AUSTRALIA'S PACIFIC SOLUTION MARK II: THE LESSONS TO BE LEARNED

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In January 2006, forty three individuals who had set out in a canoe from the Indonesian province of Papua arrived in mainland Australia and sought asylum claiming that they feared persecution by the Indonesian Government.[1] In March, Australia granted protection visas to forty two of them leading to very robust expressions of displeasure by the Indonesian Government.[2] On 13 April 2006, Senator Amanda Vanstone, then Minister for Immigration, announced that the Government proposed new legislation that, once passed, would extend the offshore processing regime already applying to all unauthorised arrivals entering Australia at an excised offshore place to apply as well to all those arriving unauthorised by boat after 13 April, regardless of where they entered.[3] Since the existing offshore processing regime was known to the Australian public as the Pacific Solution, the proposed extension to it was immediately dubbed Pacific Solution Mark II by the Australian media.

On 11 May 2006, the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 was introduced into the House of Representatives (as earlier foreshadowed by the Minister for Immigration) and on 10 August 2006 it was passed by that house. However, on the eve of the Senate vote on the same bill (14 August 2006), the Prime Minister, John Howard, announced its withdrawal. This article considers the lessons to be learned about Australian asylum seeker policy from the fact of the Bill's introduction and from its subsequent withdrawal.

Pacific Solution Mark I

Since the commencement in 1994 of the *Migration Reform Act 1992* (Cth), a non-citizen who enters Australia's 'migration zone'[4] without a valid visa has

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1 Mike Steketee, 'The Vanstone Wiggle', *The Australian*, 27 May 2006, 20.

2 Ibid. The 43rd asylum seeker was rejected at first instance but was successful in the Refugee Review Tribunal: Jewel Topsfield and Michelle Grattan, 'Indonesia Blamed for Rights Abuses', *The Age* (Melbourne), 2 August 2006, 5.

3 Amanda Vanstone, *Strengthened Border Control Measures for Unauthorised Boat Arrivals* (Press Release, 13 April 2006) <http://www.minister.immi.gov.au/media/media-releases/2006/v06048.htm> at 4 June 2007.

4 *Migration Act 1958* (Cth) s 5.

become an 'unlawful non-citizen'.[5] On 26 September 2001, the Australian Government procured amendments to the *Migration Act* pursuant to which Christmas Island, Ashmore and Cartier Islands and Cocos (Keeling) Islands were defined as 'excised offshore places'. The amendments also allow for the making of regulations designating other parts of Australia as excised offshore places. On 21 July 2005, the Government made regulations[6] designating the Coral Sea Islands Territory and offshore islands forming part of Queensland, Western Australia and the Northern Territory as excised offshore places. As a result not much more than mainland Australia and Tasmania remain unexcised from the migration zone.

'Excised offshore places' continue to fall within the definition of the 'migration zone'. However, a person who becomes an 'unlawful non-citizen' by entering Australia at an excised offshore place is labelled an 'offshore entry person'.[7] Section 46A of the *Migration Act* invalidates a purported visa application made by an offshore entry person who is an unlawful non-citizen in Australia. The *Migration Act* provides instead that offshore entry persons *may* be taken to a 'declared country'.[8] The Australian Government also has the option of taking such individuals to any 'place outside Australia' or keeping them at an excised offshore place.[9]

Presently, Nauru and Papua New Guinea are 'declared countries'. The terms of their participation in the Pacific Solution are set out in bilateral Memoranda of Understanding (MOUs) signed with the Australian Government. The initial agreements, entered into in 2001, have been renewed several times. The most recent agreements with both countries, providing for the accommodation of up to 1,500 persons in Nauru and 1,000 in Papua New Guinea, expire on 30 June 2007.[10] The offshore processing centres established in the declared countries pursuant to these MOUs are managed and operated by the International Organisation for Migration under contract with the Australian Government.[11] Although the processing centre in Papua New Guniea has been mothballed since July 2003, it is available for reactivation on short notice.[12]

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5 *Migration Act* ss 13, 14.
6 *Migration Regulations 1994* (Cth) reg 5.15C.
7 *Migration Act* s 5.
8 *Migration Act* s 198A.
9 Savitri Taylor, 'Sovereign Power at the Border' (2005) 16 (1) *Public Law Review* 55, 63–68.
10 Department of Immigration, *Annual Report 2005–06* (2006) 178. Australia is presently negotiating a renewal of the MOU with Nauru: Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, *Proof Committee Hansard, Budget Estimates*, 29 May 2007, 11 (Evidence of Mr Ritchie, Department of Foreign Affairs and Trade). It is most likely engaged in similar negotiations with PNG.
11 Savitri Taylor, 'The Pacific Solution or a Pacific Nightmare: The Difference between Burden Shifting and Responsibility Sharing' (2005) 6 (1) *Asian-Pacific Law and Policy Journal* 1, 13.
12 'Government Mothballs PNG Detention Centre', *The Age* (Melbourne), 28 July 2003 <http://www.theage.com.au/articles/2003/07/28/1059244556821.html> at 6 June 2007.

Persons taken to declared countries have their protection claims (if any) considered by officers of Australia's Department of Immigration acting as such, but pursuant to a procedure which has no statutory basis.[13] Moreover, Australia's stated position is that those found to be refugees will only be resettled in Australia as a last resort if no other country is willing to take them. In the past, the time wasted in a futile search for third country resettlement places has resulted in recognised refugees spending up to four years in limbo in Nauru before eventually being brought to Australia, though usually on temporary visas.[14] Indeed, at the time that the Minister for Immigration foreshadowed its extension, there were still two men taken to Nauru pursuant to Pacific Solution Mark I remaining on the island.[15] Even more significantly, it was well known that Pacific Solution Mark I had had a devastating impact on the physical and mental health of the persons subjected to it.[16] Why then did the Australian Government choose to extend the Pacific Solution instead of winding it up?

Rhetoric v Reality

BORDER CONTROL AND THE PROBLEM OF 'MIXED FLOWS'

Subject to limited inroads made by international legal obligations such as those of refugee protection, it is the sovereign right of states to exclude non-citizens from their territory. Although seventeen countries presently make refugee resettlement places available to the Office of the United Nations High Commissioner for Refugees (UNHCR),[17] Australia is in fact one of

13 For the legal implications of this, see Savitri Taylor, above n 9, 60–61.

14 Ibid 61–62. Only 4.3 per cent of those found to be refugees under Pacific Solution Mark I were found resettlement in countries outside Australia and New Zealand: Senate Legal and Constitutional Legislation Committee, Commonwealth Parliament, *Report: Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* (2006) [3.97].

