>	<p>To make minor amendments to the <i>Migration (Visa Application) Charge Amendment Act 1998</i>.</p>

**1999**

<i>Bill</i>	<i>Description of Purpose (from Bills Digest)</i>
<a href="#">Migration Legislation Amendment (Temporary Safe Haven Visas) Bill 1999</a>	<p>To create a class of visa, to be known as a 'temporary safe haven visa' [On 15 April 1999, the Migration Regulations were amended to prescribe new visa class UJ and new visa subclass 448 - Kosovar Safe Haven (Temporary).]</p> <p>To prevent holders of temporary safe haven visas from applying for a visa other than a temporary safe haven visa, and</p> <p>To prevent holders, or former holders, of temporary safe haven visas from seeking merits review or judicial review of decisions by the Minister.</p>
<a href="#">Migration Legislation Amendment Bill (No. 2) 1999</a>	<p>To implement procedures for the monitoring and cancelling temporary entry business sponsorships; prevent potential visa applicants from making applications for visas that would be refused under current migration policy; implement a more flexible method of authorising persons, and classes of persons, to be 'officers' for the purposes of the Act; empower State and Territory corrective services authorities to detain (for the purposes of removal from Australia) non-citizens who are liable for deportation at the end of their prison sentence; provide for merits review of decisions to refuse applications for permanent migrant spouse or interdependency visas; provide for (in certain circumstances) the granting of visas to applicants who would otherwise be adversely affected by the visa capping provisions; extend to two years the period in which a points tested visa applicant who meets the pool mark for the grant of a visa may have their visa application held in reserve; and remove the age limitation on the appointment of full-time members of the Refugee Review Tribunal.</p>
<a href="#">Migrant Legislation Amendment (Migration Agents) Bill 1999</a>	<p>To extend the current arrangements for the regulation of the migration advice industry [In short, the amendments change the expiry date for the scheme set in Division 7 of Part 3 from 21 March 2000 to 21 March 2003].</p> <p>To provide more efficient methods for warning the public of the suspension or cancellation of an agent's registration, and</p> <p>To enable the Migration Agents Registration Authority to protect the rights and interests of people whose migration agent has died or has been deregistered.</p>
<a href="#">Border Protection Legislation Amendment Bill 1999</a>	<p>To strengthen provisions of the <i>Customs Act 1901</i> and the <i>Migration Act 1958</i> relating to the interception and prevention of people smuggling operations and to amend the <i>Migration Act 1958</i></p>

	and the <i>Fisheries Management Act 1991</i> to allow for the detention of Indonesian citizens who are arrested for fishing illegally in Australian waters, pending their prosecution.
<a href="#">Administrative Decisions (Effect of International Instruments) Bill 1999</a>	To restore the situation which existed before <i>Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh</i> (1995) 183 CLR 273, in which if there were to be changes to procedural or substantive rights in Australian law resulting from adherence to a treaty, they would be made by parliamentary and not executive action.

## 2000

<i>Bill</i>	<i>Description of Purpose (from Bills Digest)</i>
<a href="#">Migration Legislation Amendment Bill (No. 2) 2000</a>	To restrict access to the courts for judicial review of migration decisions, by preventing class actions in migration matters before the Federal and High Courts, changing the requirements for standing in the Federal Court, and introducing time limits for original applications to the High Court in migration matters.
<a href="#">Migration Legislation Amendment (Parents and Other Measures) Bill 2000</a>	To amend the <i>Health Insurance Act 1973</i> to specify the categories of visa for which applicants are eligible for Medicare.  To amend the <i>Migration Act 1958</i> to accommodate an extension of the visa application charge regime in the Migration (Visa Application) Charge Amendment Bill 2000, and  To amend the Migration Regulations 1994 to create two new visa classes for supported aged parents and to increase obligations relating to these visas in terms of assurance of support bonds and health insurance indemnification.
<a href="#">Migration (Visa Application) Charge Amendment Bill 2000</a>	To amend the <i>Migration (Visa Application) Charge Act 1997</i> to increase the visa application charge limit from \$12,500 to \$30,000.
<a href="#">Migration Legislation Amendment (Overseas Students) Bill 2000</a>	To amend the <i>Migration Act 1958</i> to provide for automatic cancellation where overseas students breach conditions of student visas and to create an enforcement regime which mirrors the regime established in the proposed <i>Education Services for Overseas Students Act 2000</i> .

