Border Protection; UNCLOS and the M. V. Tampa Incident 2001

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1. Introduction
On 26 September 2001, the Border Protection (Validation and Enforcement Powers) Act 2001, the Migration Amendment (Excision from Jurisdiction) Act 2001 and the Migration Amendment (Excision from Jurisdiction) (Consequential Provisions) Act 2001¹ were passed to amend the Migration Act 1958 (Cth). In a nutshell, the amendments strengthen the Commonwealth’s enforcement powers in Australia’s offshore zones under Division 12A of the Migration Act and implements what is popularly referred to as the “Pacific Solution” whereby refugees unlawfully arriving in Australia’s external territories in the Indian Ocean are sent to certain Pacific Island Nations to have their claims for refugee status processed.

The border protection legislation was passed following the arrival of the Tampa and other boats carrying persons attempting to illegally enter Australia. This article examines whether the border protection legislation complies with Australia’s obligations under international law².

The Australian government seeks to balance its interests in maintaining its border integrity with the very legitimate concern Australians have for refugees from all around the world³. The Prime Minister has made it clear that Australia will take its share of refugees and has pointed out on many occasions that Australia is second to Canada in its

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¹ These Acts shall be collectively referred to as the “border protection legislation”.

² It is not intended to examine the recent developments of the Tampa incident including admissions by the Government that it intercepted certain telephone conversations during the incident and the release of photographs discrediting earlier claims that boat people threw their children overboard in October 2001. In addition, it is not intended to examine possible breaches of international law during the Tampa incident itself. Breaches of the United Nations Convention on the Law of the Sea 1982 and other rules of international law are identified in White, M., M/V Tampa Incident and Australia's Obligations - August 2001 (2002) 122 Maritime Studies 11-17.

total intake of refugees per capita. Whilst the government is not attempting to close the
doors on genuine refugees, it is of the view that it is entitled to process refugees in an
orderly manner and protect the integrity of its borders.

The border legislation allows the Commonwealth to take certain measures in
Australia’s offshore zones against vessels suspected of carrying illegal immigrants into
Australia. Australia’s offshore zones are subject to the international law of the sea and
illegal immigrants may seek protection under the Convention relating to the Status of
Refugees and Protocol Relating to the Status of Refugees. Accordingly, it is important
to determine whether the border protection legislation does balance Australia’s interests
in protecting its borders with its obligations under international law. After considering
the legislative and historical background in which the border protection legislation was
passed, the international law applicable to Australia’s offshore zones and refugees will
be examined. The border protection legislation will then be reviewed to determine
whether it is consistent with international law.

It is submitted that most of the provisions in the border protection legislation,
including the “Pacific Solution”, do not breach Australia’s obligations under
international law. The possible exceptions concern the use of force under s.245C and
s.245F of the Migration Act, the exercise of the right of hot pursuit by a Commonwealth
ship where its crew has lost sight of the pursued ship and can find no trace of it on radar
and the restriction on refugees’ right of access to Courts under s.494AA.

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7 The term “illegal immigrants” will be used for ease of reference to include unlawful non-citizens, persons in
the migration zone suspected of being an unlawful non-citizen and persons in Australia but not in
the migration zone who are seeking to enter the migration zone and would, if in the migration zone, be an
unlawful non-citizen. The term “unlawful arrival” may be interchanged with “illegal immigrant” and both
have the same meaning.

September 2001), hereinafter referred to as the “Refugee Convention”. The Refugee Convention entered into
force in Australia and generally on 22 April 1954.

December 2001), hereinafter referred to as the “Protocol”. The Protocol entered into force generally on 4
2. Background
(a) Illegal Immigration and People Smuggling
People attempt to illegally enter Australia by sea not because air travel is expensive since the cost of travelling illegally by sea is much higher. Rather, it is because they are ineligible for a visa\(^{10}\), they do not want to endure what they perceive is a "protracted, complicated and expensive migration process" or they are unable to participate in legitimate migration process due to political, economic or social circumstances.\(^{11}\) Thus, economic migrants sometimes pose as refugees\(^{12}\), thereby depriving protection and settlement assistance to genuine refugees\(^{13}\).

The only source of rights for non-citizens\(^{14}\) to enter Australia is the *Migration Act*\(^{15}\). That Act prohibits non-citizens without a current visa\(^{16}\) from travelling to Australia\(^{17}\) and those who enter the migration zone are unlawful non-citizens\(^{18}\). The migration zone means the area consisting of the States, the Territories, Australian resource installations\(^{19}\) and Australian sea installations\(^{20}\) and includes land that is part of a State or Territory at mean low water, sea within the limits of both a State or Territory and a port and piers or similar structures connected to such land or ground under such sea but not other parts of the territorial sea\(^{21}\). The Act applies to the Territories of Cocos (Keeling) Islands, Christmas Islands and the Ashmore and Cartier Islands\(^{22}\).


\(^{11}\) David, F., *Human smuggling and trafficking: an overview of the response at the federal level*, Australian Institute of Criminology, Canberra, 2000 at 3.


\(^{14}\) Department of Immigration and Multicultural Affairs, DIMA Fact Sheet 26: *Australia’s International Protection Obligations*, <http://www.immi.gov.au/facts/46protect.htm> (18 November 2001). The Humanitarian (Refugee) Program is divided into two sub-programs being the on-shore program in which 2,000 places are allocated each year and the offshore program in which 10,000 places are allocated. If the number of on-shore protection visas granted exceed 2,000, the excess will be drawn from the Offshore Program and any shortfall in the On-shore Program will be transferred to the Off-shore Program: Department of Immigration and Multicultural Affairs, *Background Paper on Unauthorised Arrivals Strategy*, <http://www.immi.gov.au/media_releases/media01r01131_bgpaper.htm> (18 November 2001).

\(^{15}\) Any person who is not an Australian citizen: *Migration Act* 1958 (Cth), section 5(1).

\(^{16}\) *Migration Act*, section 4(2).

\(^{17}\) The Act refers to "a visa that is in effect". However, that phrase is cumbersome and the phrase "current visa" will be used in its place.

\(^{18}\) *Migration Act*, section 42(1). There are two exceptions which are not relevant here: visas are not required for inhabitants of the Protected Zone established under Article 10 of the *Torres Strait Treaty* done at Sydney on 18 December 1978 if they are travelling to a place within the Protected Zone (section 42(2)) or where regulations permit a specified non-citizen or non-citizen in a specified class to travel to Australia without a visa (section 42(3)).

\(^{19}\) An unlawful non-citizen is a non-citizen who is in the migration zone and is not a lawful non-citizen: section 14(1). Section 13(1) defines a lawful non-citizen as a non-citizen in the migration zone who holds a current visa. The section 13(2) definition applying to inhabitants of the Protected Zone established under Article 10 of the *Torres Strait Treaty* is again not relevant for the purposes of this dissertation.

\(^{20}\) As defined by sections 5(1) and 8(1) of *Migration Act*.

\(^{21}\) As defined by sections 5(1) and 9(1) of *Migration Act*.

\(^{22}\) *Migration Act*, section 5(1).
Non-citizens arriving in Australia must produce evidence of their identity, visa and other information required by law. Non-citizens arriving with fraudulent documents or with no documents are unlawful arrivals.

Traditionally, unlawful arrivals by sea only constituted about one third of unlawful arrivals in Australia, as shown by figure 1.

Illegal migration patterns changed in 1999 when the number of unlawful arrivals by sea exceeded the number of unlawful arrivals by air, as illustrated by figures 2 and 3.

23 Migration Act, section 166.
29 Note 28.
The main landing sites in 1999 - 2000 have been Ashmore Island, Christmas Island and Western Australia as illustrated by figure 4.\(^{30}\)

In 1999-2000, the last country of embarkation for 97% of boats was Indonesia (figure 5\textsuperscript{31}) yet the majority of persons onboard were from the Middle East and Afghanistan (figure 6\textsuperscript{32}). Many of the unlawful arrivals disposed of their passports and travel documents before arriving in Australia to avoid identification\textsuperscript{33} and then claimed refugee status.\textsuperscript{34}

\textsuperscript{31} Note 30.
\textsuperscript{32} Note 30.
People smuggling is behind a large proportion of unlawful arrivals, with Indonesia being the key staging point for the movement of people from the Middle East and Afghanistan to Australia. People smuggling involves a person gaining entry into a country without the necessary permission and is often undertaken for profit. Where payment is involved, it implies the existence of a voluntary agreement between the organiser and the person smuggled.

36 David (2000), n 11 at xiii; DIMA (2001), n 33.
People smuggling is a transnational crime\textsuperscript{38} or a crime impacting on more than one jurisdiction\textsuperscript{39}. People smugglers often have pre-arranged transport, accommodation and documentation for migrants arriving in Australia and maintain regular contact with people smugglers overseas\textsuperscript{40}. Transnational criminals do not recognise borders, readily violate national sovereignty\textsuperscript{41} and treat business as a war with law enforcement authorities by attacking weaknesses in their capabilities and legislation.\textsuperscript{42} Some criminal syndicates involved in people smuggling also engage in the international trade of illicit drugs\textsuperscript{43}.

There are hundreds of thousands of people who do not have the money to engage people smugglers. Those people are being prejudiced by those who seek to enter Australia with the aid of people smugglers\textsuperscript{44} and the Australian government seeks to send a strong message to people smugglers that Australia is no longer an easy target for illegal immigrants\textsuperscript{45}.

People smuggling is lucrative and relatively low risk. People smugglers demand thousands of dollars for organising illegal travel\textsuperscript{46}. In contrast, their clients take on enormous risks. The sea voyage across the Indian Ocean is dangerous\textsuperscript{47} and is usually undertaken on overcrowded unseaworthy vessels, some of which have sunk en-route\textsuperscript{48}. Clients are given unrealistic expectations of the law and employment opportunities\textsuperscript{49}. In addition, female illegal immigrants using people smugglers to find work in the sex industry may find themselves deceived as to their employment conditions and the actual debt owed\textsuperscript{50}. Accordingly, people smuggling is of great concern from both a criminal justice perspective and a human rights perspective\textsuperscript{51}.

\textsuperscript{38} David (2000), n 11 at xvi.  
\textsuperscript{40} Burn, J., & Reich, A, The Immigration Kit, 6th ed, The Federation Press, Sydney, 2001 at 7; Bedlington (1997) n 10 at 102.  
\textsuperscript{41} Note 39.  
\textsuperscript{42} Note 39.  
\textsuperscript{43} Dima (2001a), n 37.  
\textsuperscript{44} Ruddock (2001), n 5.  
\textsuperscript{46} MacKinnon & Schwerdt (1997), n 39 at 65; DIMA (2001a), n 37. For example, some of the persons who arrived on Ashmore Island on board the Aceng paid people smugglers up to $US8,000.00 each: Powell, S., “Out of the Manoora frying pan, into Nauru”, The Australian, 18 September 2001 at 14; Papps, N., “News blackout keeps detainees in dark”, The Courier Mail, 18 September 2001 at 2. Those on board the Kayuen paid $40,000.00 each: David (2000), n 11 at 8.  
\textsuperscript{48} David (2000), n 11 at 9.  
\textsuperscript{49} Department of Immigration and Multicultural Affairs, “People smuggling to Australia”, in Healy, J. (ed), Refugees and Illegal Immigrants, The Spinney Press, Balmain, 2000 at 2.  
\textsuperscript{50} David (2000), n 11 at 11.  
\textsuperscript{51} David (2000), n 11 at 15.
(b) Previous Legislation
Officers of the Department of Immigration and Multicultural Affairs as well as officers under the *Customs Act* 1901 (Cth) and the *Australian Protective Service Act* 1987 (Cth) and State, Territory and Federal police are authorised to deal with illegal immigrants while Australian Defence Force ("ADF") members have no such authorisation. Under s.189 of the *Migration Act*, an officer must detain illegal immigrants. S.251 authorises Officers to board, search and detain any vessel they suspect contains illegal immigrants.