15 Both were recognised refugees. However, adverse security assessments precluded even temporary resettlement in Australia and no other country was willing to resettle them either. One of the two men was later evacuated to Australia for medical reasons: Michael Gordon, 'Living in Limbo', *The Age* (Melbourne), 30 September 2006 10. While in Australia he made a visa application which was granted after ASIO provided a fresh security assessment which was not adverse: Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, *Official Committee Hansard: Additional Estimates*, 12 February 2007, 118 (Evidence of Mr Metcalfe, Department of Immigration). The other man eventually did find a third country prepared to resettle him and he departed Nauru on 6 February 2007: Ibid (Evidence of Mr Metcalfe and Mr Correll, Department of Immigration).

16 See e.g. Jewel Topsfield, 'Sri Lankans Face 'Limbo' on Nauru', *The Age* (Melbourne), 16 March 2007 <http://www.theage.com.au/news/national/sri-lankans-face-limbo-on-nauru/2007/03/15/1173722655236.html at 6 June 2007>; Victorian Foundation for the Survivors of Torture, *Submission to Senate Legal and Constitutional Legislation Committee Inquiry into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* 23 May 2006 <http://www.aph.gov.au/senate/committee/legcon_ctte/migration_unauthorised_arrivals/submissions/sub117.pdf> at 4 June 2007; Peter Mares, 'Australia's Sledgehammer Approach to Asylum Seekers', *Amnesty News*, 24 February 2004 <http://news.amnesty.org/index/ENGASA1224042004> at 4 June 2007; JM Dormaar 'Asylum seekers in the Pacific Ocean: High prevalence of psychiatric disorders due to camp conditions' (2003) 147 (16) *Nederlands Tijdschrift voor Geneeskunde*, 773.

17 These countries are United States, Canada, Australia, Sweden, Norway, Finland, New

only four countries in the world (the others are Canada, New Zealand and the United States) to have a formalised *general* program of permanent immigration.[18] However, it no less than other developed countries wants to control who the immigrants are.

The reasons that the citizens of developed countries such as Australia have for wishing to exercise control over the number and nature of immigrants to their shores fall into four broad categories: preservation of national culture, protection of the economic and social rights of citizens, protection of the right of citizens to democratic self determination and protection of liberal values and the rule of law. None of these reasons stands up particularly well to scrutiny,[19] but what is to the point is the *belief* that there are strong reasons for exercising control over immigration. What is also to the point is that state-endorsed opportunities for migration to developed countries are at present far outstripped by the demand for such opportunities and that, faced with this reality, some individuals decide or are forced to take matters into their own hands. This leads to the problem of 'mixed flows'. In other words, it leads to situations in which persons moving irregularly across the borders of developed countries are a mixture of refugees and voluntary migrants, with the additional complication that those falling into the latter category try to pass themselves off as refugees in order to achieve their purpose.

As well as being perceived as a threat to immigration control, irregular movement of people across national borders is perceived as a threat to national security. For example, when the 11 September terrorist attack on the United States followed close on the heels of the Tampa incident, the Australian Government was quick to draw attention to the possibility that asylum seekers arriving without authorisation might have terrorist links.[20]

Before 1999 Australian government rhetoric divided onshore asylum seekers[21] into two categories: refugees (a small proportion), and non-refugees who were abusing the asylum system (the rest). According to this rhetoric Australia was keen to identify and provide protection to those who were in

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Zealand, Denmark, and the Netherlands (together accounting for the bulk of refugee resettlement places) and Chile, Benin, Burkina Faso, Brazil, Ireland, Iceland, Spain and the United Kingdom (dubbed 'emerging resettlement countries'): UNHCR, *New Resettlement Programmes* <http://www.unhcr.org/protect/3bb2e1d04.html> at 29 June 2007.

18 International Organisation for Migration, *World Migration 2003: Managing Migration Challenges and Responses for People on the Move* (2003) 17.

19 Savitri Taylor, 'From Border Control to Migration Management: The Case for a Paradigm Change in the Western Response to Transborder Population Movement' (2005) 39 (6) *Social Policy and Administration: An International Journal of Policy and Research* 563, 566–71.

20 Dennis Atkins, 'PM Links Terror to Asylum Seekers', *The Courier-Mail* (Brisbane), 7 November 2001, 1; Mike Seccombe, 'Politics of Fear Works Well for PM', *The Sydney Morning Herald* (Sydney), 19 September 2001, 8.

21 Meaning here, all those individuals who arrive in Australia and then seek its protection, regardless of whether their initial entry into Australia was authorised or unauthorised.

fact refugees but determined at the same time to identify and remove from the country those who were not. In other words, domestic refugee status determination procedures were intended to serve an immigration control as well as refugee protection purpose and, in many ways, achievement of the latter purpose was subordinated to the former.

THE RED HERRING OF 'SECONDARY MOVEMENT'

In 1999 the Australian Government discerned what it described as a 'notable change in the pattern of illegal migration': numbers of unauthorised arrivals were increasing; most were using the services of a people-smuggling operation; and most were seeking asylum.[22] Worst of all from the Government's perspective, about 95 per cent of these mainly Iraqi and Afghan asylum seekers were being found to be refugees and, therefore, eligible under the law as it then stood to permanent residence in Australia.[23] Since the Government could not explain its hostility towards these asylum seekers by using the rhetoric of non-refugees abusing the asylum system, the rhetoric changed.

Most of the Iraqi and Afghan asylum seekers were coming to Australia via Indonesia, so Australia asserted that 'Most of them already had, or had bypassed, effective protection in a country of first asylum.'[24] In other words, they were engaging in 'secondary movement' as opposed to 'primary movement', which is direct arrival from a country in which persecution is feared. Australia's stated rationale for objecting to secondary movement is that

> those who undertake secondary movement to their country of choice because they have the financial resources to do so, are undermining the international system of protection. Such secondary flows disadvantage those in refugee camps who are often in greater relative need of assistance.[25]

This is the so-called 'queue-jumping' argument. The queue-jumping rhetoric is powerful because it draws the Australian public's attention away from the 'effectiveness' or otherwise of the protection available in the country of first asylum and focuses it on the fact that all the refugees in that country are in the same predicament, making it seem unfair for those with money to pay people smugglers to get them to a potential resettlement country ahead of persons who had been in the country of first asylum longer or whose needs are greater.[26]

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22 Phillip Ruddock, *Border Protection: Background Paper on Unauthorised Arrivals Strategy* (2001) Minister for Immigration <http://www.minister.immi.gov.au/media/media-releases/2001/r01131_bgpaper.htm> 4 June 2007.