**2001**

<i>Bill</i>	<i>Description of Purpose (from Bills Digest)</i>
<a href="#"><u>Migration Legislation Amendment (Application of Criminal Code) Bill 2001</u></a>	To revise criminal offence provisions in three statutes in the Immigration and Multicultural Affairs portfolio so that they harmonise with the principles of criminal responsibility found in Chapter 2 of the Criminal Code
<a href="#"><u>Migration Legislation Amendment (Immigration Detainees) Bill 2001</u></a>	To establish a regime under which immigration detainees can be strip searched; strengthen the offence of escape from immigration detention and create a new offence in relation to weapons, and introduce additional security measures for visitors to immigration detention centres.
<a href="#"><u>Jurisdiction of the Federal Magistrates Service Legislation Amendment Bill 2001</u></a>	To confer jurisdiction in migration matters on the Federal Magistrates Court

## Endnotes

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1. John McMillan, 'Federal Court v Minister for Immigration', *Australian Institute of Administrative Law Forum*, No. 22, p. 1.
2. *Victorian Council for Civil Liberties Incorporated v the Minister for Immigration and Multicultural Affairs* [2001] FCA 1297, para 50.
3. John Howard, MP, 'MV Tampa – Unauthorised Arrivals', *Media Release*, 1 September 2001.
4. Agreement of 3 September 2001 described in *Victorian Council for Civil Liberties Incorporated v the Minister for Immigration and Multicultural Affairs* [2001] FCA 1297, para 42.
5. John Howard, MP, *Transcript of Doorstop Interview, Sydney Airport*, 8 September 2001.
6. [2001] FCA 1329.
7. Philip Ruddock, MP, Migration Legislation Amendment Bill (No 6) 2001, Second Reading Speech, House of Representatives, *Debates*, 28/09/01, p. 30198.
8. Proposed subsection 4(1).
9. Proposed subsection 4(3).
10. Proposed section 5.
11. Proposed subsection 4(2).
12. Proposed section 8.
13. Proposed section 7.
14. Proposed section 10.
15. Proposed section 9.
16. Robert McClelland, MP, 'Government Declares Own Bill Unconstitutional', *Press Release*, 31 August 2001.
17. 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.
18. Kim Beazley, MP, *Transcript of Doorstop Interview, Parliament House*, 30 August 2001.
19. Kim Beazley, MP, *Transcript of Doorstop Interview, Parliament House*, 30 August 2001.
20. That is, the *Convention relating to the Status of Refugees* of 28 July 1951 and the *Protocol relating to the Status of Refugees* of 31 January 1967.
21. Philip Ruddock, MP, 'Background Paper on Unauthorised Arrivals Strategy', 6 September 2001.
22. *Ibid.*

23. John Howard, MP, *Transcript of Doorstop Interview, Sydney Airport*, 8 September 2001.
24. Philip Ruddock, MP, 'Boats, Christmas Island', *Transcript of Press Conference*, 10 September 2001.
25. (1992) 176 CLR 1
26. (1993) 43 FCR 100. Wilcox J held that section 88 only applied to persons who come to Australia on a vessel in the course of a continuing journey (at pp 135–136), applying comments made by Toohey J in *Lim's Case* at pp 33–34.
27. The provisions relating to mandatory detention commenced on 6 May 1992. Other provisions commenced 3 June 1992 and 6 November 1992.
28. The Hon Gerry Hand, MP, Migration Amendment Bill 1992, [Second Reading Speech](#), House of Representatives, *Debates*, 5 May 1992, p. 2370.
29. The delay was intended to allow drafting of subordinate legislation, design and printing of forms, training, development of new information technology systems and programs.
30. Section 189 of the *Migration Act 1958* provides:
  - (1) If an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person.
  - (2) If an officer reasonably suspects that a person in Australia but outside the migration zone:
    - (a) is seeking to enter the migration zone; and
    - (b) would, if in the migration zone, be an unlawful non-citizen;the officer must detain the person.

[‘Officer’ is defined in section 5 to include immigration officers, police officers, protective service officers, etc.]
31. Section 196 provides:
  - (1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:
    - (a) removed from Australia under section 198 or 199; or
    - (b) deported under section 200; or
    - (c) granted a visa.
  - (2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.
  - (3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa.
32. These provisions were inserted as sections 54W and 54ZD by the *Migration Reform Act 1992*. The *Migration Reform Act 1992* was due to commence on 1 November 1993 but was deferred by the *Migration Laws Amendment Bill 1993* to 1 September 1994.
33. Migration Regulations (Amendment) SR No. 280 of 1994.

