Chapter 7

REFUGEE POLICY AND LAW IN AUSTRALIA

Argument to this point has established that barriers have gone up in Europe to prevent a person seeking refugee status from gaining entry to the various sovereign States that comprise Europe. Whilst these actions are not strictly ultra vires the Convention, they are not in the spirit of what was intended back in 1951. It is now timely to examine Australian and Canadian refugee policy and law from the point of view as to how each country has interpreted the Convention and how its refugee policies, if any, have been formulated to give effect to the Convention.

This chapter traces the development of refugee policy and law in Australia. The policy reflects the philosophy of a Department imbued with State sovereignty in which control of movement in and out of Australia is seen as the essence of the immigration function. It will be argued that refugee movement, seen as part of immigration policy, is not given the status and recognition it needs as policy. The Department does not seem to be able to grasp the distinction between policy and law, but especially legal rights. This results in a paranoia towards the courts from which have flowed various exercises in court bashing. The control mentality manifests itself in the fear that the courts might dictate refugee policy. The Department would do well to recall the words of the High Court in *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 293-4:

> "[The] principle is that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it ... Although statements of the principle commonly speak of 'suspicion of bias' we prefer to avoid the use of that phrase because it sometimes conveys unintended nuances of meaning."

WHAT IS POLICY?

What guides planning is policy or strategy. Policies provide the overall definition of objectives that underline planning. To formulate policies means to create frameworks for action which become compelling to the very bodies that issue such policies, and to related agencies and implementors.

Policy reform must be formally carried out by the relevant governments or agencies. It must be understood that some agencies or governments, on occasion, may prefer to maintain a policy vacuum rather than issue binding normative guidelines and legal structures. Some agencies are aggressively reluctant to formulate public sector guidelines for activities that they know are going to be problematic, difficult or controversial. Avoiding formal policy commitments leaves more operational flexibility in the short term, but often at the expense of higher long term costs, externalised to others.

Frohock (1979, 11) wrote that "Public policy should correspond at least roughly to the dimensions and types of political action, since policy is the pattern of action that resolves conflicting claims or provides incentives for co-operation". He stated that policy is a social *practice*, not a singular or isolated event. Policy is occasioned by the need either to reconcile conflicting claims or to establish incentives for collective action among those who do share goals but find it irrational to co-operate with one another.

Lowi (1964) lists three types of public policy. These are:

* Regulatory policies - statutes regulate how people can act toward one another.
* Distributive policies - grant goods and services to specific segments of the population.
* Redistributive policies - aim at rearranging one of more of the basic schedules of social and economic rewards.

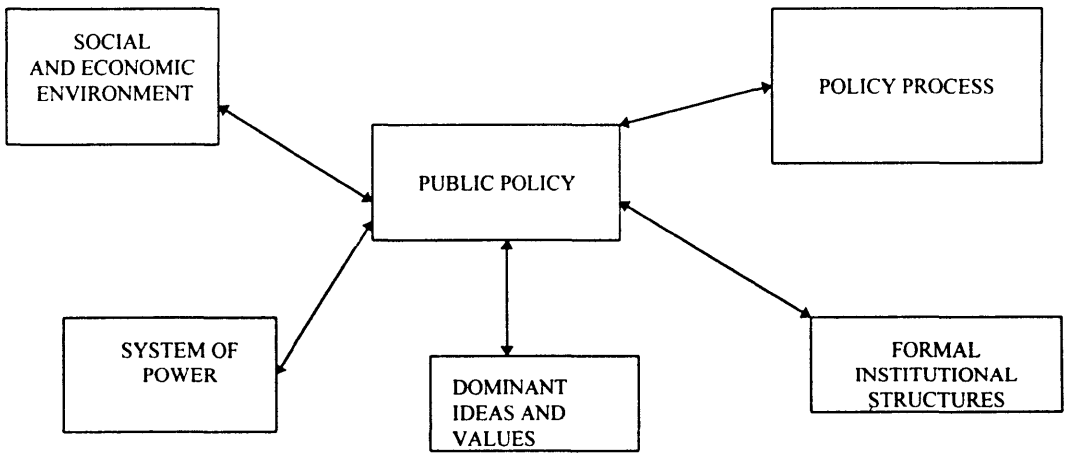
Cranston (1987, x) pointed out that law details public policy. Law (and legislation in particular), spells out in detail how the public policies that are legitimated by law are intended to work in practice. The extent to which legislation should spell out policy details and the extent to which those policy details should be filled in by non-legislative government instruments (e.g. ministerial guidelines), by administrative

discretions and by the courts, is a matter of ongoing debate, which has been fuelled in recent years by the "plain English" movement.

A vacuum in public policy exists when a policy and a legal framework allow detrimental practices to happen without checks or penalty. In fact, such policy vacuum amplifies the risks of adverse consequences since legal safeguards for preventing such adverse consequences are not institutionalised.

Policy is larger than a decision - it is a series of decisions. Policy is never final, complete or perfect - it is on-going. It is a matter of making value choices. As such, it is a matter for politicians. The distinction between policy and administration is not clear cut. Policies can have outcomes that may or may not have been foreseen. It is therefore critical to obtain feedback for policies. Policy involves intra and inter organisational relationships. There is no area of policy which is perfectly contained in one compartment.

The following diagram illustrates the factors which influence public policy (cf. Personal Communication, Associate Professor Helen Nelson, University of Sydney):



Social Economic Environment : Population increase; general state of economy; export prices; employment rate etc.

System of Power : Interest groups have impact on policy choices. If an interest group has no influence politically, it has no power.

		Media has influence. If something is on front page of many newspapers it will have influence on policy.
Dominant Ideas and Values	:	Political culture is the dominant force on policy-making. Cultural values change over time. Environmental values are a key factor in public policy. The community may have direct input.
Formal Institutional Structures	:	How the bureaucracy is organised effects choices. International treaties influence or may limit choices.
Policy Process	:	The process involves choices and outcomes. The process may be influenced by organisational relationships.

In this chapter it will be shown that refugee policy is proposed by a single purpose Department. It resents involvement by other bodies in policy formulation. An international treaty limits choices although the proposition is advanced that without that treaty namely the 1951 Convention Australia's position may well be less generous. The question is also raised as to what would be the situation if the Department of Foreign Affairs and Trade was responsible for refugee policy. That Department is more concerned with the image of Australia on the world-stage. In chapter 10 direct input by community and other non-government organisations will be considered from the point of view as to whether they influence the formulation of public policy in Australia and Canada.

Australia is among the world leaders in terms of numbers of refugees accepted for permanent resettlement. Since the end of World War II Australia has received more

than half a million refugees. (DIEA Factsheet 32, 10 June 1995) Australia's approach to refugee policy has changed dramatically during the period. From the mid-fifties until 1975, Australia's yearly intake was generally small, but it rose in response to major upheavals in Europe. Settlement policies were directed toward assimilation; European refugees were accordingly settled in much the same way as other migrants. However since 1975 Australia has been much more prepared to accept other than European refugees. The change in approach to refugee policy was in response to the arrival of the Lebanese from the Civil War and the first boatloads of Vietnamese in Australia in 1976. The intake of Vietnamese, it was initially emphasised, was to be consistent with Australia's capacity to absorb the refugees. It has been and still is DIEA's policy to concentrate on recent arrivals. Is settlement a life long or short term process? How long do we use the term refugee?

It must be remembered that neither conventional law, in the form of the 1951 Convention and its 1967 Protocol nor customary international law provides for a right to asylum. There is, therefore, no international law obligation on Australia and Canada to maintain a liberal posture regarding political asylum. On the other hand, when Australia or any party to the Convention decides to modify its refugee laws, it is obliged to ensure that, at least, the new legal setting meets the minimum standards required by the Convention, in particular the obligation of *non-refoulement* under Article 33.

Ratification of the Convention by the executive was a statement to the national and international community that the Commonwealth recognised and accepted the principles of the Convention. That statement provided persons seeking asylum with a legitimate expectation that an application for refugee status would be considered in a manner which adhered to the relevant principles of the Convention thus giving rise to a right to procedural fairness. Persons exercising delegated administrative powers to make decisions are expected to apply the broad principles of the Convention or so far as it is consonant with the national interest and not contrary to statutory provisions to do so.

Legitimate expectation and refugees is not elaborated upon in this thesis. As noted in chapter 5, the High Court on 30 June 1994 granted special leave in *Minister for Immigration and Ethnic Affairs v Teoh.* The application concerned: (1) whether the ratification of the United Nations Convention on the Rights of the Child by Australia gives rise to a legitimate expectation on the part of parents and children whose interest could be affected by actions or decisions of the Commonwealth which concern

children, that such actions or decisions would be conducted or made having regard to, and consistently with, the principles of the convention; and (2) if Australia's ratification of the convention does give rise to such legitimate expectation, does this change the requirements of procedural fairness which would otherwise exist under the general law. As noted in chapter 5, the High Court held ratification was an adequate foundation for a legitimate expectation.

It should, however, be pointed out that as long ago as 1948, the High Court affirmed the principle that the Judiciary should interpret legislation and policy wherever possible as consistent with international conventions ratified by Australia: *Chow Hung Ching v R* (1948) 77 CLR 449 at 477.

Persons applying to settle in Australia as refugees are assessed on a case-by-case basis under the Australian Guidelines for the Determination and Processing of Refugees. These guidelines, introduced in July 1982, interpret the 1951 Convention definition of refugees in the light of Australia's own priorities and criteria for the selection of refugees. Such criteria include:

- the size and nature of the refugee problem;
- the urgency of resettlement;
- the validity of the claim for refugee status or consideration within the Special Humanitarian Program;
- the views and policies of the United Nations High Commissioner for Refugees, countries of first refuge and other resettlement countries;
- the existence of ethnic communities in Australia likely to facilitate sponsorship and other post-arrival support; and
- Australia's regional and other national interests.