23 Senate Legal and Constitutional Legislation Committee, Commonwealth Parliament, *Official Committee Hansard: Consideration of Additional Estimates*, 10 February 2000, 176, 204 (Evidence of Department of Immigration).

24 Department of Immigration, *Refugee and Humanitarian Issues: Australia's Response* (2002) 4.

25 Ibid.

26 Senate Select Committee on a Certain Maritime Incident, Commonwealth Parliament, *Official Committee Hansard: Reference: Certain Maritime Incident*, 1 May 2002, 1394–95 (Senator Brandis).

The Australian Government also has another reason for objecting to 'secondary movement', which is probably its greater motivator, and that is the fear of the floodgates opening. In the words of one Department of Immigration official:

> if you take that to the extreme and say that refugees have the right to choose, then, if every one of the 22 million refugees suddenly decided that they would prefer Australia as their country of protection, does that mean that Australia should just say, 'Yes, that is okay, we will take them all,' and every other donor country in the international protection system does not have to worry about refugees anymore?[27]

Australia is indeed one of the most attractive destinations in the Asia Pacific Region. However, it is much more likely that a mass influx of refugees to Australia (something that Australia has not yet experienced[28]) would consist of direct arrivals from a country in the Asia Pacific region, than that it would consist of secondary movers. When questioned on the issue during a budget estimates hearing, the Secretary of the Department of Immigration responded:

> If you did have that large influx of direct arrivals who raised protection issues and who were found to warrant protection, what would we do? Would we do what we have traditionally done—that is, resettle people in Australia—or would we look for some broader settlement? I do not think that particular issue has been addressed as a live issue in any detailed way.[29]

Maybe so, but it is noteworthy that most of the measures which Australia has introduced over the years to discourage asylum seekers do not, in fact, distinguish between primary and secondary movers but simply between authorised and unauthorised arrivals.

It is more difficult for unauthorised arrivals who are also secondary movers to obtain permanent residence in Australia than it is for primary movers,[30] but this is the exception to the general rule. None of the many

27 Senate Legal and Constitutional References Committee, Commonwealth Parliament, *Official Committee Hansard: Operation of Australia's Refugee and Humanitarian Program*, 22 November 1999, 791 (Evidence of Ms Bedlington, Department of Immigration).

28 There were 5,870 unauthorised arrivals to Australia by air and sea in the financial year 1999–2000 and 5,560 in 2000–01: Australian Bureau of Statistics, *Year Book Australia 2004* (2004) Australian Bureau of Statistics <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/1301.0Main+Features12004?OpenDocument> 4 June 2007; ABS, *Year Book Australia 2002* (2002) Australian Bureau of Statistics <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/1301.0Main+Features12002?OpenDocument> 4 June 2007. This rate of unauthorised arrivals has not been exceeded before or since. Although the Australian Government attempted to characterise it as such, it hardly constituted a mass influx: Human Rights Watch, *Next Government Must Improve Refugee Protection* (Press Release, 8 November 2001) <http://hrw.org/english/docs/2001/11/08/austra3344.htm> 4 June 2007; Peter Mares, 'Australia's Sledgehammer Approach to Asylum Seekers', *Amnesty News*, 24 February 2004 <http://news.amnesty.org/index/ENGASA1224042004> 4 June 2007.

29 Senate Legal and Constitutional Legislation Committee, Commonwealth Parliament, *Official Committee Hansard: Consideration of Budget Estimates*, 29 May 2002, 434 (Evidence of Mr Farmer, Department of Immigration).

30 Savitri Taylor, 'The Human Rights Implications of the Psycho-Social Harm Caused by

offshore barriers to entry which Australia places in the way of would be asylum seekers to prevent them from getting to its borders in the first place draws any distinction between primary and secondary movers.[31] Similarly, Australia's mandatory detention regime applies to all unauthorised arrivals.[32] Most significantly for present purposes, its offshore processing regime applies to all unauthorised arrivals entering Australia at an 'excised offshore place'.

The reason the forty three Papuan asylum seekers who arrived in Australia in January 2006 could not be subjected to the offshore processing regime was not because they were primary movers but that they had made it to a non-excised part of Australia's migration zone. The purpose of the Migration Amendment (Designated Unauthorised Arrivals) Bill was to ensure that *all* future unauthorised boat arrivals could be subjected to the offshore processing regime thus avoiding a repeat of the January 2006 embarrassment.

How Many is Too Many?

Unlike Pacific Solution Mark I, Pacific Solution Mark II could not plausibly be represented as a response to secondary movement because it was very evident that the impetus for the proposal was a group of asylum seekers arriving directly from the persecuting country. It could not plausibly be represented as a response to potential mass influx either, because Operation Relex, the naval operation introduced in the aftermath of the Tampa incident to prevent suspected unauthorised arrivals from entering Australian waters, is ongoing[33] and relatively effective.[34] Moreover in response to the arrival of the forty three Papuan asylum seekers, the government allocated two more navy vessels 'to provide additional surveillance and

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Australia's Temporary Protection Regime' (2005) 11(1) *Australian Journal of Human Rights* 233.

31 Savitri Taylor, 'Offshore Barriers to Asylum Seeker Movements: The Exercise of Power without Responsibility?' (Paper presented at the Moving On: Forced Migration and Human Rights Conference, Sydney, on 22 November 2005).

32 Savitri Taylor, 'Immigration Detention Reforms: A Small Gain in Human Rights' (2006) 13(1) *Agenda* 49.

33 Operation Relex became Operation Relex II and then in July 2006 was combined with three other naval operations into Operation Resolute: Department of Defence, *Operation Resolute* (2006) <http://www.defence.gov.au/opresolute/default.htm> 4 June 2007.

