Submission to the Legal and Constitutional Reference Committee:

Inquiry into Migration Zone Excision - Discussion in the light of Australia's international refugee obligation of non-refoulement.

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1. The Principle of Non-Refoulement at Public International Law

In general, refugee law is a dynamic body of law, informed by the broad object and purpose of the 1951 Refugee Convention and its 1967 Protocol,[1] as well as by developments in related areas of international law such as human rights and international humanitarian law.

The principle of non-refoulement is enunciated in Article 33 of the Refugee Convention which states:

> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted y a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Under international law, Article 33 applies to refugees irrespective of their formal recognition and to asylum seekers. In the case of asylum seekers, this applies up to the point that their status is finally determined in a fair procedure. In the *Handbook on the Procedures and Criteria for Determining Refugee Status* prepared by the office of the UNHCR it states:

> "A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of the recognition, but is recognised because he is a refugee."[2]

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[1] 1952 Convention relating to the Status of Refugees ("Refugee Convention") and the 1967 Protocol relating to the Status of Refugees ("Protocol")

[2] Office of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* 1992 at para. 28

Any other approach would significantly undermine the effectiveness and utility of the protective arrangements of the Convention. It is an approach that has been unambiguously and consistently affirmed over a 25year period.[3]

As far back as 1977, the Executive Committee[4] commented upon the fundamental humanitarian character of the principle of non-refoulement and its general acceptance by States.[5] This has been affirmed subsequently.[6] The importance of the principle has been emphasised recently in *Conclusion No. 79 (XLVII)* - 1996 and *No. 81 (XVVIII)* - 1997 in substantially the same terms as follows:

> "The Executive Committee
> ...
>
> Reaffirms the fundamental importance of the principle on non-refoulement, which prohibits expulsion and return of refugees in any manner whatsoever to the frontiers of the territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, whether or not they have been formally granted refugee status, or of person in respect of whom there are substantial grounds for believing that they would be in danger of being subjected to torture, as set forth in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment."[7]

The principle of non-refoulement also appears in varying forms in a number of other instruments. Article III(3) of the 1966 Asian-African Refugee Principles[8]; Article 3 of

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[3] Executive Committee *Conclusion No. 6 (XXVIII)* 1997 at para. (c); *Conclusion No. 79 (XLVII)* - 1996 at para. (j); *Conclusion No. 81 (XLVII)* 1997 at para (I). See also UNGA Resolution 52/103 of 9 February 1998 at para. 5 and *The Asian-African Refugee Principles* and *Declaration on Territorial Asylum UNGA Resolution 2132 (XXII)* of 14 December 1967. The *OAU Refugee Convention* and the *ACHR* are cast in even broader terms.

[4] ECOSOC Resolution 672 (XXV) of 30 April 1928 established the Executive Committee with a membership of 24 States. Resolution 672 (XXV) provides that the Executive Committee shall "[d]etermine the general policies under which the [United Nations] High Commissioner [for Refugees] shall plan, develop and administer programmes and projects required to help solve the problems of [new refugee situations requiring international assistance]." In the exercise of its mandate, the Executive Committee adopts *Conclusions on International Protection* ("Conclusions") addressing particular aspects of the UNHCR's work. While the Conclusions are not formally binding, regard may be properly had to them as elements relevant to the interpretation of the 1951 Convention.

[5] *Conclusion No. 6 (XXVIII)* - 1977

[6] *Conclusion No. 25 (XXXIII)* - 1982. See also *Conclusion No. 17 (XXXI)* - 1980.

[7] *Conclusion No. 79 (XLVII)* - 1996 at para. (j); *Conclusion No. 81 (XLVIII)* - 1997 at para. (i).