Division 12A of the *Migration Act* authorises "Commonwealth ships" to chase, board and detain ships suspected of contravening the provisions of the *Migration Act*. Division 12A was enacted to ensure refugee claimants arriving unlawfully in Australian beyond the migration zone were able to be brought to the mainland to have their claims considered and be detained as unlawful non-citizens.

S.245B gives the Commander of a Commonwealth Ship power to request the master of another ship permission to board for the purposes of the *Migration Act*. S. 245C and s.245D set out the circumstances in which a Commonwealth Ship may chase a ship which does not comply with a request under s.245B. The circumstances in which that ship may then be boarded and the powers of Officers are set out in s.245F and s.245G. An Officer may detain a ship boarded under s.245F if it is suspected of being involved in a contravention of the Act and persons on board may be detained and brought to the migration zone.

Persons detained under the Act are in “immigration detention” until they are removed from Australia under s.198 or s.199, deported under s.200 or granted a visa. Under s.256, persons in immigration detention are entitled to be provided with facilities to apply for visas and obtain legal advice or take legal proceedings concerning his or her immigration detention. This allows detained persons seeking protection under the *Refugee Convention* to apply for a protection visa.

(c) The Tampa Incident
On 26 August 2001, Rescue Coordination Centre Australia requested the *Tampa*, with a crew of 27 and built to accommodate 40 people, to rescue a sinking Indonesian vessel carrying 438 people. After the rescue, the *Tampa* headed for Indonesia. Several rescued then confronted Captain Rinnan demanding to be transported to Christmas Island.  

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52 Bedlington (1997), n 10 at 100.  
53 *Migration Act*, section 5(1).  
54 Ships in the service of the Commonwealth and flying the ensign prescribed for the purposes of the *Customs Act* 1901 (Cth). Currently Regulation 26 of the Customs Regulations prescribe the ensigns and insignia to be used by Commonwealth ships until such time as new regulations are made to prescribe new symbols specifically for Commonwealth vessels.  
57 *Migration Act*, section 245F (8).  
58 *Migration Act*, section 245F(8).  
59 *Migration Act*, section 5(1).  
60 *Migration Act*, section 196.  
62 The people rescued off the sinking ship by the *Tampa* will be referred to as "the rescued". Justice North referred to the rescued person as "rescues" as a "neutral term" in his judgment in *Victorian Council for Civil*
Island, threatening to jump overboard if their demands were refused. The Captain saw no alternative but to meet their demands as the situation was frightening and could have turned ugly had he disagreed.

The Australian Government refused the Tampa’s request for permission to anchor off Christmas Island and it remained stationary 12 miles offshore. The port at Christmas Island was then closed and all boat movements in and out of the port were prohibited by order of the harbour master.

The Government informed Captain Rinnan the Tampa would be stopped and boarded if it entered the Australian territorial sea. The Captain agreed not to enter the territorial sea if medical assistance were provided. After several rescues threatened to jump overboard, Captain Rinnan took the Tampa into the territorial sea and stopped 4 miles from Christmas Island. 45 SAS troops then boarded the Tampa to render medical and humanitarian assistance in response to the Tampa’s distress signal and to prevent the rescues from landing on Christmas Island. Although the Tampa was free to leave Christmas Island, Captain Rinnan refused to leave while the rescues were onboard claiming the Tampa was unseaworthy.


Navalweb (2001), n 61.


Madigan, M., Dickins, J., & McKinnon, M., “Australia locked in high-seas stalemate”, The Courier Mail, 28 August 2001 at 1. The Australian Government’s refusal to allow the Tampa to enter Australia and disembark the rescues was backed by the Opposition. The Government had specifically singled out the Tampa. It was a large vessel with the largest number of people attempting to enter Australia. The Government was able to communicate its disapproval of the rescues’ attempted entry to the Captain, which he could accept or reject. Further, the rescues were safe on board the Tampa which would have continued to Indonesia but for the duress several rescues exerted over Captain Rinnan: Howard (2001c), n 6; 60 Minutes, Television Interview with John Howard, Prime Minister, Channel 9, 2 September 2001, interview by Charles Woolley, <http://www.pm.gov.au/news/interviews/2001/interview1210.htm>, (4 November 2001); Radio Interview with John Howard, Prime Minister, 3LO, 4 September 2001, interview by Jon Faine, <http://www.pm.gov.au/news/interviews/2001/interview1201.htm>, (4 November 2001).

Madigan, Dickins & McKinnon (2001), n 66 at 1.


Howard (2001c), note 6; Howard (2001), n 3; Ruddock (2001), n 5.

Australian Defence Force doctors indicated that none of the rescues presented as being in need of urgent medical assistance and this was confirmed by the Ambassador for Norway: Howard (2001c) note 6; Howard (2001a), n 4; Howard (2001b), n 4.

On 31 August 2001, the Victorian Council of Civil Liberties (VCCL) Incorporated and Mr Vardarlis filed applications in the Federal Court against the Commonwealth. Justice North granted an interlocutory injunction restraining the Commonwealth from taking any steps to remove the *Tampa* from Australian territorial waters and hearing commenced on 1 September 2001. On the same day, the Australian government reached an agreement with the governments of Nauru and New Zealand for the processing of the rescues' refugee claims ("the NZ/Nauru Arrangement"). 150 of the rescues would be processed in New Zealand and the balance processed in Nauru. The NZ/Nauru Arrangements had the support of the Secretary General to the United Nations. Nevertheless, the VCCL and Mr. Vardarlis proceeded with their application, which was set down for urgent hearing.

Following an agreement between the parties, the injunction was lifted and the rescues were transferred off the *Tampa* onto the *HMAS Manoora* thereby allowing the *Tampa* to leave Christmas Island. In the event the Applications succeeded, the Commonwealth undertook to comply with any court order to return the rescues to Australia. The agreement also allowed the Commonwealth to arrest 4 Indonesians onboard the *Tampa* and charge them with people smuggling.

In the meantime, boatloads of asylum seekers continued to arrive in Australian territories in the Indian Ocean including the *Aceng* off the Ashmore Islands, 70 Sri Lankans at Cocos (Keeling). *HMAS Arunta* successfully forced a boatload of asylum seekers back to Indonesian waters on 29 October 2001 while *HMAS Warramunga*...

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73 More specifically, the VCCL's application was against Minister for Immigration and Multicultural Affairs, the Attorney General, the Minister for Defence and the Commonwealth while Mr. Vardarlis' Application was against Minister for Immigration and Multicultural Affairs and the Commonwealth.


80 Minister for Defence, *Media Release- People Traffickers Intercepted*, 8 September 2001, <http://www.minister.defence.gov.au/Reith/rlf.cfm?CurrentId=974>, (23 September 2001). The *Aceng* was located on 7 September 2001 by a Coastwatch aircraft 35 miles off the Ashmore Islands. *HMMS Warramunga* intercepted the vessel, which was displaying no flags or port of registry indications. The vessel was boarded to establish the port of registry and identified as being registered in Bali. Despite several warnings, the *Aceng* continued its voyage to Ashmore Islands. When the *Aceng* entered the contiguous zone, the vessel was boarded on several occasions and made to depart the contiguous zone. However, the boardings ceased after the crew and passengers became agitated. *HMMS Warramunga* and *HMMS Newcastle* delivered food and medical supplies to those on board the *Aceng* but made no further attempts to remove it from the contiguous zone. The passengers were later transferred onto the *HMMS Manoora*.


rescued more than 100 boatpeople after they disabled their boat, which then sank off Christmas Island. On 23 October 2001, about 350 Iraqi asylum seekers heading for Christmas Island drowned when their unseaworthy vessel sank in rough seas.

Since the NZ/Nauru arrangements were made, other Pacific Island nations have also agreed to accept boat people under what is now known as “the Pacific Solution.”

(d) The Tampa Case

VCCL and Mr. Vadarlis brought applications in the Federal Court claiming mandamus and injunctions to compel the Commonwealth to place the refugees in immigration detention under s.189 and s.245F of the Migration Act and allow them to apply for protection visas. Justice North held the applicants did not have standing to bring that application. In the alternate, they sought relief in the nature of habeas corpus arguing that if s.189 and s.245F did not apply, then the refugees were unlawfully detained.

Justice North held the Commonwealth detained the refugees. Whilst the Commonwealth did not prevent the refugees from leaving Australia, the freedom was illusory as the Tampa would not leave with them onboard and there was no evidence that anyone was prepared to take the refugees off the Tampa. He rejected the

83 Note 82.
85 As at 25 October 2001, there were 71 Sri Lankans on Cocos Island, 220 were on board a naval vessel off Christmas Island, 220 persons held in Papua New Guinea, 790 in Nauru and 131 in Auckland with Fiji and Kiribati being touted as future destinations. Up to 1,500 persons had paid people smugglers and were awaiting transportation and a further 2,000 were finalising their transportation arrangements. O’Brien, N., Niesche, C., Harvey, C., “Ring of misery around region”, The Australian, 25 October 2001 at 2.
86 Under s.39B of the Judiciary Act 1903 (Cth).
90 The applicants’ standing to bring this application and Court’s jurisdiction was not challenged by the Commonwealth: Victorian Council for Civil Liberties Incorporated and Others v Minister for Immigration and Multicultural Affairs and Others [2001] FCA 1297 <www.austlii.edu.au/au/cases/cth/federal_ct/2001/1297.html>, paras 55 and 56 (18 September 2001). As explained by Justice North, the process of an application for the grant of a writ of habeas corpus is an ancient procedure whereby the Court may order the release of a person who is detained without lawful authority: Victorian Council for Civil Liberties Incorporated and Others v Minister for Immigration and Multicultural Affairs and Others [2001] FCA 1297 <www.austlii.edu.au/au/cases/cth/federal_ct/2001/1297.html>, para 50 (18 September 2001).
NZ/Nauru arrangement as a means of escape since the rescues were not voluntary participants to the arrangement. The Commonwealth argued the detention was in aid of an exercise of prerogative power to expel the rescues. Justice North found the existence of such a power doubtful and, in any event, the Migration Act’s comprehensive provisions governing the removal and deportation of aliens displaced it. Having found that the Commonwealth unlawfully detained the rescues, Justice North ordered that the rescues be released and brought onto the Australian mainland.

The Commonwealth appealed, arguing its executive power under s.61 of the Constitution authorised the expulsion of rescues from Australia and that Justice North erred in finding the rescues were detained. The majority of Full Court of the Federal Court allowed the appeal and set aside Justice North’s orders.

Chief Justice Black accepted Justice North’s reasons for holding the rescues were unlawfully detained. Justice French held otherwise, finding that whilst the Commonwealth prevented the rescues from landing in Australia, they had no right to land and their inability to go elsewhere did not arise from the Commonwealth’s actions. The NZ/Nauru arrangements provided a practical exit from the situation. Thus, nothing done by the Commonwealth amounted to a restraint upon the rescues’ freedom.