These guidelines were meant to be just as they were called - guidelines. They soon became inflexible, mandatory rules in their application. Although policy was a case-by-case determination with the assistance of the Guidelines this was not the result.

Since 1901, the Commonwealth Government has been responsible for immigration, although before 1925 the role of the Commonwealth was not fully asserted. The Australian Constitution contains specific references to the power of the Commonwealth Parliament to legislate on immigration-related issues, for example, section 51 (xix) (naturalisation and aliens); (xxvi) race; (xxvii) (immigration and emigration); and (xxviii) (the influx of criminals). A non-citizen within the Migration

Act is an alien for the purposes of para (xxvii) of section 51: *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178.

The first substantial Act to be enacted by the new Commonwealth Parliament was the Immigration Restriction Act of 1901 - part of a body of law passed by the first Commonwealth Parliament to establish a comprehensive policy known popularly as the White Australia Policy. The Immigration Restriction Act was amended in 1905, 1910, 1912, 1920, 1924, 1925, 1930, 1932, 1935, 1940, 1948 and 1949 mainly to strengthen its provisions in relation to illegal entry.

REFUGEE POLICY

The first major policy statement on refugees was delivered by the Honourable J McEwen, then Minister for the Interior in the United Australia Party Government. McEwen pointed out that refugee policy should be considered with the general question of immigration. The Government agreed to accept 15 000 refugee and displaced persons from 1939 to 1941. Briefly the policy was:

> " ... the existing standards of living should not be disturbed and for reconciling with the interests of refugees, the interests of Australia's present population, and of people of British race who desire to establish themselves in Australia.
>
> "The Government will approve of only the admission of those classes whose entry into Australia will not disturb existing labour conditions.
>
> " ... the admission of refugees should conform to the same principles as those governing the entry of white aliens generally.
>
> "Every refugee must be desirable as an individual, and of good character and health, of which prior evidence must be forthcoming. He must have the approved amount of landing money or have his maintenance guaranteed by some approved individual or organisation in this country.
>
> " ... aliens who are given permission to come to Australia shall be distributed as widely as is possible throughout our country, in order to facilitate their assimilation into our population, and the Government maintains a steady policy against facilitating or permitting undue aggregation of aliens in any particular towns or centres." (*Parliamentary Debates*, Houses of Representatives 1 December 1938 V 158, p. 2534-6).

In a policy statement on refugees and displaced persons (*Parliamentary Debates*, House of Representatives 6 March 1947 V 190, p. 430) the Minister for Immigration, the Hon. A. A. Calwell, acknowledged that the Labor Government's policy was in line with the policy introduced by the Lyons Government. Calwell's statement was an apology for accepting refugees. Only 6475 European refugees, mainly Jews from

Austria and Germany, had come. He admitted the Government's preference to returning Australians and British migrants. So really from the earliest formulations of refugee policy there was a bipartisan approach.

The concept of control featured prominently in the first ministerial statement in which he referred to displaced persons. Calwell said:

> "After visiting a number of displaced persons' camps in Germany, I was pleased to be able to sign, on the 21st July, an agreement on behalf of the Commonwealth Government, with the Preparatory Commission of the International Refugee Organisation covering admission to Australia of displaced person from Europe. This agreement ... provides that the Commonwealth shall have the full right of selection of migrants which will be carried out without discrimination as to race or religion" (*Parliamentary Debates,* House of Representatives, 28 November 1947, V 195, p. 2922).

Initially it was decided that 12 000 displaced persons would be brought to Australia annually. They were persons unable to return to their homelands for political or other reasons. Selection criteria were virtually the same as for migrants being sought from the United Kingdom.

The Migration Act 1958 repealed the 1901 Act. It embodied the basic principle of international law that each country has the right to decide who may enter and remain within its boundaries. It provided the statutory framework through which government policy can be implemented. The long title of the Act was "An Act relating to Immigration, Deportation and Emigration" which made it clear it was 'machinery' legislation. It should, however, be noted the title was altered by the Migration Amendment Act 1983 effective from 2 April 1984 to:

> "An Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons."

The Convention definition of refugee has not been formally enacted into the domestic law of Australia. It has in Canada. Nor is the Convention and Protocol part of Australian domestic law: *Gunaleela v Minister for Immigration, Local Government and Ethnic Affairs* (1987) 14 ALD 129. It does not create rights and obligations directly enforceable in Australian courts. Rather it falls within the category of international instruments which have a legitimate and important influence on the development of the Common law: *Teoh v MILGEA* (1994) 32 ALD 420 at 422.

On 24 May 1977, the Minister for Immigration, the Hon. M. J. R. MacKellar presented to Parliament a statement on Refugee Policy and Mechanisms. The Minister accepted the convention definition of "refugee" as well as extending it "to people in refugee-type situations who do not fall strictly within the UNHCR mandate or written convention definitions". In that statement the Minister outlined four principles on which refugee policy would be based:

* Australia fully recognised its humanitarian commitment and responsibility to admit refugees for resettlement.

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

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

* It may not be in the interests of some refugees to settle in Australia. Their interests may be better served by resettlement elsewhere. The Australian Government makes an annual contribution to the UNHCR which is the main body associated with such resettlement (*Parliamentary Debates*, House of Representatives, 24 May 1977, V 105, p. 1714).

These four principles have remained the basis of Australia's refugee practice. However, there is no underlying immigration policy or refugee policy. The major criterion is national interest. As MacKellar noted, Australia's past contribution to refugee settlement had been made "partly to develop our country, partly to respond to situations demanding a humanitarian response. We have done this without an articulate policy. Such a policy is needed." (*Parliamentary Debates,* House of Representatives 24 May 1977, V 105, p. 1714). In relation to the annual contribution to UNHCR, it might be noted that Australia's financial contribution seriously declined until 1994/95. In 1981, Australia contributed 7.1 per cent of UNHCR's total financial requirements, whereas in 1993 its contributions represented only 0.79 per cent of those requirements (JSCM, S1197). In 1994/95 the contribution was increased by $A5M to $12.9M.

In his 24 May 1977 statement the Minister announced he would establish an interdepartmental committee to advise him, in consultation with voluntary agencies, on Australia's capacity to accept refugees. This committee when established comprised senior officers of the Departments of Immigration and Ethnic Affairs, Prime Minister and Cabinet, Employment and Industrial Relations, Social Security and Health. It should be noted that the Departments of Foreign Affairs and of the Attorney General were not represented on this Committee.

INDO-CHINESE REFUGEES ARRIVE

Whilst Australia had accepted refugees in response to various international crises it was the Indo-Chinese problem which highlighted the inadequacy of Australia's refugee policy and law. Special provision had been made for evacuees from East Timor, of refugees from Cyprus and, under relaxed migration criteria, of Lebanese with relatives in Australia who had been displaced by events in their homeland.

In 1976/77 7 small boats carrying 204 persons reached northern and north-western Australia. All were allowed to remain permanently. In total between 1975 and June 1978, 45 boats carrying 1641 Indo-Chinese refugees reached Australia. On 17 May 1978 the Minister made a further statement on refugees in which he referred to:-

* moves to internationalise the approach to the Indo-Chinese situation by concerted action with the United States of America and other receiving countries to persuade more nations to accept refugees for resettlement;

* a decision to accept 9000 Indo-Chinese refugees in 1978-79;

* approaches to regional governments seeking their co-operation in holding Vietnamese vessels in transit to enable processing of "boat people" in those countries;

* an approach to the United Nations High Commissioner for Refugees seeking greater involvement of his organisation among receiving countries and regional governments.

On 16 March 1978 the Determination of Refugee Status Committee (DORS) - a non-statutory committee - was established to deal with applications from people in, or arriving in, Australia seeking refugee status as defined in the 1951 Convention. This Committee comprised representatives of the Departments of Immigration and Ethnic Affairs (Chairman), Foreign Affairs, Prime Minister and Cabinet and Attorney General. The Committee made recommendations on cases to the Minister or his Departmental delegate for determination.

The desperate need for all interested governments to take concerted action to try to resolve the problems was underlined by the monthly inflow of boat refugees from Vietnam to major first asylum countries. This continued to increase from 5833 in July 1978 to 53133 in June 1979. Land movement was also in great numbers. Developments in Kampuchea and Laos produced increased movement across borders into Thailand. By the end of 1978/79, the spectre of famine strode across Kampuchea defying the efforts towards solution by the International Red Cross and compassionate governments and presenting the possibility of even greater refugee movements. At the end of June 1979 there were 153000 refugees in camps in Thailand, 74 800 in Malaysia, 42 900 in Indonesia, 64 000 in Hong Kong and 9800 in other countries of first refuge, a total of 350 000 in boat and land camps (DIEA 1978/79, 11).

In July 1979 the UN Secretary-General convened an international conference on Indo-Chinese refugees. It was attended by sixty-six nations. The major outcomes of the meeting were an increase in resettlement places offered throughout the world (from 125 000 to 260 000), a significant increase in funding pledges to UNHCR and an undertaking by the Vietnamese Government to declare a moratorium on the outflow of boat people for a reasonable time.

The 1979 Conference resulted in a dramatic decrease in the number of refugees leaving Vietnam by boat and in the caseload of boat refugees in first asylum countries awaiting resettlement. Between April 1975 and June 1980, Australia had accepted 37 693 Indo-Chinese refugees. In line with Australian Government policy, first priority was given to reuniting close relatives - spouses, parents and accompanying children. However, the Indo-Chinese were not the only refugees Australia was being asked to take. Refugees admitted from Eastern Europe (2500), Assyrians in Greece (349), Chileans (39 families), Cubans (200) and White Russians were all sponsored by the Australian Council of Churches.