[8] It states: "No one seeking asylum in accordance with these principles should, except for overriding reasons of national security or safeguarding the populations, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory."

the 1967 Declaration on Territorial Asylum adopted unanimously by UNGA as Resolution 2132 (XXII) 14 December 1967[9]; Article II(3) of the 1969 OAU Refugee Convention[10]; Article 22(8) of the 1969 American Convention on Human Rights[11]; and Section III paragraph 5 of the 1984 Cartegna Declaration which states:

> ... the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) is a cornerstone on the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observes as a rule of *jus cogens*.[12]

The principle of non-refoulement is also applied as a component part of the prohibition on torture, cruel, inhuman or degrading treatment or punishment: Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Forms of Treatment or Punishment (CAT)[13]; and under Article 7 of the International Covenant on Civil and Political Rights (ICCPR). Article 7 provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The UN Human Rights Committee has interpreted Article 7 to mean that:

> States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.[14]

The corresponding provision in Article 3 of the 1950 *European Convention on Human Rights* has been similarly interpreted by the European Court of Human Rights as

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[9] It provides: "1. No person referred to in article 1, paragraph 1 [seeking asylum from persecution], shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution."

[10] It provides: "No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article 1, paragraphs 1 and 2 [concerning persecutions for reasons of race, religion, nationality, membership of a particular social group or political opinion or who is compelled to leave his country of origin or place of habitual residence in order to seek refuge from external aggression, occupation, foreign domination or events seriously disturbing the public order]."

[11] It reads: "In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."

[12] Cartegna Declaration on Refugees, 1984 published by the UNHCR, embodying the Conclusions of the *Colloquium on the International Protection of Refugees in Central America, Mexico and Panama.*

[13] It states: "1. No State Party shall expel, return (*'refouler'*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

[14] United Nations Human Rights Committee *General Comment No. 20 (1992)* HROI/HEN/1.Rev.1 28 July 1994 at para. 9

imposing a prohibition on non-refoulement.[15] Non-refoulement also finds expression in standard-setting conventions concerned with extradition. For example, Article 4(5) of the 1981 *Inter-American Convention on Extradition* precludes extradition when "it can be inferred that persecution for reasons of race, religion or nationality is involved, or that the position of the person sought may be prejudiced for any of these reasons." In summary, the overwhelming majority of the international community are bound by some or other treaty commitment prohibiting refoulement. It is safe to conclude that non-refoulement is a principle of customary international law.[16]

The attribution to a State of conduct amounting to refoulement is determined by the principles of the law of State responsibility.[17]

2. Incorporation of the Principle of Non-Refoulement into Australian Law

Australia has international obligations under both treaty law[18] and customary international law not to refoule an asylum seeker. Under the doctrine of the margin of appreciation, each State has a discretion as to how it gives effect to these obligations.[19]

The principle of non-refoulement has been incorporated into Australian law by virtue of section 36 of the *Migration Act 1958* (Cth) which states:

> "(1) There is a class of visas to be known as protection visas.
> (2) A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugee Convention as amended by the Refugee Protocols."

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[15] See *Soering v United Kingdom* (1989), 98 ILR 270 at para. 88; *Vilvarajah v United Kingdom* (1991) 108 ILR 321 at paras 73-74 and 79-81; and *Chalal v United Kingdom* (1997) 108 ILR 385 at para. 75.

[16] Lauterpacht, E & Bethlehem, D *The Scope and Content of the Principle of Non-Refoulement* United Nations High Commissioner for Refugees, 20 June 2001

[17] See International Law Commission *Articles on the Responsibility of States for Internationally Wrongful Acts*, A/CN.4/L.602, 31 May 2001

[18] Australia acceded to the Convention Relating to the Status of Refugees on 22 January 1954 and the Protocol relating to the Status of Refugees on 13 December 1973. It ratified the International Covenant on Civil and Political Rights on 13 August 1980; the Convention against Torture and Other Cruel, Inhuman or degrading Forms of Treatment and Punishment on 8 August 1989; and the Convention on the Rights of the Child on 17 December 1990.

[19] The International Law Commission has commented: "So long as the State has not failed to achieve *in concreto* the result required by an international obligation, the fact that it has not taken a certain measure which would have seemed especially suitable for that purpose - in particular, that it has not enacted a law, cannot be held against it as a breach of that obligation." *Year Book of the International Law Commission* (1977) Part 2 at page 23. See also *Handyside Case* (1976) ECHR Series A, 24 and *Rasmussen Case* (1984) ECHR Series A, 281

The principle of non-refoulement has also been given effect in the *Extradition Act 1988* (Cth).