Chief Justice Black accepted the Commonwealth had sovereign power to expel illegally entering aliens but that power derived from laws made by parliament. He considered the existence of a prerogative power or executive power under s.61 of the Constitution to exclude aliens doubtful. Even if such a power existed, the Migration Act’s comprehensive provisions regulating the entry into and removal of aliens from...

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96 Victorian Council for Civil Liberties Incorporated and Others v Minister for Immigration and Multicultural Affairs and Others [2001] FCA 1297 <www.austlii.edu.au/au/cases/cth/federal_ct/2001/1297.html>, para 75 (18 September 2001). Evidence was given that the illegal entry of persons into Australia were normally brought into the migration zone and processed under the provisions of the Migration Act which allows for the detention of unlawful non citizens under section 189. However, the Commonwealth resolved that the rescues would not be brought into the migration zone meaning they would not be given an opportunity to apply for protection visas under section 256.
Australia displaced it\textsuperscript{105}. Justice French\textsuperscript{106} held there was power under s.61 to prevent the entry of persons into Australia and this included the power to prevent a person or boat from entering Australia or compelling it to leave\textsuperscript{107}. The provisions of the Migration Act did not operate to abrogate this power\textsuperscript{108}.

The border protection legislation was passed shortly after the Full Court’s decision. In order to assess the validity of the border protection legislation under international law, it is necessary to first examine Australia’s rights and obligations under international law in its offshore areas.

3. The Law of the Sea

Australia can only exercise jurisdiction over its offshore areas in accordance the United Nations Convention on the Law of the Sea 1982 ("UNCLOS")\textsuperscript{109} and other rules of international law. UNCLOS provides a framework for the allocation of jurisdiction, rights and duties among states, carefully balancing coastal States’ interests in controlling activities off their own coasts and the interests of all states in protecting the freedom to use the sea without undue interference\textsuperscript{110}. It is not a complete code on the international law of the sea. In some cases, it merely provides the framework within which States must adopt certain rules\textsuperscript{111}. Any matter not regulated by UNCLOS continues to be governed by general international law\textsuperscript{112}.

The following paragraphs in this section will examine the relevant provisions of UNCLOS and the general law in relation to internal waters, the territorial sea, the contiguous zone and beyond.

(a) Internal Waters

Internal waters are the waters on the landward side of the baseline and are subject to the sovereignty of the coastal State while waters seaward of the baseline to a distance of not


\textsuperscript{110} Christopher, W., 'Letter of Submittal', Letters of Transmittal and Submittal and Commentary from President Clinton to the U.S. Senate, October 1994 at 3.

\textsuperscript{111} For example, Part XII, which provides a comprehensive legal and international framework for the protection and preservation of the marine environment, requires states to cooperate on a regional and global basis to adopt rules, standards and recommended practices on a variety of topics such as pollution from seabed activities (article 208), pollution from vessels (article 211) and pollution from land based sources (article 207).

more than 12 nautical miles form the territorial sea\textsuperscript{113}. Internal waters are regarded part of the coastal State's territory\textsuperscript{114}. While it is not been the subject of detailed regulation in UNCLOS\textsuperscript{115}. Coastal States may exercise legislative and enforcement jurisdiction over ships in internal waters although they will leave matters relating solely to the internal economy of the ship to the flag State.\textsuperscript{116} A coastal State will commonly exercise its jurisdiction where its national interests are affected, the offence affects the peace and good order of the State or its consequences extend beyond the limits of the internal economy of the ship.\textsuperscript{117}

UNCLOS does not provide a general right of entry into internal waters and ports. There is no right of innocent passage except where the right has been preserved in waters that were not previously considered as internal waters prior to the establishment of straight baselines under article 7\textsuperscript{118}.

Article 18(1) defines “passage” as “navigation through the territorial sea for the purposes of... proceeding to or from internal waters or a call at such roadstead or port facility”. However, this does not create a right of innocent passage through internal waters and article 25(2) allows the coastal State to take necessary steps to prevent any breach of conditions of entry into internal waters or ports.\textsuperscript{119} State may temporarily suspend the right of innocent passage in the parts of its territorial sea under article 25(3) effectively denying access to a port or internal waters\textsuperscript{120}. Finally, article 125(1), which provides land-locked states\textsuperscript{121} a right of entry into the ports of transit States\textsuperscript{122} and article 225, which provides that States shall endeavour to adopt reasonable rules to facilitate access to their harbours for marine scientific research vessels, clearly implies


\textsuperscript{115} Churchill & Lowe (1999), n 113 at 61.

\textsuperscript{116} Blay, Piotrowicz & Tsimen (1997), n 113 at 332, Pamborides (1999), n 114 at 26.

\textsuperscript{117} Note 114.

\textsuperscript{118} UNCLOS, article 8(2), <http://www.un.org/Depts/los/unclos/part2.htm>, (9 July 2000). The existence of sovereignty over internal waters and the absence of any general right of innocent passage through them implies the absence of any right in customary international law for foreign ships to enter a State’s ports or other internal waters: Churchill & Lowe (1999), n 113 at 61.

\textsuperscript{119} Pamborides (1999), n 114 at 29.


\textsuperscript{121} A land-locked State is a State that has no seacoast (UNCLOS, article 124(1)(a) <http://www.un.org/Depts/los/unclos/part10.htm>, (16 July 2000)).

\textsuperscript{122} A State, with or without a seacoast, situated between land-locked States and the coast, through whose territory traffic in transit (UNCLOS, article 124(1) <http://www.un.org/Depts/los/unclos/part10.htm>, (16 July 2000)). Traffic in transit refers to the transit of persons, baggage, goods and means of transport across the territory of one or more transit States, with or without trans-shipment, warehousing, breaking bulk or change in the mode of transport, is only a portion of a complete journey which begins or terminates within the territory of the land-locked State (UNCLOS, article 124(1)(c) <http://www.un.org/Depts/los/unclos/part10.htm>, (16 July 2000)).
the absence of any general right of entry into ports and internal waters under UNCLOS\textsuperscript{123}.

Some commentators argue there is a general rule of international law obliging States to allow foreign ships into their ports\textsuperscript{124}. However, this is rejected by the majority of commentators\textsuperscript{125} except where cases of distress are concerned\textsuperscript{126}. The practice of denying vessels a right of entry dates back many centuries\textsuperscript{127} indicating there is no general right of access to internal waters or ports in customary international law\textsuperscript{128}. Instead, a State has a right to decide which of its ports are to be open to international maritime commerce\textsuperscript{129} and regulate the conditions of entry\textsuperscript{130}. States may close ports normally open for international traffic to maintain security and good order, prevent pollution or even signal political displeasure\textsuperscript{131}. The dicta in the Aramco Arbitration to the effect that "the ports of every state must be open to foreign merchant vessels and can only be closed when the vital interests of the State so require"\textsuperscript{132} is not supported by the authorities cited in that decision.\textsuperscript{133}

\textsuperscript{123} Dupuy & Vignes (1991) n 113, volume 1 at 942.
\textsuperscript{124} Dupuy & Vignes (1991) n 113, volume 1 at 941 (Footnote 298: See, in particular, Colombos, \textit{The International Law of the Sea}, 6th ed. London, 1967, pp. 176 et seq.); Pamborides (1999), n 114 at 27 refers again to Colombos as well as Kunding, RP, "International Strays: Regime of Access", (1975) 5 Georgia Journal of International and Comparative Law 107 at 115 and Jessup, PC, "The United Nations Conference on the Law of the Sea" (1959) 55 Columbus Law Review 234 at 247. See also Higgins, AP, & Colombos, CJ, \textit{The International Law of the Sea}, Longmans, Green & Co., London, 1945 at 119 in which Colombos states "in times of peace, commercial ports must be left open to international traffic. Liberty of access to ports granted to foreign vessels implies their right to load and unload their cargoes, embark and disembark their passengers" and that the entry of foreign vessels may reasonably be regulated "provided no hindrance is put in the way of international trade and no discrimination is made between states so as to favour some at the expense of others".
\textsuperscript{125} Blay, Piotrowicz & Tsamenyi (1997), n 113 at 332; Pamborides (1999), n 114 at 27 citing Lowe A.V., "The Right of Entry into Maritime Ports in International Ports" (1976-77) 14 San Diego Law Review 527.
\textsuperscript{127} Lowe (1977), n 120 at 616.
\textsuperscript{128} Lagoni, R, "Seagoing Vessels in Internal Waters" in Bindschedler, R.L., & Macalister-Smith, P, (eds) \textit{Encyclopedia of Public International Law}, North-Holland, Amsterdam, 1989, volume 2 at 156. For example, the United Kingdom declined a request for the Embassy of USSR for permission to allow the Soviet research vessel \textit{Academician B. Petrov} to visit the internal waters and territorial sea off the coast of South-west Scotland. This followed a similar refusal by Soviet Authorities in 1989 to grant permission to the British Government Research Ship \textit{Cirolana}: "Seas, waterways, ships - internal waters, including ports". \textit{British Yearbook of International Law}, 1991, Volume LXII at 633-4.
\textsuperscript{129} Lowe (1977), n 120 at 606; Churchill & Lowe (1999), n 113 at 62.
\textsuperscript{130} Lowe (1977), n 120 at 608; Blay, Piotrowicz & Tsamenyi (1997), n 113 at 332; \textit{Nicaragua Case} (1986) ICJ Rep. 14 at 111.
\textsuperscript{131} Lowe (1977), n 120 at 607; Blay, Piotrowicz & Tsamenyi (1997), n 113 at 332; Churchill & Lowe (1999), n 113 at 62; \textit{Patterson v. Bark Eudora} (1903) 190 US 169 at 178. An example is New Zealand's practice of denying nuclear powered vessels and vessels carrying nuclear weapons access to its ports: Dupuy & Vignes (1991) n 113, volume 1 at 942.
\textsuperscript{133} Lowe (1977), n 120 at 600-4. The outcome of the \textit{Aramco Arbitration} turned on whether the Saudi Arabian Government had breached a 1933 agreement it had with Aramco in denying it access to its ports. However, the Tribunal took it upon itself to comment of a right of entry into ports under customary international law despite Aramco's counsel making no submissions on this point and impliedly conceding that no such right existed. Lowe (1977), n 120 at 599 citing Transcript of the Session of the Tribunal at 333-53, Aramco Tribunal, 27 ILR 117 (Int'l Lab. Org. Ad. Trib. 1958).
A right of entry is often found in bilateral treaties of ‘friendship, commerce and navigation’. However, the existence of such treaties does not constitute a rule of international law. Australia is a party to the Convention and Statue on the International Regime of Maritime Ports 1923 which stipulates the equality of treatment of all vessels regarding freedom of access to maritime ports and the use of port facilities to contracting States. Article 16 deals with the right of States to close their ports and provides that a State may close a port in the event of an emergency affecting the safety or vital interests of the State. Whilst that Convention secures equality of treatment for vessels in foreign ports, it does not to establish a general right of entry.

Ships in distress have a right to enter ports and internal waters in order to preserve human life. Although UNCLOS is silent on the right of foreign ships in distress to enter ports, that right enjoys universal acceptance. Ships under “real and irresistible distress” must be allowed to take shelter in internal waters and ports. However, the distress must be of urgent necessity for example due to stress of weather. There need not be a storm so long as the distress is such that it would render it dangerous to the lives of persons on board to prosecute the voyage. However, the distress cannot be one created by those on board the ship, for example, by putting on board an insufficient quantity of water or provisions for the voyage.

