THE UNIVERSITY OF MELBOURNE

16 July 2002

Mr Peter Hallahan
Secretary
Australian Senate
Legal and Constitutional References
Committee/Legislation Committee
Parliament House
Canberra ACT 2600

Dear Mr Hallahan,

Thank you for your letter of 4 July, 2002 inviting me to make a submission to the References Committee's inquiry on the excision of certain islands from Australia's migration zone.

I am due to go overseas shortly on sabbatical so I am not in a position to contribute a full submission. However, I have recently published a piece called "Citizenship, Sovereignty and Migration: Australia's Exclusive Approach to Membership of the Community" in the *Public Law Review* and I am attaching a copy for the Committee.

In that piece I am critical of the *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth) for various reasons.

First, it takes our migration law system back to pre-1994 Migration law days of legal fictions regarding entry into Australia. The post-1994 changes were heralded as significant in removing those legal fictions. Creating new legal fictions is therefore a retrograde step in terms of migration law development.

Moreover, legal fictions do not enhance our legal system as a whole. The rule of law is meant to be about open, accessible, credible laws. To quote from my article:

> "The 'Alice in Wonderland' contortion and the extent to which the legislation strains to call a spade a sea anchor, or anything other than what it is, will, over time, if not already, take its toll on the credibility of the laws enacted in haste." (at 109)

I am heartened to see that the recent legislation introduced to expand the definition of "excised offshore place" is receiving more attention from the Senate than the original amendment Act. I urge the committee to view with extreme caution any further expansion of this legal fiction, and indeed to call into question the original piece of amending legislation.

Yours sincerely,

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Citizenship, Sovereignty and Migration: Australia's Exclusive Approach to Membership of the Community

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This article analyses the Tampa incident from the perspective of three concepts: citizenship, sovereignty and migration. The author argues that these concepts are fundamentally interlinked and integrated. The article defines the use of the word "citizenship" and distinguishes the formal, legal notion from the normative, jurisprudential notion, arguing that Tampa had an impact upon both aspects of citizenship. Moreover, the author develops an argument derived from Professor James Nafziger in critiquing the use of sovereignty to justify the exclusion of the Tampa asylum seekers. The Federal Court, in the cases surrounding the Tampa, and the Parliament, in amending the Migration Act 1958 (Cth) following Tampa, have relied upon notions of sovereignty that, in the author's view, are not justified. This leads to a highly exclusive notion of membership of the Australian community which demeans current Australian citizens.

Introduction

Citizenship, sovereignty and migration are legal notions that are fundamentally interlinked and integrated. This is highlighted by the Government's executive and legislative response to refugee applicants and, in particular, in the specific way in which it responded to the *Tampa* incident.

On 26 August 2001, 433 people were rescued at sea in international waters near Christmas Island and taken aboard the Norwegian vessel *Tampa*.[1] At the time, the *Tampa* was on its way from Fremantle to Singapore, carrying a crew of 27 under the command of Captain Arne Rinnan. The Captain had responded to a call from Australian authorities asking him to rescue the ship in distress. On his agreement, he was guided to the ship by Australian authorities. After taking the occupants from the leaky boat aboard his ship, Captain Rinnan asked the Australian authorities where he should take them and the Australian coastguard responded that it did not know. On starting to head towards Indonesia, several of the occupants threatened to commit suicide if the ship did not change course towards Christmas Island (an Australian Territory) and, under that pressure, the Captain changed course. When the *Tampa* was close to Christmas Island, but outside Australian territorial waters, Captain Rinnan was asked by the Australian authorities to change course towards Indonesia. Certain threats were also made by the authorities.[2] It

[1] Facts taken from the decision in *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452. See also Lynch and O'Brien, "From Dehumanisation to Demonisation: The MV Tampa and the Denial of Humanity" (2001) 26 (5) *Alternative Law Journal* 215.

[2] This is discussed in North J's judgment in *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452 at 457 [18]. See also Lynch and O'Brien, n 1 at 216 and n 23.

is not clear from the trial, as Captain Rinnan was not called to give evidence, what those threats were.[3] On looking at the *Migration Act 1958* (Cth), one can identify s 232 of the Act imposing a penalty on the "master, owner, agent and charterer of [a] vessel"[4] as a possible threat used by the authorities to discourage the Captain from proceeding toward Christmas Island.