34 From the commencement of Operation Relex in September 2001 to 23 June 2006, the Australian Navy had intercepted seventeen Suspected Illegal Entry Vessels: Senate Foreign Affairs Defence and Trade Additional Estimates 2005–06, Answers to Questions on Notice from the Department of Defence, 10–11, <http://www.aph.gov.au/Senate/committee/FADT_CTTE/estimates/add_0506/def/ans_def_feb06.pdf> 29 June 2007; Senate Foreign Affairs Defence and Trade Budget Estimates 2006-07, Answers to Questions on Notice from the Department of Defence, 34 <http://www.aph.gov.au/Senate/committee/FADT_CTTE/estimates/bud_0607/def/ans_def_cons_jun06.pdf> 29 June 2007. Five of the seventeen boats were 'escorted back to a position adjacent to the outer limits of the Indonesian Territorial Sea': Senate Foreign Affairs Defence and Trade Budget Estimates 2006–07, Answers to Questions on Notice from the Department of Defence, 34.

patrolling capability of Australia's high threat maritime approaches'.[35]

According to the Minister for Immigration, the Government had 'taken a policy position that will allow us to balance the three priorities that we have in this area'.[36] It enabled the Government to 'live up to our requirements under the convention, live up to border protection commitments to the Australian community and live up to our foreign affairs obligations to keep good and stable relationships with our neighbours. That includes making sure that Australia is not used as a staging point for protests about domestic issues in other countries.'[37] In this context, the Minister also said: 'It is the Government's strong preference that protection is not offered in Australia to Papuan separatists.'[38]

In other words, despite professions to the contrary, Australia's most fundamental objection to on-shore asylum seekers is not that they may be persons abusing the asylum system, not that they may be secondary movers, not even that they may arrive in thousands rather than in tens but that every on-shore asylum seeker who is found to be a refugee is a person who has managed to undermine Australia's ability to 'decide who comes to this country, and the circumstances in which they come'.[39] While the size and composition of its offshore humanitarian program is entirely within Australia's control, Australia's international obligations leave it little leeway to refuse to protect refugees[40] who have actually come within its

35 Senate Foreign Affairs Defence and Trade Budget Estimates 2006–07, Answers to Questions on Notice from the Department of Defence, 36. The Department of Defence has also informed a Senate Committee that 'The Government asked Defence to examine the feasibility of coordinated patrols with Indonesia in mid-2005. Coordinated patrols seek to enhance our maritime surveillance efforts with Indonesia through effective scheduling of patrols and exchange of surveillance information ... During the Australia-Indonesia Navy talks in August 2005, the Royal Australian Navy proposed coordinated naval patrols with the Indonesian Navy. Both parties agreed to examine the feasibility of such a proposal. Currently Australia's proposal for coordinated patrols is still being considered by the Indonesian Navy': Ibid, 37. When asked, 'does the Navy co-operate with PNG defence forces to repel asylum seekers from Australia?', the Department responded, 'The ADF and Papua New Guinea Defence Force regularly conduct joint activities that are of mutual security benefit. This has included joint naval patrols. The Papua New Guinea Defence Force has not conducted any patrols to interdict potential illegal immigrants at Australia's request': Ibid, 39.

36 Commonwealth, *Parliamentary Debates*, Senate, 13 June 2006, 31 (Amanda Vanstone, Minister for Immigration).

37 Ibid.

38 Amanda Vanstone, 'Let's Not Support Separatism', *The Australian* (Sydney) 29 April 2006, 22.

39 John Howard, Address at the Federal Liberal Party Campaign Launch, Sydney (28 October 2001) <http://www.pm.gov.au/media/Speech/2001/speech1311.cfm> 12 July 2007.

40 That is, persons who come within the definition of 'refugee' contained in article 1A of the *Convention Relating to the Status of Refugees* [1954] ATS 5 (Refugees Convention) and are not excluded from refugee status by articles 1D, 1E or 1F. Australian domestic law interprets article 1A (see *Migration Act* s 91R and s 91S) and article 1F (see *Migration Act* s 91T) in a manner designed to reduce the number of persons determined to be refugees by domestic decision makers. However, since determination of refugee status is 'declaratory, rather than constitutive' (Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed, 2007, 50) Australia places itself at risk of breaching

jurisdiction.[41] This leads to hostility towards all refugees arriving outside the auspices of the offshore humanitarian program and manifests in policy responses such as the Migration Amendment (Designated Unauthorised Arrivals) Bill.

What about Refugee Protection and Equitable Burden Sharing?

Even though the bill was eventually withdrawn for reasons discussed below, the excised offshore place legislation is still in place and the Pacific Solution is enjoying a second lease of life. Eight Burmese Rohingya asylum seekers who arrived at Ashmore Reef (an excised offshore place) in mid-August 2006 were taken to Christmas Island (another excised offshore place) for medical checks and then sent on to Nauru,[42] while the Australian Government considered a 'range of options for handling the future of the group'.[43] In mid-December 2006, the Burmese asylum seekers were advised that they had two options. The first was to return voluntarily to Malaysia where they had been living for many years after fleeing Burma.[44] They were informed that if they chose this option, the Malaysian Government would give them two year temporary residence visas and while in Malaysia they would be able to apply for places in Australia's

its treaty obligations to the extent that its domestic interpretations of the treaty text prevent it from identifying as 'refugees' those who would be found to be such if international law rules of treaty interpretation were applied.

41 Article 33(2) of the Refugees Convention provides that the prohibition on *refoulement* contained in article 33(1) does not apply in respect of a refugee whom, 'there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted of a final judgement of a particularly serious crime, constitutes a danger to the community of that country'. Australia makes use of this exception, but *Migration Act* s 91U interprets article 33(2) more expansively than is likely to be acceptable under international law (Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed, 2007, 239–40) placing Australia at risk of breaching its article 33(1) obligation in some cases. Australia also makes use of the so-called safe third country principle, but its translation into Australian domestic law as the 'any place but here' principle probably goes beyond what is permissible at international law: see Savitri Taylor, 'Protection Elsewhere/Nowhere' (2006) 18(2) *International Journal of Refugee Law* 283.

42 Seven of the asylum seekers were transferred to Nauru on 17 September 2006 and the eighth, who was initially kept back for medical reasons, was transferred on 26 October 2006: Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, *Official Committee Hansard: Additional Budget Estimates*, 12 February 2007, 117 (Evidence of Mr Correll, Department of Immigration); Craig Skehan, 'Detainees put on secret flight to Nauru', *Sydney Morning Herald* (Sydney), 18 September 2006 <http://www.smh.com.au/news/national/detainees-put-on-secret-flight-to-nauru/2006/09/17/1158431585596.html> at 4 June 2007.