34. Migration Legislation Amendment (Judicial Review) Bill 1998 [2001], Explanatory Memorandum, p. 5.
35. Migration Legislation Amendment Bill (No. 4) 1997.
36. Migration Legislation Amendment Bill (No. 5) 1997.
37. Krysti Guest, 'Migration Legislation Amendment (Judicial Review) Bill 1998', *Bills Digest No. 90 1998-99* at <http://www.aph.gov.au/library/pubs/bd/1998-99/99bd090.htm>.
38. Section 229.
39. Section 232A.
40. Section 233A. Also ss 22, 23 and 234.
41. Section 334.
42. Section 335.
43. Subsection 245B(2).
44. Subsection 245B(4).
45. Subsection 245B(5).
46. Subsection 245B(6).
47. Subsection 245B(7).
48. An 'officer' includes any person who is in command, or a member of the crew, of the relevant ship or a member of the Australian Defence Force: subsection 245F(18).
49. Paragraph 245F(3)(f)(3)(d)(iii).
50. Paragraph 245F(3)(f)(i).
51. Paragraph 245F(3)(f). Arrests within the 'contiguous zone' must be made in accordance with Australia's international obligations: Subsection 245F(4).
52. Paragraph 245F(8)(c).
53. Subsection 245F(9).
54. Subsection 245G(4).
55. Subsection 245G(6).
56. *VCCL v MIMA*, per North J, at para. 63.
57. *VCCL v MIMA*, per North J, at para. 83.
58. 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.

59. *VCCL v MIMA*, per North J, at para. 161.
60. *Ruddock v Vadarlis*, per French J, at para. 213.
61. *Ruddock v Vadarlis*, per French J, at para. 212.
62. *VCCL v MIMA*, per North J, at para. 117.
63. *VCCL v MIMA*. North J referred to a statement by Barton J in *Robetelmes v Brennan* (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 Administrative Law*, 5<sup>th</sup> Edition, Penguin 1985 that '[w]hether the exclusion or expulsion of friendly aliens was permissible under the prerogative is doubtful' (at pp. 149–150).
64. *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.
65. *Ruddock v Vadarlis*, per French J, at para. 193.
66. *Barton v The Commonwealth* (1974) 131 CLR 477, per Mason J, at p 498.
67. *Ruddock v Vadarlis*, per French J, at para. 193.
68. *Ruddock v Vadarlis*, per French J, at para. 194.
69. *Ruddock v Vadarlis*, per Beaumont J, at para. 101.
70. *Ruddock v Vadarlis*, per Beaumont J, at para. 107.
71. *Ruddock v Vadarlis*, per Beaumont J, at para. 104.
72. 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.

73. 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>.
74. Robert McClelland MP, 'Tampa Decision: Government Needs Lawful Basis For Holding Of Tampa Asylum Seekers', *Media Release*, 11/09/01
75. '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.
76. The distinction was noted with the introduction of the *Migration Amendment Act 1992*: 'References to powers of arrest will be removed from sections 92 and 93 and from a number of related sections to ensure that no confusion arises between the powers under the Act to take persons into what might be termed 'migration custody' and the power to arrest persons for criminal offences': The Hon Gerry Hand, MP, Migration Amendment Bill 1992, [Second Reading Speech](#), House of Representatives, *Debates*, 5 May 1992, p. 2370.
77. *Robtelmes v Brennan* (1906) 4 CLR 395 per Barton J at p. 415.
78. *Koon Wing Lau v Calwell* (1949) 80 CLR 533 per Latham CJ at p. 555.
79. *Chu Keong Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, per Brennan, Deane and Dawson JJ, at p. 33.
80. *Chu Keong Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, per McHugh J, at pp 71–72.
81. *Chu Keong Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, per Brennan, Deane and Dawson JJ, at pp 33–34.
82. *Chu Keong Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, per McHugh J, at pp 71–72.
83. *Chan Yee Kin*, op. cit., per Dawson J, at p. 426.
84. *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989-90) 169 CLR 379, per McHugh J at p. 429.
85. *Minister for Immigration and Ethnic Affairs v Haji Ibrahim* (2000) 175 ALR 585, per Gummow J, at p. 622.
86. It is worth noting that 'systematic conduct' is not intended to equate with the 'widespread or systematic attack' envisaged in humanitarian law. The emphasis is clearly on the selectivity of harassment rather than its widespread scale or its links with official policy or complicity.
87. *Chan Yee Kin*, op. cit., per McHugh J, at pp. 430–431.
88. *Applicant A*, op. cit., per McHugh J, at p. 258; *Chen Shi Hai v Minister for Immigration and Ethnic Affairs* (2000) 201 CLR 293, per Gleeson CJ, Gaudron, Gummow and Hayne JJ, pp. 304–305.