Many cases have restated the right of vessels in distress to enter ports and internal waters under immunity from the laws and regulations of the coastal State. However, even in cases of genuine distress, coastal States will not grant immunity to a vessel entering its internal waters or territorial sea if it is engaged in illegal activities.

134 Lowe (1977), n 120 at 616 and 619; Blay, Piotrowicz & Tsmenyi (1997), n 113 at 332; Lagoni (1989a), n 128 at 155.
135 Lowe (1977), n 120 at 619.
136 Blay, Piotrowicz & Tsmenyi (1997), n 113 at 332.
138 Lowe (1977), n 120 at 604; Pamborides (1999), n 114 at 27.
139 Lagoni (1989a), n 128 at 155.
140 Lowe (1977), n 120 at 605.
142 De Zayas (1989), n 141.
143 (1809) Edw 135 at 159 - 160.
145 The Eleonor (1809) Edw 135 at 161. Thus, the act of disabling the ship’s engine thereby rendering it unseaworthy in the case of a fishing vessel carrying illegal immigrants off Christmas Island on 29 October 2001 (McPherdan (2001), n 82) would have disqualified the ship from any immunity from Australian jurisdiction.
146 Lagoni (1989a), n 128 at 160; Simmonds & Sarup (1976), n 144, volume 1 at 198 citing The New York 16 US (3 Wheat.) 59 (1818), The Aeolus 18 US 13 (Wheat.) 354 (1868), The Lown F [1923] 293 F. 933, U.S. v Sullivan [1928] 26 F. 2d 606 (5th Cir.) (1928) and The May v R [1931] 3 DLR 15. In U.S. v The Diana (74 U.S. (7 Wall.) 354 (1868) it was held that a vessel in distress can even enter a blockaded port. However, in that case, the Diana failed to satisfy the test of distress based on the evidence contained in the ship’s log. In fact, The Diana was attempting to enter a blockaded port under pretence of distress. The Court held that the distress must be one of absolute and uncontrollable necessity and must be established beyond reasonable doubt.
147 De Zayas (1989), n 141 at 289.
(b) The Territorial Sea

State Sovereignty

State may establish a territorial sea with a breadth not exceeding 12 nautical miles from the baseline. The coastal State’s sovereignty extends to the territorial sea and is exercised subject to the provisions of UNCLOS and to “other rules of international law.” The reference to “other rules of international law” was included since it is impossible to list every rule of international law restricting the exercise of sovereignty in the territorial sea. Those rules are equally applicable throughout the coastal State’s land and territorial sea. One practical limitation on State sovereignty that differentiates the territorial sea from its land territory is the right of innocent passage and transit passage by foreign ships.

Innocent Passage

The right of innocent passage is an important principle of the law of the sea. It balances the interests of States in maintaining freedom of navigation and the interests of coastal States in the waters adjacent to their shores. The existence of a right of

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148 UNCLOS, articles 3 and 4, <http://www.un.org/Depts/los/unclos/part2.htm>, (9 July 2000). The concept of a territorial sea was developed in the 16th and 17th centuries although the precise nature and the breadth of the territorial sea remained unresolved until the 20th century. It was not until the 1930 Hague Conference that it was accepted the territorial sea was subject to the sovereignty of the coastal State and there was no agreement as to the breadth of the territorial sea prior to UNCLOS: Churchill & Lowe (1999), n 113 at 72-4. Australia’s “territorial sea” has the same meaning as in articles 3 and 4 of UNCLOS (Section 3(1) Seas and Submerged Lands Act 1973) and extends 12 nautical miles seaward of the baseline. An extension of the breadth of the territorial sea from 3 nautical miles to 12 nautical miles from the baselines was declared under section 7(1) of the Seas and Submerged Lands Act 1973 (Cth) (see Proclamation in Gazette No. S 297, Tuesday, 13 November 1990). The proclamation took effect from 20 November 1990. “Law of the Sea” (1991) 13 Australian Yearbook of International Law 277.


151 Ngatchafta (1990), n 150 at 8.

152 The right of transit passage is found in article 38 and refers to the right to pass through a strait consisting of territorial waters of a single State or two or more States bordering the strait. Coastal state jurisdiction and navigation rights in straits used for international navigation are dealt with in Part III of UNCLOS. The focus of this paper is on the operation of the Migration Act in the waters adjacent to Christmas Island, Ashmore and Cartier Islands and therefore, Part III does not fall within the scope.


innocent passage was established under customary international law but diversity in State practice necessitated its codification in the TSC and, later, UNCLOS.

Article 17 of UNCLOS provides that ships of all States enjoy the right of innocent passage through the territorial sea. Articles 17 to 32 deal with the regime of innocent passage. Article 17 must be read together with article 18, which defines “passage”, and article 19, which defines “innocence”.

**Article 18 - “Passage”**

“Passage” means navigation through the territorial sea for the purpose of traversing that sea:

(a) Without entering internal waters or calling at a roadstead or port facility outside internal waters; or

(b) Proceeding to or from internal waters or call at such roadstead or port facility.

The second limb of the definition does not create a right of entry into ports and internal waters but brings ships travelling to and from ports and internal waters into the regime of innocent passage for the purposes of coastal State control and jurisdiction. Thus, navigation by a vessel through the territorial sea to enter internal waters to which it has no right of access is not “passage”.

Passage must be “continuous and expeditious” but includes stopping and anchoring to the extent it is incidental to ordinary navigation or rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in distress. Therefore, ships cannot “hover” around the territorial sea because it is not “continuous and expeditious” navigation for the purposes contained in article 18. Whilst article 18 defines “passage”, article 19 determines whether passage is “innocent”.

**Article 19 - Innocent Passage**

The requirement that passage be “innocent” protects the coastal State’s interests. “Innocent” is more complex than “passage”. Article 19(1) of UNCLOS provides that passage is innocent “so long as it is not prejudicial to the peace, order or security of the coastal State” and “shall take place in conformity with these articles and with other rules of international law”.

Article 19(2) lists 12 activities that will render passage prejudicial to the peace, good order or security of the coastal State. These activities include the loading or unloading

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157 Ngantcha (1990), n 150 at 38-9; Pamborides (1999), n 114 at 32, Johnson (1989), n 156.

158 These provisions were preceded by the TSC, Section III: Nordquist (1985), n 150, volume 2 at 53.

159 Nordquist (1985), n 150, volume 2 153; Ngantcha (1990), n 150 at 43.


161 Churchill & Lowe (1999), n 113 at 82.


164 Churchill & Lowe (1999), n 113 at 82.

165 Nordquist (1985), n 150, volume 2 at 159.

166 Dupuy & Vignes (1991) n 113, volume 1 at 907; Ngantcha (1990), n 150 at 43.

167 Pamborides (1999), n 114 at 33; Johnson (1989), n 156.

of any person contrary to immigration laws and regulations of the coastal State\(^{169}\) and "any other activity not having a direct bearing on passage".\(^{170}\)

Article 19(2) limits the coastal State’s discretion in determining whether passage is prejudicial to its "peace, good order or security"\(^{171}\) and innocence is determined on the basis of acts committed while the ship is in the territorial sea.\(^{172}\)

The reference to "other activities not having a direct bearing on passage"\(^{173}\) has raised doubts as to whether or not the list in article 19(2) is exhaustive.\(^{174}\) Accordingly, the USA and the USSR signed a Uniform Interpretation of Norms of International Law Governing Innocent Passage\(^{175}\). Paragraph 3 states:

Article 19 of the Convention of 1982 sets out in paragraph 2 an exhaustive list of activities that would render passage not innocent. A ship passing through the territorial sea that does not engage in any of those activities is in innocent passage.

The agreement is only binds U.S.A. and Russia but is influential given the importance of those two States as maritime powers.\(^{176}\) However, it is submitted that the words "any other activity" prevents ships from engaging in activities other than those necessary for passage within the meaning of article 18 making it difficult to interpret the list as exhaustive.

*Coastal State’s rights and duties in the territorial sea*\(^{177}\)

Article 24(1) requires coastal States not to hamper the innocent passage of foreign ships through its territorial sea except in accordance with UNCLOS. This obligation protects the interests of navigation.\(^{178}\) Any laws adopted under UNCLOS shall not have the practical effect of denying or impairing the right of innocent passage nor shall it discriminate in form or fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State.

Article 21(1) limits the subject matter on which a coastal State may legislate with respect to innocent passage to 8 topics including the prevention of infringements immigration laws and regulations.\(^{179}\) Those laws must conform to other provisions of

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\(^{171}\) Dupuy & Vignes (1991) n 113, volume 1 at 912; Rothwell (2000), n 154 at 80.

\(^{172}\) Christopher (1994), n 110 at 12.


\(^{174}\) Churchill & Lowe (1999), n 113 at 86; Rothwell (2000), n 154 at 75.


\(^{176}\) Nordquist (1985), n 113 at 86. However, it must be noted that neither country has ratified UNCLOS to date: Nordquist (1985), n 150, volume 2 173.

\(^{177}\) Section 3. Part II of UNCLOS sets out a number of rights and duties of coastal States in the territorial sea which need not be covered here. These include the right to designate sea lanes and traffic separation schemes in the territorial sea (article 22), the duty of the coastal State to give appropriate publicity to any danger to navigation of which it has knowledge within its territorial sea (article 24(2)), the duty not to charge levies on foreign ships passing through the territorial sea other than in payment for specific services rendered to the ship (article 26) and the provisions in subsection C regarding rules applicable to warships and other government ships operated for non-commercial purposes.

\(^{178}\) Dupuy & Vignes (1991), n 113 at 907.

UNCLOS and other rules on international law. Article 21(4) obliges ships exercising the right of innocent passage to comply with the laws and regulations adopted under article 21(1). Articles 19 and 21, when read together, imply that a breach of laws adopted under article 21(1) by a foreign ship will render its passage not innocent. 

Article 21(3) requires coastal States to give due publicity to laws adopted under article 21(1). "Due publicity" is not defined but requires that coastal States give sufficient notice of its laws governing innocent passage to those exercising the right of innocent passage. The United Nations and its specialised agencies such as the International Maritime Organization have their own systems for dissemination of information regarding such matters.

The list in article 21(1) is exhaustive but a coastal State may legislate on matters concerning the territorial sea if it does not affect the right of innocent passage. Any foreign ship not engaged in innocent passage will be subject to all the coastal State's laws. In addition, article 27 may have the indirect effect of expanding the coastal State's jurisdiction beyond the list in article 21(1).

Article 27(1) provides that "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 on board the ship during its passage, save only in the following cases:

(a) if the consequences of the crime extended to the coastal State;
(b) if the crime is of a kind to disturb the peace of the country or good order of the territorial sea;
(c) if the assistance of local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
(d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances."

Coastal States are also authorised to arrest persons or conduct investigations onboard foreign ships in the territorial sea that have passed through internal waters. The coastal State must have due regard to the interests of navigation when considering whether to make an arrest and how such arrest be made. Unless otherwise provided for, no steps may be taken onboard a foreign ship merely passing through the territorial sea without entering internal waters if the crime was committed before the ship entered the territorial sea.