43 Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, *Official Committee Hansard: Supplementary Budget Estimates*, 30 October 2006, 124 (Evidence of Mr Hughes, Department of Immigration).

44 Craig Skehan, 'Detainees put on secret flight to Nauru', *Sydney Morning Herald* (Sydney), 18 September 2006 <http://www.smh.com.au/news/national/detainees-put-on-secret-flight-to-nauru/2006/09/17/1158431585596.html> at 4 June 2007; Michael Gordon, 'Asylum Seekers Fear Return to Malaysia', *The Age* (Melbourne) 17 February 2007, 1, 8.

offshore humanitarian program 'in the normal way' (i.e. no guarantee was given that the applications would succeed).[45] The second option was to be subjected to Australia's non-statutory refugee status determination process in Nauru, with resettlement found for them in a third country if they were determined to be refugees. They were told that there was no prospect of being resettled in Australia pursuant to the second option.[46] The asylum seekers, who claimed that they had moved onward to Australia to escape mistreatment in Malaysia, chose not to return there.[47]

The remainder of the Nauru processing centre's current occupants got there by a slightly different route. On 20 February 2007, a boat carrying eighty three Sri Lankan Tamils was intercepted by the Australian Navy ship HMAS *Success* in international waters.[48] On 22 February, whilst the boat was still in international waters, Australia approached Indonesia (whence the boat had come) about the possibility of returning the boat and its occupants to Indonesia.[49] In the meantime, the boat's occupants took deliberate steps to render it unseaworthy causing them to be taken on board HMAS *Success* for their safety.[50] On 24 February the decision was made to transfer them to Christmas Island.[51]

The Navy refuses to disclose its rules of engagement for 'operational security reasons'.[52] However, in response to a question posed at a Senate estimates hearing,[53] the Department of Defence has stated that:

> The experience with Operations Relex and Relex II is that when a Navy or Customs vessel intercepts a SIEV [suspected illegal entry vessel], the persons on board the SIEV usually make their intentions known and these intentions are communicated to Canberra. At this point, whole-of-government processes are engaged through the People Smuggling Task Force. Subsequent decisions, including whether a vessel will be returned in the direction from where it came from, are made by the Government and implemented through the People Smuggling Task Force.

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45 Michael Gordon, 'Asylum Seekers Fear Return to Malaysia', *The Age*, 17 February 2007, 1, 8.

46 Plaintiffs' Outline of Submissions on the Summons for Directions (24 May 2007) [8.2] in the case of *Plaintiff M57A et al v Minister for Immigration and Citizenship and the Commonwealth of Australia* (redacted copy of court document on file with author).

47 Ibid [10].

48 Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, *Proof Committee Hansard, Budget Estimates*, 21 May 2007, 92 (Evidence of Mr Correll Department of Immigration).

49 Ibid.

50 Ibid.

51 Ibid.

52 Senate Foreign Affairs Defence and Trade Budget Estimates 2006–07, Answers to Questions on Notice from the Department of Defence, 35.

53 The question, asked by Senator Nettle, was: 'What assessment is conducted when the Navy intercepts a boat as to whether the people on board wish to seek asylum? Are they interviewed? Who conducts the interview? ... How does the Navy assess whether people have *prima face* claim to asylum? Who makes the decision as to whether to turn a boat around or to bring the boat to Australia? What level of official? Are these decisions made in consultation with Canberra? Who in Canberra is consulted or makes the decision?' (Ibid).

> Once a determination is made, it is relayed to the ship or patrol boat for implementation.
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> Arrangements for interviews of passengers and crew are determined by circumstances around each vessel, and may involve the ADF, Customs, Australian Federal Police or the Department of Immigration and Multicultural Affairs. Regardless, results of interviews are forwarded to Canberra and if claims for protection are identified, authorised officers of the Department of Immigration and Multicultural Affairs decide if prima facie claims for Australia's protection are evident.[54]

The usual did not happen in the case of the Sri Lankans. According to the Department of Immigration, it was only after they had been taken to Christmas Island that they indicated for the first time that they were asylum seekers.[55] Nevertheless, and to its credit, the Australian Government's dialogue with Indonesia was from the beginning concerned with obtaining a guarantee that 'if the group were returned to Indonesia and if the people on board had issues that went to their protection, they would have the opportunity to pursue those matters with the United Nations High Commissioner for Refugees and not simply to be returned directly to Sri Lanka.'[56] By the time that the Sri Lankans had identified themselves as asylum seekers it had become clear that the Indonesian authorities would not provide the guarantee being sought.[57] On 15 March 2007, the Australian Government announced that it would be transferring the Sri Lankans to Nauru and processing their asylum claims there in order to 'send a strong message to those considering any attempt to enter Australia illegally'.[58] The Government also indicated that, for the same reason, third country resettlement would be sought for any of the Sri Lankans found to be refugees.[59] At the time of writing, third country resettlement places were being sought for two of the Sri Lankans who had turned out to be UNHCR-mandated refugees and the remainder were at various stages of the refugee status determination process.[60]

Pacific Solution Mark I was held out by the Australian Government as being consistent with its refugee protection obligations and the burden sharing principle, but was in fact inconsistent with both.[61] From the

54 Ibid.
55 Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, *Proof Committee Hansard, Budget Estimates*, 21 May 2007, 95 (Mr Metcalfe, Department of Immigration).
56 Ibid.
57 Ibid, 96.
58 Kevin Andrews, Minister for Immigration, quoted in Jewel Topsfield, 'Sri Lankans Face 'Limbo' on Nauru', *The Age* (Melbourne) 16 March 2007 <http://www.theage.com.au/news/national/sri-lankans-face-limbo-on-nauru/2007/03/15/1173722655236.html> 6 June 2007.
59 Ibid.
60 Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, *Proof Committee Hansard, Budget Estimates*, 21 May 2007, 96 (Ms Keski-Nummi, Department of Immigration).
61 Savitri Taylor, above n 11, 1.

manner in which it has been implemented to date, it Pacific Solution Mark II is only slightly better than Mark I. In relation to refugee protection, the following points are worth making. In return for the passage of the Migration Amendment (Designated Unauthorised Arrivals) bill, the Australian Government had offered its recalcitrant backbenchers a package of reforms to the Pacific Solution Mark I arrangements that were in line with recommendations made in the Senate Legal Constitutional Legislation Committee's majority report on the bill.[62] The reforms offered included village type accommodation for women and children, access to Department funded legal advice, legislated processing 'time limits'[63] of ninety days and a legislated role for the Commonwealth Ombudsman in overseeing Department of Immigration action in Nauru.[64] Once the bill was off the table so were the reforms,[65] though one would have assumed that a government seriously committed to refugee protection would have proceeded with the reforms regardless.