The incident raised a range of legal issues, as this special issue of *Public Law Review* displays. This article addresses some of the legal issues raised by that incident in light of citizenship, sovereignty and migration and critiques the use of sovereignty as a method of exclusion from Australia.

Citizenship

The Government's actions, in its public rhetoric and legislative response, revolve around an exclusive notion of Australian citizenship. It is important to define what is meant when the term "citizenship" is used in this article. Different discussions occur when citizenship is conceived as a formal legal notion,[5] as opposed to citizenship as a normative concept.[6] Sometimes this is conceived as a difference between citizenship's technical meaning and its jurisprudential meaning.[7] I am talking primarily in this instance about citizenship as a legal term — the formal status of one who is a full member of the Australian community.[8] In order to apply for the legal status of citizenship, the applicant must be a permanent resident.[9] Stopping people from getting into the country, or restricting their right to apply for permanent residence depending upon where they arrive within Australian territory, affects their ability to apply for citizenship.[10] Australia's identity through this practice is formed more by who is excluded rather than by who is included.

Ironically, this is an approach to citizenship the Government has arguably been seeking to avoid and

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[3] In Lynch and O'Brien, ibid, reference is made to a letter from James Neill (Aus Ship P&I) to Neville Nixon (DIMA) dated 27 August 2001, revealing threats made by the Government to the shipping company.

[4] Section 232(1) provides:

"Where:

(a) a non-citizen:
  (i) enters Australia on a vessel; and
  (ii) because he or she is not the holder of a visa that is in effect, or because of section 173, becomes upon entry an unlawful non-citizen; and
  (iii) is a person to whom subsection 42(1) applies: or
(b) a removee or deportee who has been placed on board a vessel for removal or deportation leaves the vessel in Australia otherwise than in immigration detention under this Act;

the master, owner, agent and charterer of the vessel shall each be deemed to be guilty of an offence against this Act punishable by a fine not exceeding 100 penalty units.

(1A) An offence against subsection (1) is an offence of absolute liability."

For "absolute liability", see s 6.2 of the *Criminal Code 1995* (Cth).

[5] Another legal term used for citizenship is "nationality". Nationality is often referred to when discussing legal, formal membership in the international context, whereas citizenship is the term used for legal, formal membership in the national, domestic context. For further discussions about the distinction, see Rubenstein and Adler, "International Citizenship: The Future of Nationality in a Globalized World" (2000) 7 *Indiana Journal of Global Legal Studies* 519 at 521.

[6] This divide has recently been highlighted in Bosniak, "Universal Citizenship and the Problem of Alienage" (2000) 94 *Northwestern University Law Review* 963; Slawner, "Uncivil Society: Liberalism, Hermeneutics, and 'Good Citizenship'" in Slawner and Denham (eds), *Citizenship after Liberalism* (1998), p 81.

[7] See Allars, "The Rights of Citizens and the Limits of Administrative Discretion: The Contribution of Sir Anthony Mason to Administrative Law" (2000) 28 FL Rev 187. Allars states in her first footnote: "[t]he term 'citizen' is employed in this essay, not with the technical meaning found in migration and citizenship laws, but rather in the wider and jurisprudential sense of a person in a reciprocal relationship with government defined by political and civil rights and duties". This is the same sense in which citizenship is discussed by Mason in his chapter, "Citizenship" in Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996), p 5.

[8] I discuss at greater length the different ways in which citizenship is used in political and legal discussions in Rubenstein, *Australian Citizenship Law in Context* (2002). The main distinction of importance here is citizenship as a normative notion and citizenship as a formal, legal term.

[9] There are different levels of legal membership in Australia. All non-citizens must hold a valid visa to be lawfully within the country. There are three main types of visas: bridging visas, temporary visas and permanent visas. The factors that the Minister takes into account in determining an application for citizenship are set out in s 13 of the *Australian Citizenship Act 1948* (Cth).