Article 27 does not diminish the coastal State's authority to bring offenders to Court but limits its powers to arrest persons onboard a ship in the territorial sea. However, the words "should not" implies that adherence to article 27(1) is desirable but not

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180 Rothwell (2000), n 154 at 78. This includes the duty not to hamper innocent passage or discriminate against ships under article 24.
182 Ngambea (1990), n 150 at 176.
184 Nordquist (1985), n 150, volume 2 at 201.
185 Dupuis & Vignes (1991) n 113, volume 1 at 918; Christopher (1994), n 110 at 12.
186 Churchill & Lowe (1999), n 113 at 95.
191 Nordquist (1985), n 150, volume 2 at 239-40.
mandatory,\textsuperscript{192} giving coastal States a wide discretion in the exercise of criminal jurisdiction over foreign ships in the territorial sea. The duty of coastal States not to hamper innocent passage should prevent the excessive use of that discretion.\textsuperscript{193}

Article 25(3) permits coastal States, without discriminating against foreign ships, to temporarily suspend innocent passage in specific areas of its territorial sea if it is essential for the coastal State's security and only after it has been duly published. Suspension must be temporary although this is not strictly adhered to in practice.\textsuperscript{194} The requirement that the suspension of innocent passage must be essential for the coastal State's security implies that it is the only available option and not one of several available options.\textsuperscript{195}

The use of force to prevent non innocent passage
Article 25 authorises coastal States to "take the necessary steps" in its territorial sea to prevent non-innocent passage and breaches of conditions of entry into its port and internal waters. Article 25 does not apply to vessels that are not engaged in passage and UNCLOS contains no express right to exclude such vessels from the territorial sea.\textsuperscript{196} However, UNCLOS has defined "passage" independently from "innocence" and contains no specific provisions to shield a vessel not engaged in passage from the coastal State's jurisdiction thereby implying a right to expel such ships from the territorial sea.\textsuperscript{197}

UNCLOS is silent on how a coastal State may prevent non-innocent passage\textsuperscript{198} but "necessary steps" includes verbal warnings, the positioning of vessels to prevent the offending vessels from proceeding further, boarding the offending vessel and escorting the it out of the territorial sea.\textsuperscript{199} The word "necessary" implies that the steps taken must be proportionate to the offence in question.\textsuperscript{200} In addition, article 225 states:

In the exercise under this Convention of their powers of enforcement against foreign vessels, States shall not endanger the safety of navigation or otherwise create any hazard to a vessel, or bring it to an unsafe anchorage, or expose the marine environment to an unreasonable risk.

Article 225 applies to the use of force generally under UNCLOS but does not give any guidance to the level of force that may be used in particular circumstances, especially in the case of pursued vessels deliberately evading the legitimate approach of an investigating or enforcing vessel, making it necessary to read article 225 subject to the customary international law.\textsuperscript{201}

\textsuperscript{192} Shearer (1997), n 153, at 243.
\textsuperscript{193} Ngantcha (1990), n 150 at 106.
\textsuperscript{194} Dupuy & Vignes (1991) n 113; volume 1 at 340; Ngantcha (1990), n 150 at 166.
\textsuperscript{195} Ngantcha (1990), n 150 at 166.
\textsuperscript{196} Churchill & Lowe (1999), n 113 at 87.
\textsuperscript{197} Dupuy & Vignes (1991) n 113, volume 1 at 911. Churchill & Lowe (1999), n 113 at 87, which cites the refusal of British Authorities to grant a Soviet research vessel access to the internal waters and territorial sea off South-west Scotland in June 1991: see "Seas, waterways, ships - internal waters, including ports", \textit{British Yearbook of International Law}, 1991, Volume LXII at 633-34.
\textsuperscript{198} Rothwell (2000), n 154 at 76.
\textsuperscript{200} McLaughlin (1999), n 112 at 17; Dupuy & Vignes (1991) n 113, volume 1 at 916. The use of force must be in keeping with the UN Charter that requires the principle of proportionality to be observed.
\textsuperscript{201} Shearer (1997), n 153 at 251.
According to Shearer, no more force may be used than is strictly necessary to achieve the legitimate objective and must be proportionate in all the circumstances. For example, one should give a verbal warning before fire warning shots and fire warning shots before firing directly at the vessel. Shearer cites two cases in support of his proposition. The I'm Alone held that necessary and reasonable force may be used to board, search, seize and bring a suspected vessel into port and, if the sinking should occur incidentally as a result of the exercise of such force, the pursuing vessel might be blameless. But in that case, the intentional sinking of a vessel engaged in liquor smuggling during the American Prohibition resulting in the loss of lives was not justified. It is significant to note that the Captain and some members of the crew were not a party to the illegal conspiracy to smuggle liquor into the United States thus emphasising the importance of avoiding the use of unnecessary force as some persons on board the offending vessel may have played no part in the commission of the offence. In The Red Crusader, the arbitral tribunal held that the use of gunshots into the hull of a Scottish trawler found illegally fishing in Danish waters was “without proved necessity” and “other means should have been attempted, which, if duly persisted in, might have finally the skipper to stop and revert to ordinary procedure.”

According to Shearer, whether or not a higher level of force should be used depends on the nature of the offence. Force endangering human lives is unjustified in the case of “regulatory offences” such as infringement of fishing laws while deadly force might be justified in the case of vessels carrying arms to dissidents or large quantities of narcotic drugs. Accordingly, the Australian practice of abandoning attempts to capture illegal fishing vessels rather than firing upon it and risking the safety of those onboard is consistent with international law.

If a coastal State is to have effective control over its land and territorial sea, it may need to exercise jurisdiction beyond the limits of the territorial sea.

(c) The Contiguous Zone

The contiguous zone provides coastal States with “elbow room” to intercept vessels to prevent or punish breaches of its laws relating to narcotics, other illegal goods, immigration, quarantine and revenue laws in its territory. It extends 24 nautical miles from the baseline and allows the coastal State to punish or prevent the infringement of its customs, fiscal, immigration and sanitary laws within its territory or territorial sea. However, there is no jurisdiction to prescribe laws or enforce laws in respect of infringements committed within the contiguous zone.

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202 Shearer (1997), n 153 at 249.
203 (Canada v U.S.A.) (1935) 3 UN Reports of the International Arbitral Awards 1609.
204 Higgins & Colombos (1945) n 124 at 106.
206 Shearer (1997), n 153 at 250.
207 Shearer (1997), n 153 at 250.
208 McLaughlin (1999), n 112 at 18.
209 Blay, Piotrowicz & Tsamenyi (1997), n 113 at 334.
213 Blay, Piotrowicz & Tsamenyi (1997), n 113 at 334; Lumb, R.D., The law of the sea and Australian offshore areas, University of Queensland Press, St. Lucia, 1966 at 17.
Article 33 does not provide protection of the coastal State’s security interests. Nevertheless, a coastal State can assume a protective jurisdiction beyond the territorial sea in the exercise of a right of self-defence in order to protect its ships, aircrafts and rights of territorial integrity and political independence from imminent danger or actual attack.

(d) Beyond the Contiguous Zone

The EEZ lies adjacent to and seaward of the territorial sea extending not more than 200 nautical miles from the baselines and is governed by Part V of UNCLOS. The EEZ overlaps with the contiguous zone, although it is not redundant since the EEZ is essentially a “natural resources zone” and coastal States have no powers to enforce their customary, fiscal, immigration and sanitary laws there.

All States enjoy freedom of navigation in the high seas. Articles 88 to 115 of UNCLOS set out the States’ rights and duties in the high seas. Those provisions, including the high seas freedom of navigation, apply in the EEZ to the extent they are consistent with Part V. The relevant enforcement powers are found in articles 110 and 111.

(i) Articles 110 and 111

Warships and other vessels and aircraft clearly marked and identified as being in the coastal State’s service may exercise the powers under articles 110 and 111.

Article 110 allows coastal States to board vessel to ascertain its nationality if it is reasonably suspected that it is engaged in piracy, slave trading, unauthorised broadcasting or is without nationality or is flying the flag of another State but in

215 Bowett (1958), n 214 at 71. In support of his argument, Bowett asserts that “it can scarcely be contemplated that a State must remain passive whilst a serious menace to its security mounts on the high seas beyond its territorial sea” and yet be permitted to exercise jurisdiction in the contiguous zone to prevent infringements within its territory with respect to its customs, fiscal, sanitary and immigration laws.
219 If no EEZ is claimed by the coastal State, then the contiguous zone will remain part of the high seas.
220 Article 56 of UNCLOS grants the coastal State the sovereign right to explore, exploit, conserve and manage the natural resources of the EEZ and jurisdiction with respect to the establishment and use of artificial reefs, installations and structures, marine research, the protection and preservation of the marine environment as well as other rights and duties provided for in UNCLOS.
221 Shearer (1995), n 210 at 26; Nordquist (1985), n 150, volume 2 at 275. The only exception is Article 60, which gives coastal State exclusive jurisdiction over any artificial islands and installations in the EEZ with regard to customs, fiscal, health, safety and immigration laws within a 500 metre “safety zone”.
223 High Seas are not defined in UNCLOS but are governed by Part VII. Article 86 provides that the provisions of Part VII “apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in internal waters of a State or in the archipelagic waters of an archipelagic state.” UNCLOS, article 86, <http://www.un.org/Depts/los/unclos/part7.htm> (14 July 2000).
227 This is subject to the flag State of the warship having jurisdiction under article 109: UNCLOS, article 110(1)(c), <http://www.un.org/Depts/los/unclos/part7.htm> (14 July 2000).
reality has no nationality or has the same nationality of coastal State.228 Ships changing flags during a voyage or in a port of call are regarded as having no nationality unless there is a real change of ownership or registry.229

Article 111 codifies the customary international law on the right of hot pursuit.230 Hot pursuit of a ship maybe commenced if the coastal State has “good reason to believe” the ship has violated its laws.231 A ship is entitled to compensation for any loss suffered if it was arrested in circumstances that do not justify the exercise of the right of hot pursuit against it.232

Hot pursuit must be commenced when the foreign ship or one of its crafts is within the coastal State’s internal waters, territorial sea or contiguous zone.233 The pursuing ship must be satisfied the offending ship is within those waters and must give a visual or auditory signal to stop from a distance that enables it to be seen or heard by the ship.234 Where an aircraft commences hot pursuit, the aircraft must order the ship to stop and actively pursue it and either arrest it or summon other aircrafts or ships to continue the pursuit.235

The pursuit can continue beyond the territorial sea or contiguous zone provided it is continuous and uninterrupted236 and must be terminated once the pursued ship enters the territorial sea of another State.237 Article 111 does not specify when pursuit is interrupted although, according to Shearer238, customary international law requires sight (including identification on radar) must not be lost.