A major concern about Pacific Solution Mark I was the adverse impact that conditions in the declared countries had on the physical and mental health of the asylum seekers to them. There is no reason to suppose that conditions in the declared countries will be any less a threat to the health of asylum seekers this time round.[66] It is true that unlike Mark I asylum seekers, who were effectively detained,[67] asylum seekers taken to Nauru pursuant to Mark II have been admitted on visas 'allowing for free movement outside the centre within the community during the day, from 8 am to 7 pm.'[68] It is also true that medical assistance available to

62 Senate Legal and Constitutional Legislation Committee, Commonwealth Parliament, *Report: Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* (2006) [3.209]. See further below for a discussion of the report.

63 As with parallel provisions relating to mainland Australia, these would not have been true time limits but rather the requirement that an explanation be provided to the Minister if processing time at either first instance or review exceeded 90 days.

64 Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, *Official Committee Hansard: Supplementary Budget Estimates*, 30 October 2006, 149 (Evidence of Senator Amanda Vanstone, Minister for Immigration).

65 Ibid.

66 Victorian Foundation for the Survivors of Torture, Submission to Senate Legal and Constitutional Legislation Committee Inquiry into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, 23 May 2006. <http://www.aph.gov.au/senate/committee/legcon_ctte/migration_unauthorised_arrivals/submissions/sub117.pdf> 4 June 2007; Royal Australian and New Zealand College of Psychiatrists, Submission to Senate Legal and Constitutional Legislation Committee Inquiry into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, 25 May 2006 <http://www.aph.gov.au/senate/committee/legcon_ctte/migration_unauthorised_arrivals/submissions/sub128.pdf> 6 June 2007.

67 Persons taken by Australia to Nauru and Papua New Guinea pursuant to Mark I were admitted into those countries on visas that were subject to a condition that they would not leave the processing centres. Visa holders who attempted to leave the centres (other than on supervised excursions) could be arrested for breach of this visa condition: Savitri Taylor, above n 11, 9–10.

68 Department of Immigration, *Fact Sheet 76: Offshore Processing Arrangements* (6 June 2007, revision) <http://www.immi.gov.au/media/fact-sheets/76offshore.htm at 30 June 2007>. The Department is, however, careful to make the point that '[a]s an

residents of the offshore processing centre in Nauru, has been upgraded.[69] However, these are improvements at the margins.

In any event, it remains the case that the offshore processing regime is procedurally inferior to the Australian mainland regime and therefore more likely to result in unintentional breach of Australia's protection obligations under international law.[70] Fortunately for them, the Burmese asylum seekers and twenty seven of the Sri Lankan asylum seekers have managed to procure pro bono legal assistance from the Refugee and Immigration Legal Centre Inc., an Australian-based community legal centre. Advised by the Centre, seven of the Burmese asylum seekers lodged applications for Offshore Refugee and Humanitarian (Class XB) visas at the Department of Immigration office in Nauru in late 2006.[71] When departmental officers indicated that they would be interviewing the asylum seekers in April 2007, the asylum seekers requested that the interviews 'occur as part of the consideration of their visa applications and not as part of the non-statutory refugee determination process'.[72] This request was refused and the interviews did not in fact take place.[73] In proceedings commenced in the High Court of Australia on 24 May 2007, the Burmese asylum seekers sought a writ of mandamus against the Minister for Immigration compelling him to consider their applications for Offshore Refugee and Humanitarian (Class XB) visas.[74] At a directions hearing held on 27 June 2007, the Minister undertook to consider the visa applications and the court proceedings were adjourned.[75] As a matter of domestic law, this result places the Burmese asylum seekers in the same position as the tens of thousands of other individuals applying for one of the 13,000 places in Australia's offshore humanitarian program. The problem is that under international law their position is entirely different from those tens of thousands of others because, if they are, in fact, refugees, they are persons in respect of whom Australia's Refugees Convention obligations have already been engaged.[76]

As for asylum seekers taken to Nauru pursuant to Pacific Solution Mark II and found to be refugees under the non-statutory refugee status

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independent sovereign nation, Nauru is free to impose any visa restrictions it deems fit' (Ibid).

69 Ibid.

70 Savitri Taylor, above n 9, 59–61.

71 *Plaintiff M57A et al v Minister for Immigration and Citizenship and the Commonwealth of Australia*, Plaintiffs' Outline of Submissions on the Summons for Directions (24 May 2007) [4]–[6].

72 Ibid [15].

73 Ibid [16]–[17].

74 Application for an Order to Show Cause (24 May 2007) in the case of *Plaintiff M57A et al v Minister for Immigration and Citizenship and the Commonwealth of Australia* (redacted copy of court document on file with author).

75 *Plaintiff M57A & Ors v Minister for Immigration & Citizenship & Anor* [2007] HCA 330 <http://www.austlii.edu.au/au/other/HCATrans/2007/330.html> 12 July 2007.

76 Savitri Taylor, above n 9, 63.

determination process, the Australian Government's determination to find them resettlement places elsewhere than Australia may well result in the individuals concerned languishing in Nauru for as long as the Pacific Solution Mark I caseload did.[77] It should be mentioned, however, that on 3 April 2007 Australia and the United States of America signed an MOU [78] pursuant to which each country agreed to consider for resettlement under their normal humanitarian programs up to 200 refugees per annum referred by the other country.[79] In Australia's case the referrals would be from the Nauru caseload, and the US referrals would be from the Guantanamo Bay caseload.[80] Both countries believe that ensuring that persons moving irregularly are resettled in a place other than their intended destination will be a deterrent to people smuggling.[81] The logic of this is not immediately apparent, given that the two countries are equivalent in terms of safety and everything else and would appear therefore to be perfectly substitutable from the perspective of both asylum seekers and migrants. Be that as it may, the Australia-US arrangement is a welcome development, if it results in persons found to be refugees being resettled more quickly than ended up being the case with Pacific Solution Mark I.