[10] The legislation introduced to amend the *Migration Act 1958* (Cth) following the *Tampa* incident altered refugee applicants' rights to permanent residence depending upon where their application was made. See further discussion below. Dauvergne argues that migration law is more important than citizenship law for the question of who can become an Australian citizen. The detailed criteria of migration laws which regulate permanent residency are the most significant barriers to full membership in the polity: see Dauvergne, "Confronting Chaos: Migration Law Responds to Images of Disorder" (1999) 5 *Res Publica* 23 at 40 (n 59).

divert attention from, particularly through the work of the Australian Citizenship Council.[11] The Council, chaired by Sir Ninian Stephen, was responsible for important recommendations[12] that the Government ultimately supported in the *Australian Citizenship Amendment Bill 2001* (Cth), first introduced in August 2001 in the 39th Parliament. The most significant recommendation was the proposed repeal of s 17 of the *Australian Citizenship Act 1948* (Cth). That provision currently provides that Australians whose sole and dominant purpose is to obtain another citizenship lose their Australian citizenship by operation of law. The provision reflects an exclusive notion of Australian citizenship — that Australians can only have an allegiance, commitment and attachment to one country. It is an approach that is no longer common in countries around the world.[13] It is a practice the Australian Citizenship Council highlighted as inconsistent with an internationally mobile population and a world in which borders are easily crossed.

It is particularly symbolic, then, that the legislation which received most attention in the closing days of the 39th Parliament — amendments to a variety of legislation relating to migration — was urged on by the *Tampa* crisis and delayed the passage of the *Australian Citizenship Amendment Bill*. The years of work that went into the repeal of s 17 by policy-makers, non-governmental actors, lobbyists and Australians fundamentally affected by its consequences, vanished quickly in the face of a view that isolates Australia even further. An exclusive, rather than inclusive, approach to membership of the Australian community triumphed at that time.[14]

It is an approach that underpins the migration legislation, which is addressed later in this article.

Sovereignty

In addition, the rhetoric of this political issue ha revolved around Australia's sovereignty. On feature of the rise of the nation state is the notio that the state has power over its own territory t determine the laws that govern those within. Th notion that matters within a country were solely fo its own determination was fundamental in the earl development of international law. As Penelop Mathew has argued, "Sovereignty is an ill-define term in international law".[15] In its classical form,[1 the principle of sovereignty describes a world i which supreme power is exercised within particular territorial unit.[17] Sovereignty is universa and, accordingly, the whole world is divided int these units. Socially and territorially, cohesive state are capable of making rational decisions reflecting national interest. These states, then, are seen as the primary actors in the international arena, engaging with one another on the basis of formal equality.[1 While the system operates under the assumption o (legal/moral) equality there are, and always have been, great power differentials between individual states.

In light of this and other criticisms, sovereignty is more an ideal, a paradigm for the analysis and regulation of international relations, than a strictly descriptive category.[19] Nevertheless, reflecting the dominant paradigm of international relations over the past three centuries, the principle of sovereignty has had a strong normative effect. Sovereignty has greatly influenced the way we perceive our relationships with our national communities and their interactions with one another.

It appears to have been almost universally accepted by legislators, judges, commentators, policy-makers and large sections of the public

[11] The Council was established by the Coalition Government in 1998.

[12] These recommendations were set out in the Australian Citizenship Council's report, *Australian Citizenship for a New Century* (February 2000).

[13] See Australian Citizenship Council's report, ibid, p 65, which sets out the countries that no longer preclude dual citizenship.

[14] The Bill was re-introduced on 13 February 2002 as the *Australian Citizenship Legislation Amendment Bill 2002* (Cth). It was passed in the Senate in March 2002.

[15] Mathew, "Sovereignty and the Right to Seek Asylum: The Case of Cambodian Asylum-Seekers in Australia" (1994) 15 *Australian Year Book of International Law* 35 at 45.

[16] As espoused by the realist school of international relations. For an overview of international relations realism see Gill and Law, *The Global Political Economy: Perspectives, Problems and Policies* (1988), pp 25ff.

[17] Camilleri and Falk, *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World* (1992), p 3.

[18] Giddens, *The Consequences of Modernity* (1990), p 65.

[19] For a feminist critique of the notion of sovereignty see Knop, "Re/statements: Feminism and State Sovereignty in International Law" (1993) 3 *Transnational Law and Contemporary Problems* 293.

expressing support for the Government's policy, that Australia's sovereignty as an independent nation provides a legitimate foundation for the Government's actions.[20] The judges in the *Tampa* cases refer to Australia's sovereignty in discussing the legality of the Government's actions.[21] Where does this sovereign right to exclude emanate from — and is it as absolute as everyone seems to agree?