Article 111 is silent on the use of force that may be used and, therefore, must be read subject to article 225. It is submitted that the comments made under the previous heading of The use of force to prevent non innocent passage are also applicable to the use of force that may be applied during hot pursuit. That is, no more force may be used than is strictly necessary to achieve the legitimate objective and is proportionate in all

226 Ngatcha (1990), n 150 at 169.
228 UNCLOS, article 111(8), <http://www.un.org/Depts/los/unclos/part7.htm> (14 July 2000). Entitlement to compensation will not arise where the coastal State commenced pursuit having “good reason to believe” the ship violated its laws even if the ship is subsequently cleared of any wrongdoing: Ngatcha (1990), n 150 at 169. See also The Marianna Flora 24 U.S. (11 Wheat.) 1 (1826) 1. In that case, the United States warship Alligator was fired upon by the Portuguese merchant ship The Marianna Flora whose crew was under the mistaken but unjustified belief the Alligator was a pirate ship. The Alligator subsequently pursued and boarded the Marianna Flora and brought the ship in for adjudication. It was subsequently released as “innocent” but its subsequent claim for damages failed as Justice Story held, at 50-4, that the Alligator’s conduct was justified as it had reason to believe that The Marianna Flora was a pirate ship.
229 UNCLOS, article 111(1), <http://www.un.org/Depts/los/unclos/part7.htm> (14 July 2000). The right of hot pursuit also applies to violations within the EEZ, the continental shelf and safety zones around artificial islands and installations within those zones under article 111(5). The right to commence hot pursuit of a vessel within the contiguous zone. EEZ or continental shelf is an extension of the customary international law on the right of hot pursuit. Prior to UNCLOS and TSC, the right of hot pursuit could not be commenced against another vessel which was beyond the territorial sea of the coastal State: Higgins & Colombos (1945), n 124 at 104 citing The James Hamilton Lewis, Moore’s Digest, Vol. i, at 927 (Award of 1902), Westlake 1 at 178.
232 UNCLOS, article 110(1), <http://www.un.org/Depts/los/unclos/part7.htm> (14 July 2000). This was also the position under customary international law: Higgins & Colombos (1945), n 124 at 103; The Ship North v R (1906) 37 S.C.R. 385 at 394, 400 and 402.
234 Shearer (1997), n 153 at 247 citing The I’m Alone (Canada v U.S.A.)1935 3 UN Reports of International Arbitral Awards 1609.
the circumstances. In addition, The I’m Alone and The Red Crusader, which were cited by Shearer in support of his arguments on the use of force under customary international law, were both cases involving the exercise of the right of hot pursuit.

(ii) Ships in Distress

Article 98(1) of UNCLOS and regulation 10, Chapter V, Annex 1 of SOLAS 1974 obliges flag states to require the masters of vessels flying its flag to rescue persons in distress to the extent the master can do so without risking danger to the ship and those onboard. Article 98(2) of UNCLOS and regulation 15, Chapter V, Annex 1 of SOLAS 1974 requires coastal States to promote the establishment, operation and maintenance of an adequate search and rescue service. SAR 1979 implements article 98(2) by establishing an international system of search and rescue operations. The technical annex set out the Contracting States’ obligations.

In summary, assistance must be provided to any person in distress at sea regardless of nationality, status or the circumstances in which the person is found. Contracting States are required to ensure necessary arrangements are made for the provision of adequate search and rescue services for persons in distress at sea around their coasts and establish search and rescue (“SAR”) regions.

The boundaries of SAR regions are unrelated to the maritime boundaries of coastal States and Contracting States should ensure that necessary arrangements are made for the entry into or over its territorial sea or territory by rescue units of other contracting states and other vessels, aircraft, personnel and equipment, solely for the purposes of effecting a rescue.

UNCLOS, SOLAS 1974 and SAR 1979 do not expressly oblige States to allow persons rescued at sea entry into their territory. In the absence of any provisions stating where the rescues should be taken, it is submitted the master of the rescue ship has discretion to decide where to take the rescues, presumably having regard to the safety

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239 Shearer (1997), n 153 at 249 and 251.
240 (Canada v U.S.A.) (1935) 3 UN Reports of International Arbitral Awards 1609
241 (1962) 35 International Law Reports 485
244 Article 98 also applies to the EEZ by virtue of article 58(2).
of the ship and crew and the health and wellbeing of those rescued. Contracting States are obliged to allow rescues into its territory if additional assistance by way of medical evacuations arises after the rescue is required. However, SAR 1979’s objectives may not be achieved if Contracting States construed their obligations strictly because there are only a limited number of signatories to it and its implementation in the Indian Ocean has been problematic.

4. The Refugee Convention

The Refugee Convention regulates the status of refugees to all refugee problems existing on or before 1 January 1951 whilst Protocol extended the terms of the Refugee Convention to all refugee problems.

A “refugee” is a person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality or membership of a particular social group or political opinion, is outside his or her country of nationality or of habitual residence, is stateless and is unable or, owing to such fear, is unwilling to seek the protection of that country.” People merely attempting to escape economic hardship or seek a better

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251 SAR 1979, Technical Annex, Chapter 5.12.2,
253 Many of the problems associated with the implementation of SAR 1979 in the Indian Ocean are dealt with in Lomasney, R., “Maritime Safety and SAR in the Indian Ocean Region - An Australian Perspective”, in Woodroffe, CD. (ed), Maritime Natural Hazards in the Indian Ocean Region, University of Wollongong, Wollongong, 1998 at 91. One problem is that many of Australia’s near neighbours developing countries with limited SAR capabilities meaning Australia may have respond to a call for assistance outside of its SAR region: Herriman, M., Tsamenny, M., Ramli, J. & Bateman, S., Review of International Agreements, Conventions, Obligations and Other Instruments Influencing Use and Management of Australia's Marine Environment, University of Wollongong, Wollongong, 1997,
255 Jahn 1995, p 254, volume IV at 74. See also the Preamble to the Protocol. Article 1 of the Protocol provides that State Parties shall apply articles 2 to 34 of the Refugee Convention to persons defined as refugees under the Protocol.
256 The five grounds on which a person fears persecution in the definition of “refugee” are sometimes referred to as “Convention grounds.”
257 Refugee Convention, Art 1 A(2); and the Protocol, Art 1 (2). The Refugee Convention covers events causing a refugee problem before 1 January 1951, while the Protocol extends the definition by removing the reference to events prior to that date; Crock, M., Immigration and Refugee Law in Australia, Federation Press, Leichhardt, 1998, at 123.
life\textsuperscript{258} and persons with multiple nationalities failing to avail themselves of the protection of one of their countries of nationality are not refugees.\textsuperscript{259}

The final arbiter of whether a person is a refugee is the International Court of Justice.\textsuperscript{260} The \textit{Refugee Convention} is silent on what procedures States should adopt to determine a person’s refugee status\textsuperscript{261}. In the absence of any provision making protection under the \textit{Refugee Convention} dependent on the outcome of the procedures adopted by a State to determine a person’s refugee status, it is submitted that refugees become entitled to the protection of the Refugee Convention from the moment they meet the definition of refugee, which means that any procedures adopted by a state will have a declarative, rather than a constitutive function\textsuperscript{262}.

Australia has a sovereign right to determine who enters Australia and their conditions of entry.\textsuperscript{263} The \textit{Refugee Convention} and \textit{Protocol} does not grant a right of admission into Australia but only imposes the minimum standard of treatment of refugees in Australia.\textsuperscript{264}

Article 33 of the \textit{Refugee Convention} prohibits the return (or \textit{refoulement}) of refugees to the frontier of territories where their lives or freedoms would be threatened on account of the Convention grounds. This is the \textit{Refugee Convention}'s most important obligation\textsuperscript{265} and is now a recognised rule of customary international law.\textsuperscript{266} However, it does not prevent refugees from being sent to States where they will not be threatened\textsuperscript{267} and refugees already in countries with refugee assessing authorities\textsuperscript{268} should apply to these authorities before attempting to enter Australia.\textsuperscript{269}

Article 32 prohibits Contracting States from expelling refugees lawfully within their territories save on grounds of national security or public order. Any expulsion shall be in accordance with a decision made under due process of law and after the refugee has been allowed an opportunity to submit evidence in his or her defence.

Article 31(1) provides that Contracting States shall not impose penalties on refugees on account of their illegal entry or presence where they have come directly from a territory where their life or freedom was threatened providing they present themselves without delay to the authorities. Article 31(2) requires Contracting States not to apply restrictions on the movements of refugees other than those that are necessary or until their status can be regularised or they obtain admission into another country.

\textsuperscript{258} Neff, SC, “Rescue across State Boundaries: International Legal Aspects of Rescue” in Menloew, MA., & Smith, AM, (eds), \textit{The Duty to Rescue: the jurisprudence of aid}, Dartmouth Publishing Company Limited, Cambridge, 1993 at 181. Such persons are sometimes referred to in the press as “economic refugees”. It is submitted that the term can be misleading as persons who are only fleeing their homes for economic reasons are not refugees under the definition contained in the \textit{Refugee Convention} and \textit{Protocol}. Such people are more correctly referred to as “economic migrants”. On the other hand, some genuine refugees may choose to seek asylum in a particular country merely for economic reasons.


\textsuperscript{260} Refugee Convention, article 38; Protocol, article IV.

\textsuperscript{261} Crock (1998), n 257 at 127.

\textsuperscript{262} Crock (1998), n 257 at 127.

\textsuperscript{263} Neff (1993), n 258 at 179; Crock (1998), n 257 at 123.

\textsuperscript{264} Neff (1993), n 258 at 180, see also pages 180 - 181; Crock (1998), n 257 at 123; Jahn (1995), n 254, Volume IV, at 74. It should be noted that an attempt to adopt a legally binding Convention, which would grant a refugee a right of admission into the State whose frontiers they flee, failed on the 1970's.

\textsuperscript{265} Crock (1998), n 257 at 123.

\textsuperscript{266} Jahn (1995), n 254, Volume IV, at 74.

\textsuperscript{267} Neff (1993), n 258 at 181.

\textsuperscript{268} Such as Beirut, Iran, Greece, Turkey, Pakistan, India and Indonesia.

\textsuperscript{269} Burn & Riech (2001), n 40 at 218.
Article 16 provides that refugees shall have free access to the courts of law on the territories of Contracting States and shall enjoy the same treatment as a national in matters pertaining to access to the courts.

The protection afforded under Refugee Convention is only temporary and shall cease to apply to persons who voluntarily returns to their country of origin or nationality, acquires the protection of a new nationality or the circumstances in connexion with which they were recognised as a refugee cease to exist.

5. The Border Protection Legislation


The three Acts amend the Migration Act to ensure Australia has control over who crosses Australia's borders. For sake of convenience, the amendments under each of the three Acts will be examined separately.

(a) The Border Protection (Validation and Enforcement Powers) Act 2001

This Act validated the action taken by the Commonwealth in relation to the Tampa incident and the Aceng between 27 August 2001 and commencement of the Act on 27 September 2001. The Act also amended the Migration Act.

(i) Executive power of the Commonwealth

S.7A was inserted in the Migration Act to place beyond doubt the existence of the Commonwealth's executive power to protect Australia's borders including the ejection of persons who have crossed those borders and it operates concurrently with the provisions of the Act.

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270 Crock (1998), n 257 at 159.
276 Section 6 of Border Protection (Validation and Enforcement Powers) Act 2001 states that all action to which Part 2 of the Act applies is taken to be lawful when it occurred. Part 2 applies to any action taken by the Commonwealth during the validation period in relation to the MV Tampa, Aceng, any other vessel carrying persons in respect of whom there were reasonable grounds for believing their intention was to arrive in Australia unlawfully or any person on board those vessels during the validation period (section 5). The validation period means the period commencing 27 August 2001 to the date on which the Act commences (section 4) being 27 September 2001 when the Act received Royal Assent (section 2).
(ii) People-smuggling offences

Section 232A of the *Migration Act* makes it an offence to organise or facilitate the bringing or coming into Australia of a group of five or more illegal immigrants. Section 233A makes it an offence to give an official forged or false documents or false or misleading information in connection with the entry or proposed entry of a group of 5 or more illegal immigrants. Both offences carry a maximum penalty of 20 years imprisonment.