Ensuring equitable burden sharing does not appear to be uppermost in the Australian Government's mind. For example, at the end of 2005, Australia's refugee and asylum seeker burden in proportion to its GDP per capita was half that of Papua New Guinea.[82] However, when asked how Papuans fleeing Indonesia were supposed to find asylum, the Australian Government came very close to saying that they should go to PNG in

77 Senate Legal and Constitutional Legislation Committee, Commonwealth Parliament, *Report: Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* (2006) [3.95]–[3.96].

78 Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, *Proof Committee Hansard, Budget Estimates*, 29 May 2007, 61–62 (Mr Potts, Department of Foreign Affairs and Trade).

79 Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, *Proof Committee Hansard, Budget Estimates*, 21 May 2007, 69–77 (Mr Metcalfe, Department of Immigration). The arrangement will be reviewed after two years (Ibid).

80 Ibid.

81 Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, *Proof Committee Hansard, Budget Estimates*, 29 May 2007, 61 (Mr Potts, Department of Foreign Affairs and Trade).

82 Australia hosted 64,964 refugees and 1,822 asylum seekers at the end of 2005: United Nations High Commissioner for Refugees, *2005 Global Refugee Trends* (2006) Table 1. Australia's estimated GDP per capita in 2005 was US$31,900: Central Intelligence Agency, *The World Fact Book Rank Order— GDP—per capita (PPP)* (2006) <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html> 4 June 2007. Therefore Australia's refugee and asylum seeker burden to GDP per capita was two. PNG officially hosted 9,999 refugees and four asylum seekers at the end of 2005: United Nations High Commissioner for Refugees, *2005 Global Refugee Trends* (2006) Table 1. PNG's estimated GDP per capita in 2005 was US$2,600: Central Intelligence Agency, *The World Fact Book Rank Order—GDP— per capita (PPP)* (2006) <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html> 4 June 2007. Therefore, its refugee and asylum seeker burden to GDP per capita was four.

the first instance,[83] with blithe unconcern for the fact that Papua New Guinea is far worse placed than Australia to provide effective protection (or the fact that, like Australia, Papua New Guinea needs to maintain a good relationship with Indonesia). Similarly, in seeking to return the Burmese asylum seekers to Malaysia and the Sri Lankan asylum seekers to Indonesia it did not appear to concern Australia that both those countries have a far higher refugee burden in proportion to GDP per capita than Australia has.[84]

As to whether Australia's arrangements with the declared countries constitute equitable burden sharing, that too is open to question given the huge disparity in bargaining power between Australia and the countries concerned.[85] For example, Nauru, which has expressed considerable unhappiness about the manner in which Pacific Solution Mark I panned out, attempted to encourage quick resolution of Pacific Solution Mark II cases by imposing a fee of $2,000 to issue a ninety day visa for each asylum seeker taken there and imposing monthly visa renewal fees thereafter.[86] The Australian Government successfully resisted the move, reporting at a Senate estimates hearing that 'There was no fee for the 83 Sri Lankans [and] in relation to the Burmese we paid a first instalment which was $2,000 [per person] for the first three months. But there were then no ongoing fees for the Burmese.'[87]

Domestic Politics and the Defeat of Bill

Part of the explanation for the Australian Government's behaviour, it is suggested, is that Australia is a democracy, meaning that the Government is accountable to the people (i.e. Australian citizens) for the manner in which it exercises state power but is not accountable to non-citizens, even if the exercise of state power also has a profound impact on the interests of those non-citizens. The upshot is that politicians have no incentive to take the interests of non-citizens adequately into account in the making of public policy, unless citizens demand it of them. Unfortunately, most Australian citizens have been led to believe by those very politicians that there are good reasons for keeping non-citizens away from its shores or at the least exercising absolute control over who enters.

83 Evidence to Senate Legal and Constitutional Legislation Committee, Commonwealth Parliament, *Official Committee Hansard: Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, 6 June 2006, 66 (Mr Hughes, Department of Immigration); Commonwealth, *Parliamentary Debates*, House of Representatives, 14 June 2006, 99 (Phillip Ruddock, Attorney-General).

84 UNHCR, *Statistical Yearbook 2005* (2007) Table V.1.

85 See further Savitri Taylor, above n 11.

86 Michael Gordon, 'Nauru to Raise Charges for Asylum Seekers', *The Age* (Melbourne), 21 August 2006 <http://www.theage.com.au/news/national/nauru-to-raise-charges-for-asylum-seekers/2006/08/20/1156012411560.html> 4 June 2007.

87 Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, *Proof Committee Hansard, Budget Estimates*, 21 May 2007, 103 (Mr Correll Department of Immigration).

Making immigration control an election issue is now the bread and butter of most politicians in developed countries and this for one very simple reason. In a rapidly globalising world it is easier for domestic governments to appear to deliver on immigration control than on any of the other things that their publics expect of them. Although the ability to exercise immigration control is nowhere near as complete as governments try to represent,[88] Sarah Collinson has a point when she says,

> Although the state has lost a great deal of power and authority to other actors in the world system, it has, in the main, kept its core sovereign authority over the transnational movement of people.
>
> Thus, it is likely that migration control is and will continue to be used by governments to express and assert their positive sovereignty when their sovereignty is in serious doubt in so many other areas, and to demonstrate (albeit often manipulated) representative democracy when the whole basis of democracy appears in dire trouble in many crucial policy areas.[89]

It is not surprising therefore that what lies at the heart of Australia's immigration policy is the Prime Minister's mantra 'We will decide who comes to this country, and the circumstances in which they come.'[90]

Since asylum seeker issues are intertwined with immigration issues in Australia's domestic politics and are highly politically sensitive, those who wish to change Australia's present asylum seeker policy need to convince its citizens to place a greater value on human rights and international solidarity that they presently do.[91] This task is of course one that is much easier to articulate than accomplish, but it is not one which needs to be commenced from scratch.

Australia and most other developed states are not just democracies, they are liberal democracies. *The assertion in article 1 of the Universal Declaration of Human Rights* that 'All human beings are born free and equal in dignity and rights' states not only the moral premise on which the concept of universal human rights is founded but also the central tenet of liberalism. The historical process through which liberalism emerged led to classic liberalism focusing on those rights which are necessary to ensure that each individual can pursue his or her own vision of the good life without interference or persecution by the state. However, in order to acknowledge

88 Savitri Taylor, above n 19, 571–73.

89 Sarah Collinson, 'Globalisation and the Dynamics of International Migration: Implications for the Refugee Regime' (Working Paper No. 1, UNHCR Centre for Documentation and Research, 1999) 15.