Professor James Nafziger has sought to challenge this presumption on several grounds.[22] He points out that the jurisprudential writing relied upon to support this approach actually requires legitimate reasons for exclusion in individual cases, such as necessity or self-preservation.[23] Examples may include public safety, security, public welfare or a threat to essential institutions. None of those specific matters have been raised in this instance, although since the September 11 terrorist attacks in the United States, politically the language of sovereignty has incorporated assumptions about security, public safety and threats to civilised society.

More importantly, Nafziger argues that judicial opinions are unconvincing as they often misinterpret authority, contradict contemporaneous statements of opinion and rest on questionable, often racist, presumptions. Moreover, he presents a persuasive argument that:

> "[T]he international significance of migration and the interdependence of states lends support to the argument that the general admission of aliens should not be regarded as an untrammeled discretionary power within the exclusive domestic jurisdiction of states".[24]

Sovereignty in Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs and Ruddock v Vadarlis

North J, in *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs*,[25] refers to the High Court decision of *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[26] in considering the Commonwealth's power to exclude. In determining that the *Migration Act 1958* (Cth) was intended to regulate the whole area of removal of aliens, he cites the passage in *Chu Kheng Lim* referring to Lord Atkinson in *Attorney-General (Canada) v Cain*:

> "The power to exclude or expel even a friendly alien is recognized by international law as an incident of sovereignty over territory. As Lord Atkinson, speaking for a strong Judicial Committee of the Privy Council, said in *Attorney-General (Canada) v Cain* [1906] AC 542 at 546:
>
> 'One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests: Vattel, *Law of Nations*, book 1, s 231; book 2, s 125.' "[27]

This citation is also used by Beaumont J in the Full Federal Court decision[28] in finding the asylum seekers had no legal right at common law to enter Australia and that there was no foundation for the prerogative writ of habeas corpus compelling entry into Australia. Moreover, he was of the view that "there is nothing in any of the authorities to contradict the principle that an alien has no common law right to enter Australia".[29] For that reason alone, he stated, he would allow the appeal.

Vattel's *Law of Nations*[30] is often referred to in judicial pronouncements in this area. Nafziger

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[20] For an interesting discussion about the Government's approach to Cambodian asylum seekers and sovereignty see Mathew, n 15.

[21] As set out below.

[22] "The General Admission of Aliens Under International Law" (1983) 77 *American Journal of International Law* 804.

[23] Ibid at 804.

[24] Ibid at 805 (author's emphasis).

[25] (2001) 110 FCR 452.

[26] (1992) 176 CLR 1.

[27] (2001) 110 FCR 452 at 481–482 [119] per North J, citing *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 30.

[28] *Ruddock v Vadarlis* (2001) 110 FCR 491 at 520 [114].

[29] Ibid at 521 [125].

[30] *Le droit des gens, ou, Principes de la loi naturelle appliques a la conduite et aux affaires des nations et des souverains par m. de Vattel* (1916) (introduction by de Lapradelle); The title of Vol 3 is in English: *The Law of Nations, or, The Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, (translation of the 1758 edition was by Fenwick, with an introduction by de Lapradelle).

persuasively argues, however, that the *Law of Nations* has been selectively used and, in fact, there are other parts of Vattel's treatise that compel the opposite conclusion. He explains:

> "Vattel distinguished the internal law of nations, rooted in natural law, from the external law, rooted in what today one might call positivism. Internal law establishes sovereign duties as a matter of conscience and principle, whereas external law establishes sovereign rights as a matter of will."[31]

It is Vattel's external law that is repeatedly cited in these authorities and his internal law has been ignored. Again, Nafziger argues that Vattel's "right 'of fugitives or exiles' is particularly illuminating as an exception to sovereign prerogatives under his concept of positive external law".[32] Moreover, he:

> "took sovereign duties as well as rights seriously. Even if the sovereign theoretically has the right, or "inherent power" in modern terminology to exclude aliens absolutely, [the sovereign] cannot do so in some instances because of [the] qualified duty to admit some foreigners".[33]

