Scheme ("ASAS") has been greatly reduced.[66] Permission to work has been restricted[67] and due to a link between work permits and Medicare, asylum seekers without permission to work are not only denied the opportunity to earn a living, but they are also denied access to publicly funded health care. Given that asylum seekers may have fled from situations of war and deprivation, the denial of medical care may have serious implications for their health. Furthermore, asylum seekers are also no longer entitled to Legal Aid except in exceptional situations.[68]

The Coalition has also sought to significantly curtail asylum seekers' access to court review. The Migration Legislation Amendment (Judicial Review) Bill 1998 (Cth)[69] has been on the Government's agenda since it was elected in 1996 and would extend the *Migration Reform Act* 1992 (Cth), which restricts appeals to the courts by refugee claimants to very limited grounds.[70] The rationale behind the Judicial Review Bill is that despite the existence of a supposedly independent tribunal for reviewing failed refugee claims, the amount and cost of refugee litigation to the Federal Court has escalated.[71] In 1998-99, refugee litigation to the High Court nearly doubled, proving, according to the Minister, the case for stricter limits to judicial review. While the increase in refugee

66 Since July 1993, asylum seekers have been entitled to ASAS assistance only when their Protection Visa ("PV") application has been with the Immigration Department for more than six months – the so-called six month rule: Australian Red Cross, "Submission to the Joint Standing Committee on Treaties with respect to the United Nations Convention on the Rights of the Child" (April, 1997), p 4. A copy of this document was obtained by the author from a former Red Cross worker and is on file with the author. Exemption to the six month rule could be gained under certain circumstances. In September 1996, the Coalition Government tightened the guidelines for exemptions to the six month rule in an attempt to "significantly reduce the number of persons able to receive ASAS" within the initial six months after the PV lodgement (at p 4). The Australian Red Cross ("ARC") then withdrew from the "exceptional circumstances" provisions of the scheme because it felt that the new criteria for such cases were unfairly harsh. It was not until May 1998 – two years after the Coalition took office – that the Government and ARC signed a new ASAS agreement. A further change to ASAS eligibility occurred in October 1996 when the Government decided that asylum seekers whose cases were at the review stage of the process would no longer be eligible for ASAS: ARC, at p 4. In its 1999-2000 budget, the Government altered its position and announced that funds would be made available for asylum seekers at the RRT stage with 'exceptional circumstances': P Ruddock, "Budget initiatives offer more to refugees and multiculturalism", Media Release, 11 May 1999.

67 M Chaaya, "Proposed Changes to the Review of Migration Decisions: Sensible Reform Agenda or Political Expediency?" (1997) 19 *Syd L Rev* 547 at 554-5; *Migration Regulations* 1994 (Cth), Schedule 2, Subclass 051, 051.611A.

68 C Graydon, "A Decade of Dismay: Good Bye to Refugee Protection" (2000) 9 *Human Rights Defender* 1 at 21.

69 Migration Legislation Amendment (Judicial Review) Bill 1998 (Cth).

70 *Migration Reform Act* 1992 (Cth). As well as limiting judicial review, the ALP government introduced the practice of mandatory detention for unauthorised arrivals following the boat arrival of several hundred Cambodians in the late 1980s and early 1990s: note 111 *infra*. It also began the process, to be followed by the Coalition, of seeking to avoid responsibility for determining the claims of about 1 650 East Timorese asylum seekers for fear of damaging its relationship with Indonesia. For a general background on the East Timorese asylum seekers see C Stewart, "Hostages to History" *The Weekend Australian*, 14 October 1995, p 26; S Lobez, *The Law Report*, Radio National, Australian Broadcasting Corporation, 9 June 1998.

71 P Ruddock, "Immigration Reform: The Unfinished Agenda", presented at National Press Club, 18 March 1998; see also P Ruddock, "Australia's Migration and Humanitarian Programs: Policies and Objectives", presented at Migration Institute of Australia, 14 April 1997.

litigation in the High Court is undeniable, lawyers have said that the increase is mainly due to the restrictions placed on Federal Court review of refugee matters by the Labor Government.[72] Members of the High Court appear to share this view.[73]

In March 2000, the Government introduced the Migration Legislation Amendment Bill (No 2) 2000 to Federal Parliament to prevent unauthorised entrants from initiating class action suits,[74] with the Minister again stating that it was part of Government policy to limit judicial review in immigration matters.[75] According to Minister Ruddock, applications for judicial review by refugee claimants constitute an abuse of the system as asylum seekers attempt to extend their stay in Australia while benefiting from work rights, Medicare and access to welfare assistance.[76] This is the same logic which dominated the response to the recent Iraqi and Afghan asylum seekers. While there can be no doubt that the on-shore protection determination process – including access to judicial review – is exploited by some applicants, the measures taken by the Government can be questioned on the dual grounds of their effectiveness and their impact on those genuinely seeking Australia's protection. The measures introduced by the Government are all part of the general policy direction of removing incentives[77] from people who might use the refugee determination process as a means to access Australia's social support system.

Yet if the mandatory detention regime can be taken as an important component in this strategy, it would appear that the approach is at best only partially successful. Mandatory detention is supposed to act as a deterrent against future unauthorised arrivals.[78] But while it may be true that the detention policy has limited the number of unauthorised arrivals over the past decade – although this would be difficult to substantiate – the recent influx of 'boat-people' would suggest that there are limits to the effectiveness of such measures.[79]

Restrictive Government policies can also be criticised because of their impact on genuine refugees. As well as affecting those who might 'abuse' the refugee determination process, people who fear for their lives and liberty may be denied the income required to meet their daily needs, access to adequate medical care and the legal advice necessary to ensure their future safety.

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72 B Lane, "Court action doubles" *The Australian*, 7 December 1999.

73 Refugee and Immigration Legal Centre, "Submission to Joint Standing Committee on Migration Migration Legislation Amendment Bill (No 2) 2000", <http://www.aph.gov.au/house/committee/MIG/mlab/submissions.htm>. In *Abebe v Commonwealth* (1999) 197 CLR 510 at 534, CJ Gleeson and J McHugh acknowledge this point noting that the legislative scheme "must inevitably force or at all events invite applicants for refugee status to invoke the constitutionally entrenched s 75(v) jurisdiction of this Court. The effect on the business of this Court is bound to be serious."

74 Migration Legislation Amendment Bill (No 2) 2000 (Cth).

75 ABC, "Govt legislates against illegal entrants", 14 March 2000.

76 Note 71 *supra*. Speech to the National Press Club

77 ABC News, "Ruddock renews vow to push through immigration changes", 21 November 1999.

78 Note 60 *supra*.

79 Mr Ruddock effectively acknowledged this when, in response to the recent unauthorised boat arrival of significant numbers of asylum seekers, he said that detention is not an incentive to deter boat arrivals: P Ruddock interview with L Oaks, *Sunday*, Channel 9, 21 November 1999.

It may be argued that the Government had no reasonable alternative to the policy it continues to pursue. From this perspective, the increasing number of unauthorised arrivals are part of an international pattern in which organised criminal groups illegally transport migrants into countries such as Australia. Australia is targeted as a destination because of the relative generosity it shows towards refugees and asylum seekers. Thus, the Government's policy was to explode the perception of Australia as an 'easy touch'[80] in an attempt to prevent further 'people smuggling' from occurring.

While it is true that 'people smugglers' are an increasing international phenomenon,[81] a number of the other presumptions in this argument need to be challenged. First, there must be a detailed comparison between Australian and international policy responses to asylum seekers. While space precludes a detailed international comparison, a number of points can be noted which suggest that the claims to Australia's apparent liberal asylum policies are simplistic, if not unfounded. For example, Australia's mandatory detention regime is unusually rigid by international standards.[82] Asylum seekers' access to welfare assistance in Australia is not overly generous but rather comparable to or more limited than access for asylum seekers in other countries. The majority of asylum seekers in Australia are not eligible for ASAS, while in Germany asylum seekers are eligible for in-kind support,[83] and in Britain they are paid with

80 Note 65 *supra*.

81 See for example B Crossette, "People trafficking on rise warns UN" *The Age*, 26 June 2000; I Black, "EU struggles to find common approach to control influx" *The Guardian*, 27 March 2000; "A single market in crime" *The Economist*, 16-22 October 1999.

82 Under 1996 legislation, aliens, including asylum seekers, who arrive without appropriate documentation in the US are detained: USCR, "Country Report: United States" (1997), <http://www.refugees.org>, 1999; see also LCHR, "Refugees Behind Bars: The Imprisonment of Asylum Seekers in the Wake of the 1996 Immigration Act", <http://www.lchr.org>, 1999; but asylum seekers in the US can be paroled pending the outcome of their claim, although the parole program has also been criticised: USCR, "Revisiting APSO: Improving the system for releasing genuine asylum seekers from detention", <http://www.refugees.org>, 1996; see also E Acer, "Lawyers Committee Testimony on INS Detention" <http://www.lchr.org>, 16 September 1998. Detention of asylum seekers in the UK remains an important issue, with the Tory opposition recently calling for all unlawful entrants to be detained for the full period of the refugee determination process: G Jones, "Hague in call to detain illegal migrants" *The Telegraph*, 18 April 2000; M Kallenbach, "Labour accused of being a soft touch over refugees" *The Daily Telegraph*, 3 February 2000. But 1999 legislation, for the first time created routine bail hearings for all detainees: Immigration and Nationality Directorate, *IND Report 1999*, "Enforcing Immigration Law". In Canada, asylum seekers are not generally detained: (1999) 10(6) *Migration News*, although draft legislation, should it have been passed before upcoming national elections, would clarify and extend Canada's detention provisions: Citizenship and Immigration Canada, "Backgrounder #4 Detention Provisions Clarified", Media Release, 2000, <http://cicnet.ci.gc.ca/English/press/00/0009-bg4.html>. But unlike the Australian system in which detention is not reviewable, in Canada, immigration detention must be reviewed after 48 hours, then after 7 days and then at each subsequent 30-day period: Inter-American Commission on Human Rights of the Organisation of American States, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, February 2000, section 129.

83 P Minderhoud, "Asylum seekers and access to social security: recent developments in The Netherlands, United Kingdom, Germany and Belgium" in A Bloch and C Levy (eds), *Refugees, Citizenship and Social Policy in Europe*, Macmillan Press (1999) at 140-1; F Liebaut & J Hughes (eds), *Legal and Social Conditions for Asylum Seekers in Western European Countries*, Danish Refugee Council (1997), 'Germany'.

vouchers.[84] Access to work rights for asylum seekers in Australia may be marginally more liberal than in some other countries,[85] but work permits are not given to those who do not apply for protection within 45 days of arrival in Australia.[86] Asylum seekers in Australia who do not have permission to work are only eligible for medical care on a full user pays basis.[87] In Britain, asylum seekers are eligible to publicly funded medical care[88] and in Germany, to medical and dental treatment in cases of acute illness or pain.[89] In these countries, asylum seekers are also eligible for some form of state-provided accommodation, unlike asylum seekers in Australia.[90]

Even if the rationale behind the Government's policies can be challenged, it may still be argued that there are no plausible policy alternatives for addressing concerns that the on-shore refugee determination system is being 'abused'. But an alternative response might be to make the system more open and efficient. For example, if applicants had greater access to sound legal representation at the beginning of the process, applications for judicial review might decline.[91] Another positive approach would be to incorporate other international human

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84 Home Office, *Explanatory Notes to Immigration and Asylum Act 1999* (1999), Chapter 33; <http:www.legislation.hmso.gov.uk/acts/en/99en33-a.htm>; Anon "Immigration and Asylum Act 1999" *The Guardian*, 30 March 2000.