3. Case Study: The Excision of Christmas Island from Australia's Migration Zone

3.1 Background: The Tampa Incident

On 26 August 2001, a routine surveillance flight by Coastwatch Australia 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 Arnie 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 Australian territorial waters it was instructed to remain in the contiguous zone[20]. On 28 August the Tampa issued a distress signal based on the fact that assistance had not been provided within 48 hour. On 29 August it proceeded into the territorial water[21] surrounding Christmas Island and was interdicted by 45 SAS members. The same day the Government introduced border protection legislation into Parliament.[22]

There is a presumption at international law that there exists an obligation to rescue persons and ships distressed at sea.[23] However, international law does not give any guidance as to how the obligation to rescue is to be balanced against territorial sovereignty particularly in relation to asylum seekers. [24] The Tampa incident clearly exposes the problem caused by the gaps in the implementation in domestic law of

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[20] The contiguous zone is defined in Article 33 of the United Nations Convention of the Law of the Sea (UNCLOS) as the sea between 12 and 24 nautical miles of the territorial baseline. A State may exercise control necessary to punish or prevent 'infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territorial sea": UNCLOS Article 27(5).

[21] Territorial waters are the sea within 12 nautical miles of the territorial baseline: UNCLOS Article 2(1). Under UNCLOS, a country may enforce laws with respect to any issue within its internal waters.

[22] "Refugee Law – Recent Legislative Developments" Current Issues Brief 5 Parliamentary Library of Australia <http:/www.aph.gov.au/library/pubs/CIB/2001-02/02cib05.htm.

[23] See 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); 1960 and 1978 Conventions for the safety of Life at Sea; International Convention on Maritime Search and Rescue by the Inter-Governmental Maritime Consultative Organisation in 1979; UNCLOS (Article 98). In 1982 the Executive Committee reported on the Meeting of the Working Group of Government representatives on the Question of Rescue of Asylum-Seekers at Sea held in Geneva (5-7 July 1982) and stated: "The obligation to rescue asylum-seekers in distress on the high seas is fundamental and should be strictly observed and facilitated by the ships' master, ships' owner and concerned States." EC/SCP/21, 21 July 1982. The obligation applies irrespective of the nationality or status of the people rescued, or of "the circumstances in which the person is found" (1979 IMCO Convention).

[24] High Commissioner for Refugees "Problems Related to the Rescue of Asylum-Seekers in Distress at Sea" at para. 23 EC/SCP/18, 26 August 1981 at http://www.unhcr.ch/refworld/unhcr/scip/18.htm

international treaties and norms, including rescue at sea and the protection of asylum seekers against arbitrary detention.[25]

3.2 Migration Amendment (Excision from Migration Zone) Act 2001(Cth)

Christmas Island is an island situated in the Indian ocean in or about latitude 10 30' south and longitude 105 40' east.[26] The Commonwealth of Australia formally accepted Christmas Island as a territory under the authority of the Commonwealth under the Christmas Island Act 1958 from the United Kingdom. The Act was proclaimed to come into operation on 1 October 1958. Australia has since asserted sovereignty over Christmas. Australia's sovereignty over Christmas Island is derived from effective British occupation and administration of the island, a valid transfer of the island from Britain to Australian in 1959 by complementary British and Australian legislation, and continuous governmental and judicial activities by Australia ever since. The primary source of Commonwealth power in relation to Christmas Island is section 122 of the Commonwealth Constitution which empowers the Commonwealth parliament to make laws for the government of any territory.