Black CJ, in the minority in *Ruddock v Vadarlis*, was conscious of the limitations on the executive in exercising the prerogative power to exclude aliens. He analysed the juristic writings in the latter part of the 19th century and the early part of the 20th century, including Sir William Holdsworth:

> ""During the greater part of the eighteenth century, there appear to be very few instances in which the Crown used its prerogative to exclude or to expel aliens; and when, at the end of the century, it was thought desirable to exclude aliens, statutory powers were [enacted] ... These statutes were passed to exclude aliens who, it was though[t], might spread in England the ideas of the French Revolution. They were therefore opposed by the new Whigs who sympathized with these ideas. In 1816 Romilly, Mackintosh, and Denman denied that the Crown had the wide prerogative attributed to it by Eldon and Ellenborough; the same thesis was maintained in 1825 in a learned article in the *Edinburgh Review*; and in 1890 it was supported by Mr. Craies.""[34]

Moreover, Black CJ concluded:

> "The preponderance of opinion by the text writers supports the view that, by the end of the nineteenth century, in English jurisprudence, the power to exclude aliens in times of peace was not considered to be part of the prerogative."[35]

In contrast, French J concentrated on the sovereign power to exclude:

> "The power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the Government of the nation would lack under the power conferred upon it directly by the Constitution, the ability to prevent people not part of the Australia community, from entering."[36]

Is it really so central? And should the power be absolute? Surely there are legitimate restrictions on the Government in exercising any power?

Nafziger's concern in challenging the theory itself is motivated by the fact that the proposition of the state's right to exclude aliens has been instrumental "in shaping exclusionary provisions of municipal law and policy".[37] He argues that international law should articulate a "qualified duty of states to admit aliens"[38] and that a state may legitimately exclude aliens only if, individually or collectively, they pose serious danger to its public safety, security, general welfare or essential institutions. While admitting that it needs refining, the philosophical basis is one of inclusion over exclusion.

In my view, there has not been enough opposition to the rhetoric of absolute sovereign power to exclude aliens.

Migration

The *Migration Act 1958* (Cth) reflects Australia's legislative expression of sovereignty. The object of the Act, as set out in s 4 is to "regulate, in the national interest, the coming into, and presence in, Australia of non-citizens". There is no definition of the national interest within the Act. In contrast, the Canadian *Immigration Act* sets out

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[31] Nafziger, n 22, at 812.
[32] Ibid at 813.
[33] Ibid at 814.
[34] *Ruddock v Vadarlis* (2001) 110 FCR 491 at 499 [22] per Black CJ, quoting from Holdsworth, *A History of English Law*, (1938) Vol X, pp 396-397 (citations omitted).
[35] *Ruddock v Vadarlis* (2001) 110 FCR 491 at 500 [26].
[36] Ibid at 543 [193].
[37] Nafziger, n 22, at 845.
[38] Ibid.

in s 3 some examples of the "domestic and international interests of Canada" such as

- "the attainment of ... demographic goals";
  the strengthening of the "cultural and social fabric of Canada";
- the "reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad";
- the promotion of "trade and commerce, tourism, cultural and scientific activities and international understanding";
- the fulfilment of "Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and the persecuted".[39]

The extensive changes that occurred in 1994 to the *Migration Act 1958* (Cth), including the complete codification of the visas, reflects the Government's desire to have absolute control in determining the matters relevant to the national interest in granting visas. In the 1994 Full Federal Court decision, *Chaudhary v Minister for Immigration and Ethnic Affairs*,[40] the court directed that the *Migration Act 1958* (Cth) be administered in the best interests of Australia, which were deemed by the court to be wider than economic interests. For instance, Wilcox, Gurchett and Foster JJ stated:

> "[I]t is in Australia's best interest to be seen as civilised and compassionate, as an advanced nation ... and as willing to accept some of the responsibilities of a leading country in our area of the Pacific."[41]

This decision concerned an application that had been made before the complete codification of the visa categories, and decisions such as this motivated the Government to set out more specifically the criterion relevant for each visa. In that way, the courts were less able to set out, as they did in this case, their own views of Australia's national interest.