The first refugee families began to move into the community under the Community Refugee Settlement Scheme announced in October 1979. The first application approved was to settle 20 Indo-Chinese families in Whyalla, South Australia (DIEA 1979/80, 6, 46). This scheme:

* gave an opportunity to the community to become directly involved in the settlement of refugees and in their successful integration;

* provided an alternative means of settlement to that which depends on Government programs in Migration Centres;

* encouraged greater community awareness of the problems of refugees and of Australia's refugee resettlement program; and

* achieved a more even spread of refugees throughout the Australian community (DIEA 1980/81, 26).

This Scheme is quite different from the Canadian policy which permits any group of more than five Canadians to sponsor convention refugee immigrants and dependants under a written undertaking "to make provision for the lodging, care, maintenance, and resettlement assistance for those refugees for one year" (Hawkins 1991, 175). Under the Australian scheme refugees are selected at overseas posts and then allocated to a Community Refugee Settlement Scheme group. Before the commencement of this Scheme a similar sponsorship scheme was operating under the auspices of the Australian Council of Churches. In Canada, about half of all refugees are privately sponsored. Indeed, the Canadian Government encourages ethnic groups to sponsor fellow country people. In both Australia and Canada it is mainly religious groups who do the sponsoring.

By 1981, Australia was fourth in the world in terms of number of Indo-Chinese settled, and by 1986 85 000 boat people had been admitted (USCR 1987, 17). It is worth noting that the prospect of large numbers of direct arrivals prompted the establishment of Australia's Indo-China resettlement program in an attempt to reassure first asylum countries in Southeast Asia and dissuade them from encouraging onward movements.

Over the years there has been a general consensus among the Australian public that a significant proportion of Australia's immigration intake should be devoted to what may be broadly regarded as humanitarian cases (*Review '85* (65). "Government policy attempts to express this general commitment in detailed decisions which balance Australia's humanitarian undertaking with the realities of refugee situations themselves and other national interests." An important development in the 1984-85 refugee intake of 14803 was that although most refugees continued to come from Indo-China and Eastern Europe, a growing number were arriving from other

countries, for example Ethiopia (144 persons), Iran (1882), Chile (752). This trend has continued.

Australia was a prominent participant in the international discussions and working group meetings which culminated in an International Conference on Indo-Chinese Refugees held in Geneva in June 1989 under the auspices of the UN Secretary General. All participating countries endorsed a Comprehensive Plan of Action (CPA) which, if fully implemented and adhered to by all parties, was expected to achieve a durable solution to the problem of the Indo-Chinese outflow. The key elements of the Plan were (*Review '89*, 25):

- "first asylum countries in South-East Asia and Hong Kong will continue to grant temporary refuge to all asylum-seekers;
- "first asylum countries will screen all new arrivals against internationally-recognised criteria to determine if they are bona fide refugees;
- "persons deemed not to be refugees will be returned to their country of origin;
- "persons in camps throughout the region who arrived prior to cut-off dates for screening will be resettled along with those accepted as refugees;
- "there will be an expanded role for orderly departure as the safe and preferable means of departure from Vietnam."

Australia agreed to participate in the camp clearance exercise and also to accept a proportion of those identified as genuine refugees.

REPORTS OF THE 1980s

Three important reports were issued in the 1980's regarding procedures for assessing onshore applications for refugee status. In 1985 the Human Rights Commission (HRC) reported to the Attorney-General on Human Rights and the Migration Act 1958. The HRC recommended that the DORS Committee have an independent Chair, and that consideration be given to providing for appeal from decisions of the Minister. In 1986 the Administrative Review Council (ARC) reported to the Attorney-General on the review of migration decisions. The ARC indicated that refugee status decisions were different in some respects from other administrative decisions due to the obligations imposed on Australia under international treaties to which Australia is a signatory; and the desperate nature of the decisions involved, where it could well be a matter of life or death. The ARC concluded that because decisions such as the

refusal of refugee status are of such significance to an applicant, and the consequences of wrong decisions so potentially severe, they should be subject to merits review.

The ARC stated (ARC, 1986, 90):

> " ... while the current practice of the DORS Committee of reconsidering its advice at the request of the Minister or an applicant for refugee status is a desirable one in the absence of a system of external appeals, reconsideration by that Committee is not an adequate alternative to review on the merits by an independent tribunal ... the [DORS] Committee cannot be said to provide an independent review of its own primary decisions."

The ARC report recommended a two stage review process by the Administrative Appeals Tribunal(AAT). It was proposed that the first stage be a "leave to appeal" stage, instead of the normal right of review direct to the AAT in order to guard against the possibility of applicants bringing review proceedings primarily to prolong their stay in Australia. Subsequently in letters to the Attorney-General dated 18 June 1990 and 16 August 1990, the ARC recommended that:

* primary decisions should be made within DILGEA at a reasonably senior level;

* there should be speedy and informal merits review by a panel modelled on the DORS Committee, with an independent Chair;

* there should be an opportunity for independent external review by a specially constituted AAT, albeit subject to a fairly rigorous leave requirement to be determined on the papers;

* there should be strict time limits for each stage of the process, with primary and informal merits review completed within six months, and full AAT review where applicable within nine months; and

* the Minister should have the power to exclude cases from external review by certificate tabled in Parliament (ARC, 1991, pp 77-89).

Unfortunately, the ARC proposal was rejected by the Government. In evidence to the Joint Standing Committee on Migration Regulations (1991, S637), DILGEA stated the ARC proposal was estimated to cost between $2.28 million and $3.81 million per 1000 refugee applications.

On 4 September 1987 the Minister for Immigration, Local Government and Ethnic Affairs established the Committee to Advise on Australia's Immigration Policies (CAAIP). There was not a specific reference to the Committee on refugee issues although the Committee was requested to "have regard to Australia's continuing commitment to play its part in providing international humanitarian assistance to those in need" (CAAIP, 1988, ix).

The Committee considered the refugee intake as being part of immigration intakes. It recommended that the five immigration categories namely Family Migration, Skilled and Business, Independent and Concessional, Refugee and Humanitarian and Special Eligibility be reduced to three categories: Family Immigration, Refugee and Humanitarian, and Open (CAAIP, 1988, 82). As previously pointed out while refugee movement is seen as part of immigration policy it is not given the status and recognition it needs as policy.

The Committee noted that the humanitarian program should remain flexible and responsive to emergency humanitarian crises around the world. It recommended:

> "30. That two distinct but complementary programs be established for refugee and humanitarian cases. One would be for people identified by the Australian Government as needing resettlement on humanitarian grounds. The other would be for humanitarian cases identified by community organisations with international agency affiliations and with the capacity to verify such cases and provide settlement support. In all cases, it will remain the responsibility of the Australian Government to decide who will be accepted for resettlement in Australia.
>
> "31. That in 1988/89 the government and community programs number a total of 15 000 places, in which there should be a flexible contingency figure. The size of the program should be reviewed after one year and the number of places reduced if the program has not been filled. The Government should pay the travel costs to Australia of a total of 7 500 people, of which up to 1000 places would be available for agency sponsorship. This latter arrangement should also be reviewed at an agreed time.
>
> "32. That funding go to those in most humanitarian need, namely refugees and in-country rescue cases.
>
> "33. That the existing Community Refugee Settlement Scheme be expanded to offer support to all refugees including agency sponsored cases.
>
> "34. That from 1988/89 Australia gradually disengage itself from Indo-Chinese resettlement, in line with the decreasing outflow and diminishing number of refugees from Indo-China and in the context of positive strategies for solutions to this problem.

"35. That the allocations in the refugee program for refugees from different regions in the world cease to be regarded as quotas or targets.

"36. That Australia work in multilateral forums towards a separate program of measures including a legal framework, for the orderly and humane management of mass movements of undocumented migrants."

The CAAIP recommended (CAAIP, 1988, 116) that a Commissioner for Refugees be established to replace the DORS Committee. The Commissioner, was to have determinative powers in assessing claims. There was to be no opportunity for merits review of the Commissioner's decisions. The only review available would have been by leave to the full Federal Court on points of law.

As part of its decision on CAAIP, Cabinet endorsed the DORS process in December 1988 and supported the provision of additional resources to enhance DORS operations in 1989/90. The adoption of new procedures meant applicants for refugee status could lodge a parallel application for Grant of Resident Status (GORS) on humanitarian grounds. This change was to reduce double handling in considering claims and result in speedier decision-making.

In the context of the substantial increase in refugee numbers and the mobility of present day refugees, the Joint Standing Committee on Migration Regulations commenced an inquiry into refugee and humanitarian visas and permits in June 1990. As a result of an announcement in October 1990 regarding proposed changes for the determination of refugee status the Committee adjourned its review, re-commencing it in February 1991. In August 1992 the Committee released its report "Australia's Refugee and Humanitarian System: Achieving a Balance between Refuge and Control." The report made thirty recommendations covering "The Law and Practice Concerning Refugee Status", "The Law and Practice Concerning Humanitarian Status", "Border Claimants: Processing and Detention Practices", "Citizens of the People's Republic of China". The Committee received 107 submissions - of which 15 were supplementary submissions from DILGEA, 8 supplementary submissions from Brian Murray and Associates, so one could say the Committee was not overwhelmed with submissions. The report is principally historical in nature and can hardly be said to address policy issues relating to requests for asylum Australia would face in the years ahead. It was not until 30 June 1994 that the Government's response to the report was tabled., (*Parliamentary Debates*, Senate 30 June 1994 p. 2459-2465). Generally the Government supported the recommendations many of which had

already been implemented or time had overtaken. The Committee missed a wonderful opportunity to develop policy which, as has been previously pointed out, MacKellar noted was needed as long ago as 1977. I consider this opportunity was missed because the Department does not want a binding policy set in words. It suits the Department better to devise ad hoc policies "on the run" without parliamentary and public scrutiny.

PROGRAM OBJECTIVES

The objective of Sub-program 1.5 - Refugees, Humanitarian and Special Assistance contained in the Department's 1991/95 Corporate Plan is:

> "To meet Australia's international obligations towards refugees and to respond appropriately to situations of humanitarian need, especially those involving individuals or groups with close ties to Australia."