89. *Chan Yee Kin*, op. cit., per McHugh J, at pp. 430–431.
90. Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct [but] .... on whether it discriminates against the person because of race, religion, nationality political opinion or membership of a social group: *Applicant A v Minister for Immigration and Ethnic Affairs* (1996-97) 190 CLR 225, per McHugh J, at p. 258.
91. *Applicant A*, op. cit., per McHugh J, at p. 258.
92. *Chen Shi Hai*, op. cit.
93. *Ibrahim*, op. cit.
94. *Jahazi v Minister for Immigration and Ethnic Affairs* (1995) 133 ALR 437 at p. 433; *Minister for Immigration and Ethnic Affairs v Abdi* (1999) 162 ALR 105 at p. 112.
95. *Jahazi v Minister for Immigration and Ethnic Affairs* (1995) 133 ALR 437, per French J, at p. 433.
96. *Ram v Minister for Immigration and Ethnic Affairs* (1995) 130 ALR 214, per Burchett J, at p. 317.
97. *Applicant A*, op. cit., per Gummow J at p. 284.
98. *Chen Shi Hai* op. cit., per Gleeson CJ, Gaudron, Gummow and Hayne JJ, at pp. 304–305.
99. Mark Leeming, 'Case Note: When is Persecution for a Convention Reason', *Australian Journal of Administrative Law*, Vol. 7, February 2000, pp. 100–103; Goodwin-Gill, *The Law of Refugees*, 2nd Edition, 1996, pp. 50–52.
100. *Applicant A*, op. cit., per Dawson J at p. 242. This was endorsed in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293, Gleeson CJ, Gaudron, Gummow and Hayne JJ at p. 299.
101. *Applicant A*, op. cit.
102. '[T]he question is whether children, who did not contravene that policy but were born in contravention of it, can constitute a group of that kind. To put the matter in that way indicates that the group constituted by children born on those circumstances is defined other than by reference to the discriminatory treatment of persecution that they fear': *Chen Shi Hai*, op. cit., per Gleeson CJ, Gaudron, Gummow and Hayne JJ at p. 302.
103. Minister for Immigration and Multicultural Affairs, the Hon. Philip Ruddock, MP, second reading speech on the Migration Legislation Amendment Bill (No 6) 2001, House of Representatives, *Hansard*, p. 30198.
104. Proposed paragraphs 91R(1)(b) and (c).
105. Proposed subsection 91R(2).
106. Proposed paragraph 91R(1)(a).
107. The material in this section is drawn substantially from Krysti Guest, 'Migration Legislation Amendment (Judicial Review) Bill 1998', *Bills Digest No. 90 1998-99* at <http://www.aph.gov.au/library/pubs/bd/1998-99/99bd090.htm>.