There are various heads of power in s 51 of the *Constitution* through which Parliament can legislate, including s 51(xix), "Naturalisation and aliens", and s 51(xxvii), "Immigration and emigration". With the advent of cases concerning the deportation of people who had become "absorbed into the Australian community",[42] the Government came to rely primarily upon the naturalisation and aliens power, as seen through the use of the terminology of non-citizens in the object clause.[43]

As discussed, the legislation which was rushed through the 39th Parliament in its last days all gained urgency through attention to the *Tampa* issue. *Tampa* revitalised, and led to, a series of Bills amending the *Migration Act 1958* (Cth). The passage of the *Migration Legislation Amendment (Judicial Review) Bill 2001* introduced privative clause decisions that are not reviewable by any court. The terminology of the new s 474 is explicit:

> "(1) A privative clause decision:
> (a) is final and conclusive; and
> (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
> (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account."

We await a future High Court determination on the constitutional validity of this piece of legislation that, on its face, seeks to override s 75(v) of the *Constitution*.[44]

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[39] *Immigration Act 1976-1977* (Canada).

[40] (1994) 121 ALR 315.

[41] Ibid at 318.

[42] The notion of absorption into the Australian community is another interesting aspect of migration, citizenship and membership. See discussion in Rubenstein, n 8, Ch 3 and early High Court decisions such as *Ex parte Walsh; Re Yates* (1925) 37 CLR 36 and *Potter v Minahan* (1908) 7 CLR 277.

[43] The High Court decision, *Re Taylor: Ex parte Patterson* (2001) 75 ALJR 1439, overrides the earlier case of *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178. In *Re Taylor* it was found that British subjects resident in Australia in 1987, when the *Australian Citizenship Act 1948* (Cth) amendments came into effect removing the status of British subjects, have retained their non-alien constitutional status, despite being non-citizens, and cannot be detained or deported under current provisions.

[44] Evans's article in this edition (at 94-101) raises issues that are also relevant to that piece of legislation. He has also written about the privative clause in Evans, "Protection Visas and Privative Clause Decisions: Hickman and the *Migration Act 1958* (Cth)" (2002) 9 A J Admin L 49. The Federal Court has begun to deal with this: see *NABL v Minister for Immigration and Multicultural Affairs* [2002] FCA 102; *NACB v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 57; *NABB v Minister for Immigration and Multicultural Affairs* [2002] FCA 69; *WAAJ v Minister for Immigration and Multicultural Affairs* [2002] FCA 23; *Walton v Philip Ruddock, Minister for Immigration and Multicultural Affairs* [2001] FCA 1839; *Nabi v Minister for Immigration and Multicultural Affairs* [2001] FCA

The Parliament also passed the *Migration Legislation Amendment Act (No 1) 2001* (Cth) preventing class actions, amongst other things, and the *Migration Legislation Amendment Act (No 6) 2001* (Cth) amending the definition of "refugee". There are many issues associated with the rule of law that Evans raises in his article which are of pressing concern.[45] In my view, the failure of parliamentary review with the hasty passage of this legislation is the most significant in reflecting upon the weakness of our constitutional system in protecting rights. A broader understanding of democracy, greater than the dictates of the ballot box and majority rule, would empower the courts with an even greater role in reviewing legislation such as this.

The events also gave rise to the *Border Protection Act 2001* (Cth), the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth), the *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth) and the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth). It is the latter two Acts this article will highlight as backward steps in the development of migration law in Australia.

The *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth) excises Australian territory from the "migration zone" under the *Migration Act 1958* (Cth) and creates "offshore entry persons" who enter Australia at an "excised offshore place" after the "excision time" for that offshore place. Those people become "unlawful non-citizens" because of that entry.[46] The *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth) provides for certain powers that flow from these new places and persons. These include coercive powers of removal of persons from vehicles or vessels and the use of force that is necessary and reasonable.[47] In addition, it introduces further restrictions on the grant of protection, refugee and humanitarian visas.[48] It also places bars on legal proceedings by offshore entry persons, denying them the right to apply to a court regarding the lawfulness of their detention, amongst other things.[49]

As raised above, the restrictions upon refugees' rights to apply for permanent visas set up a distinct second-class category of migrants — those who are never entitled to apply for citizenship. This is reminiscent of earlier discriminatory citizenship practices that precluded certain persons of non-British backgrounds from ever becoming citizens by virtue of denying them permanent visa status.[50] It also places these individuals in a most unenviable position — they are in limbo, with a lack of certainty in their lives.