This sub-program contributes to the corporate goal of playing a responsible and compassionate role in providing assistance to refugees and other victims of human rights abuse world-wide. The sub-program has both an offshore and an onshore component.

The Department's Annual Reports of 1991/92 and 1992/93 (DILGEA '92, 80; DIEA 1992/93, 49) state the strategies being pursued to meet this sub-program's objective are to:

- "develop and maintain a flexible and responsive resettlement program for refugees and other groups of humanitarian concern as an important element of Australia's commitment to international 'burden-sharing';
- "assess and advise on international developments that could impact on the structure and composition of the Humanitarian Program and undertake necessary action internationally to pursue Australian migration interests;
- "monitor trends in international asylum and mass movements and the development of national policies and multilateral instruments;
- "seek to promote the harmonisation and rationalisation of procedures between like-minded countries; and
- "promote Australian perspectives on these issues through active participation in international fora."

These strategies must be read in conjunction with the objective of Program 1 viz: "To determine the flow of people into and out of Australia so that national and international benefits to the Australian community are maximised and costs are minimised" (DIEA 1992/93, 19). Put succinctly, this means control. The strategies are no different to those of the UK Home Office and Canada, Immigration.

The Humanitarian Program comprises:

- The Refugee category for persons overseas who have fled their country of nationality or usual residence because of persecution or a well-founded fear of persecution;
- The Global Special Humanitarian Program for people who are outside their country of nationality or usual residence and who, while not meeting the UN Convention definition of a refugee, have, nonetheless, suffered substantial discrimination amounting to gross violation of human rights; and
- The Special Assistance Category for individuals or groups who are not victims of persecution or substantial discrimination but who are in vulnerable positions or suffering grave hardship either in or outside their country of normal residence.

In addition the program includes:

- a small Incountry Special Humanitarian Program for people experiencing persecution in their own countries;
- an Onshore Humanitarian Program to allow finalisation of the residual humanitarian change of status cases under repealed provisions of the Migration Act; and
- special Extension of Stay concessions to allow people from countries experiencing civil unrest to temporarily extend their stay in Australia.

The majority of refugees resettled in Australia in 1991/92 and 1992/93 came from camps in South East Asia. This reflected Australia's continuing commitment to achieving a durable solution to the situation of Vietnamese and Lao asylum-seekers under the Comprehensive Plan of Action.

As previously stated, the Humanitarian Program has three main components. First, there is the Refugee category for persons overseas who have fled their country of nationality or usual residence because of persecution or a well-founded fear of

persecution. Their claims are assessed against the 1951 Convention and the 1967 Protocol. Second, the Global Special Humanitarian Program (SHP) is for people who are outside their country of nationality or usual residence and who, while not meeting the UN Convention of a refugee, have, nonetheless, suffered substantial discrimination amounting to gross violation of human rights. Those approved under this Program have included Afghans from camps in Pakistan and India, Ethiopians and Somalis, and Iraqi minorities, such as Kurds and Assyrian Christians, who had been displaced as a result of the Gulf crisis. Third, there is the Special Assistance Category (SAC) for individuals or groups who are not victims of persecution or substantial discrimination but who are in vulnerable positions or suffering grave hardship either in or outside their country of normal residence. The SAC program catered for those displaced by fighting in the former Yugoslavia, Jews from the former Soviet Union, Burmese from Burma and Thailand and Sudanese Christians suffering discrimination under the Islamic regime in Khartoum. This category was introduced in 1991/92.

Australia has granted either resettlement or regularised the status of spontaneous arrivals of between 11 000 to 12 500 persons annually since 1987. This annual figure, known as Australia's "Refugee and Humanitarian Program" has increasingly become a program for special humanitarian cases and spontaneous arrivals. In 1991/92, of the 12 009 persons accepted 2263 (19 per cent) were resettled refugees; 2862 (24 per cent) were persons whose status was legalised after arriving in Australia and seeking asylum, and 6884 persons (57 per cent) were admitted as "Special Humanitarian" or Special Assistance" cases.

The onshore program has grown at the expense of the refugee component of the offshore program. However, the National Population Council (NPC) (1991, 128) has pointed out that the range of factors influencing the level and nature of the intake made it "erroneous to conclude that the changed ratio between refugees and the SHP in Australia's humanitarian programs over the last ten years represents a lessening of commitment by the Government to people in need of resettlement as a durable solution". The National Population Council noted that, in 1980, Australia was operating a refugee program in designated situations, such as Indo-China, which did not require individual refugee determinations. Further, it indicated that one of Australia's major resettlement programs in 1991 was operating from Central America, where people meet the refugee definition other than the technical requirement of being outside their country of origin. Such people are admitted under Australia's "in-country SHP".

There are no age limits in force for entrants under any of the Humanitarian Program categories. All applicants for entry under the program must meet the public health criteria which are the same as those for all other people seeking to settle in Australia. There are no occupational requirements in force for entrants under the Humanitarian Program categories. However, an applicant's occupation may be taken into account when considering a person's ability to settle in Australia. There are no application fees for any class of visa issued under the Humanitarian Program. Medical fees for applicants for Refugee on In-Country SHP visas are paid by the Australian Government. Applicants for a visa under the Global SHP or SAC pay their own medical fees. The Australian Government pays the travel of Refugee, In-Country SHP and Women at Risk entrants. Global SHP and SAC entrants have to meet their own travel expenses. All Humanitarian Program entrants are eligible for mainstream social security benefits and have immediate access to Medicare. Access to State housing varies from State to State but they are immediately eligible to apply for public housing.

All applicants under the Humanitarian Program are considered on an individual basis against the Migration Regulations. There is no prescribed system for processing single parents, torture victims and so on. These individual circumstances are taken into account when considering a person's application. The extent of a person's connections with Australia is taken into account when considering their ability to settle in Australia.
Situations may arise in overseas countries that require a humanitarian response to nationals of those countries who are temporarily in Australia, allowing them to extend their stay. Such concessions have been given to citizens of Sri Lanka, the former Yugoslavia and for the 20 000 PRC citizens who were in Australia at the time of the turmoil in China in June 1989 and some 9000 spouses and dependant children who have since joined them.

The Joint Standing Committee on Migration Regulations in its majority report "Australia's Refugee and Humanitarian System" (1992) recommended that normal policy apply to this group, that is, those who do not meet criteria for permanent residency or for continuing stay on refugee grounds, should be required to depart. The minority reports of Dr A Theophanus and Senator Barney Cooney both ALP parliamentarians, recommended more generous provisions for permanent residence or on-going stay.

The Australian Government provides funding for legal assistance to asylum-seekers who arrive in Australia by boat. This funding is for the provision of advice and assistance with the completion and lodgement of applications for refugee status and for review. The assistance used to be provided through contractual agreements with three organisations, the Refugee Council of Australia (RCOA), Refugee Advice and Casework Service (RACS) and Australian Lawyers for Refugees Inc. RACS funding assisted applicants for refugee status in the community to prepare their application and help them as necessary throughout the processing period. This assistance has been used by many asylum-seekers and has helped overcome some of the access barriers they encounter. RACS also had been provided with funding for community education projects in the refugee area. However, in 1994/95 funding to RACS ceased. The provision of legal services has been put to tender by the Minister's Office.

Over time, RACS had built up considerable expertise in the area of refugee law. As this chapter shows, Australian refugee law is complex. Generally speaking, little expertise has been built up in legal firms. One wonders if the Minister's purpose in cutting off funding to RACS was to dissipate the expertise making it more difficult for refugees to be successfully represented before the Refugee Review Tribunal and the Federal Court. The danger in putting the work out to contract is that the successful tenderers may well be small legal practices with little experience in the area and few resources or Migration Agents with even less experience in statutory interpretation and knowledge of international and refugee law.

Persons who are in detention have access to legal assistance and to educational, health and welfare services including English language training. The Australian Government provides funding to a number of organisations who offer torture and trauma counselling. Persons awaiting a decision on their applications and who are experiencing hardship may apply for permission to work or seek emergency assistance through the Government-funded Asylum-Seeker Assistance (ASA) Scheme.

In July 1992 the Government agreed to fund the Australian Red Cross Society to administer the ASA Scheme. In the period July to December 1992 a number of voluntary agencies were involved in an interim emergency assistance program for needy asylum-seekers and on 4 January 1993 the Red Cross began operating the Scheme. The target group for the Scheme is persons who have waited some months for decisions on their applications for refugee status. However, the Red Cross considers the individual circumstances of any asylum-seeker when determining what,

if any, assistance can be provided. Between January and June 1993 the Red Cross assisted over 2600 clients. It distributed almost $5M in assistance including costs of basic food and shelter and in some instances medical costs. The St Vincent de Paul decided to withdraw from the emergency relief program because of its deep concern with the harsh nature of the eligibility criteria introduced by the Department of Immigration and Ethnic Affairs (St Vincent de Paul Society 1994, 5). The grant to the Australian Red Cross for the scheme increased to $16.3M in 1993/94 (DIEA 1994, 149).

Whereas some OECD countries facing growing asylum populations have largely abandoned resettlement offers to refugees from outside their respective countries, Australia and Canada have not followed this path. The Governments of both countries are committed to maintaining a strong offshore program to assist genuine refugees world-wide.

Review '92 (82) noted:

> "Of special concern are people who arrive at Australia's frontier without authorisation and seek to enter by lodging a refugee status application."

Such a comment does not reflect well on the Department. It is a persons right under the 1951 Convention to arrive at a border and seek asylum. Second, would Australia have issued visas and third, if the people were in fear of persecution in their home countries could they have left in an orderly manner? When one reads such a comment, one wonders if the third generation bureaucrats of Canberra know what it is like to live in the Third World. They at times have difficulty in relating to life in an Australian State.