108. *Deputy Commissioner of Taxation v. Richard Walter Pty. Ltd* (1995) 183 CLR 168, per Deane and Gaudron JJ, at p. 205.
109. See *R v. Commonwealth Court of Conciliation and Arbitration; Ex Parte Whybrow & Co* (1910) 11 CLR 1.
110. For a general discussion of this history, see Aronson and Dwyer, op.cit., pp. 962–76.
111. For a detailed discussion of this issue, see *ibid.*, pp. 91–103.
112. *R v. Hickman: Ex parte Fox and Clinton* (1945) 70 CLR 598.
113. On the importance of reading the *Hickman* principle as a tool of statutory construction, see *Darling Casino Limited v. New South Wales Casino Control Authority & Ors* (1997) 191 CLR 602, per Gaudron and Gummow JJ, at p. 631.
114. The decision must be a bone fide attempt to exercise the decision-maker's power; the decision must relate to the subject matter of the legislation and be reasonably capable of reference to the power given to the tribunal; and the decision must not display a constitutional or statutory jurisdictional error on its face.
115. For example, privative clauses may not prevent judicial review if officers of the Commonwealth have failed to discharge 'inviolable duties' or the decision goes beyond 'inviolable limitations or restraints': *Darling Casino Limited v. New South Wales Casino Control Authority & Ors*. per Gaudron and Gummow JJ, op. cit., at p.632 citing *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at p. 248.
116. Both of these arguments were raised by Ms Kim Rubenstein, then lecturer in constitutional, administrative and migration law at the University of Melbourne, in evidence to the Senate Legal and Constitutional Legislation Committee: Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Migration Legislation Amendment Bill (No. 4) 1997; Migration Legislation Amendment Bill (No. 5) 1997*, October 1997, p. 31.
117. Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Migration Legislation Amendment Bill (No. 4) 1997; Migration Legislation Amendment Bill (No. 5) 1997*, October 1997, Minority Report, p. 57.
118. *Ibid.*
119. Senator Ian Campbell, Second Reading Speech — Migration Legislation Amendment Bill (No. 5) 1997, *Hansard*, 2 December 1998, p. 1025–1022.
120. Section 17.
121. Subsection 7(1).
122. Section 5.
123. Section 5.
124. Section 6.

125. The *Acts Interpretation Act 1901* applies to all Commonwealth Acts 'except so far as the contrary intention appears': section 2.
126. This specific obligation (against 'refoulement') is contained in the *Convention relating to the Status of Refugees*, Article 33(1). Australia ratified the Convention on 22 January 1954.
127. *Ibid*, Article 32(1).
128. *Ibid*, Article 32(2).
129. Melissa Marino and Paul Heinrichs, 'PM's legal bid on refugees attacked', *Sunday Age*, 09/09/01.
130. 10 December 1982, UN Doc A/Conf 62/122; 21 ILM 1261 (1982). The convention came into force on 16 November 1994.
131. Article 2(1). In general, the territorial baseline is the low-water line along the coast.
132. A nautical mile is equal to 1,852 metres: Schedule 1.(1) of the *Seas and Submerged Lands Act 1973* and see Australian Surveying and Land Information Group, 'Maritime Boundaries', at <http://www.auslig.gov.au/marbound/mile.htm> [25/1/00].
133. Article 3.
134. Article 33.
135. Articles 55 and 57.
136. Article 76.
137. Article 83.
138. The *Seas and Submerged Lands Act 1973* provides for the inner limits (baselines) and outer limits (breadth) of the territorial sea to be determined by proclamation in accordance with international law (s 7). The inner limits of the territorial sea were proclaimed as early as 1974 (Proclamation in Gazette S 89A, Thursday, 24 October 1974, and Proclamations in Gazette No. S 29, Wednesday, 9 February 1983 and Gazette No. S 57, Tuesday, 31 March 1987). The outer limit of territorial sea was left to be determined according to common law until the full 12 nm limit was proclaimed in 1990 (Proclamation in Gazette No. S 297, Tuesday, 13 November 1990).
139. Section 5(1).
140. Section 7.
141. In the diagram 'coastal waters' corresponds to 'internal waters'. Map courtesy Australian Surveying and Land Information Group, Department of Industry, Science and Resources, Canberra, Australia. Crown Copyright © www.auslig.gov.au.
142. Map courtesy Australian Surveying and Land Information Group, Department of Industry, Science and Resources, Canberra, Australia. Crown Copyright © www.auslig.gov.au.
143. 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.

144. *Croft v Dunphy* [1933] AC 156.
145. *Bonser v La Macchia* (1969) 122 CLR 177, per Windeyer J at 226.
146. *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1936) 56 CLR 337, per Dixon J at 375.
147. *Pearce v Florenca* (1976) 135 CLR 507 at 518.
148. 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.
149. *Polities v The Commonwealth* (1945) 70 CLR 60 and *Fishwick v Cleland* (1960) 106 CLR 186.
150. *Horta v The Commonwealth* (1994) 181 CLR 183 at 195.
151. *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.
152. See generally *Halsbury's Laws of Australia*, 'Title 215—Foreign Relations' [215–175].
153. Article 27(1).
154. Article 21.
155. Article 27(2).
156. Article 27(5).
157. Article 19(2).
158. Article 19(2)(g).
159. Article 33.
160. Article 73(1).
161. Article 73(3). A 'flag state' is a ship's country of registration.
162. Article 60(2).
163. Article 77(1).
164. Article 78(1).
165. Article 111.
166. That is, it is not registered under the laws of another country.
167. Article 110.
168. 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].