85 In the US, asylum seekers can apply for work permits 150 days after lodging their completed asylum claim. If their work application is not responded to within 30 days, they automatically receive a work permit: S Legomsky, "The New Techniques for Managing High-Volume Asylum Seekers" (1996) 81 *Iowa Law Journal*, reprinted in *Retreating from the Refugee Convention: Conference Proceedings*, NT University, Darwin, 7-10 February 1997, p 688. In the UK, asylum seekers have the right to work after 6 months, although it can take up to 6 months to obtain work permits: P Minderhoud, note 83 *supra* at 137-8. In Germany asylum seekers are not allowed to work for at least the first 3 months of their stay, and even then, can only apply for a work permit for a specific job which must have been advertised for a specific period without being filled, and offered to a German national or other 'privileged foreigner': F Liebaut and J Hughes, note 83 *supra*.

86 Department of Immigration and Multicultural Affairs, Fact sheet 42: *Assistance for Asylum Seekers in Australia*, <http://www.immi.gov.au>, updated 12 May 2000.

87 *Ibid.*

88 F Liebaut and J Hughes, note 83 *supra*, "United Kingdom".

89 P Minderhoud, note 83 *supra* at 141.

90 In Germany asylum seekers are housed firstly in reception centres, then in the community: F Liebaut and J Hughes, note 83 *supra*. In Britain, they are compulsorily dispersed throughout the country: BBC News, "Asylum seekers spread across UK", 6 November 1999; IND, *IND Report 1999*, "Providing Asylum Support"; IND, *A Consultation Paper on the Integration of Recognised Refugees in the UK*, October 1999.

91 Refugee Council of Australia, "Submission on Migration Bill (Judicial Review)", <http://www.refugeecoucil.org.au>. The Senate Legal and Constitutional References Committee, in its June review of Australia's refugee and humanitarian programs, concluded that legal assistance to litigants benefits both courts and the individuals concerned, but recommended that further research be undertaken to determine if increasing legal assistance would lead to a decrease in the rate of court appeals by asylum seekers: Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000 at 105-6.

rights instruments to which Australia is a signatory[92] into the established refugee determination process so that people who have a legitimate claim for Australia's protection but who do not fit the refugee definition will be afforded protection.[93] This would mean that such claimants would not have to be rejected by the refugee determination process, as they are now and then apply for exercise of the Minister's humanitarian discretion. This would then reduce delay in the system.

The creation of a 'manifestly founded' list whereby certain groups of people could be presumed to have legitimate claims for protection if they prove their identities and pose no risk to the community, might also make the determination process more efficient. Applicants fitting into the 'manifestly founded' category could be assessed in an accelerated determination process so that they are not spending months, if not years, in detention. Such a list might have greatly reduced the amount of time spent in detention by many of the Afghan and Iraqi recent arrivals who may have fit such a category.[94]

There is no suggestion here that the Government should forgo its responsibility for the health and security of the nation by relinquishing control over the state's borders. Australia should take reasonable steps to curb the recent increase in 'people smuggling'. But there should also be recognition that a permanent solution will require a complex, international response that tackles the root causes of the desperation of the clients of people smugglers. The challenge is to seek to address the problem of people smuggling, while at the same time ensuring that the policies affecting those seeking Australia's protection are humane.

If, as the evidence suggests, Australia is not a 'soft touch' and there are policy alternatives to the 'get tough' line the Government has pursued, why does the Government continue to construe the recent arrivals as abusing Australia's

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92 Human Rights and Equal Opportunity Commission, Submission to the Senate Legal and Constitutional References Committee inquiry into Australia's refugee and humanitarian program" at 13; Amnesty International Australia, Submission to the Joint Standing Committee on Migration on the Migration Legislation Amendment Bill (No 2) 2000, June 1999, recommendation 1. Both HREOC and AI have called for the incorporation of the principles articulated in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention on Civil and Political Rights into Australia's on-shore protection regime. The Senate Legal and Constitutional References Committee concurred with the position of these organisations: note 91 *supra*, at 60. Australia would not be alone in moving in this direction. In October 1998, President Clinton signed into law an 'omnibus spending bill' that bars the US from forcibly returning aliens in danger of being tortured: USCR, "US Refugee and Asylum Programs and Policies: A 1998 Chronology", <http://www.refugees.org>, 1999. The UK, a country that has traditionally resisted such moves, has, under the Blair government, incorporated the 1950 European Convention on Human Rights (ECHR) into British domestic law. This will allow asylum seekers to appeal to remain in the UK on the grounds that their removal would violate ECHR provisions: Home Office, *Fairer, Faster, Firmer: A modern approach to immigration and asylum*, The Stationary Office, July 1998, Ch 2, 2.4 - 2.5.

93 As proposed in draft Canadian legislation: Citizenship and Immigration Canada, "Caplan tables new immigration and refugee protection act", Media Release, 6 April 2000.

94 Hazara Afghan asylum seekers might fit this category, for example. See Refugee Advice and Casework Service "Submission to Department of Immigration and Multicultural Affairs Re Hazara Afghan Applicants", 5 December 1999. The Refugee Advice and Casework Service thought it appropriate to submit a generic report for these applicants because they had "essentially similar core claims, based on their Hazara ethnicity, their Shia religion and an imputed political opinion of support for the Hezb-l-Wahdat".

'liberal' asylum policies? As well as reflecting the ongoing challenges facing Australian immigration officials, the Australian response may point to a more general sentiment within the Australian community. The meaning of the asylum debate as part of this broader social and political trend is explored next.

VI. ASYLUM SEEKERS, SYMBOLISM AND THE MOOD OF THE NATION

By the time the Iraqi and Afghan asylum seekers entered Australia by boat beginning late last year, unease within the political, economic and social climate in Australia had become entrenched. The rise of Pauline Hanson in 1996 was nothing if not an articulation of the sense of disempowerment felt by many Australians. The Howard Government appeared reluctant to dismiss the claims of Hanson and One Nation.[95] Instead, it seemed to view the rise of Hanson as politically advantageous and as a vindication of the Government's stance against the 'politically correct' elite who had been supported by the previous Government.[96] The rise of Hanson was proof that multiculturalism, indigenous rights and feminism had left many in the Australian community behind. The challenge for the Government was not to alienate Hanson's supporters, but to harness their discontent into a force for a more conservative social agenda.

Even with the subsequent decline of One Nation, the sentiments articulated by Hanson loom large. With the Howard Government's ambivalence towards the Hanson social analysis, the blaming of the 'other' as an explanation of the dislocation of many from the national project, gained a place within the nation's leadership. The Government has conveyed an underlying message that the

95 For an overview of Hanson's rise and Howard's initial response see J Brett, "John Howard and the politics of grievance" in G Gray & C Winter (eds), *The Resurgence of Racism: Howard, Hanson and the Race Debate*, Monash Publications in History (1997) pp 7-9.

96 For a range of views on the role of the 'politically correct' in creating the environment that led to Hansonism see PP McGuiness, "'The Political Elites' Contribution to Hansonism", in T Abbot et al , *Two Nations: The Causes and Effects of the Rise of the One Nation Party in Australia*, Bookman (1998) p 133; T Lynch & R Reavell, "Through the Looking Glass: Howard, Hanson and the Politics of 'Political Correctness'" in B Grant (ed), *Pauline Hanson: One Nation and Australian Politics*, University of New England Press (1997) 39; A Marcus, "John Howard and the re-naturalisation of bigotry", in G Gray & C Winter (eds), *ibid.*

Australian community has been taken advantage of by an unworthy minority.[97] A rhetoric of dismissal has simplistically constructed the marginalised as undeserving, often threatening, people who are deliberately exploiting the generosity of the nation, especially its taxpayers. Cuts to government spending have been justified as efforts to reduce 'rorts' in the system. This tendency has been evident in the Australian Government's attitudes towards asylum seekers. As well as referring to asylum seekers in the negative terms noted above, Minister Ruddock has suggested that 'abuse' of the asylum seeker process "costs tax payers millions of dollars, undermines public confidence in the system and delays processing times, disadvantaging those applicants who are genuine".[98]

Even the Kosovar and East Timorese temporary evacuees became subject to the Government's rigid rhetorical and policy position.[99] The temporary safe haven program, motivated partly by humanitarian concerns, ultimately became a display of the Government's need to control immigration. This was evident in the legislative basis for the entry and stay of the temporary evacuees.[100] Later,

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97 For examples of this tendency see the Prime Minister's analogy of the pendulum needing to swing back in the native title debate: K Middleton, "PM raises election card over Wik" *The Age*, 19 May 1997, which suggested that the dispossessed had been given too much and that what they had been given was at the expense of other Australians. The discourse surrounding the 'stolen generations' has been similarly dismissive. As well as attempting to discredit the Human Rights and Equal Opportunity Commission report by attacking one of its authors, the Minister responsible, Senator Herron, has suggested, along with right-wing media commentators, that the stolen generations were 'rescued', not stolen. Even the public space in which the stolen generations' might tell their stories has been restricted: Those who were the victims of government policies have been attacked with suggestions that their stories are exaggerated: R Manne, "The apology you make when you're not..." *The Age*, 30 August 1999. In a similar vein, the term 'job snobs' used by the Employment Services Minister: A Carson, "Minister has another lash at jobless" *The Age*, 6 August 1999, especially in the context of the philosophy of 'mutual obligation' implies that the unemployed are exploiting Australian taxpayers and are not meeting what is required of them.

98 Note 71 *supra*, speech to the Migration Institute.

99 It might be argued that by international standards, Australia's response to the temporary evacuees was generous. It is true that on a per capita basis, Australia accepted more Kosovars, and certainly more Timorese than many other countries. Australia gave temporary refuge to about 4 000 Kosovars: DIMA, Fact Sheet 62: *Operation Safe Haven*, updated 14 June 1999; and 1 800 East Timorese: Minister for Immigration and Multicultural Affairs, "Minister announces extension of save haven care to East Timorese evacuees", Media Release, 14 September 1999. No other country had a similar program for East Timorese, although several hundred thousand fled to West Timor. Regarding the Kosovars, the United Kingdom, with a population much larger than Australia's, accepted only a few hundred more evacuees: Immigration and Nationality Directorate, *IND Report 1999*, "Asylum and After Entry Casework". But while Australia, like Britain, was keen to see the temporary evacuees return – to the point of threatening forced repatriation (see for example D Gray and F Farouque, "We won't go: Kosovars" *The Age*, 10 April 2000; B Montgomery, "Sponsorship lifeline for five Kosovars" *The Australian*, 13 April 2000; ABC News Online, "Kosovars to be moved to WA detention centre", 15 April 2000) – Britain allowed those in its territory to apply for refugee status through its already overwhelmed on-shore determination process (J Walker, "Britain braces for Kosovar deportation" *The Australian*, 26 June 2000). Those temporary evacuees in Australia were not entitled to enter the refugee determination process, except with the non-compellable, non-reviewable, discretionary approval of the Minister: *Migration Act* 1958 (Cth), Subdivision AJ, ss 91H-91L. The US and Canada gave refuge to 14 300 and 7 200 Kosovars respectively. Both countries have allowed the temporary evacuees in their territories to return or to remain and apply for permanent residence: J Brooke, "Kosovars changing Canadian Prairies" *The New York Times*, 16 May 2000.