This new system reminds me of an earlier period of migration regulation, and a seminar in 1994 at the Melbourne office of the Department of Immigration. A senior departmental delegate, responsible for explaining the changes to migration law at that time, stated with relief that the former legal fiction of a person deemed to have not entered Australia, when they were in fact on Australian territory, was no longer a part of the system. The former complicated system of entry involved visas and entry permits where visas allowed for travel to Australia and entry permits allowed for entry. This led to the legal fiction where unauthorised arrivals were deemed to have not entered Australia and "were subjected to differential detention arrangements and harsh turn-around provisions".[51]

The changes made in the mid-1990s to rectify this legal fiction led to the following definitions in s 5(1) of the *Migration Act 1958* (Cth):

> *"enter Australia*, in relation to a person, means enter the migration zone.

1841; *VAM v Minister for Immigration and Multicultural Affairs* [2001] FCA 1809; *VAZ v Minister for Immigration and Multicultural Affairs* [2001] FCA 1805; *VBA v Minister for Immigration and Multicultural Affairs* [2001] FCA 1797. (I am grateful to Huttner's website, <http://videlex.com/> for this list).

[45] See Evans's article in this edition at 94-101.

[46] These definitions are all now within s 5 of the *Migration Act 1958* (Cth).

[47] *Migration Act 1958* (Cth), s 198A.

[48] See s 46A, and the amendments to the *Migration Regulations 1994*, in particular the Refugee and Humanitarian class (Class XB). Also see the introduction of Secondary Movement Offshore Entry (Temporary) visas (subclass 447) and Secondary Movement Relocation (Temporary) visas (subclass 451).

[49] *Migration Act 1958* (Cth), s 494AA. Note the section states in subsection (3): "Nothing in this section is intended to affect the jurisdiction of the High Court under section 75 of the *Constitution*."

[50] Jordens discusses this discrimination in her chapter, "The Legal and Non-legal Aspects of Immigration and Citizenship" in Rubenstein (ed), *Individual, Community, Nation: 50 years of Australian Citizenship* (2000), pp 85-87.

[51] Crock, *Immigration and Refugee Law in Australia* (1998), p 54.

...

leave Australia, in relation to a person, means, subject to section 80 (leaving without going to other country), leave the migration zone.

...

migration zone, means the area consisting of the States, the Territories, Australian resource installations and Australian sea installations and, to avoid doubt, includes:

(a) land that is part of a State or Territory at mean low water; and

(b) sea within the limits of both a State or a Territory and a port; and

(c) piers, or similar structures, any part of which is connected to such land or to ground under such sea;

but does not include sea within the limits of a State or Territory but not in a port.

...

remain in Australia, in relation to a person, means remain in the migration zone."

The new legislation determines that certain parts of Australian territory are not within the migration zone and, therefore, are not covered by those sections of the *Migration Act 1958* (Cth) in which the migration zone is fundamental. These amendments to the migration zone, in effect, reintroduce the legal fiction previously removed.

Ultimately, it is my view that these legal fictions are unacceptable from the perspective of the rule of law.[52] The "Alice in Wonderland" contortion and the extent to which the legislation strains to call a spade a sea anchor, or anything other than what it is, will, over time if not already, take its toll on the credibility of the laws enacted in haste.

Conclusion

This, then, returns me to where I started. Principles of citizenship are discussed in both legal and normative ways.[53] I have shown that the *Tampa* issue will impact upon Australian citizenship law. I have questioned the strength of the reliance upon sovereignty as the foundation of all legal issues. It is my view that the *Tampa* incident impacts upon Australian citizenship in the normative sense also. We talk about the good citizen — the person who contributes to the greater good — who acts beyond self-interest and in the interests of the common wealth. In these days, in which the fundamental links between nation states are so evident, not only because of times of war, but also in times of peace, Australia has lessened its standing as an international citizen and its own citizens will suffer as a result.

[52] See Evans' article in this edition for an excellent summary of this term.

[53] See further, Rubenstein, n 8.