Section 233B prevents the discharge of any person charged with an offence under sections 232A or 233A without conviction under section 19 *Crimes Act* 1914 (Cth) unless the person is under the age of 18 years at the time the offence was committed.

Section 233C provides that any persons (other than persons under the age of 18 years at the time the offence was committed) convicted of an offence under sections 232A or 233B receive a sentence of at least 8 years (with a non-parole period of 5 years) for repeat offenders and 5 years (with a non-parole period of 3 years) in any other case.

(iii) Amendments to Division 12A *Migration Act*

Amendments have been made to sections 245B, 245F and 245H while new sections 245FA and 245FB have been inserted.

*Australian Defence Force Personnel*

ADF members are now authorised to exercise the powers under Division 12A. Those amendments are necessary since the government intends to use the ADF to protect Australia's borders as ADF members were not previously authorised to exercise those powers without prior approval from the Department of Immigration and Multicultural Affairs.

*S. 245B - Power to Request Permission to Board*

The Commander may request permission to board an Australian ship that is outside the territorial sea of a foreign country.

The Commander may make the request to board a foreign ship under the following circumstances:

- **S.245B(2)** The ship is within the Australian territorial sea and the request is made for the purposes of the *Migration Act*.
- **S.245B(4)** The ship is within the Australian contiguous zone and the Commander wishes to establish the ship’s identity or reasonably suspects it is or

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279 *Migration Act*, sections 245B(11)(a), 245F(18), 245H(8), 245FA(8) and 245FB(3).


281 Bedlington (1997), n 10 at 100.

282 An Australian ship is an Australian ship as defined in the *Shipping Registration Act* 1981 or an unregistered ship which is wholly owned or operated by Australian nationals or residents: *Migration Act*, section 245A.

283 *Migration Act*, section 245B(3).

284 A ship that is not an Australian ship: *Migration Act*, section 245A.
will be involved in a contravention or attempted contravention of the *Migration Act* in Australia;

S.245B(5) The ship is outside the Australian contiguous zone and the territorial sea of a foreign country and the Commander reasonably suspects that ship is or is being used in direct support or preparation for a contravention in Australia by another ship;

S.245B(6) The ship is outside the Australian contiguous zone and the territorial sea of a foreign country and is entitled to fly the flag of another country with which Australia has an agreement that enables the exercise of Australian jurisdiction over that ship;

S.245B(7) The ship is outside the Australian contiguous zone and the territorial sea of a foreign country and it is not flying the flag of another country or is flying the flag of a country it is not entitled to fly or has been flying the flag of more than one country and the Commander wishes to identify that ship.

S.245B(5) is necessary to provide for a situation where a foreign mother ship is found to be constructively present but does not attempt to flee. In such a situation the commander is given the power to request to board. The commander can only make the request once one of the support crafts has been involved in the contravention, and the request must be made as soon practicable after the contravention occurs. This ensures that, as far as practicable, any action taken against the mother ship is contemporaneous with the offence committed in the territorial sea.\(^{285}\)

Once a request under s.245B has been made, the powers to board the ship under sections 245F and 245G may be exercised.\(^ {286}\) An officer can board the ship under s.245G after making a request under s.245B(7) even though the request has not been complied with, but the commander cannot chase the ship if it flees.\(^ {287}\) In all other cases, sections 245C and 245D give the Commander a right of hot pursuit against a ship or a foreign mother ship if it attempts to flee.

**Power to chase ship**

S.245C applies to foreign ships, while s.245D applies to Australian ships.\(^ {288}\) The Commander of a Commonwealth ship or aircraft may chase a foreign ship if a request has been made under s.245B other than one made under s.245B(7).\(^ {289}\) The ship may also be chased under s.245C(3) if, immediately before the chase, the Commander could

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\(^{289}\) *Migration Act*, section 245C(1).
have made a request under s.245B(5). This allows a ship to be chased where it has not been possible to make a request under s.245B because the ship has fled and there is no way to communicate that request.\(^\text{290}\)

Provided that the chase is not interrupted within the meaning of article 111 of UNCLOS\(^\text{291}\), one or more Commonwealth ships or aircrafts may continue the chase\(^\text{292}\) even if the crew of the Commonwealth ship lose sight of the foreign ship or can find no trace of it on radar or other sensing device\(^\text{293}\).

In the case of Australian ships, s.245D is similar to s.245C except that there is no requirement that a request be made under s.245B\(^\text{294}\) or that the chase continue uninterrupted. This reflects the unlimited jurisdiction Australia has over Australian ships outside the territorial seas of other countries\(^\text{295}\).

In both cases, the chase cannot continue if the ship enters the territorial sea of another country\(^\text{296}\) and necessary and reasonable force may be used to enable the boarding of the ship, including firing a gun as a signal, firing at or into the ship to disable it or compel it to be brought for boarding\(^\text{297}\).

**Power to board, search and detain ships**

An Officer may board a ship outside a foreign country under s.245F if a request was made under s.245B (other than a request under s.245B(6) or s.245B(7) unless the officer is satisfied under s.245G(3) that the ship is an Australian ship\(^\text{298}\)), the ship is a foreign ship chased under s.245C(3)\(^\text{299}\) or is an Australian ship\(^\text{300}\). S.245F(3) gives Officers boarding a ship powers of investigation to identify any contravention or attempted contravention of the *Migration Act* in or outside Australia.

Officers may arrest any person found on the ship without a warrant if the person is found on a ship in Australia and the officer reasonably suspects that the person has committed, is committing or attempting to commit, or is involved in the commission of, an offence, either inside or outside Australia, against the *Migration Act*.\(^\text{301}\) Persons found on ships outside Australia may also be arrested without warrant if the officer reasonably suspects that person has committed, or is committing or attempting to commit, or involved in the commission of, an offence in Australia against the *Migration Act*.

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\(^{291}\) *Migration Act*, section 245C(5).

\(^{292}\) *Migration Act*, section 245C(2).

\(^{293}\) *Migration Act*, section 245C(4).


\(^{296}\) Sections 245C (1) and 245D (1) of the *Migration Act* only authorise the chase of a ship to any place outside the territorial sea of another country.

\(^{297}\) *Migration Act*, sections 245C (6) and 245D (3).

\(^{298}\) *Migration Act*, section 245B(1)(a).

\(^{299}\) *Migration Act*, section 245B(1)(b).

\(^{300}\) *Migration Act*, section 245B(1)(c).

\(^{301}\) *Migration Act*, section 245F(3)(f)(i).
The power to arrest a person without a warrant in Australia’s contiguous zone is exercised subject to Australia’s obligations under international law. Under s.245F(8), an Officer may detain the ship and bring it or cause it to be brought a port or to another place including a place within the territorial sea or contiguous zone if the Officer reasonably suspects the ship has been involved in a contravention either inside or outside Australia and the ship is either inside Australia or is an Australian ship outside Australia or in the case of foreign ships outside Australia, the Officer reasonably suspects the ship will be or has been involved in a contravention inside Australia.

S.245F(9) allows an officer detaining a ship under s.245F(8) to detain persons onboard the ship and either bring them to the migration zone or to a place outside Australia. An officer may search detainees and confiscate weapons found on them. Persons who were onboard a ship detained under s.245F but later leaves the ship may be returned to the ship if it is safe to do so. Persons detained under s.245F are not in immigration detention meaning that the officers responsible for the detention of persons under s.245F are not under the duty in s.256 to provide them with the necessary resources to make a visa application. Any actions taken under s.245F(8) or s.245F(9) do not amount to an unlawful detention or restraint of liberty of persons and no proceedings for false imprisonment or application for habeas corpus can be instituted against the Commonwealth or its officers.

An officer may only use reasonable and necessary force when exercising the powers under s.245F. In addition, they must not use force other than what is necessary to make the arrest or detention or prevent the person from escaping after the arrest or detention and must not do anything likely to cause grievous bodily harm unless the officer has believes on reasonable grounds that such action is necessary to protect life or prevent serious injury of another person or the person has been called to surrender and is unable to be apprehended in any other way.

If a request to board has been made under s.245B(6), then the officer may exercise any powers prescribed by regulations consistently with the agreement or arrangement in relation to persons found on the ship.

A ship may be boarded under s.245G pursuant to a request under s.245B(6) or s.245B(7) if the ship is outside Australia’s contiguous zone and the territorial sea of another country. If the ship is an Australian ship, then the officer can exercise the powers under s.245F. If the ship is a foreign ship entitled to fly the flag of a country, and Australia has an agreement with that country which enables Australia to exercise

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302 Migration Act, section 245(3)(f)(ii).
303 Migration Act, section 245F(4). These obligations include the obligations under UNCLOS as well as any conventions, treaties and arrangements Australia may have entered into with other countries.
304 Section 245F(8)(a) Migration Act.
305 Migration Act, section 245F(8)(b).
306 Migration Act, section 245F(8)(c).
307 Migration Act, section 245FA.
308 Migration Act, section 245FB.
309 Migration Act, section 5(1).
310 Migration Act, section 245F(8A). However, this does not affect the High Court’s jurisdiction under section 75 of the Constitution.
311 Migration Act, section 245F(10).
312 Migration Act, sections 245F(12) and 245F(13).
313 Migration Act, section 245F(14).
314 Migration Act, section 245G(1).
315 Migration Act, section 245G(3).
Australian jurisdiction over ships from that country, the officer may exercise any powers prescribed by regulations providing they are consistent with the agreement. If the ship is a foreign ship entitled to fly a flag of a country with which Australia does not have an agreement, the officer must leave the ship. Officers may search a ship if they are satisfied the ship is a foreign ship that is not entitled to fly the flag of a country or has been flying the flag of more than one country.

(b) Migration Amendment (Excision from Migration Zone) Act 2001

S.46A of the Migration Act provides that any visa application made by an “offshore entry person” who is an unlawful non-citizen is not a valid application. An “offshore entry person” means a person who has entered Australia at an “excised offshore place” after the “excision time” for that offshore place and became an unlawful non-citizen because of that entry.

“Excised offshore place” means Christmas Island, Ashmore and Cartier Islands, Cocos (Keeling) Islands, any other external territories prescribed by regulations, any islands forming part of a state or territory prescribed by regulation, an Australian sea installation and Australian resource installation.

The “excision time” is 8 September 2001 for Christmas Island and Ashmore and Cartier Islands, 17 September 2001 for Cocos (Keeling) Island and 27 September 2001 for Australian sea installations and Australian resource installations. In all other cases, the excision time is the commencement date of the applicable regulation.

79% of unauthorised arrivals by boat landed in Ashmore and Cartier Islands and Christmas Island in 1999-2000 so s.46A will prevent a large number of boat people from making valid visa applications, reducing the incentives for people engaging people smugglers and making the hazardous voyage to those Islands.

(c) Migration Amendment (Excision from Migration Zone)(Consequential Provisions) Act 2001

S.189 has been amended to provide a separate regime of detention for unlawful non-citizens in excised offshore areas. Officers may detain unlawful non-citizens in excised offshore areas under s.189(3) of the Migration Act and persons in excised offshore places attempting to enter the migration zone who would become unlawful non-citizens upon entry under s.189(4). S.198A gives officers power to take offshore entry persons to specified countries to process their claims for refugee status. S.198A is the means by which the “Pacific Solution” is implemented.