Included in the raft of proposed legislation responding to the Tampa incident were amendments to the *Migration Act* 1958 to excise Christmas Island and Ashmore Reef from the "migration zone" so that "any arrivals [on these two territories] would not be sufficient grounds for application for status under the Migration Act."[27] The announcement was endorsed by the Minister for Immigration and Multicultural Affairs who stated that "simply arriving at Christmas Island or Ashmore Reef will no longer be an automatic entrée into Australia" and that "people who come to either [territory] from now on 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 claim in Malaysia, of their claims were dealt with by the UNHCR in Pakistan and Iran."[28]

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[25] ICCPR Article 9(1) and UNHCR *Guidelines on applicable criteria and standards relating to the detention of asylum seekers* (1999). See also EXCOMM Conclusion No. 44 (XXXVII); *Amuur v France* (1992) 22 ECHR 533 and *Saadi v Secretary of State for the Home Department* Unreported 0/007/4/01, UK High Court, 7 September 2001, Collins J.

[26] *Islands in the Sun: The Legal Regimes of Australia's External Territories and the Jervis Bay Territory*, Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, AGPS March 1991. Christmas Island was placed under the authority of the Governor of the Straits Settlement in 1889 and incorporated within the settlement of Singapore in 1900. During World War 2, Christmas Island was surrender to the Japanese who occupied it for 3 years. The Singapore Colony Order in Council 1946 provided that "the Island of Singapore and its dependencies Cocos (Keeling) Island and Christmas Island shall be governed and administered as a separate colony and should be called the Colony of Singapore". By Order in Council dated 13 December 1957, made under the *Straits Settlement (Repeal) Act* 1946 and the *British Settlement Acts* of 1887 and 1945, Christmas Island was excised from the Colony of Singapore and governed as a separate colony. A raft of legislation designed to have Christmas Island designated as an external territory of Australia followed the Order in Council. This included the *Christmas Island Request and Consent Act 1957* by which the Parliament of the Commonwealth requested the enactment by the Parliament of the UK of an Act designed to enable the transfer of Christmas Island to Australia. The transfer was subsequently facilitated by the UK Parliament's enactment of the *Christmas Island Act 1958*. This was followed by the *Christmas Island (Transfer to Australia) Order in Council 1958* which empowered and then arranged for the island to be placed under the authority of the Commonwealth.

[27] John Howard, MP, *Transcript of Doorstop Interview, Sydney Airport,* 8 September 2001

[28] Philip Ruddock, MP, "Boats, Christmas Island", *Transcript of Press Conference*, 10 September 2001

The key issue underlying the proposed legislation was that in order to be issued with a protection visa under the Migration Act, a person must be "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" 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."[29] Prior to the excision amendment, the *Migration Act 1958* applied to "prescribed territory" which "[meant] the Coral Sea Islands territory, the Territory of Cocos (Keeling) islands, the Territory of Christmas Island and the territory of Ashmore and Cartier Islands".[30] A "migration zone" was defined as "the area consisting of the States, Territories .. [and the sea within a port]."[31] On 27 September 2001 the *Migration Amendment (Excision from Migration Zone)* Act 2001 entered into force in Australia.

It cannot be doubted that a State has a sovereign power to exclude illegally entering aliens from its borders and to legislate for this purpose: *Robtelmes v Brennan* (1906) 4 CLR 395; *Attorney-General for Canada v Cain* (1906) AC 547. The arrival of asylum seekers by boat puts at issue not only non-refoulement but also the extent of freedom of navigation and of coastal States' sovereign rights to police and protect their borders. It raises the so-called "right of unilateral qualification" expressed in Article 1(3) of the Declaration on Territorial Asylum which states that "[i]t shall rest with the State granting asylum to evaluate the grounds for the grant of asylum."[32] Australia's obligation not to refoule an asylum seeker proscribes expulsion or return of any person to the frontier of a territory where they reasonably fear persecution on account of their race, religion, nationality, membership of a particular social group or political opinion; or where there is a real risk that the person will be subjected to torture or cruel, inhuman or degrading forms of treatment or punishment. Domestic legislation cannot be used to avoid treaty obligations.[33] Australia's international obligations under the Refugee Convention arise once a person enters our territorial waters whether or not those territorial waters are included in a "migration zone" under domestic legislation. Once an asylum seeker enters Australia's territorial waters, Australia cannot refoule that person.