100 *Ibid.*

when some of the Kosovar and East Timorese temporary evacuees expressed a desire to remain in Australia while their home countries restored basic services and order after the violence, the Government appeared to misjudge the mood of the electorate[101] and instead of reacting compassionately, decided to maintain the absolute 'integrity' of the immigration program.[102] The evacuees were met with threats of withdrawing services and of being treated as unlawful non-citizens.[103]

The suggestion here is not that the nation's acceptance of refugees and provisions for asylum seekers could, or even should, be limitless. There are competing demands for the nation's limited resources. Rather, it is the public undermining of the evacuees, the dismissal of their claims[104] and the attempts to portray them as 'ungrateful' that should not be condoned.

Temporary protection, the passing of legislation excluding certain classes of people from entering the on-shore determination process and the possibility of a 'user pays'[105] detention scheme are the most recent of the Government's 'get tough' policies directed at unauthorised arrivals in particular and asylum seekers more generally. These policies and the language that has accompanied them are not merely examples of the Government imposing its will on the electorate. In fact, rather than forcing its policies on an unwitting nation, the Howard Government has, according to the respected journalist Paul Kelly, made a practice of constructing policy on the basis of opinion polls, talkback radio and

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101 If letters to newspapers can be seen as some reflection of the way the people are feeling about particular issues, these were overwhelmingly calling for a more 'compassionate' response to those Kosovars seeking an extension of their temporary visas. For a small sample see letters from K Lynch, *The Age*, 12 April 2000; S Brentwall, *The Age*, 11 April 2000; G Reilly, *The Australian*, 7 April 2000. The support of the ALP (ABC, "Govt considers 11th hour visa applications of Kosovar Albanians", 8 April 2000; K Taylor, F Faroque & A Derby, "Kosovars to be deported 'in days'" *The Age*, 11 April 2000) and of some state governments (B Montgomery, "Sponsorship lifeline for five Kosovars" *The Australian*, 13 April 2000; T Hemming and P Murphy, "Victoria a haven for refugees: Bracks" *The Sunday Age*, 16 April 2000) for the remaining Kosovars to stay in Australia, might also be read as an indication of the level of support for the Kosovars within the community.

102 A Hodge & M Saunders, "Coaxing fails as refugees refuse to go" *The Australian*, 13 April 2000. In a similar sentiment, the Minister also said that offering the Kosovars 'on-shore' permission to remain in Australia would set a bad precedent: A Clennell, "Kosovars 'conned' into leaving" *Sydney Morning Herald*, 14 April 2000.

103 J MacDonald, "Plea on Timor refugees" *The Age*, 30 September 1999; J Vigor Nathan, letter, *The Age*, 29 September 1999; M Videnieks and M Saunders, "Stay-put refugees risk losing privileges" *The Australian*, 7 December 1999.

104 Responding to calls from a small group of Kosovars to remain in Australia, the Government reverted to a language of dismissal, attempting again to undermine the legitimacy of the marginalised for political purposes – this time to pressure the Kosovars to agree to return. The Minister was keen to highlight a claim that some of the evacuees had misled the Government by saying that they were from Kosovo, when in fact they were from Serb-dominated Eastern Kosovo: ABC, "Ruddock says some Kosovars are misleading about home", 12 April 2000. The Minister's tone reflected a lack of understanding for the desperate plight from which the evacuees had fled; a situation from which it would be reasonable for people to say anything to escape.

When the East Timorese suggested resistance to the Government's agenda, it attempted to make the 'cost-abuse' link, with the Immigration Department noting that an aborted attempt to move people to Sydney had cost $30 000 dollars: D Reardon & J MacDonald, "East Timorese agree to Sydney move" *The Age*, 8 December 1999. Implicit in these statements is an attempt to paint the East Timorese as potentially ungrateful wasters of taxpayers' money.

105 ABC Newsmail, "Opposition blasts user-pays plan for refugees", 26 April 2000.

tabloid headlines.[106] The Government's position is that of a party that won office on the promise of making the nation 'relaxed and comfortable'[107] by governing 'for all of us'[108] and not pandering to noisy special interest groups. The marginalised in the Howard Government's discourse are 'mainstream' Australians.[109] And while it is clear that some sections of the community have been dramatically and negatively affected by the economic changes of the last couple of decades,[110] Prime Minister Howard's conception of the nation has reinstated the exclusion of those groups who have always been considered 'other'.

Nor was the Government simply doing its job by responding to the expressed will of the people. The political response to the increasing numbers of unauthorised boat arrivals was not an example of a form of democracy played out through the commercial media. To be sure, the Government must be attuned to the concerns of the nation, but it should also offer constructive responses to these concerns, especially if they are not soundly based. But as increasing numbers of asylum seekers arrived without prior authorization by boat, the politicians themselves inflamed hostile community sentiment for their own political purposes. And they were doing so, in large part, through a discourse that only partly reflected reality. What was missing was a national leadership that took seriously the nation's concerns but which also posited productive responses.

It was within this social and political environment that the Iraqi and Afghan boat-people needed to be detained and upon release, given restricted rights. This was not just about deterring other unauthorised arrivals. Like the detention of Cambodian asylum seekers a decade earlier,[111] the Afghan and Iraqi asylum seekers were symbolic of something occurring within the nation, and because of that, their detention was symbolic. Their arrival was the realisation of a number of fears. They tapped into the long-held unease of the white Australian nation of its location in the Asian region, including the fear of invasion.[112] These refugees represented the changing nature of the national economy and the strain this has placed on some sections of the community.[113] They symbolised the shifting demography of Australia – mass immigration out of control – and the way the

106 P Kelly, "National disgrace" *The Weekend Australian*, 19-20 February 2000.

107 J Howard on *4 Corners* quoted in K Davidson "Poll sends clear Telstra message" *The Age*, 16 March 1996.

108 M Grattan, "Libs bet on slogan magnetism" *The Age*, 31 January 1996; Anon "What the leaders said", *The Age*, 28 January 1996.

109 Anon, *ibid.*

110 Anon, "Death of the fair go" *The Weekend Australian*, 17-18 June 2000; A Harding, "Swill time for those at the top" *The Australian*, 21 June 2000.

111 For the story of the Cambodians see three articles by A Hamilton: "Three Years Hard" (1993) 3 *Eureka Street* 1; "Three Years Hard" (1993) 3 *Eureka Street* 2; "The Fourth Year Hard" (1994) 4 *Eureka Street* 3. See also P Mathew, "Sovereignty and the Right to Seek Asylum: The Case of Cambodian Asylum Seekers in Australia" (1994) 15 *Australian Year Book of International Law* 35.

112 Terms such as 'orchestrated invasion and 'war' (notes 24, 27 *supra*) are also reminiscent of the language of Australia's history such as the threat of the 'yellow peril', and after the Second World War the need to 'populate or perish'.

113 For references to the cost to the taxpayer, leeches, see notes 21, 22 *supra*.

Australian nation has come to be imagined particularly with respect to indigenous rights and multiculturalism.[114] The recent boat arrivals symbolised the threats to the Australian nation posed by globalisation.

VII. CONCLUSION

The response to the increasing number of asylum seekers arriving in Australia by boat without prior authorisation was heated and, at times, unreasonable. The public discourse constructed the asylum seekers as abusers of the on-shore refugee determination process and as threats to the Australian community. These presumptions were also the basis for the Government's policy response. While this construction was largely unsubstantiated, it did fit with the Government's longer-term asylum policy agenda, and the Government sought to use the dramatic arrival of increasing numbers of 'boat-people' to move this agenda forward. As well as this, the response to the recent arrivals can be interpreted as reflecting a sentiment in the Australian nation. In the context of the socio-economic changes that characterise contemporary life, many feel alienated from the political, social and economic processes that affect their lives. The language of the public debate revealed the sense that the asylum seekers – 'them' – represented a threat to 'us'.[115] The Government seemed keen to promote this image of the asylum seekers[116] in an effort to maintain the electoral support of those sections of the community who remain disillusioned with the state of the Australian nation.

114 For terms such as 'our own', threats to culture, values, lifestyle, see notes 8, 22, 25, 26 & 27 *supra*.

115 Note 22 *supra*.

116 Mr Ruddock played right into the 'us' and 'them' sentiment saying "Why would you want to do more for these people over and above your own citizens who have no greater entitlement?": Interview with K Dickens, 5DN, 23 June 2000.

AUSTRALIA AND THE BOAT-PEOPLE: 25 YEARS OF UNAUTHORISED ARRIVALS

ANDREAS SCHLOENHARDT*

> But finally, whether you succeed or not is up to you.
> Now is the time to decide and see if you believe
> you will succeed like other migrants to Australia.[1]

I. INTRODUCTION

The world's largest exodus since 1945 occurred 25 years ago with the fall of Vietnam in 1975. Many of those who left Vietnam after the war tried to escape by boat, bringing the term 'boat-people' into the language. Since the mid 1970s, almost every country in the Asia Pacific region has witnessed unregulated migration flows, and has viewed with varying degrees of alarm and anxiety the arrival of refugees and illegal migrants by land, air and, particularly in the case of Australia, by sea.

At 1 January 1998, one third or 7 536 500 of the world's 22 376 300 refugees and other persons of concern to the United Nations High Commissioner for Refugees ("UNHCR"), had their origins in Asia and Oceania.[2] While political, demographic, social and economic migration pressures have increased rapidly in the Asia Pacific region, opportunities for legal migration have become scarcer and many countries have placed harsh penalties on unauthorised entry into their

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1 From the information provided (in Vietnamese) by the Australian selection team to refugees in Hong Kong, Singapore and Malaysia – "Brief Points for Vietnamese refugees coming to Australia", reprinted in Australia, Senate, Standing Committee on Foreign Affairs and Defence, *Australia and the Refugee Problem*, Commonwealth Government Printer (1976) p 118.

2 UNHCR, *UNHCR by Numbers*, UNHCR (1998) p 2.

territory. With rising competition in a global economy and fears over declining living-standards as well as anxieties about multiculturalism, many industrialised countries, including Australia, are witnessing strong public anti-immigrant sentiments.

As the number of people willing or forced to migrate grew rapidly in the last quarter of the twentieth century, irregular migration has emerged as a major issue for most countries in the Asia Pacific region. In response to decreasing avenues of legal migration, people who believe themselves to be in jeopardy dare to take their fate into their own hands and migrate without the proper consent of national authorities, often facilitated by professional traffickers who ship their 'human cargo' across the seas.

This article seeks to examine Australia's responses to unauthorised arrivals and to illuminate Australian refugee policies in the context of migratory flows in the Asia Pacific region over the last 25 years.

II. THE FALL OF VIETNAM AND AFTER

A. The Vietnam War and the Refugee Crisis.

The Vietnam War (1965-75) and the fall of Saigon on 30 April 1975 caused one of the largest movements of refugees in world history. The war made millions of people homeless, caused millions of deaths and forced millions to flee into other countries.