Under Australian domestic law, that is the Migration Act 1958, a refugee requires an entry permit to stay in Australia legally. Up to 19 December 1989 Australia granted refugees immediate resident status pursuant to section 6A(1) which was repealed from that date. Under the Migration Act 1958 prior to 1 September 1994 a visa entitled a person to travel to Australia and an entry permit entitled the person to remain.

1989 AMENDMENTS

The Migration Legislation Amendment Act 1989 came into force on 19 December 1989. These amendments provided for the creation of a statutory entitlement to a particular class of visa or entry permit on satisfaction of criteria specified in the Regulations; a statutory two-tier merits review system of migration decisions; and separation of the processes of selection (ie entitlement to enter or remain in Australia) from the process of enforcement of departure of non-citizens. Prior to 19 December 1989 there were few regulations, namely the Migration Regulations 1959, and the Department relied on policy to decide cases. This gave the Minister absolute discretion in deciding cases. The 1959 Migration Regulations had been amended on only 30 occasions over 30 years. This gives some idea of their stability when compared with the number of changes annually to later regulations.

From 19 December 1989 to 27 June 1990, there were four temporary entry permit (TEP) types - Refugee A, B, C and D temporary entry permits. This was an extremely complicated system designed to limit the numbers of refugees given immediate permanent residence and to authorise the continued stay in Australia of those considered to have a refugee "claim of substance" but who were awaiting final processing of their claims. This classification fitted in with the Department's policy to give money to categories not people.

The Refugee A temporary entry permit gave the holder eligibility to qualify for a Refugee Permanent Entry Permit After Entry. Pursuant to regulation 116, it was given to refugees where:

> "(d) the Minister is satisfied that permanent settlement in Australia is the appropriate durable solution for the applicant;
>
> "(e) settlement of the applicant in Australia would not be contrary to the interests of Australia."

Regulation 117 referred to refugees who did not wish to remain permanently in Australia and those cases where no other country had been found which would accept the applicant for resettlement. This regulation authorised the Refugee B (restricted) visa or entry permit where the Minister was satisfied that at the time when the applicant was granted refugee status "that permanent settlement in Australia is not the appropriate durable solution for the applicant or would be contrary to the interests of Australia".

Regulation 118 (Refugee C (restricted) entry permit) and regulation 119 (Refugee D (restricted) entry permit) authorised the stay of applicants for refugee status who had a "claim of substance" to be granted refugee status. Regulation 118 applied to holders of a temporary entry permit that is valid for the purposes of section 47 of the Act and Regulation 119 to non-holders of such a permit. In June 1990 the Minister announced that people assessed as being refugees or as having strongly-based claims on humanitarian grounds would initially be granted temporary stay for a period not exceeding four years (rather than resident status as was previously the case). They would have the opportunity to apply for further temporary stay or permanent residence after the expiry of their initial temporary entry permit, subject to an ongoing need for protection and the availability of places in the migration program. Regulation 116 was repealed on 27 June 1990. Regulation 117 was amended so that it applied only to persons who had been granted refugee status. Regulations 118 and 119 were repealed on 12 July 1990. Regulation 117 was again amended from that date so as to provide:

117 (1) "The following criteria are prescribed in relation to a refugee (restricted) visa or entry permit:

"(a) the applicant is present in Australia on the day of the application;

"(b) the applicant has been granted refugee status by the Minister;

"(c) the applicant has undergone:

(i) a medical examination carried out by a medical officer of the Australian Government Health Service; and

(ii) a chest X-ray examination conducted by a medical practitioner who qualified as a radiologist in Australia."

(2) "A refugee (restricted) visa or entry permit is not valid for a period exceeding 4 years."

From 1 August 1990 a new refugee permit was added. Regulation 119I was inserted into the Regulations. The refugee (temporary) entry permit was for refugees whom the Minister considered, in the national interest, should be given the permit. The holder of this permit was eligible for a refugee (permanent) entry permit pursuant to clause 142A. In October 1990 further changes were announced to the process to be followed in determining refugee and humanitarian claims to ensure all aspects of claims were exhaustively tested. This was effective from 10 December 1990.

Regulation 117 was repealed from 27 February 1991. From that date a domestic protection (temporary) entry permit could be issued (Regulation 117A). Regulation 119I was repealed on 19 September 1991. This meant that from that date the refugee (temporary) entry permit ceased to exist. That permit was a necessary precondition to qualify for the refugee (permanent) entry permit. The result was persons were no longer eligible for a refugee (permanent) entry permit. However, note should be made of regulation 22D inserted on 27 February 1991. Pursuant to this clause an application by a person to the Minister, lodged before 27 February 1991, for refugee status or to reconsider the rejection of the person's application for refugee status on what the Minister had not made a decision prior to 27 February 1991 also had the effect as an application for a domestic protection (temporary) visa or entry permit.

The Regulations provide for temporary entry permits (TEP) which give short term protection to nationals of some countries which Australia recognises as having severe problems such as civil war. Such a permit gives short term protection until it is considered safe for them to return home. The holder of such a permit is not recognised as a refugee however, refugee status can be applied for. Prior to 1 September 1994, schedule 2 provided temporary residence for people from PRC (Part 437, Class 437 (PRC (Temporary)) Visa and Entry Permit); Sri Lanka (Part 435, Class 435) Sri Lankan (Temporary)) Entry Permit); and Former Socialist Republic of Yugoslavia (Part 443, Class 443 (Citizens of the Former Socialist Federal Republic of Yugoslavia (Temporary)) Entry Permit).

These permits will be explained in a little detail for they show the complexity of the Regulations. To have been eligible for a PRC TEP the applicant must be a citizen of the PRC; and must have entered Australia on or before 20 June 1989 and be in Australia on that day; and must not be entitled to reside in a place outside the PRC; and is not a citizen other than the PRC; and must pass public interest criteria; and must not be applying for any other visa or entry permit. However, applicants can also apply for other visas or entry permits AFTER they have applied for the PRC TEP. This means the holder of a PRC TEP can apply for a PRC Permanent Entry Permit (Class 815), apply for other temporary entry permits, for example, temporary resident, student. Pursuant to regulation 2.35 (2)(c) the grant of any type of entry permit replaces any previous one. The applicant can also apply for Refugee Status and the Permanent Entry Permit. However, under section 22AD of the Act the Department was not required to consider refugee applications from PRC holders until the Minister considered it appropriate. The holder of a PRC TEP was entitled to work, social security (special benefits, family allowance, family allowance supplement), Medicare,

study, sponsor certain overseas family members, a PRC temporary visa to travel outside Australia. Paragraph 9114, schedule 9 of the Regulations provides a visa and entry permit is cancelled if the holder travels to the PRC.

To be eligible for a Sri Lankan TEP the applicant must be a citizen of and normally a resident of Sri Lanka, be legally in Australia on or after 31 December 1991, not have an entry permit which is valid up to or beyond 31 January 1994. Sri Lankan TEP holders had the right to remain in Australia until their entry permit expired. They were allowed to work but were not entitled to a Medicare card, claim social security, study formal courses or sponsor family members to join them in Australia. The Migration Regulations do not contain a visa for Sri Lankan TEP holders. This meant Sri Lankan TEP holders could not travel overseas and re-enter Australia.

Similar requirements were needed for a Former Socialist Federal Republic of Yugoslavia TEP. In addition, the applicant had to be a citizen of Yugoslavia on 19 June 1991 and not have had an entry permit cancelled under s. 35 of the Migration Act. Yugoslavian TEP holders had the same rights.

Holders of either TEP could apply for refugee status and the DP TEP, apply for the Special Permanent Entry Permit under the special 1 November 1993 concessions, apply for other TEPs or apply to change status to permanent residence on other grounds, for example, by marrying an Australian permanent resident or being sponsored under the Employer Nomination Scheme. The 1 November 1993 concessions are discussed later in this chapter.

Obsession with control was the theme of a Matter of Public Importance moved by the shadow Minister, Mr P Ruddock on 5 May 1992, namely:

> "The Government's abysmal failure to maintain control of entry to Australia for permanent settlement" (*Parliamentary Debates*, House of Representatives, No. 6 1992, p. 2358).

Mr Ruddock's motion was not a general one but was specifically directed at the way Chinese students in Australia had been accommodated. He made the usual claims about refugees queue jumping, maintaining the integrity of the refugee component of Australia's immigration program and that the government of the day should have the right to determine who shall, or shall not be able to enter Australia and settle permanently. He considered the claims of the 20 000 Chinese students who were in Australia at the time of the Tiananmen Square massacre should have been dealt with

on a case-by-case basis and not determined on class grounds. He claimed Prime Minister Hawke's decision compromised Australia's immigration program because every other group of people who might want to make claims for refugee status believed it was entitled to the same sort of concessional arrangement because of that decision. He cited thousands of people from Fiji and the Middle East who wanted to make such claims.

Ruddock also expressed concern about a letter from Prime Minister Keating to the Chinese *New Migrants Magazine* which stated: "The Labor Government has made it clear that Chinese nationals in Australia on 20 June 1989 will not be required to return to China against their will unless they had seriously breached Australian law".

He went on to restate the policy announced by the Government on 27 June 1990:

> "After 30 June 1994, subject to a need for on-going protection, places in the immigration program and conditions in China, permanent residence or extended temporary stay will be available to those reluctant to leave.
>
> "Chinese nationals who arrived after 20 June are subject to the same non-discriminatory criteria as other temporary residents to Australia if they apply for permanent residence or refugee status."