3.3 The Pacific Solution

The law of non-refoulement does not, however, stipulate in positive terms where an asylum seekers may find refuge. There is no positive right to asylum under the Refugee Convention. As a result of State practice, the concept of "safe third country" has been developed as a basis for excluding asylum seekers from one country who have access to protection in other countries. A "safe third country" is a country in which asylum seekers

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[29] Section 17
[30] Section 17 subsection (7)(1)
[31] Section 5
[32] 1967 UN declaration on territorial Asylum UNGR Resolution 2132 (XXII). This provision, which Poland introduced during discussions in the Third Committee, is of uncertain scope. So far as the grant of asylum remains discretionary and a manifestation of the sovereignty by the territorial State, it is redundant.
[33] Article 27 Vienna Convention on the Law of Treaties 1969

can enjoy asylum without danger of persecution.[34] Under the principle of non-refoulement, an asylum seeker can be lawfully sent to a safe third country for determination of his refugee status provided there are sufficient guarantees that the person will not be persecuted and will be treated in accordance with international standards.[35]

As a consequence of the excision of Christmas Island from Australia's migration zone, asylum seekers who arrive at Christmas Island are now sent to certain Pacific countries – Nauru and Papua New Guinea. These Pacific countries are funded by the Australian Government to undertake the determination of the refugee status of these asylum seekers. Under Schedule Two of the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act* 2001, the Minister for Immigration must now only grant "Pacific solution" refugees a temporary, three year Offshore Entry Visa having regard to:

- the extent of the applicant's connection with Australia
- if the applicant is subject to persecution in their home country the degree of persecution to which the applicant is subject
- if the applicant is subject o substantial discrimination amounting to a gross violation of human rights in their home country the degree of discrimination to which the applicant is subject
- if the applicant is a female who is subject to persecution or who is registered as being of concern to the United Nations High Commissioner for Refugees whether the applicant has the protection of a male relative and is in danger of victimization, harassment or serious abuse because of her sex
- whether there is any suitable country available other than Australia that can provide for the applicant's stay and protection from persecution, discrimination, victimization, harassment or serious abuse
- the capacity of the Australian community to provide for the temporary stay of persons such as the applicant in Australia.

In and of themselves, these new provisions do not offend Australia's international non-refoulement obligations although some might argue that they certainly offend the spirit of the Refugee Convention.

Conclusion

The arrival of asylum seekers by boat into Australia's territorial waters highlights tensions that inexorably exist between Australia's capacity as a sovereign nation to control its borders and Australia's international human rights and humanitarian

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[34] Executive Committee *Background note on the safe country concept and refugee status*, p.1 cited in Senate Legal and Constitutional Reference Committee *A Sanctuary under review: An examination of Australia's Refugee and Humanitarian Determination Processes*, Commonwealth of Australia June 2000 at p. 65

[35] Executive Committee Conclusion No. 58(XL), 1989 paragraphs (e) and (f).

obligations towards the asylum seekers. Article 14 of the United Nations Declaration of Human Rights states that:

> "(1) Everyone has the right to seek and enjoy in other countries asylum from persecution."

However, granting refugee status and asylum are delicate political matters. The 1951 Refugee Convention reflects the political concern of States that their national sovereignty not be eroded. The Refugee Convention does not grant asylum seekers the right of asylum. It does not prescribe the procedures a State should apply to determine refugee status. Nor does the Convention dictate what constitutes entry into a contracting State for the purpose of claiming its benefits of privileges. In legislating to excise Christmas Island from Australia's migration zone and in administering the Pacific Solution, the Australian Government has steered a tight course through the provisions of international treaty law and custom consonant with the international principle of non-refoulement. Such a course is narrow and difficult. The 2001 Christmas Island excision legislation bears witness to the degree the Australian Government will endeavor to comply with international norms in the exercise of its sovereign powers and democratic mandate in the full knowledge that such international norms do not form a direct part of the domestic law of Australia.[36]

[36] See *Nulyarimma v Thompson* (1999) FCA 1192 at para. 20 per Wicox, J in relation to customary international law; *Minister for Immigration and Ethnic Affairs v Teoh* supra at 286-287 per Mason CJ and Deane J in relation to treaty law.

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