Many escaped by sea, using small, overcrowded vessels to save their lives and find refuge abroad. Some found asylum in neighbouring countries, but when some Asian nations refused to accept refugees from Vietnam, some of them were resettled in the United States, and in smaller numbers in Canada, Europe and Australia. The dawn of the Sino-Vietnamese War in 1978 brought a new wave of refugees from Vietnam, especially by boat. Initially, Vietnam did little to prevent the exodus, particularly in its early stages when most of the boat-people were Chinese from southern Vietnam who were 'squeezed' from Vietnam for political and ethnic reasons.[3]

Following the 1978 exodus, the United Nations called for a Meeting on Refugees and Displaced Persons in South East Asia, which convened in Geneva in July 1979.[4] As a result of the meeting a number of countries, including Australia, pledged to establish resettlement places and refugee status for arrivals, and that an orderly departure program for Vietnam would be instituted.

In the late 1970s and 1980s, Vietnam, the Lao People's Democratic Republic and Cambodia remained politically and economically isolated. Despite harsh penalties for illegal emigration, throughout the 1980s, Vietnamese continued to

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3 Cf Y Tran, "The Closing of the Saga of the Vietnamese Asylum Seekers" (1995) 17 *Hous J I L* 463 at 466-9.

4 Meeting on Refugees and Displaced Persons in South-East Asia, convened by the Secretary General of the UN at Geneva, on 20 and 21 July 1979, UN Doc A/34/627 (1979).

flee from food shortage, drought and flood and from the re-education programs imposed by the new Government. The number of refugees exceeded the pledges for resettlement allocated in the 1979 Plan and some countries even forced boat refugees back to sea.[5]

Throughout the 1980s, the Asia Pacific region repeatedly witnessed mass migration from Vietnam, and, after two years of widespread famine, a further sharp rise in 1988. This again led to the implementation of entry restrictions and further push-back policies in many destination countries. Thousands of Vietnamese perished in the South China Sea.[6]

Calls from ASEAN member countries led the UN to hold a second conference, the International Conference on Indo-Chinese Refugees, in Geneva in July 1989. The principal result of this conference was the declaration of the 1989 Comprehensive Plan of Action,[7] forcing Vietnam to prevent clandestine departures and to introduce an orderly departure programme in return for financial aid. The plan also sought to repatriate the remaining Indo-Chinese who were living in refugee camps in the Asia Pacific region. Formal procedures for the repatriation of the remaining Indo-Chinese refugees were implemented in accordance with the 1951 Convention Relating to the Status of Refugees ("Refugees Convention"), the 1967 Protocol and the *United Nations Handbook on Procedures and Criteria for Determining Refugee Status*. Those who were determined to be refugees had to be resettled in countries that agreed to accept them. Those who were considered not to be refugees had to be returned, often involuntarily, to Vietnam.

Despite the good intention to bring an end to the long-lasting refugee crisis, in practice, the plan was utilised as a tool to empty the refugee camps in the region and soon became the subject of widespread criticism. Many countries were quick to label those Indo-Chinese living in the camps as 'economic migrants' and sent them back to Vietnam, without proper assessment of their claims. Although the determination process under the Comprehensive Plan of Action prescribed the application of the refugee definition of the Refugees Convention and 1967 Protocol, it did not sufficiently prevent individual countries from applying their own standards when deciding whom to send back to Indo-China. Furthermore, the plan put those who were not adequately assessed in danger of involuntary repatriation.[8]

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5 For example, Malaysia 'redirected' boats full of Vietnamese asylum seekers out to sea; UNHCR, *Report*, UN Doc A/AC.96/751 (1990) 2. Also, Brunei, Singapore and Thailand adopted policies of no-entry towards refugees from Indo-China in the late 1980s; V Muntarbhorn, *The Status of Refugees in Asia*, Clarendon Press (1992) pp 97, 122, 139.

6 For the history of the 1979 Meeting on Refugees and Displaced Persons in South-East Asia and the period before the 1989 Comprehensive Plan of Action, see A Helton, "The Comprehensive Plan of Action for Indo-Chinese Refugees" (1990) 8 *NYL Sch J Hum Rts* 111 at 111-13; G Loescher, *Beyond Charity*, Oxford University Press (1993) p 87; Y Tran, note 3 *supra* at 471-80.

7 Comprehensive Plan of Action approved by the International Conference on Indo-Chinese Refugees, Geneva, 13-14 June 1989, UN Doc A/44/523 (22 Sep 1989).

8 J Hathaway, "Labelling the 'Boat People'" (1993) 5 *Human Rights Q* 686 at 686-91, 696. See also A Helton, note 6 *supra* at 115-17; Y Tran, note 3 *supra* at 505-16.

B. Australia and the Indo-Chinese Boat-People.

Until 1975, illegal immigration and the arrival of refugees and asylum seekers were largely unknown phenomena in Australia. The geographical isolation of the country and the rigid White Australia Policy implemented immediately after Federation in 1901[9] enabled Australia to be very selective about who would be allowed to settle within its borders. The very few refugees Australia had accepted before 1975 were, for the most part, of European extraction, and Asian immigrants only came to settle in Australia after the White Australia Policy was abandoned in 1973. Australia also had no formal system for determining refugee status. The very small number of people who had sought asylum in Australia prior to 1975 were dealt with on an individual basis by the Minister for Immigration in exercise of his or her discretion to grant entry permits under s 6 of the *Migration Act* 1958 (Cth) ("*Migration Act*").[10]

As refugees fled from Vietnam in ever increasing numbers, Australia suddenly found itself forced to act as a country of first asylum. Between 1976 and 1978, 55 boats carrying a total of 2 087 people arrived in Australia. By 31 July 1979 Australia had accepted a total of approximately 6 000 Laotian, Cambodian and Vietnamese refugees.

Initially, the Australian Government accepted very few refugees, most of them Vietnamese and Cambodian students already residing in Australia at the time North Vietnamese forces moved into Saigon. The Government tried to prevent the arrival of further boat-people from Indo-China by signing bilateral agreements with Hong Kong, Indonesia and Malaysia. Australia offered to take selected refugees from the camps in these countries if, in return, their Governments took steps to stop the boat-people from travelling to Australia. This move gave an early indication that Australia would be unwilling to accept on-shore refugee claims and rather select individual asylum seekers through off-shore humanitarian programs; a principle, that, together with deterrence and prevention strategies, would soon become characteristic of Australia's immigration policy.[11]

In 1977, in response to the arrival of Indo-Chinese refugees, the Government established the inter-departmental Determination of Refugee Status Committee ("DORS") to consider refugee claims and make recommendations to the Minister. But despite the establishment of DORS, the Minister's discretion continued to be almost completely unlimited, particularly as DORS was not

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9 Cf S Castles, *The Age of Migration*, Guilford (2nd ed, 1998) p 57; M Crock, *Immigration and Refugee Law in Australia*, Federation Press (1998) pp 11-15; G Freemann & J Jupp, "Comparing Immigration Policy in Australia and the United States", in G Freemann & J Jupp (eds), *Nations of Immigrants* Oxford University Press (1992) at 4.

10 No 62 of 1958 [hereafter *Migration Act*].

11 For details on the selection of refugees from camps overseas and the admission of Indo-Chinese refugees see Australia, Senate Standing Committee on Foreign Affairs and Defence, note 1 *supra* at pp 31-6, 46-8.

given any statutory basis and its recommendations were not binding on the Minister. The applications that were brought to DORS were decided on an ad hoc basis only and did not include a hearing of the applicant. Applicants were left without a chance to verbally defend and illuminate their claims and, even worse, given no right of appeal or review. DORS was not designed to make decisions on humanitarian grounds, assisting those fleeing persecution, and the ministerial guidelines prohibited the Committee from granting a protection visa (the visa category that entitles immigrants to stay in Australia on humanitarian grounds) to any person fleeing a natural or ecological disaster or general political or social upheaval.[12] In practice, DORS determinations were simply an administrative process and, due to the composition of the Committee,[13] strongly influenced by political considerations. The establishment of DORS crystallised the increasingly severe approach of the Government to refugees; it was clear that refugees were just another, more difficult, class of immigrants, and not a humanitarian exception.[14]

At about the same time, the Australian Government commenced a deterrence policy which has characterised practices and policies dealing with refugees and undocumented migrants to this day. To prevent further people from coming to Australia, the Government responded to the increasing number of boat-people by tightening entry control and enforcing immigration offences. For example, s 4 of the *Migration Amendment Act* 1979 (Cth)[15] repealed the option to grant entry permits after entering Australia,[16] imposed all deportation and accommodation costs upon the 'prohibited immigrants' (*Migration Act*, s 21A)[17] and barred them from entering the country again (s 27(1)(a)(aa)).[18] Furthermore, the Act criminalised the carriage and the employment of unauthorised non-citizens (*Migration Amendment Act* 1979 (Cth), ss 9, 17, 19).[19]

Simultaneously, the sharp rise of refugee arrivals and the lack of regulations and facilities to deal with them led the Senate Standing Committee on Foreign Affairs and Defence to recommend changes to the immigration law and the formulation of a new refugee policy for Australia.[20] This resulted in the

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12 DIEA, Media Release, 15 March 1991.

13 The DORS Committee had one member each from the Department of Immigration and Ethnic Affairs ("DIEA"), the Department of Foreign Affairs, the Attorney General's Department, the Department of Prime Minister and Cabinet, and a UNHCR representative who did not have voting rights.

14 R Birrell, "Immigration Control in Australia" (1994) 534 *Annals of the American Academy of Political and Social Science* 106 at 109-10; M Crock, note 9 *supra*, p 131; M Crock, "The Peril of the Boat People" in H Selby (ed), *Tomorrow's Law*, Federation Press (1995) at 31-2; A Hans & A Suhrke, "Responsibility Sharing" in J Hathaway (ed), *Reconceiving International Refugee Law*, Nijhoff (1997) at 100; P Hyndman, "Australian Immigration Law and Procedures Pertaining to the Admission of Refugees" (1988) 33 *McGill LJ* 716 at 727-9.

15 No 117 of 1979.

16 *Migration Act*, s 6(5).

17 *Migration Amendment Act* 1979 (Cth), s 12, now *Migration Act*, Div 10, ss 209 ff.

18 *Ibid* s 15(a), now repealed.

19 *Migration Act*, ss 11C, 30, 31B, now substituted.

20 Australia, Senate Standing Committee on Foreign Affairs and Defence, note 1 *supra* at pp 89-98.

announcement of the following four principles of a new Australian refugee policy by the then Immigration Minister MacKellar on 24 May 1977:

a) Australia fully recognises its humanitarian commitment and responsibility to admit refugees for resettlement.

b) The decision to accept refugees must always remain with the Government of Australia.

c) Special assistance will often need to be provided for the movement of refugees in designated situations or for their resettlement in Australia.

d) It may not be in the interest of some refugees to settle in Australia. Their interests may be better served elsewhere. The Australian Government makes an annual contribution to the UNHCR which is the main body associated with such resettlement.[21]

Three years later, the Government formally implemented some of the obligations arising from the Refugees Convention[22] and the 1967 Protocol[23] (to which Australia became a member party in 1954 and 1973) into national law. Consequently, the new s 6A(1)(a), (c), (e) of the *Migration Amendment Act (No 2)* 1980 (Cth)[24] exempted immigrants from the requirement to hold a visa upon arrival in Australia if they had been granted territorial asylum, refugee status or temporary entry permits on "strong compassionate or humanitarian grounds".