Ruddock stated the Government had put in place a flawed decision and it had been compounded by the actions of the Prime Minister. It put at risk "the very basis upon which we can continue to control immigration and refugee determination in this country." Ruddock continued:

> "I have been making it very clear that the Opposition is of the view, in relation to the Chinese nationals in Australia at that time, that if they had a continuing need for protection, substantiated by refugee type claims, of course they would have that protection, but it would have to be substantiated. If they were able to make claims under the ordinary immigration criteria that any other was able to make and which is consistently applied, such as spouse grounds or occupational grounds, of course they ought to be able to apply for a grant of resident status. If they cannot substitute claims for protection or apply on the same basis as anybody else for permanent residency, then our expectation is that in 1994 they should leave Australia" (*Parliamentary Debates*, House of Representatives, 5 May 1992, No 6 1992, p. 2359).

Ruddock's statement was quite clear. However, in my opinion, it lacked political foresight. With an election looming it was not going to win votes in the increasing Asian community whose vote the Australia Labor Party claimed it had. Chinese students genuinely believed they would be deported if the Coalition won power

(Personal Communications). Ruddock did not understand the Government's statements. It was stated by Prime Minister Hawke and by Minister Hand on many occasions that in 1994 people from the PRC who were in Australia on 20 June 1989 would not have an automatic right to permanent residency. What would happen would depend on conditions in China. In any case, each application would be dealt with individually.

The Migration Act 1958 does not contain special provisions relating to persons seeking asylum. The essential consideration in any given case is whether an individual's entry into Australia has been authorised. Where entry has not been authorised and a person is taken into custody under section 89 or Division 4B, detention is mandatory until the person is granted an entry permit or leaves Australia. Section 89 refers to unauthorised airport arrivals and Division 4B to unauthorised boat arrivals.

DETENTION

The distinction between the detention regimes relating to authorised and unauthorised arrivals was explained by the Minister for Immigration and Ethnic Affairs in his second reading speech (5 May 1992) when introducing the Migration Amendment Bill 1992 which was to insert Division 4B into the Principal Act. The Bill was designed to strike out the Cambodian's appeal relating to their classification by grouping together as "designated persons" all boat people who arrived in Australia between 19 November 1989 and 1 December 1992, whether they were apprehended before landing or after having landed. The amendments gave the Department power to detain such persons immediately following commencement of the amendment. The Minister said:

> "I believe it is crucial that all persons who come to Australia without authorisation not be released into the community. Their release would undermine the Government's strategy for determining their refugee status or entry claims. Indeed, I believe it is vital to Australia that this be prevented as far as possible. The Government is determined that a clear message be sent that migration to Australia may not be achieved by simply arriving in this country and expecting to be allowed into the community. Australia will, of course, continue to honour its statutory obligations as it has always done. Any claims made by these people will be fully and fairly considered under the available processes, and any person found to qualify for Australia's protection will be allowed to enter. Until the process is complete, however, Australia cannot afford to allow unauthorised boat arrivals to simply move into the community"

(*Parliamentary Debates*, House of Representatives, 5 May 1992, No. 6 1992 p. 2372).

The amendment provided that a court was not to order release from custody of a designated person (s.54R). Of course this did not alter the High Court's inherent power in relation to habeas corpus. The amendment required custody for 273 days, i.e. 9 months. This period was restricted to the time where consideration of a person's claims was directly within the Department's control. For example, where it was up to the applicant to provide information relevant to a claim, the time taken to provide that information would not be included in the period. This means the 9 month period could be exceeded. The amendment also provided that if a claimant's application for refugee status or entry was refused, the claimant would have to leave Australia. The Department was required to effect removal as soon as practicable. This would depend on the time taken to make appropriate arrangements with the receiving country to properly effect removal. It should be noted that a person may be deported "from Australia" but not "to anywhere". (The High Court considered these amendments in detail in *MIEA v Tang* (1995) 35 ALD 449).

It should be noted that section 54R was ruled invalid by the High Court in *Chu Kheng Lim v MILGEA* (1992) 110 ALR 97. The court held the section invalidly authorised the executive arm of government to exercise an aspect of the judicial power of the Commonwealth. A direction by the parliament to the courts as to the manner in which they should exercise their jurisdiction was inconsistent with the Constitution (chapter III).

The Migration Amendment Act (No. 2) 1992 (Act 84 of 1992) was assented to on 30 June 1992 and commenced that day. It inserted Division 1AA - Refugees into the Act. This Division provided that the Minister may determine in writing that a person is a refugee if the Minister is satisfied that the person is a refugee. It provided a Regulation making power for procedures for determination of refugee status. Only persons in Australia could be determined to be refugees. Pursuant to this Act, the Minister was not required to consider applications for refugee status from applicants who were holders of a permanent entry permit, or an entry visa not subject to any limitation as to the time the holder is authorised to remain in Australia, or a four year PRC temporary entry permit. These provisions made it clear that the refugee stream was restricted to those who needed protection. If persons had permanent residence or the four years protection afforded by the PRC permit, the Minister was not required to consider or grant the persons refugee status during the terms of their permit.

MIGRATION REFORM ACT 1992

The Migration Reform Act 1992 received Assent on 7 December 1992. It was to have commenced on 1 November 1993. However, the Migration Laws Amendment Act 1993 was enacted to postpone commencement until 1 September 1994. The amendments in this Act were the most significant since 1989. Its key features were:

* a single entry requirement - the visa - replacing the dual visa/entry permit system;
* clarification of the status of people who arrive in Australia as either lawful or unlawful non-citizens;
* establishment of a Refugee Review Tribunal (RRT) to review protection visa decisions;
* a system of referral by the RRT of certain applications for review involving important principles or issues of general application to the Administrative Appeals Tribunal (AAT);
* a special immigration-specific code for judicial review by the Federal Court of Australia.

One amendment that was missing was to rename the Act the Movement Control Act. It is no longer a Migration Act. The objects of the Act are simply control and regulation of persons coming into and out of Australia and control of immigration litigation. The Act took codification to an extreme point. It continued the prescription of the 1989 Act although in many respects it was more formalistic. It enshrined a reactive rather than a proactive role of the bureaucracy.

The Explanatory Note to the Bill stated:

> "The Reform Bill continues the process of modernising Australia's immigration law."

It was further said:

> "The major themes behind the changes to be made by the Reform Bill are simplicity, clarity, certainty and fairness."

It went on to say:

> "The changes will replace the legislative framework which currently underpins the regulation of entry to and stay in Australia as well as detention and removal of non-citizens here unlawfully. It will provide a new and greatly extended basis for merits review of ... decisions and,

> for the first time, provide independent, determinative merits review of refugee-related decisions."

There is certainly plenty of scope for simplicity, clarity, certainty and fairness. There are few areas of Australian law more complex than migration and refugee law. Plain English is not possible because the legislation is trying to cover every eventuality - real or imagined. As McHugh J (1995, 48) pointed out "there is strong reason for refusing to place one's faith in the idea that ever more detailed legislative provisions can cover the field in a way which less compendious drafting cannot". In *Hunt v Minister for Immigration and Ethnic Affairs* (1993) 41FCR 380 at 386 Gummow J stated about the Migration Act 1958 and its Regulations:

> " ... the greater the specificity of the fixed criteria, the greater the chance that without the existence of a ' back-stop' discretion by which the law may be tempered by equity, hard cases will fall short of compliance with the letter of the law."

The main problem is the frequency of change. The 1989 Migration Regulations were amended on 54 occasions over a period of three years. Then there are Procedures Advice Manuals (PAMs). These are not law but are designed to give Departmental officers guidance on how to interpret the Act and Regulations. In addition, there are Policy Control Instructions (PCIs) which are issued to update information in PAMs and other guidelines.

New regulations, the Migration (1993) Regulations were gazetted on 30 November 1992, effective from 1 February 1993. These Regulations were amended on 19 occasions in a little over a year, again indicating the instability of the legislation. These Regulations were more simply structured than the 1989 Regulations in that all the requirements for the grant of a particular class of visa or entry permit were listed in one place. Even the Department seemed to realise the complexity of the Regulations. It prepared a consolidation as at 30 September 1993 with a Reader's Guide to describe the Regulations in a straightforward way. Between April 1993 and May 1994, 4778 pages of policy guidelines were issued (PAM II). The sheer volume of Regulations and guidelines shows how difficult it is for a practitioner, let alone a refugee, to keep abreast of refugee law in Australia. This suggests Australia has bad policy and bad law.

REFUGEE REVIEW TRIBUNAL

The Refugee Review Tribunal commenced operation on 1 July 1993. The Tribunal has a heavy caseload. It is expected it will conduct about 4000 hearings in 1994/95 compared with 1958 in 1993/94. It cost $14.78M in 1993/94. The Refugee Review Tribunal is an inquisitorial tribunal, that is non-adversary. There is no right of appearance. The Act requires the following process:

(i) application for review in approved form (s.166BA), including the filing of supporting evidence and written arguments (s.166D);

(ii) review "on the papers" (s.166DA);

(iii) the applicant's right to a hearing where the Tribunal is not prepared to make "on the papers" the decision that is most favourable to the applicant (ss.166DB and 166DC);

(iv) notification of the decision and reasons for the decision.