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316 Migration Act, section 245G(4).
317 Migration Act, section 245G(5).
318 Migration Act, section 245G(6).
319 Migration Act, section 5(1).
320 Migration Act, section 5(1).
321 Section 5(1) of the Migration Act which provides that excision time is the commencement date of the Migration Amendment (Excision from Migration Zone) Act 2001. Under section 2 of that Act, the commencement date is the date of assent, being 27 September 2001.
322 Migration Act, section 5(1).
323 Note 30.
325 Migration Act, section 198A(1).
S.494AA prohibits the institution of proceedings in any court against the Commonwealth relating to an offshore entry by an offshore entry person, the status of an offshore entry person during the ineligibility period, the lawfulness of the offshore entry person's detention during the ineligibility period and the exercise of powers under s.198A. The "ineligibility period" means the period from the time of offshore entry until the person ceases to be an unlawful non-citizen\(^{327}\). However, s.494AA does not affect the High Court's jurisdiction under s.75 of the Constitution\(^{328}\).

6. Is the Border Protection Legislation consistent with International Law?

(a) Section 7A

S.7A of the Migration Act only presents problems if the exercise of executive power to protect Australia's borders is contrary to international law. For example, s.7A cannot be used to hamper innocent passage of foreign ships\(^{329}\), refoule refugees\(^{330}\), prevent vessels in distress from seeking shelter in internal waters\(^{331}\) (although this does not prevent the Government from taking enforcement action against a vessel in distress where it is engaged in illegal activities) or to unreasonably refuse entry to vessels carrying persons rescued at sea\(^{332}\).

(b) People Smuggling Offences

Sections 232A, 233A, 233B and 233C of the Migration Act are not contrary to any rules of international law and gives effect to article 8 of the Bangkok Declaration on Irregular Migration\(^{333}\) and article 6 of the Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organised Crime\(^{334}\) requiring the enactment of legislation criminalizing people smuggling and penalising people smugglers.

(c) Division 12A

It is only necessary to consider the exercise of powers under Division 12A over foreign ships since Australia has jurisdiction over ships flying its flag and not in the territorial sea of another State.

\(^{326}\) Migration Act, section 198A(3).
\(^{327}\) Migration Act, section 494AA(4).
\(^{328}\) Migration Act, section 494AA(3).
\(^{329}\) In breach of article 24(1) of UNCLOS.
\(^{330}\) In breach of the non-refoulement principle in article 33 of the Refugee Convention.
\(^{331}\) In breach of customary international law.
\(^{332}\) In breach of Australia's obligations under Article 98(2) of UNCLOS, SOLAS 1974 and SAR 1979.
\(^{333}\) The Bangkok Declaration on Irregular Migration done at Bangkok on 21-23 April 1999, ("Bangkok Declaration") reproduced in David (2000), n 11 at 52-6. Australia, Bangladesh, Brunei Darussalam, Cambodia, China, Indonesia, Japan, Korea, LAO PDR, Malaysia, Myanmar, New Zealand, Papua New Guinea, Philippines, Singapore, Sri Lanka, Thailand and Vietnam are signatories to the Declaration.
The power to board a foreign ship to carry out any investigations in the territorial sea under s.245B(2) and s.245F may be contrary to the duty not to hamper innocent passage under article 24(1) of UNCLOS and the rules regarding the exercise of criminal jurisdiction under article 27(1). It is arguable that s.245B(2) and s.245F are laws adopted under article 21(1)(h) meaning that foreign ships must comply with any request under those sections. However, it is submitted that the act of transporting illegal immigrants would render the passage of a foreign ship not innocent thereby depriving it of protection against Australian jurisdiction including the power to arrest persons onboard the foreign ship who have committed or is committing or has attempted to commit\(^{335}\) an offence under the Migration Act.\(^{336}\) The detention of a foreign ship in the territorial sea under s.245F(8) is permitted under article 25 to prevent breaches of Australia’s migration laws and under article 27(1) where those laws have been breached.

The power to request permission to board a foreign vessel in the contiguous zone under s.245B(4) to establish its identity or where it is suspected it is or will be involved in a contravention or attempted contravention is consistent with articles 33 and 110 of UNCLOS. However, a person cannot be arrested in the contiguous zone under s.245F(3) unless an offence has been committed within Australia or its territorial sea.\(^{337}\) S.245F(4) ensures that a person is not arrested contrary to article 33. The powers of investigation under s.245F(3) and detention of vessels which have been involved or likely to be involved in contraventions of the Migration Act in Australia under s.245F(8) and of persons onboard under s.245F(9) are not inconsistent with article 33 which enables the coastal State to punish or prevent such contraventions.

Article 110 of UNCLOS permits the boarding of vessels under s.245G pursuant to a request under s.245B(7). The right to board of vessels under s.245G pursuant to a request under s.245B(6) will turn on the conditions of any agreement or arrangement between Australia and the flag State of the vessel in question.

The power under s.245B(5) to request permission to board ships outside the territorial sea and contiguous zone where one of its craft is or is being used in Australia to contravene the Migration Act and to exercise the powers under s.245F has its basis in article 111 which permits the hot pursuit of such vessels. It would be anomalous if one could exercise jurisdiction over such vessels through the right of hot pursuit but no jurisdiction could be exercised if the ship made no attempt to escape.

The right of hot pursuit of foreign ships in s.245C is generally consistent with the terms of article 111 of UNCLOS. However, s.245C(4) which authorises Commonwealth ships or aircrafts to continue the chase even if the crew of the Commonwealth ship lose sight of the foreign ship or can find no trace of it on radar or other sensing device is inconsistent with the customary international law which requires sight (including identification on radar) must not be lost.\(^{338}\) In this regard, s.245(4) is also inconsistent with s.245(5) which provides that the chase must not continue if the chase is interrupted within the meaning of article 111 of UNCLOS. In addition, s.245C(3), which permits the hot pursuit of a vessel where no request was made if, immediately before the start of the chase a request could have been made under s.245B(5), is inconsistent with article

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335 Attempting to commit an Offence under Commonwealth law is an offence under section 7(1) of the Crimes Act 1914 (Cth).
336 Migration Act, section 245F(3).
337 UNCLOS, article 33(1).
338 See n 238.
111(4) which provides pursuit may only be commenced after a signal to stop has been given.

The use of force authorised in s.245C and s.245F is potentially excessive. S.245C(6) permits the use of necessary and reasonable force consistent with international law to enable the boarding of the chased ship including, “where necessary and after firing a gun as a signal, firing at or into the ship to disable it or compel it to be brought to for boarding”. S.245F(13) allows officers to use force likely to cause grievous bodily harm to arrest persons fleeing arrest if they have been called to surrender and the officer believes that the person cannot be apprehended in any other way or it is necessary to protect life or prevent serious injury of another person. According to McLoughlin, offences under the Migration Act probably fall under the category of “regulatory offences” as discussed earlier, Shearer argues that the use of force likely to endanger human lives is not warranted where regulatory offences are concerned.

Officers responsible for the detention of persons under s.245F are not under any duty to provide detainees, including refugees, with the necessary resources to make a visa application and this does not appear inconsistent with the Refugee Convention and the Protocol.

(d) The Pacific Solution

The creation of excised offshore places in Christmas Island, Ashmore and Cartier Islands and Cocos (Keeling) Islands does not amount to the “cutting off Australia’s territory” as suggested by some lawyers nor does it diminish Australia’s obligations under the Refugee Convention and Protocol to refugees in excised offshore areas.

S.46A of the Migration Act, which provides that visa applications by unlawful non-citizens in excised offshore areas are not valid, is not inconsistent with the Refugee Convention and Protocol since they do not provide refugees with a right of entry into Australia.

Sections 189 and 198A, which provide for the detention of unlawful non-citizens in excised offshore places and the implementation of the “Pacific Solution”, do not breach the Refugee Convention or Protocol. Australia has the sovereign right to exclude persons from its territories and refugees do not have a right of entry into Australia under the Refugee Convention or Protocol. Accordingly, it is submitted that sections 189 and 198A do not amount to a penalty imposed on refugees on account of their unlawful entry. Even if it did amount to a penalty, article 31 will not apply to most unlawful arrivals in the excised offshore places as they have not arrived directly from a territory where their life or freedom was threatened. Article 32 will not prevent the expulsion of any refugees arriving in the excised offshore places since their presence is unlawful. Finally, the non-refoulement principle in article 33 does not prevent refugees being sent to countries where they will not be threatened.

(e) Access to Courts by Offshore Entry Persons

S.494AA severely restricts the rights of offshore entry persons from instituting proceedings in court against the Commonwealth although the jurisdiction of the High Court under s.75 of the Constitution has been preserved. Article 16 of the Refugee

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339 McLoughlin (1999), n 112 at 15.
340 See n 207. See also n. 208.
Convention requires refugees to have free access to the courts of law whereas s.494AA provides a very restricted right of access.

As discussed earlier, a person’s entitlement to protection under the Refugee Convention is dependent that person meeting the definition of refugee and not upon the outcome of the procedures adopted by a State to determine a person’s refugee status. Accordingly, it is submitted that a person who is a refugee cannot be deprived of his or her rights under the Refugee Convention by classifying them as offshore entry persons and, therefore, it is also submitted that s.494AA is inconsistent with article 16.

7. Conclusion

Most of the provisions contained in the border protection legislation are consistent with Australia’s obligations under international law. The exercise of executive power under s.7A of the Migration Act will not breach international law provided it is not used to hamper innocent passage, refoule refugees, prevent vessels in distress from seeking shelter in internal waters or to unreasonably refuse entry to vessels carrying persons rescued at sea.

Sections 232A, 233A, 233B and 233C are not inconsistent with international law which may impose an obligation to outlaw people smuggling and punish people smugglers in the near future.

Division 12A complies with most of the provisions of UNCLOS and other rules of international law. However, the level of force that can be used under s.245C and 245F of the Migration Act is excessive and not justified under customary international law. In addition, the right of Commonwealth ships to continue the right of hot pursuit even if its crew loses sight of the pursued ship or can find no trace of it on radar is also inconsistent with customary international law.

It is submitted that the provisions giving effect to the “Pacific Solution” do not breach Australia’s obligations under the Refugee Convention and Protocol since they do not grant refugees a right of entry into Australia. However, s.494AA is inconsistent with article 16 of the Refugee Convention.

Overall, it is submitted the border protection legislation does strike a satisfactory balance between Australia’s interests in protecting its borders from illegal immigrants and Australia’s international obligations. It is unlikely that a repeat of the Tampa Incident will occur in Australia’s external territories in the Indian Ocean. The “Pacific Solution” will allow ships that come to the aid of refugees in the Indian Ocean to disembark the refugees in Australia’s external territories where they can then be sent to one of several Pacific Island Nations for processing under the “Pacific Solution”. However, it is uncertain how long the “Pacific Solution” can be maintained and it is submitted that the medium to long term solution lies in cooperation with Indonesia in preventing the egress from people from Indonesia\textsuperscript{342} and ultimately, a solution needs to be reached on an international level\textsuperscript{343}.

\textsuperscript{342} Howard (2001c), note 6; Doorstop Interview with Alexander Downer, Minister for Foreign Affairs and Trade, Adelaide, 31 August 2001
\textsuperscript{343} Howard (2001), n 3; Howard (2001b), n 4. Note that while note 2, concludes that in the shipping aspects of the Tampa that Australia clearly breached its international obligations.