Despite the attempts to deter further illegal arrivals, in 1979 and 1980 Australia continued to witness the arrival of large numbers of boat-people, most of them ethnic Chinese who were fleeing persecution in Vietnam. Approximately 2 000 people arrived illegally in Australia in the 1979-80 financial year. This led the Government to take further steps to prevent boat-people from coming. The *Immigration (Unauthorised Arrivals) Act* 1980 (Cth)[25] amended the *Migration Act* by creating a complex ensemble of immigration offences. This time the new legislation targeted the "masters, owners, agents and charterers of vessels" who facilitated the migration of boat-people and brought them to Australia.[26] The amending Act created and extended the powers of immigration officers, Federal Police and courts to board, search, detain and

21 Australia, House of Representatives 1977, Debates, vol 105 (24 May 1977) p 1714.

22 Australia acceded to the Convention on 23 Jan 1954; 189 UNTS 150, 5 ATS 1954.

23 Australia acceded to the Protocol on 13 Dec 1973; 606 UNTS 267, 37 ATS 1973.

24 No 175 of 1980. Section 6A(1) reads: "An entry permit shall not be granted to an immigrant after his entry into Australia unless one or more of the following conditions is fulfilled in respect of him, that is to say — (a) he has been granted, by instrument under the hand of a Minister, territorial asylum in Australia; (b) ...; (c) he is the holder of a temporary entry permit which is in force and the Minister has determined, by instrument in writing, that he has the status of refugee within the meaning of the *Convention Relating to the Status of Refugees* that was done at Geneva on 28 July 1951 or of the *Protocol relating to the Status of Refugees* that was done at New York on 31 January 1967; (d)...; or (e) he is the holder of a temporary entry permit which is in force and there are strong compassionate or humanitarian grounds for the grant of an entry permit to him."

25 No 112 of 1980.

26 See, for example, *Immigration (Unauthorised Arrivals) Act* 1980 (Cth), ss 6, 8.

for the forfeiture of vessels and arrest illegal immigrants.[27] The 1980 amendments were followed in 1983 by the *Migration Amendment Act* 1983 (Cth)[28] which strengthened the penalties for offences of document forgery and misuse[29] and facilitated the deportation of non-citizens.[30]

III. THE RISE IN ILLEGAL MIGRATION

A. World Events in 1989

After a period of relatively low levels of unauthorised arrivals, two major events combined in the year 1989 which gave rise to illegal migration in new, unknown dimensions: first, the end of the Cold War and the change of governments in many countries of the former Soviet Bloc; and second, the violation of human rights in the People's Republic of China, particularly the massacre in Tiananmen Square in Beijing in June 1989. The former incident brought an end to long-standing exit restrictions and opened the borders for many people willing to leave political turbulence and economic despair in their home countries to seek a better life abroad, while the latter led to increasing numbers of Chinese refugees around the world.

(i) The End of the Cold War

The relative political stability of the Cold War era, when the world was clearly divided into Socialist and Western hemispheres, came to a sudden end with the collapse of the Soviet Union and the fall of the Berlin Wall in late 1989. The disintegration of the former Soviet Bloc and the formation of new governments in ex-Socialist countries caused profound change, leading to liberalisation and more freedom, but also to increasing anarchy in some countries and growing nationalism in others, often involving generalised violence and armed conflict.[31]

For the Asia Pacific region, the collapse of the Soviet Bloc was less dramatic than it was for the USSR and the countries of Eastern Europe. Today, the People's Republic of China, the largest socialist country in the world, is still governed by the Communist party that successfully defended its rule against any attempts to introduce democracy and establish opposition. The Lao People's

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27 *Immigration (Unauthorised Arrivals) Act* 1980 (Cth), ss 12, 16, 17, 20, 26.

28 No 112 of 1983.

29 *Migration Amendment Act* 1983 (Cth), ss 14, 18, now *Migration Act*, ss 233A-234.

30 *Migration Amendment Act* 1983 (Cth), ss 15, now substituted. Cf Australia, Human Rights Commission, *Human Rights and the Migration Act 1958*, AGPS (1985) p 55; R Birrell, note 14 *supra* at 109-10.

31 B Ghosh, *Huddled Masses and Uncertain Shores*, Kluwer (1998) pp 44-6; cf G Loescher, note 6 *supra* at 114-19; A Schmid, "Manifestations and Determinants of International Migration Pressure" in A Schmid (ed), *Migration and Crime — Proceedings of the International Conference on Migration and Crime: Global and Regional Problems and Responses* International Scientific and Professional Advisory Council of the United Nations Crime Prevention and Criminal Justice Programme (ISPAC) (1998) p 53.

Democratic Republic, North Korea and Vietnam also remain under socialist rule. The transition in this part of the world over the last decade was more subtle as some governments tried to economically liberalise their countries without opening them up to democracy.[32]

Many countries abandoned the exit restrictions of the past and opened their borders for trade and travel.[33] In circumstances where easier travel and migration coincided with decreasing political and social control, people took advantage of the new opportunities and moved to Western countries in search of freedom and employment, often beyond the control of governments.

(ii) The Tiananmen Square Incident

In early 1989, student protests demanding democracy and political freedom emerged throughout the People's Republic of China. The Chinese government quickly sought to put down the protests that obtained much public attention in Western countries. Throughout the country, police and military forces responded to the protests with violence, persecution and imprisonment. The suppression of the protests reached a peak in June 1989 with the massacre on Beijing's central Tiananmen Square when the military killed numerous demonstrating students.[34] Those who could escape persecution and imprisonment tried to flee to countries that offered asylum to political refugees.

Since the 1989 incidents, China has continuously been accused of violently repressing opposition and gaoling dissidents. The on-going persecution caused many students and others involved in pro-democracy movements to seek asylum in Western countries, particularly Australia, Canada and the United States, which initially offered protection to many Chinese dissidents. Also, those already studying and working abroad at the time of the student revolt sought refugee status in countries outside China.

B. Responses by Receiving Countries

The majority of the receiving countries of the post-1989 migratory movements, including Australia, responded to the increasing numbers of asylum seekers by placing legal and administrative restrictions on immigration and asylum. The shift in governments and policies in the (former) Socialist countries also caused a change of attitude towards those who had escaped from these

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32 Cf A Dupont, "Unregulated Population Flows in East Asia" (1997) 9(1) *Pacifica Review* 1 at 6; R Skeldon, "East Asian Migration and the Changing World Order" in W Gould & A Findlay (eds), *Population Migration and the Changing World Order* John Wiley & Sons (1994) p 174.

33 For example, the *Criminal Law* 1997 of the People's Republic of China repealed the offence of "illegal emigration", formerly Art 176 of the *Criminal Law* 1979.

34 See, for example, the reports in "China erupts: 1400 shot dead, soldiers lynched" *The Australian*, 5 June 1989, p 1, 4-5; "Thousand run for their lives as troops open fire" (8 June 1989) *The Australian* 1, 8; "The Purge Begins!" *The Australian*, 9 June 1989, p 1, 8; J Pringle, "Secret police raid campuses" *The Australian*, 10-11 June 1989, p 1, 9; P Wilson, "700 snatched as China sets up hotline to death" *The Australian*, 12 June 1989, p 1, 7.

countries: formerly seen as refugees fleeing totalitarian political systems, they now began to be perceived as 'economic migrants' who sought to benefit from wealthier economies. Many receiving countries witnessed decreasing tolerance towards immigration and asylum, especially when public budgets became smaller and unemployment rates higher. Particularly disturbing to many countries such as Australia has been the fact that since 1989 more and more asylum applicants dare to independently take the initiative to migrate, rather than applying from overseas in long queues or waiting for their opportunity in refugee camps abroad. It is for that reason that refugees who seek on-shore protection have been described as 'queue jumpers'.

Stricter visa requirements, heavy border control, restrictive selection criteria and so-called safe third country policies[35] implemented since 1989 have successfully reduced the number of legal immigrants and asylum seekers in most countries, but at the same time these policies have pushed asylum seekers into illegal avenues of migration.[36]

IV. AUSTRALIA'S IMMIGRATION POLICIES SINCE 1989

A. The Increase in Refugees and Illegal Arrivals

Fourteen years after the first arrival of Indo-Chinese boat-people, refugees and asylum seekers once again became a major issue in Australia. But this time the number of boat-people was much higher, and the background and circumstances of these migratory movements were far more diverse and complex than the earlier arrivals.

TABLE 1:

Unauthorised Arrivals to Australia by Boat and Air, 1989-1999[37]

	1989-90	1990-91	1991-92	1992-93	1993-94	1994-95	1995-96	1996-97	1997-98	1998-99	July-Dec 1999
Boat arrivals	243	172	81	198	200	1089	591	36	157	926	2 912
Air arrivals	Na	na	529	452	409	485	669	1 347	1 550	2 106	911
Total	Na	na	610	650	606	1 574	1 260	1 383	1 707	3 032	3 823

35 See Part III.D of main text *infra*.

36 For analyses of illegal migration in the Asia Pacific region see, for example, A Schloenhardt, "The Business of Migration: Organised Crime and Illegal Migration in Australia and the Asia Pacific Region" (1999) 21(1) *Adel LR* 81-113; and A Schloenhardt, "International Migration, Migrant Trafficking and Regional Security" (2000) 15(3) *Forum for Applied Research and Public Policy*.

37 Australia, Prime Minister's Coastal Surveillance Task Force, note 104 *infra*, Attachment B-1; DIMA, *Protecting the Borders: Immigration Compliance*, DIMA (1999) at 69; DIMA, Unauthorised Arrivals Section, *Refused Immigration Clearance Report*, DIMA (Dec 1999) at 4, 24.

The number of unauthorised arrivals to Australia has significantly increased over the past ten years. The total number of illegal arrivals increased five-fold between the 1991-92 (610) and the 1998-99 financial year (3 032). The rising number of illegal arrivals is mostly the result of increasing numbers of unauthorised arrivals by air over the last five years. Although most public attention has been given to illegal boat arrivals, the majority of illegal immigrants have arrived in Australia by air (except for the 1994-95 financial year). The year 1999 witnessed the highest number of unauthorised boat arrivals. The number particularly increased towards the end of 1999 when 2 406 boat-people arrived between October and December of that year. Most of these new arrivals were Iraqi, Afghani and other Middle Eastern nationals, who fled after countries such as Iran and Jordan withdrew their temporary protection.

Together with more unauthorised arrivals, Australia has witnessed growing numbers of asylum applications over the last decade.

TABLE 2:

Refugees and Asylum Seekers in Australia, 1989-2000 (UNHCR)

Year	Asylum applications[38]	Recognition under 1951 Convention[39]	Rejection of asylum applications[40]	Total recognition rate[41]
1989	1 260	80	330	19.5%
1990	12 130	90	200	31.8%
1991	16 740	190	1 470	11.4%
1992	6 050	610	9 950	5.8%
1993	7 200	990	9 070	9.9%
1994	6 260	1 030	6 720	13.3%
1995	7 630	680	6 790	9.1%
1996	9 760	1 380	6 250	18.1%
1997	9 310	1 010	14 170	6.6%
1998	8 160	2 490	7 980	23.8%

38 UNHCR, "Table V.1. Asylum applications submitted in selected countries, 1989-1998", *Refugees and Others of Concern to UNHCR — 1998 Statistical Overview*, <http://www.unhcr.ch/statist/98oview>.