169. 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'.
170. 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'.
171. The powers to prevent the infringement of immigration laws within the 'contiguous zone' and the 'exclusive economic zone' are examples of the 'protective principle'.
172. *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; *Helmets v Coppins* (1961) 106 CLR 156. See also *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1.
173. *Ward v R* (1980) 142 CLR 308.
174. *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.
175. *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 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.
176. *Libman v The Queen* [1985] 2 SCR 178.
177. *Lipohar*, op cit, per Gleeson CJ at para 35; per Gaudron, Gummow and Hayne JJ at para 123; per Callinan J at para 269.
178. 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](http://law.gov.au/publications/Model_Criminal_Code/damage.pdf) [13/03/00].
179. Article 19(1).
180. Article 18(1).

181. Article 18(2).
182. O'Connell, *op. cit.*, p. 271.
183. *Ibid*, p. 274.
184. Article 25(1).
185. R Churchill and A. Lowe, *The Law of the Sea*, Manchester University Press, Manchester, 1988, p. 73.
186. Article 27(1).
187. See O'Connell, Vol. II, *op. cit.*, p. 960.
188. *Ibid* and see *Pianka v R* [1979] AC 107.
189. Churchill and Lowe, *op. cit.*, p. 52.
190. Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea signed in Brussels on 23 September 1910 (Article 10); 1958 Geneva Convention on the High Seas (Article 12); International Convention on Maritime Search and Rescue by the Inter-Governmental Maritime Consultative Organization in 1979; UNCLOS (Article 98).
191. High Commissioner for Refugees, 'Problems Related to the Rescue of Asylum-Seekers in Distress at Sea', EC/SCP/18, 26 August 1981 at <http://www.unhcr.ch/refworld/unhcr/scip/18.htm>.
192. Ivan Shearer, 'Extradition and Asylum', in Ryan (Ed.) *International Law in Australia*, 2nd Ed., Law Book Company, Sydney, 1984, pp. 201–207.
193. This specific obligation (against 'refoulement') is contained in the *Convention relating to the Status of Refugees*, Article 33(1). Australia ratified the Convention on 22 January 1954.
194. *Ibid*, Article 32(1).
195. *Ibid*, Article 32(2).
196. United Nations High Commission for Human Rights, *Convention relating to the Status of Refugees*, at <http://www.unhcr.ch/refworld/refworld/legal/instrume/asylum/1951eng.pdf>.
197. 'The Government of the Commonwealth of Australia makes a reservation with respect to the provisions contained in Article 32 of the Convention and does not accept the obligations stipulated in this Article': United Nations Treaty Series, Vol. 189, p. 202; Australian Treaty Series 1954 No. 5, p. 16.
198. For example see Chris Sidoti, 'Asylum seekers: human rights obligations', *Migration Action*, Vol 22 No. 2, 2000 pp 13–16.
199. See generally Commonwealth Parliament of Australia, Joint Standing Committee on Migration, *Asylum, Border Control and Detention*, February 1994, Chapter 3.
200. Communication No. 305/1988, Human Rights Committee Report 1990, Volume II: UN Doc. A/45/40, paragraph 5.8 (emphasis added).
201. CCPR/C/59/D/560/1993.



202. '[D]etention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal. In the instant case, the State Party has not advanced any grounds particular to the author's case, which would justify his continued detention ... The Committee therefore concludes that the author's detention ... was arbitrary': *ibid*, page 24 (emphasis added).
203. United Nations Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc. [CCPR/CO/69/AUS](#) (28 July 2000).
204. Jane Goddard, 'What the Migration Reform Act Really Means: The most significant changes to migration law and policy in five years', *Law Society Journal*, March 1994, pp 33–36.
205. There are also limits placed upon the improper exercise of power... Thus taking an irrelevant consideration into account or failing to take a relevant consideration into account, or exercising a discretionary power in bad faith, are excluded from consideration under the ground of review': Charles Beltz, 'The Migration Reform Act 1992 and changes to judicial review', *Admin Review*, No. 39/40, Winter 1994, 36-42, p. 40.
206. Beltz, *op cit*, p. 39.