In the Administrative Appeals Tribunal the applicant is served with the case. In the Refugee Review Tribunal an applicant lodges an application and then has 10 days to lodge submissions. There is no formalised structure. The Tribunal Member has all material submitted to DIEA, all material referred to by the primary decision-maker and any additional material the Refugee Review Tribunal might obtain. No papers are served on applicant. The applicant may not know what the Tribunal is relying on unless the applicant has asked to see the sources relied upon. If asked, this is supplied both to the applicant and the legal advisor. If the Tribunal cannot make a decision "on the papers" the applicant may request a hearing. The applicant is given an opportunity to respond to adverse material at the stage of the review considered appropriate by the presiding Member. The Act provides that the Tribunal is "not required to allow any person to address it orally about the issues arising in relation to the decision under review" (s.166DB(2)) and that a "person appearing before the Tribunal to give evidence is not entitled ... to be represented before the Tribunal by any other person" or to "examine or cross-examine any other person appearing before the Tribunal to give evidence" (s.166DD(6)). There is no requirement to provide the applicant with adverse material but it can be asked for. It is normal to seek and provide it under procedural fairness principles. Some practitioners believe the result is ambush. Such procedures do not lead to lawfulness, fairness and rationality - the

tenets of administrative law. They do however lead to the Tribunal being regarded by practitioners as not independent of the Minister and his Department. These procedures may well lead to intervention by the Federal Court with that Court looking at the merits of the case. However, the Full Court decision *in Chen Zhen Zi v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 48 FCR 591 that there was no requirement for an oral hearing at review stage, is noted. The Tribunal has certainly improved accountability. There can be no doubt the Tribunal is thorough. An applicant must prove persecution although many primary decisions are set aside because the applicant is given the benefit of the doubt under the UNHCR Handbook guidelines and/or under the "10 per cent chance" of the *Chan* case, so that refoulement does not occur. As pointed out previously, under the Handbook (para. 196) the weight of proof is shared equally between the examiner and the applicant. The Tribunal must satisfy itself the applicant would be persecuted if returned to the country of origin. To this end, the Tribunal obtains information from DFAT, DIEA, UNHCR, Amnesty International and other sources. There is no doubt that the Tribunal does not do everything possible to assist an applicant. The Refugee Review Tribunal is a very specialised area dealing with human lives. Representation is in many cases mediocre to say the least. There is a need for specialists in this area of law to represent applicants. In the past there was no right for lawyers to appear in the Conciliation and Arbitration Commission. This work was carried out by specialist industrial advocates, one of the more famous being Mr R. J. L. Hawke. It seems to me that there is a need for a similar specialist in the Refugee Review Tribunal.

The decisions reviewable by the Refugee Review Tribunal are set out in s. 411. These are:

- a decision, made before 1 September 1994 that a non-citizen is not a refugee under the 1951 Convention and 1967 Protocol (other than such a decision made after a review by the Minister of an earlier decision that the person was not such a refugee);

- a decision, made before 1 September 1994, to refuse to grant, or to cancel, a visa, or entry permit (in force before 1 September 1994), a criterion for which is that the applicant for it is a non-citizen who has been determined to be Convention refugee (other than such a decision made the Migration (Review) (1993) Regulation or under the repealed Part 2A of the Migration (Review) Regulation;

- a decision to refuse to grant a protection visa;

- a decision to cancel a protection visa.

Decisions made in relation to a non-citizen who is not physically present in the migration zone when the decision is made and decisions in relation to which the Minister has issued a conclusive certificate are not RRT-reviewable decisions.

The Minister may issue a conclusive certificate if the Minister believes it would be contrary to the public interest to change the decision, because any change in the decision would prejudice the security, defence or international relations of Australia; or it would be contrary to the public interest for the decision to be reviewed because such review would require consideration by the Tribunal of deliberations or decisions of the Cabinet or of a committee of Cabinet. This is an outrageous provision. There would be few matters where the Minister could not issue such a certificate. An example of its use was the denial of access to the Refugee Review Tribunal by a group of Vietnamese asylum-seekers. According to one view (*Daily Telegraph Mirror,* 30 August 1994 "Bolkus rejects refugees"), the move was directed at safeguarding international efforts to repatriate about 52 000 Vietnamese asylum-seekers in camps in several Asian countries under the Comprehensive Plan of Action. Senator Bolkus' action enabled the Government to avoid the parliamentary rejection of retrospective legislation foreshadowed in July, to deny the boat people the right to seek refugee status in Australia. It also upheld the integrity of the UNHCR - approved CPA screening process.

When introducing legislation to establish the Immigration Review Tribunal (IRT) in 1989, the then Minister for Immigration, Local Government and Ethnic Affairs committed the Government to a review of the new statutory framework for merits review by the Immigration Review Tribunal after it had been operating for two years. Accordingly, a Committee for Review of the System of Review of Migration Decisions was established in 1992. The recommendations of that Committee, which reported in December 1992, were in large measure implemented by the 1992 Act. However, the Act went significantly beyond the matters within the Committee's terms of reference. Most importantly, it introduced significant reforms in the area of review of refugee decisions.

In his second reading speech, the Minister, Mr Hand, highlighted the fact that the current legislation was not serving the purpose for which it was intended. The Minister stated:

> "There are people who are intent on bypassing the established categories of entry into this country. Some do this by trying to avoid immigration processing altogether by arriving in Australia without authority. The boat people are a good example.
>
> "Owing to weaknesses which have been inherent in our migration laws for many years, these people are often successful. Many manage to stay here even though they do not fall within the specific visa categories, which is the only lawful way to enter and stay in Australia. At the very least many manage to delay the substantive decision and, as a consequence, their departure, by using the courts to exploit any weaknesses they can find in our immigration law" (*Parliamentary Debates,* House of Representatives, No. 15 1992 p. 2620).

Since the report by the Committee to Advise on Australia's Immigration Policies (CAAIP), the wide discretionary powers in the Migration Act 1958 were replaced with what was perceived to be a more codified approach to decision-making. In a paper to the 1991 Administrative Law Forum, the Secretary to the then Department of Immigration, Local Government and Ethnic Affairs observed that the seemingly arbitrary application of policy was a source of concern and that the lawfulness of policy was questioned as it strayed beyond the boundaries of the legislation (Conybeare 1991, 69). Of course the Courts were rightly critical because the policy was not backed up by appropriate statutory provisions. No doubt the Courts were heeding the tests of administrative law - lawfulness, fairness and rationality. Conybeare seems to have forgotten that in a democracy administrative law holds the bureaucracy accountable. If the State will not do this then the Courts have to.

The Migration Reform Act 1992 made provision for merits review of protection visas covering decision-making on refugee status. Subject to the transitional arrangements (s. 166LB(1)(a) and (b)), merits review will be available by the Refugee Review Tribunal for decisions not to approve applications for protection visas and decisions to cancel protection visas (s. 166 LB(1)(c) and (d)). The Principal Member of the RRT may refer an application to the AAT where it is perceived to involve an important principle or issue of general application. (s. 166HA). On reference, the Principal Member will be a member of the AAT, unless he or she constituted the RRT prior to reference (s. 166HD). It is hoped that this mechanism may have an authoritative and normative effect on decision-making. This means the RRT, in most cases, is the final merits review. There is only appeal on points of law.

The Migration Reform Act 1992 has rendered both the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act) and section 39B of the Judiciary Act 1903 inapplicable to decisions under the Migration Act 1958 (ss. 166LK and 166LL). At the same time, the 1992 Act has substituted its own code for judicial review (Part 4B) which will exist coextensively with the jurisdiction of the High Court of Australia under section 75 (v) of the Constitution.

Prior to the commencement of this amendment the Migration Act was silent about how decisions were to be made by the Department of Immigration and Ethnic Affairs. Instead the Common law principles of procedural fairness applied. This amendment has the potential of making the High Court a common forum for the review of decisions. One must also have regard of the cost of litigation in the High Court. The High Court cannot remit the matter to the Federal Court as that Court having been established by statute does not have the power to deal with such matters. This may prove a double-edged sword. The provision will prevent the Department appealing to the Federal Court as well.

JUDICIAL REVIEW

It should be noted that, in general, judicial review under the codified regime will be available only after merits review has been completed, as provided by ss. 166L and 166LA. The new grounds for judicial review are contained in s. 166LB of the Act. These will be considered in some detail for they remove from the arena of the Courts many avenues of review which have existed for decades. Judicial review is essential for transparency - to ensure the rights of asylum-seekers. The Explanatory Memorandum to the Bill stated:

> "The procedural requirements under the existing regime have been governed by the Common law rules of natural justice and these rules have not provided the certainty needed for effective administration of the migration program. Accordingly, these Common law rules will be replaced by a codified set of procedures which will afford the same level of protection to individuals but will have the additional advantage of greater certainty in the decision-making process. For example, at Common law, prior notice of an adverse decision is required. Under the procedures established in this Bill, new section 26Y requires the Minister to give the applicant information, if that information would be the reason or part of the reason for refusing the application for a visa. The Minister is to invite the applicant to comment on it and, under new section 26ZE, the Minister is not to refuse an application until the applicant has responded, has indicated that he or she will not be responding or the time for responding has passed."

The first ground for review is that the procedures that were required by the Act or Regulations to be observed in the decision-making process were not observed. However s. 166LB(2)(a) provides that an application for judicial review of a decision may not be made for a breach of the rules of procedural fairness. The Code of Procedure (subdivision AB, Division 2, Part 2) is designed to ensure that applicants are provided with the protection necessary to receive a fair consideration when decisions are made affecting their right to remain in Australia.

What do we mean by procedural fairness? In simple terms, procedural fairness means that an individual affected by a decision will be given a hearing by the decision-maker. That person must not have an interest in the outcome of the decision which can be pecuniary or another interest. The proceedings must not give the appearance of bias to a disinterested observer. In other words, justice must not only be done, it must be seen to be done.

The Courts, for example in *Twist v Randwick Municipal Council* (1979) 136 CLR 106 at 109, have consistently held that any Parliamentary intention to exclude the rules of procedural fairness must be made unambiguously clear. Section 166LB(2) seems to do this. This exclusion does not mean, however, that a person dissatisfied with a decision under the Migration Act 1958 will have no recourse to judicial review as a means of challenging the procedures adopted by the decision-maker. The procedures required by the Act and regulations must be observed because the Migration Reform Act replaced the rules of procedural fairness with a statutory code.