39 UNHCR, "Table V.2. Recognition of asylum-seekers under the Refugees Convention in selected countries, 1989-1998", *ibid.*

40 UNHCR, "Table V.4. Rejection of asylum applications in selected countries, 1989-1998", *ibid.* If the asylum procedure includes an administrative review or appeal process, such decisions are generally included. As a result, negative decisions may have been double counted (in first instance and in appeal/review).

41 Number of refugees granted Convention and humanitarian status divided by the total number of decisions taken. UNHCR, "Table V.9. Total recognition rates in selected countries, 1989-1998", *ibid.*

Within one year, from 1989 to 1990, the number of asylum applications increased by over 10 000 cases from 1 260 (1989) to 12 130 (1990) and by another 4 610 cases to 16 740 in 1991. Many of the applicants were Chinese citizens who initially entered the country as students and who, as a consequence of the June 1989 events in the People's Republic of China, became refugees *sur place*.[42] The number of asylum applications dropped again to 6 050 in 1992 but it remained at a high level throughout the 1990s. Some of the applicants who (average 14.42 per cent 1990-98) fell within the ambit of the Refugees Convention, were granted refugee status and given protection visas to stay in Australia. But the majority fled as a result of factors that are not recognised in international refugee law, such as generalised violence, civil disorder and conditions of poverty. Consequently, their applications were rejected and most of the unsuccessful applicants removed from Australia. The number of rejections reached its peak in 1997 when 14 170 applicants were refused and only 6.6 per cent were granted refugee status.

Starting with the events of the year 1989, unauthorised arrivals in Australia reached an unprecedented level. That same year, the Australian Government commenced what retrospectively can be regarded as a policy of 'unauthorising' irregular migrants and deterring refugees. Over the past ten years, Australian immigration policy has been characterised by measures that seek to stop people from entering Australia and to detain and remove those that manage to reach Australian territory, rather than by attempts to find humanitarian solutions for international migration and refugee crises.

B. The 1989 Amendments

The Government's first response to the 1989 arrivals was the *Migration Legislation Amendment Act* 1989 (Cth),[43] which signalled a firmer stand on illegal immigration. By strengthening border controls, introducing mandatory detention and the removal of illegal entrants, and limiting opportunities for judicial review, this major reform work sought to deter those people who applied for refugee status on-shore rather than going through Australia's humanitarian off-shore program.[44]

The main features of the 1989 reforms included the tightening of immigration controls and stricter provisions with respect to illegal entrants. Sections 6(1), (2), (3) and 11A of the *Migration Act* were amended so that any person who gained entry to or resided in Australia without any immigration documents or

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42 *Sur place* refugees are people who are unable or unwilling to return to return to their country of origin because of events occurring after their departure from that country.

43 No 59 of 1989.

44 For further reading on the 1989 reform see J Crawford, "Australian Immigration Law and Refugees: The 1989 Amendments" (1990) 2 *IJRL* 626 at 626-7; M Crock, "Immigration: Understanding the New System" in P Baker & M Crock, *Immigration Law & Procedures* LAAMS (1990) 2; M Crock, note 9 *supra* at pp 127-8, 130-1; P Hyndman, note 14 *supra* at 546-7; A Patel, "Migrant Rights: Time to Reassess" (1996) 21(2) *Alt LJ* 67 at 68.

with false documentation automatically became a 'prohibited non-citizen'.[45] The legislation failed to recognise the fact that many refugees did not, and still do not have either the time or the opportunity to obtain valid documents. Secondly, the *Migration Legislation Amendment Act* 1989 (Cth) removed some of the Minister's and their officers' discretion by codifying the grounds on which the Minister could grant entry permits and determine refugee status, as well as by increasing the number of mandatory provisions. This move made refugee determination more predictable, but the procedure also became much more inflexible, streamlined and bureaucratic rather than enabling quick, humanitarian solutions for those in need.

Furthermore, the powers of immigration officers to search and arrest illegal immigrants were broadened.[46] A new system for the review of migration decisions was introduced by creating the Migration Internal Review Organisation ("MIRO") and the Immigration Review Tribunal ("IRT").[47] But the review of immigration cases remained very limited and the regulations governing the decisions of the Immigration Review Tribunal were too narrow to adequately respond to well-founded applications for asylum. For example, on-shore applicants had no right of appeal if the Minister or his officers refused refugee status at the primary stage. Also, the IRT itself could not vary or set aside ministerial decisions and grant entry permits on humanitarian grounds.[48]

Finally, the amendments introduced mandatory deportation of unauthorised arrivals after a 28 day 'period of grace'. Once the deportation order had been made, an entry permit could no longer be granted and even the Minister had no discretion to revoke the order.[49] Ever since 1989, the mandatory detention and immediate removal of illegal entrants has been utilised in Australian immigration policies as a deterrence to other boat-people.[50]

The amendments made by the *Migration Legislation Amendment Act* 1989 were considered unsatisfactory by many who had called for a humanitarian reform of Australian immigration law. Major points of criticism were that the amendments to the *Migration Act* did not include the definition of refugee found in the Refugees Convention and that some of the new regulations did not comply with the provisions of the Convention and the 1967 Protocol. Furthermore, until today the policy of mandatory detention and removal raises concerns about breaches of Australia's international obligations, especially as involuntary removal can amount to refoulement contrary to Article 33 of the Refugees

45 Now "unlawful non-citizen", *Migration Act*, s 14.

46 *Migration Legislation Amendment Act* 1989 (Cth), ss 18-20, now *Migration Act*, ss 252 ff.

47 *Ibid*, ss 26-35, now repealed.

48 *Ibid*, s 25, now repealed.

49 *Ibid*, s 8. The 28-day period was substituted by "removal as soon as practicable", *Migration Reform Act* 1992 (Cth), s 13, now *Migration Act*, s 198(1).

50 See, for example, Australia, House of Representatives, Debates, vol HR 183 p 2371 ((5 May 1992) G Hand, Minister for Immigration); R McGregor, "Minister warns of boatpeople flood" *The Australian*, 16 Nov 1999, p 1.

Convention.[51]

Soon after the 1989 reforms, as a result of the high number of asylum applications and the increasing workload of DORS in 1989 and 1990 (the number of asylum applications rose from 1 260 in 1989 to 12 130 in 1990),[52] the Minister further streamlined the procedure of asylum applications, gave the Committee more responsibilities and staff and renamed the DORS committee the Refugee Status Review Committee ("RSRC").

C. The 1991-93 Amendments

The number of applications for asylum continued to grow from 12 130 cases in 1990 to 16 740 in 1991.[53] In an attempt to deter further arrivals and reduce the number of asylum applications, the Government limited the protection offered to refugees. In 1990, the validity of refugee (restricted) visas was limited to "a period not exceeding 4 years".[54] One year later, a new category of entry permits for on-shore applicants was established ("Domestic Protection (Temporary) Entry Permit") which provided that successful applicants would only be granted temporary visas, allowing them to stay in Australia for up to four years.[55]

Throughout the years 1990-91, the large number of asylum applications, particularly of Chinese citizens, created massive problems for the refugee determination system and caused major delays in processing asylum applications. In some cases, people who entered the country legally became illegal simply because their initial temporary permit expired and immigration authorities failed to decide their refugee claims in time. Those who arrived illegally and had been detained upon arrival had to remain in custody for up to four years before their cases were finalised.[56] Furthermore, the high influx of illegal entrants and their prolonged detention exceeded the capacities of the

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51 Australia, Joint Select Committee on Migration Regulations, *First Report to the Minister for Immigration, Local Government and Ethnic Affairs*, RP Rubie (1989) p 5, para [1.17], and pp 13-21; M Crock, "Immigration: Understanding the New System", note 44 *supra* at p 4; P Hyndman, note 14 *supra* at 547-8; B Murray, "Australia's New Refugee Policies" (1990) 2(4) *IJRL* 620 at 622; A Patel, Note 44 *supra* at 70. For the wording of Art 33 of the Refugees Convention, see note 85 *infra* and accompanying text.

52 See Table 2 *supra*.

53 *Ibid*.

54 *Migration Regulations (Amendment)* 1990 (No 237), reg 21, repealed by *Migration Regulations (Amendment)* 1991 (No 25), reg 8.

55 *Migration Regulations* (Cth) Class 84, *Migration Regulations (Amendment)* 1991 (No 25), reg 9. Cf B Murray, note 51 *supra* at 621-4; J Crawford, note 44 *supra* at 627.

56 For example: A Cambodian refugee applied for refugee status on 13 December 1989 and was taken into detention on 21 December 1989. In January 1994, he was granted refugee status and released from detention. The case was brought to the UN Human Rights Committee. In April 1997, the Committee found that Australia had breached some of it obligations under the International Covenant for Civil and Political Rights; UN Doc CCPR/C/59/D/1993 (1993), reprinted in UN, Human Rights Committee, "Communication No 560/1993, A v Australia" (1997) 9 *IJRL* 506-27. For further reading see Australia, "Response of the Australian Government to the Views of the Human Rights Committee in Communication No 560/1993 (A v Australia)" (1997) 9 *IJRL* 674-8; R Piotrowicz, "The Detention of Boat People and Australia's Human Rights Obligations" (1998) 72(6) *ALJ* 417-25.

existing detention centres in Australia. The quick answer the Government found for overcrowded facilities was the opening of a new large detention centre in the remote, disused mining camp of Port Hedland, Western Australia, in 1991.[57]

Humanitarian and international organisations criticised the handling of illegal immigrants in Australia, but the Government initially remained irresponsive. The *Migration Amendment Act* 1992 (Cth),[58] passed in May 1992, sought, once again, to prevent clandestine travel to Australia by enforcing the detention of unauthorised entrants[59] and prohibiting the courts from the release of 'designated people' from detention without their claims being finalised.[60]

Finally, in 1992, an attempt was made to reduce the processing delays and change the way in which immigration decisions were made and reviewed. Legislation was passed in December 1992 (*Migration Reform Act* 1992 (Cth)) [61] and came into force on 1 September 1994. The *Migration Reform Act* repealed large parts of the *Migration Act* and renumbered the Act entirely. The Act inserted s 26B into the *Migration Act*, finally establishing a statutory category of temporary protection visas for refugees:

> 26B (1) There is a class of temporary visas to be known as protection visas.
>
> (2) A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.[62]

During 1993-94 the Australian Government realised that temporary protection caused too much uncertainty for refugees. The category of Domestic Protection (Temporary) Entry Permits was abandoned, the word 'temporary' omitted from s 26B(1) of the *Migration Act*,[63] and the Government returned to offer permanent protection to refugees, including those who applied on-shore.

Simultaneously, and unsurprisingly, the Government stepped up its deterrence policy with respect to unauthorised arrivals by introducing a new Division 4C ("Detention of unlawful non-citizens") into the *Migration Act*. The changes tightened detention regulations drastically by prohibiting any release from detention without explicit authority and further limited the court's power to release 'unlawful non-citizens'.[64] Moreover, immigration officers were given broader authority to detain and remove all persons who arrived and/or were

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57 Cf Australia, Joint Standing Committee on Migration, *Asylum, Border Control and Detention*, AGPS (1994) p 2; M Crock, "The Peril of the Boat People", note 14 *supra* at 33-4.

58 No 24 of 1992.

59 *Migration Amendment Act* 1992 (Cth), s 3, now *Migration Act*, ss 176-187.