90 John Howard, Address at the Federal Liberal Party Campaign Launch, Sydney, 28 October 2001. Border control is also being emphasised by the Australian government in the lead up to the 2007 Federal Election: Michelle Grattan, 'Tougher Border Controls', *The Age* (Melbourne), 9 July 2007 <http://www.theage.com.au/articles/2007/07/08/1183833344651.html> 12 July 2007.

91 The same approach has, of course, been suggested by others as well. See eg Alexander Betts, 'Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint Product Model in Burden-Sharing Theory' (2003) 16(3) *Journal of Refugee Studies* 274, 293–94.

and uphold the inherent and equal dignity of every individual, a liberal society must do more than merely assert that individuals are free to pursue their personal good. In the words of Oscar Schachter:

> Few will dispute that a person in abject condition, deprived of adequate means of subsistence, or denied the opportunity to work, suffers a profound affront to his sense of dignity and intrinsic worth. Economic and social arrangements cannot therefore be excluded from a consideration of the demands of dignity. At the least, it requires recognition of a minimal concept of distributive justice that would require satisfaction of the basic needs of everyone.[92]

Even if the primacy of the classic liberal rights is assumed, a liberal society ought to ensure that the each individual has the physical capacity to exercise those rights meaningfully. We are, therefore, again led to the conclusion that a liberal society must ensure that the basic survival needs of individuals are being met.[93] Moreover, since liberalism is premised on the inherent and equal worth of each person as a human being rather than as a citizen, it should in theory be difficult for a liberal society to accept the proposition that what is due to human beings within the borders of the liberal state is not due to those beyond. In practice, of course, most liberal democracies seem to operate on the basis of that proposition, but the reason that cognitive dissonance is not experienced is because liberalism's human being has been elided with democracy's citizen. To argue for an asylum seeker policy which ensures refugee protection and equitable burden sharing is not to appeal to values outside liberalism, therefore, but simply to insist on their full realisation.

Evidence that the effort is not a futile one can be found in the fact that civil society mobilisation against bill had a significant impact. The extremely speedily conducted Senate Legal and Constitutional Legislation Committee inquiry into the bill[94] received 136 submissions but only one—the one submitted by the Department of Immigration—supported it. The Committee's majority report written by *government* parliamentarians recommended that the bill not proceed, or in the event that it did proceed, that it be very significantly amended to respond to concerns raised during the inquiry and should include an eighteen month sunset clause.[95] The minority and dissenting reports written by the non-government parliamentarians on the Committee differed only in their refusal to contemplate an alternative

92 Oscar Schachter, 'Human Dignity as a Normative Concept' (1983) 77 *American Journal of International Law* 848, 851.

93 J W Fox Jr, 'Liberalism, Democratic Citizenship and Welfare Reform: The Troubling Case of Workfare' (1996) 74 *Washington University Law Quarterly* 103, 131.

94 A call was made on 12 May 2006 for submissions by 22 May 2006. Hearings were held on 26 May and 6 June 2006. The Committee's report was tabled in Parliament on 13 June 2006.

95 Senate Legal and Constitutional Legislation Committee, Commonwealth Parliament, *Report: Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* (2006) [3.208]–[3.217].

to a complete abandonment of the bill. Intense negotiations between the Prime Minster and concerned government parliamentarians procured some government-initiated amendments to the DUA Bill but these amendments were not sufficient to allay the concerns expressed. On 10 August 2006 the bill was put to the vote in the House of Representatives. In a move that was unprecedented in living memory, three Government parliamentarians crossed the floor to vote with the Opposition and another two abstained from voting.[96] Although the bill passed the lower house anyway, the political impact of this internal rebellion was powerful in a country used to tight party discipline. By 14 August 2006, it was clear to the Prime Minister that he was faced with the choice of either withdrawing the Bill or watching one or more members of his own backbench cross the floor of the Senate (in which the Government has a one seat majority) in order to defeat it. He chose the former option.[97] The long history which is necessary to explain how that point was reached but what that history illustrates is that liberal values still matter very much in Australia.

The defeat of the bill suggests that the real problem faced by thosewho seek change to Australia's asylum seeker policy is not that human rights and human solidarity are values that do not matter to Australian society, but that they are values that are not invoked with sufficient loudness, frequency and consistency in public discourse to be effective in countering government rhetoric. Part of the problem is that Australia's civil society organisations often succumb to the temptation of using any argument they think will achieve the outcome they desire in the particular situation without regard to the broader implications of using the argument.[98] For example, the Australian Labor Party understandably could not resist the jibe: 'This government decided that Indonesia will decide who comes to this country and the circumstances in which they come.'[99] Unfortunately, those whose actual concerns were human rights concerns played this angle as well because they thought it most likely to procure widespread opposition to the bill amongst Howard's battlers. By doing so they were, in fact, reinforcing the underpinnings of current Australian policy—'We will decide who comes to this country, and the circumstances in which they come.'

96 Ross Peake, 'Asylum Bill in Trouble as Senators Waver', *Canberra Times* (Canberra), 12 August 2006 <http://canberra.yourguide.com.au/detail.asp?class=news&subclass=general&story_id=501659&category=General&m=8&y=2006> 4 June 2007.

97 Michael Gordon, 'Why Resolute Senator Defeated Asylum Law', *The Age* (Melbourne), 15 August 2006 <http://www.theage.com.au/news/national/why-resolute-senator-defeated-asylum-law/2006/08/14/1155407742416.html> 4 June 2007.

98 Savitri Taylor, 'The Importance of Human Rights Talk in Asylum Seeker Advocacy: A Response to Catherine Dauvergne' (2001) 24(1) *University of New South Wales Law Journal* 191.

99 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 June 2006, 95 (Tony Burke, Opposition Immigration Spokesperson).

Conclusion

The lesson to be learned then about Australian asylum seeker policy from the fact of the bill's introduction is that the normative rhetoric which the Australian Government tends to deploy, especially in international fora, for example, the representation of its asylum seeker policy as a response to secondary movement, is not a real explanation of its actions. The real explanation of its actions lies in a determination to appear to the domestic constituency to be in full control of Australia's borders. The lesson to be learned from the bill's withdrawal is that in circumstances where those affected by government action cannot speak for themselves others can speak on their behalf and prevail. The real challenge for asylum seeker advocates is to avoid sabotaging their own cause in the long term by reinforcing harmful political rhetoric in the pursuit of short term gain.