60 See *Migration Act*, s 54R as amended by the *Migration Amendment Act* 1992 (Cth), now *Migration Act*, s 183. Cf Australia, Human Rights and Equal Opportunity Commission, *Those who've come across the Seas: Detention of Unauthorised Arrivals*, AGPS (1998) pp 23-4.

61 No 184 of 1992 [hereafter "*Migration Reform Act*"].

62 Now s 36 of the *Migration Act*.

63 *Migration Legislation Amendment Act* 1994 (Cth), s 9: "Section 26B of the Principal Act is amended by omitting from subsection (1) "temporary".

64 *Migration Act*, s 54ZD(3) as amended by the *Migration Reform Act* 1992 (Cth), now *Migration Act*, s 196(3).

staying in Australia without valid permission.[65]

The 1992 amendments also led to major changes for the review of refugee status decisions. On the one hand, the *Migration Amendment Act* 1991 (Cth)[66] finally adopted the international definition of refugees of the Refugees Convention[67] and the *Migration Amendment Act (No 2)* 1992 (Cth)[68] formally introduced a procedure for the determination of refugee status into the *Migration Act*.[69] The *Migration Reform Act* 1992, in Part 4A, created a new, independent administrative tribunal – the Refugee Review Tribunal – to review decisions that refused or cancelled protection visas, replacing the Refugee Status Review Committee, that was established only three years before.[70] Unlike the predecessor DORS and RSRC committees, the procedures of the new Tribunal were rather informal. Applicants now had to be heard before the Tribunal[71] and decisions had to be made on the basis of the 1951 Refugees Convention definition.[72] Cases that were refused by the RRT could be brought by appeal to the Federal Court, resulting in a major increase in the number of applications at review stage between the 1991-92 (229 cases) and the 1992-93 financial year (2 339).[73] Also, s 166BE of the *Migration Act* provided that the Minister could substitute the decision of the Tribunal with one more favourable to the applicant.[74]

But on the other hand, the review of refugee claims was further streamlined and the juridical powers of the Tribunal were limited against adverse decisions by the Department of Immigration and the Minister. With the establishment of the Refugee Review Tribunal the number of rejected refugee claims grew substantially from only 1 470 cases in 1991 to 9 950 in 1992, and the total recognition rate dropped significantly (1990: 31.8 per cent, 1991: 11.4 per cent, 1992: 5.8 per cent, 1993: 9.9 per cent).[75] This sharp decline raised questions

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65 *Migration Act*, ss 54W, 54ZF, as amended by the *Migration Reform Act* 1992 (Cth), now ss 189, 198 of the *Migration Act*. For further reading see, for example, Australia, Human Rights and Equal Opportunity Commission, note 60 *supra* at 17-8; R Birrell, note 14 *supra* at 115.

66 No 86 of 1991.

67 *Migration Amendment Act* 1991 (Cth), s 3(e).

68 No 84 of 1992.

69 *Migration Amendment Act (No 2)* 1992 (Cth), s 8, *Migration Act*, ss 22AA-22AD, now substituted by *Migration Regulations* 1994 (Cth), Subclass 200 — Refugee.

70 Now ss 411-473 of the *Migration Act*.

71 Section 166DB, now s 425 of the *Migration Act*.

72 For an assessment of the operation and jurisdiction of the Refugee Review Tribunal see S Kneebone, "The Refugee Review Tribunal and the Assessment of Credibility: an Inquisitorial Role?" (1998) 5 *AJ Admin L* 78-96; cf M Crock, note 9 *supra*, p 129.

73 Pt 8 *Migration Reform Act* 1992, now Pt 8 — Review of Decisions by Federal Court, *Migration Act*, ss 475-486. Figures from DIEA/DIMA, *Population Flows: Immigration Aspects*, DIEA/DIMA (1996/1997).

74 Now *Migration Act*, s 417.

75 Figures from Table 2 *supra*.

about how adequately Australia had been assessing refugee claims.[76]

D. 1994-1998

Starting in late 1994, the number of unauthorised arrivals in Australia increased further. In the 1994-95 financial year, the Immigration Department recorded 1 089 people arriving illegally by boat in addition to 485 unauthorised arrivals by air.[77] The implementation of the 1989 Comprehensive Plan of Action, and the repatriation of Vietnamese refugees who were detained in camps throughout the Asia Pacific region, led some of them to flee from the camps to Australia. Also, many of the new arrivals were Vietnamese who had been resettled in China and became displaced when the Chinese government moved to redevelop these areas.

Once the migrants reached Australia, most of them applied for refugee status, which caused a significant increase in the number of refugee applications (10 490 cases in the 1993-94 financial year).[78] The growing rate of successful refugee status applications (12.8 per cent in 1993-94)[79] caused fears that this would "sen[d] the wrong message abroad",[80] encouraging others to come to Australia. Calls emerged for preventive and restrictive measures to reduce the number of asylum claims. Once again, these motions resulted in further amendments to the *Migration Act*.

The answer to increasing asylum claims was found in the 'safe third country' policy, a legal instrument that derives from the law of several European countries.[81] The *Migration Legislation Amendment Act (No 4)* 1994 (Cth)[82] implemented ss 91B-91D into the *Migration Act*. The changes to the legislation provided that applicants who were covered by the 1989 Comprehensive Plan of Action and who had been assessed overseas for refugee status prior to arrival in Australia would not be reassessed by Australian authorities. Secondly, applicants who had arrived in Australia from designated safe third countries (as defined in s 91D *Migration Act*) became ineligible for refugee status (*Migration Act*, s 91E) and:

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76 Cf Australia, Human Rights and Equal Opportunity Commission, note 60 *supra* at 34-6; R Birrell, note 14 *supra* at p 114; M Crock, note 14 *supra* at 40-1; J Fonteyne, "Refugee Determination in Australia" (1994) 6 *IJRL* 253 at 255-9.

77 See Table 1 *supra*.

78 Figures from Table 2 *supra*.

79 See Table 2 *supra*.

80 M Crock, note 14 *supra* at 40-4.

81 See, for example, the Art 30 of the Convention Applying the Schengen Agreement of 14 JUNE 1985 between the Governments of the States of the BENELUX Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, 19 June 1990; Convention Determining the State Responsible for Examining Applications for Asylum Lodged on One of the Member States of the European Communities, signed in Dublin, 15 June 1990. See also the references in J Fitzpatrick, "Flight from Asylum: Trends Toward Temporary 'Refuge' and Local Responses to Forced Migrations" (1994) 35(1) *VA JIL* 13 at 33, n 91.

82 No 136 of 1994.

> should not be allowed to apply for a protection visa or, in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal under Division 8.[83]

In addition to the implementation of the safe third country policy, the Government further restricted the availability of protection visas by inserting ss 48A and 48B into the *Migration Act*,[84] which provided that unsuccessful applicants would not be able to make any further applications for protection visas.

This policy soon became the subject of heavy criticism.[85] It was argued that the safe third country policy would delegate the responsibility of protecting and determining refugees to countries which may have no or only questionable asylum procedures. Deporting illegal migrants to third or transit countries has also been regarded as a breach of the non-refoulement obligation under Article 33 of the Refugees Convention.[86] The principle of non-refoulement requires that Australia must be certain that the third country is willing and able to provide protection and offers a meaningful opportunity for the refugee to be heard before removal to said country. Since most of Australia's neighbours are not parties to the Refugees Convention, the 1967 Protocol,[87] or to the major human rights treaties, it is a matter of serious concern if people are sent back to these countries.

The new policy was first activated in late 1994/early 1995 following the arrival of further boat-people from the People's Republic of China.[88] Since the safe third country provisions initially did not cover Chinese claimants, the 1994 amendments were followed in January 1995 by a bilateral Memorandum of

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83 *Migration Act*, s 91A. For details of Australia's safe third country policy see M Crock, note 9 *supra*, pp 154-5; S Taylor, "Australia's 'Safe Third Country' Provisions: Their Impact on Australia's Fulfilment of Its Non-Refoulement Obligations" (1996) 15 *Univ Tas LR* 196-235; and also Australia, Human Rights and Equal Opportunity Commission, note 60 *supra* at 24-5.

84 *Migration Legislation Amendment Act (No 6)* 1995 (No 102 1995), s 14.

85 See, for example, F McKenzie, "What have we done with the Refugee Convention?" (1996) 70 *ALJ* 813 at 820-1; N Poynder, "Recent Implementation of the Refugees Convention in Australia and the Law of Accommodations to International Human Rights Treaties" (1995) 2 *AJHR* 75 at 82-5; S Taylor, note 83 *supra* at 209-31. For statements by the UNHCR see Australia, Senate Legal and Constitutional Legislation Committee (30 Sep 1994) p 146-51 (P Fontaine, UNHCR Regional Representative); and UNHCR Executive Committee, *Problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection*, UNHCR Doc Excom No 58 (XL) (1989).

86 Art 33(1) (Prohibition of expulsion or return ('refoulement')) of the Refugees Convention states that "no Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

87 Of the countries in the Asia Pacific region only Australia, Cambodia, China, Fiji, New Caledonia (France), Philippines, Papua New Guinea and Solomon Islands have signed, acceded to and/or ratified the Refugees Convention and the 1967 Protocol.

88 The number of on-shore refugee applicants from the PRC reached 10 677 in June 1993 and 8 912 in June 1994; DIEA/DIMA, *Population Flows: Immigration Aspects*, DIEA/DIMA (1994) 14, (1995) 14.

Understanding between Australia and the People's Republic of China,[89] by which the latter became a designated safe third country for Vietnamese refugees who had been resettled in China (*Migration Legislation Amendment Act (No 2)* 1995 (Cth)).[90] The applications for protection visas made by Vietnamese refugees from China were invalidated and the applicants immediately returned to China. Consequently, the number of refugee applications by Chinese citizens dropped from 8 912 by June 1994 to 4 335 by June 1995 and 2 223 applications by June 1996.[91] Australia is currently seeking other possible countries with which to negotiate safe third country agreements, including New Zealand.[92]

The Government's rigid attitude towards illegal immigrants caused criticism on the national and international levels. The universal visa requirement and the mandatory detention of illegal entrants were considered infringements of Article 31(1) of the Refugees Convention.[93] The new legislation did not recognise the fact that the majority of refugees have no time and no opportunity to obtain valid travel documentation and comply with emigration and immigration formalities. Furthermore, it was not taken into account that the transit points have in many cases posed threats to the migrants.[94]

As a consequence of the restrictive measures towards on-shore asylum claimants implemented since 1993, the number of boat-people entering the formal refugee determination procedure decreased drastically while many others have been removed without their cases having been assessed.

TABLE 3:

Entry of Boat-people into the Formal Refugee Determination Process, Australia 1993-1996[95]

Year of arrival	Entering refugee process number	%	Not entering refugee process number	%	Total
1993-94	199	100	-	-	199

89 "Understandings on special arrangements for dealing with current unauthorised arrivals in Australia of Vietnamese refugees settled in China", Beijing, 25 Jan 1995, *Migration Regulations* (Cth) Sch 11, reprinted in K Cronin et al, *Australian Immigration Law Vol 2*, Butterworths (1994) at [123-335]-[123-340]. Under the provisions of international refugee law, the allocation of responsibility for determination of refugee status from one country to another requires agreement between these countries to prevent disputes over responsibility and refoulement; P Mathew, "Lest We Forget: Australia's Policy on East Timorese Asylum Seekers" (1999) 11 *IJRL* 7 at 38.

90 No 1 of 1995, now *Migration Regulations* 1994 (Cth), reg 2.12. Cf N Poynder, note 85 *supra* at 84-5.

91 DIEA/DIMA, *Population Flows: Immigration Aspects*, DIEA/DIMA (1995) 14, (1996) 14, (1997) 14.

92 M Crock, note 14 *supra* at 40-4; DIMA, *Protecting the Borders*, note 37 *supra* at 20.

93 "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

94 M Crock, note 9 *supra*, pp 177-202; G Goodwin-Gill, *The Refugee in International Law*, Clarendon Press (2nd ed, 1996) p 152.

95 Australia, Human Rights and Equal Opportunity Commission, note 60 *supra*, p 33.

Year of arrival	Entering refugee process number	%	Not entering refugee process number	%	Total
1994-95	162	14.8	935	85.2	1 097
1995-96	61	10.4	528	89.6	589

In the 1993-94 financial year, 100 per cent of the boat-people arriving in Australia entered the formal refugee determination process. One year later only 14.8 per cent did so, while the majority of boat-people did not enter the process at all. In the 1995-96 financial year only 10.4 per cent entered the formal refugee determination process. Concern grew over the fact that unauthorised entrants who were held in detention centres would not lodge asylum applications as a result of insufficient assistance with their claims and inadequate access to legal advice and to human rights organisations. The *Migration Legislation Amendment Act* 1994 (Cth) repealed and substituted s 54ZA of the *Migration Act* which now provided that unlawful non-citizens in detention would only obtain assistance and legal advice in circumstances in which the detainee explicitly so requests:

> Apart from section 256, nothing in this Act or in any other law (whether written or unwritten) requires the Minister or any officer to:
>
> give a person ... an application form for a visa; or
>
> a) advise a person ... as to whether the person may apply for a visa; or
>
> b) give a person any opportunity to apply for a visa; or
>
> c) allow a person ... access to advice (whether legal or otherwise) in connection with applications for visas.[96]

A recent study stated that in 1996-97, 80 per cent of illegal entrants by boat were removed from Australia without requesting legal advice.[97] Current practice does not take into account that most immigrants to Australia face severe difficulties with the English language and are usually, if not always, unfamiliar with national legal and administrative systems let alone international law. As a consequence, these circumstances have created the risk that genuine refugees are sent back to countries "where [their] lives or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or political opinion", contravening Article 33 of the Refugees Convention.[98]

The detention practice caused large numbers of complaints to the Australian

96 *Migration Act*, s 193(2).

97 S Taylor, "Should Unauthorised Arrivals in Australia have Free Access to Advice and Assistance?" (2000) 6(1) *AJHR* 34 at 43.

98 Cf M Crock, note 14 *supra* at 49; A Patel, note 44 *supra* at 68; N Poynder, "The Incommunicado Detention of Boat People: A Recent Development in Australia's Refugee Policy" (1997) 3(2) *AJHR* 53 at 63; S Taylor, "Rethinking Australia's Practice of 'Turning Around' Unauthorised Arrivals" (1999) 11(1) *Pacifica Review* 43 at 46-8; S Taylor, *ibid* at pp 41-3.

Human Rights and Equal Opportunity Commission about the Immigration Department and its detention policy. This led the Commission to conduct an inquiry into the human rights dimension of the detention of unauthorised arrivals. The report, released in 1999, found a number of human rights violations and breaches of international law of the current detention practice.[99] To date, the Australian Government has failed to implement the recommendations of this report.

E. 1999 and After

In 1999, Australia witnessed the highest number of unauthorised boat arrivals since the landing of Indo-Chinese refugees in the late 1970s. The Department of Immigration and Multicultural Affairs apprehended 3 617 boat-people in 1999, compared with only 926 in the 1998-99 financial year.[100] Anxiety over illegal immigration grew with the detection of the Chinese vessel Kayuen near Port Kembla (NSW) in April 1999 as it had landed further south than any other illegal vessel recorded. The number of boat-people arriving in Australia grew rapidly towards the end of 1999. Within the month of November, 13 boats carrying 1 179 Middle Eastern asylum seekers landed at Ashmore Reef and Christmas Island[101] placing further pressure on Australia's on-shore humanitarian program and on the existing immigration detention facilities.

The *Migration Legislation Amendment Act (No 1)* 1999 (Cth),[102] assented to on 16 July 1999, was the first response of the Government to the new arrivals. The Act created new offences relating to migrant trafficking.[103] It also further reduced the right of complaint of detainees and repealed the obligations to provide unlawful non-citizens with visa and refugee status information unless explicitly requested.

Furthermore, the series of unauthorised boat arrivals that occurred along Australia's east coast led Prime Minister Howard to establish a Task Force on Coastal Surveillance that submitted a report in June 1999.[104] The report set out a list of 18 recommendations that called for stricter controls of Australia's coastline,[105] better cooperation with overseas and international agencies[106] and a

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99 For details see Australia, Human Rights and Equal Opportunity Commission, note 60 *supra*.

100 See Table 1 *supra*.

101 DIMA, Border Protection Branch, *Refused Immigration Clearance Report,* December 1999, DIMA (2000) pp 30-1.

102 No 89 of 1999; previously titled Migration Legislation Amendment Bill (No 2) 1998 (Cth). Cf M Head, "The Kosovar and Timorese 'Safe Haven' Refugees" (1999) 24(6) *Alt LJ* 279 at 280. An earlier (unsuccessful) attempt to repeal the obligations to inform illegal immigrants about their rights and reduce their rights to complain was undertaken by the Migration Legislation Amendment Bill (No 2) 1996 (Cth).

103 *Migration Act*, ss 232A, 233A.

104 Australia, Prime Minister's Coastal Surveillance Task Force, *Report*, Department of Prime Minister and Cabinet (1999).

105 *Ibid*, Attachment A, Consolidated List of Recommendations, recommendations 8-16.

106 *Ibid*, recommendations 1-7.

stronger legal framework.[107]

On the basis of this report, Coastwatch, Australia's principal coastal surveillance agency, was restructured, its budget was significantly increased and the new position of Director General of Coastwatch was created. The Task Force's call for a legal framework took the shape of the Border Protection Legislation Amendment Bill 1999 (Cth) which was enacted on 8 December 1999.[108] The new Act provided a catalogue of rigid measures which seek to prevent and deter the arrival of further boat-people. The Act created new and broader powers for law enforcement and immigration agencies to chase, board, move and destroy foreign vessels, within and beyond Australia's territorial and contiguous maritime zones, if they are suspected of carrying illegal migrants to Australia.[109]

With respect to the increasing numbers of mainly Middle Eastern refugee claimants, and in order to deter further arrivals, the *Migration Amendment Regulations* 1999 *(No 12)*[110] created a category of temporary protection visas for successful on-shore applicants (Subclass 785). This new subclass restricts welfare benefits and family reunification and limits the protection offered to refugees to a maximum of three years, if the applicant has arrived in Australia illegally. In addition, Part 6 of the *Border Protection Legislation Amendment Act* 1999 (Cth) sought to prevent 'forum shopping', a term used to describe migrants "with a bona fide protection need [who] seek to choose a particular migration outcome as well as gain protection";[111] in other words, people who migrate to a particular destination rather than to the geographically closest available country. The amendments introduced ss 91M-91Q into the *Migration Act* provide that:

> a non-citizen who can avail himself or herself of protection from a third country, because of nationality or some other right to re-enter and reside in the third country, should seek protection from the third country instead of applying in Australia for a protection visa, or, in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal under Division 8.[112]

Moreover, people who unsuccessfully applied for protection visas in Australia, who have then been removed and later re-entered the migration zone are now barred from lodging further applications.[113]

Although these harsh measures responded to a strong anti-boat-people sentiment in the public, the creation of this new, secondary class of refugees has been heavily criticised by humanitarian and refugee organisations. Concern has been expressed that the target of these rigid measures are genuine refugees and not, as intended, the traffickers who facilitate the illegal journey. Furthermore,

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107 *Ibid*, recommendations 17-18.

108 *Border Protection Legislation Amendment Act* 1999 (Cth), No 160 of 1999.

109 *Migration Act*, ss 245A-245H.

110 No 243 of 1999.

111 DIMA, *Protecting the Borders*, note 36 *supra* at p 8.

112 *Migration Act*, s 91M.

113 *Border Protection Legislation Amendment Act* 1999 (Cth), s 3, *Migration Act*, s 48A(1A).

the experience of the year 1991, when the Domestic Protection (Temporary) Entry Permit was introduced, has already shown that temporary protection does not work as a deterrent for desperate migrants who are fleeing persecution and poverty, and that it only creates insecurity for refugees.[114]

As of June 2000, the Commonwealth Government is considering further amendments to limit the rights of refugees under the Migration Act. The Migration Legislation Amendment Bill (Judicial Review) Bill 1998 (Cth), introduced into the Senate on 2 December 1998, seeks to reduce the grounds for judicial review of migration matters, particularly for unauthorised arrivals and intends to speed up the removal of unauthorised arrivals and prevent them from "using the legal process ... to extend their stay in Australia".[115]

V. CONCLUSION

Australia's wealth, stability and multicultural society are the major factors that make the country a desirable destination for migrants, both legal and illegal. Following the arrival of Vietnamese boat-people in 1975, Australia began to establish a comprehensive refugee determination regime, but simultaneously increased border surveillance and immigration control to prevent further boat-people from coming. The events of the year 1989, which mark the beginning of the most recent period of unauthorised arrivals, led the Australian Government to exercise even closer and more rigid control over immigration. Simultaneously, legal avenues for refugees to migrate to Australia have become scarcer as immigration offences were broadened and penalties heavily increased. The changes of the migration law effectively reduced the number of asylum seekers as illegal immigration has been further criminalised, and deterrence, detention and deportation have become the simplistic answers to unwanted arrivals.

But none of the harsh measures that have been implemented in the past 25 years have reduced the incentives for migration to Australia. They have meant, rather, that potential migrants started to look for other ways to migrate, which they found in clandestine, illegal migration and migrant trafficking.

Tightening borders and criminalising irregular migration has so far been unsuccessful in reducing the number of undocumented immigrants and deterring further arrivals. The amendments that have been made to the *Migration Act* 1958 (Cth) have not addressed the incentives for illegal migration and have failed to consider the migration pressures that exist in the Asia Pacific region.

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114 For comments on the Border Protection Legislation Amendment Bill 1999, see, for example, "Refugee Visa no Answer to Crisis" *The Weekend Australian*, 20-1 Nov 1999, p 18; R McGregor, "Riding the Refugee Wave" *The Weekend Australian*, 20-1 Nov 1999, p 21; J Murray, "They're Refugees not Invaders" *The Australian*, 23 Nov 1999, p 15; "Refugee Plan Cruel, Unjust and offensive", *The Weekend Australian*, 27-8 Nov 1999.

115 Australia, Senate, Debates, vol HR 193, p 1025 ((5 May 1998) Senator Patterson, Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs).

The combination of push-factors such as war, persecution, poverty and environmental degradation in the sending countries, pull-factors such as protection and employment opportunities in the destination countries, together with the growth of multiculturalism have caused growing demand for migration to the extent that many people are willing to invest life-savings and risk the dangers of illegal migration to start a new life abroad. As long as Australia remains ignorant towards the causes of refugee and migratory movements, illegal immigration is destined to increase further and reach yet unknown heights.