Other grounds for judicial review are jurisdiction (the person who purported to make the decision did not have jurisdiction to make the decision); lack of authorisation (where the statute requires a power to be exercised by the Minister personally, the Minister must be personally satisfied that the statutory criteria have been fulfilled); improper exercise of power; error of law; fraud or actual bias; no evidence. A decision-maker must state the purpose for which powers will be exercised. Primary decision-makers will be required to identify the grounds that an applicant has failed to satisfy. (s. 26 ZG(4)). The RRT is required to provide a full statement of reasons. (s. 166E). The requirement to provide a full statement of reasons enables those affected to know how the decision was made. A decision may be challenged on the basis that the power was an exercise of a discretionary policy in accordance with a rule or policy without regard to the merits of the particular case. In *Tang v Minister for Immigration and Ethnic Affairs* (1986) 67 ALR 177 it was held that policy must guide and not control decision-makers and an officer is not permitted to apply policy in an inflexible manner but must take account of the circumstances of the case. Failure to consider

the merits of a particular case would be grounds for setting the decision aside. The "jurisdiction" and "lack of authorisation" grounds for judicial review mirror ss 5(1) (c) and (d) of the ADJR Act 1977.

However, most importantly, a decision cannot be challenged on the basis that the exercise of power was so unreasonable that no reasonable person could have so exercised the power. These grounds are provided in s 5(2)(g) of the ADJR Act 1977. This is commonly referred to as Wednesbury unreasonableness following the decision in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1KB223. It is generally accepted that the courts' proper role in judicial review is not to review decisions on the merits but rather to supervise decision-making to ensure that it is consistent with the express or implied policy enshrined in the legislation and, only when an overwhelming case is made, will the courts intervene. The court does, of course, reach its decision through the interests of an individual litigant. In *Hindi v MIEA* 91 ALR 586 it was held that a delegate must give proper consideration to the merits of a case. This may well be the way to overcome unreasonableness being removed.

The supervision by the courts for decision-making involving the exercise of discretion is a very limited role. As was noted in *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 42:

> "A court should proceed with caution when reviewing an administrative decision on the ground that it does not give proper weight to relevant factors, lest it exceed its supervisory role by reviewing the decision on the merits."

Einfeld J in *Premalal v MILGEA (1993)* 31 ALD 339 at 344 was perhaps more definitive: "It is fundamental to judicial integrity that judges do not review decisions simply according to personal conceptions of policy or according to their individual moral systems. Decisions must be reviewed with an integrity which comes from a strictly legal though not necessarily formalistic approach to law."

On the issue of the courts involvement in policy Brennan (1986, 33) has written:

> "The courts are not very good at formulating or evaluating policy. Sometimes when the courts have intervened on policy grounds, the courts view of the range of policies open under the statute or of what is unreasonable policy has not won public acceptance. On the contrary, curial views of policy have been subjected to stringent criticism. In the world of politics, the courts' opinion on policy are naturally less likely to reflect the popular view than policies of a democratically elected government or of expert administrators."

Galligan (1986, 231) rightfully points out that "it is not easy to see what the role of the courts is to be in reviewing discretionary decisions".

It is true there has been a lack of uniformity in interpretation of Wednesbury unreasonableness. This has been recognised by the High Court in *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR24 at 42:

> "In its application, there has been considerable diversity in the readiness with which the courts have found the test to be satisfied."

However, the merits review scheme seems to me to be somewhat inflexible. The lack of uniformity might well be a good thing, particularly as we are dealing with human situations.

PROPORTIONALITY

The way is still open to seek judicial review on the basis of avoidance of disproportionality. The concept of proportionality is entering the Common law of Australia: *State of New South Wales v Law* (Court of Appeal, 13 November 1992, unreported), at 2. In *R v Goldstein* [1983] 1 All ER 434 at 436, Lord Diplock observed that: " ... In plain English 'proportionality' means 'You must not use a steam hammer to crack a nut, if a nut cracker would do.'" His Lordship stated that the idea of proportionality was gaining force in England by reason of the impact of the jurisprudence of the European Court of Justice on English laws subject to the Treaty of Rome. Avoiding disproportionate punishment of co-offenders and securing punishment which is proportionate to the gravity of the offence are obligations of our law of sentencing: *Veen v The Queen* [No. 2] (1988) 164 CLR 465 at 472.

I do not intend to fully discuss this principle. I merely wish to point out that refugees might well use it as a means of seeking review in the Federal Court. Kirby P pointed out in *State of New South Wales v Macquarie Bank Ltd.* 30 NSWLR 307 at 324 that: "... our High Court appears to be moving to a position more analogous to that adopted in the European Court of Justice". Thus in *South Australia v Tanner* (1989) 166 CLR 161 at 168, Wilson, Dawson, Toohey and Gaudron JJ said:

> " ... It is not enough that the court itself thinks the regulation inexpedient or misguided. It might be so lacking in reasonable proportionality as not to be a real exercise of the power."

The concept of "reasonable proportionality" was considered in some detail by Gummow and Cooper JJ in their separate judgements in *Minister for Resources and Another v Dover Fisheries Pty Ltd.* 116 ALR 54. Gummow J said at 64:

> "The concept of 'reasonable proportionality' as a criterion for assessment of validity in constitutional and administrative law appears to have entered the stream of the Common law from Europe and, in particular, from the jurisprudence of the Court of Justice of the European Communities and the European Court of Human Rights.
>
> "If a State is to justify interference by its executive, legislative or courts with the freedom of expression guaranteed by Art 10 of the European Convention For the Protection of Human Rights and Fundamental Freedoms, the interference must correspond to 'pressing social need' and be 'proportionate' to the legitimate aim' pursued by the State *Sunday Times v United Kingdom* (1979) 2 EHRR 245 at 277-8, 280."

For a refugee to be successful on the basis of this principle, it would need to be submitted that the decision or the subordinate legislation on which the decision was based was such a direct and substantial invasion of "substantive rights" that the court should hold that it was not reasonably proportionate to the enabling purpose. Proportionality will open the gates for courts to make decisions on merits and Government policy. If the Department is true to form it will enact legislation to remove proportionality as a consideration. In that way it will not lessen its control of policy making.

Paragraph 44 of the Explanatory Memorandum of the Migration Reform Bill stated that the procedures for decision-making established by that Bill would "embody the principles of natural justice." I do not agree with this contention. The obligations imposed by the code do not apply to persons other than the Minister and the Minister's delegates who may be involved in the decision-making process, for example a Commonwealth Medical Officer. It is the loss of natural justice which is considered to be the most significant change in this Act. It would appear the Department was concerned that natural justice was too flexible in the eyes of the court.

The Code of Procedure does not embody Common law notions of procedural fairness. First, where the executive disregards its own published policies which prescribe a procedure for the exercise of a power, Common law principles of procedural fairness would require the exercise of the power in accordance with the procedure. Under this legislation, government policies in respect of the processing of applications may be ignored. Second, where a decision-maker has the choice of two alternative powers

when dealing with an application and the exercise of one will be more detrimental than the other, procedural fairness requires that the decision-maker give the applicant the right to be heard. Third, the grounds of actual bias should include reasonable apprehension of bias in accordance with the Common law test. Actual bias as a matter of evidentiary proof is almost impossible to show. Decision-making must not only be impartial but be seen to be impartial. DIEA takes this seriously. Officers have been moved aside because of perceived bias. Others have been charged with corruption (Personal Communication, DIEA). As I understand international law natural justice is enshrined in it. Therefore this provision may well be in breach of international obligations.

Division 4C of the Migration Reform Act sets out when an individual must be detained and when an individual may be detained by an officer of the Department of Immigration and Ethenic Affairs. Release from detention is dependant on the individual being granted a "bridging visa" or establishing that they are in fact lawfully in Australia.

The Australian Government says that the detention of asylum-seekers is necessary as a border control measure, and that it also has a deterrent element in helping to discourage unauthorised arrivals. Border control and deterrence are not lawful reasons under international standards for detaining asylum-seekers. The 1951 Convention recognises that asylum-seekers may have no option but to seek to enter a country without prior authorisation. It explicitly states that they should not be penalised on that account.

REMOVAL FROM AUSTRALIA

Division 4D abolished the concept of deportation of illegal entrants and replaced it with the concept of "removal" of unlawful non-citizens. An unlawful non-citizen must be removed from Australia as soon as reasonably practicable if that unlawful non-citizen requested in writing that they be removed; or had been refused immigration clearance and had either, not made a valid application for a substantive visa (even though they may be eligible to apply for one) or had made an application which had been refused and finally determined; or was in detention and was entitled to apply for a visa but did not do so; or was in detention and had made an application for a substantive visa which was either refused (and finally determined) or was invalidly made. The removal of a person from Australia occurs by operation of law, rather than by decision. Therefore, it may not be a matter which could be the subject of review. Under the Migration Act (prior to 1 September 1994) an individual could

not be deported until the expiry of the "period of grace". The Migration Reform Act removed the concept of the period of grace. By operation of law, a detained person is liable to be removed as soon as their visa expires or is cancelled and they are detained. Under the Migration Reform Act all detainees are liable to pay the costs of detention and if they are removed, the costs of removal. The Department is entitled to claim the costs of detention even if the individual lodges an application for a visa which is approved. There is no provision for the Department to waive the costs of detention and there is no limitation for people who have been granted refugee status.

The Migration Reform Act 1992 had not commenced before it was being amended. Obviously, it was so seriously flawed that it could not be implemented and the program that was outlined as urgent and pressing could not commence. The Migration Laws Amendment Bill 1993 was introduced into the Senate on 31 August 1993. Introducing the Bill, Senator Ray on behalf of Senator Bolkus, said the Bill was to "finetune" the Reform Act. He foreshadowed further amendments in 1994. (*Parliamentary Debates*, Senate, 31 August 1993, No. 6 1993, p. 675). As previously stated, the Bill deferred those parts of the Reform Act which were to commence on 1 November 1993 to 1 September 1994. It also put beyond doubt the power of the Refugee Review Tribunal to consider refugee status review applications made before 1 July 1993 to the former Refugee Status Review Committee.

Further amendments, the Migration Legislation Amendment Bill 1994, were introduced on 24 March 1994 (*Parliamentary Debates,* House of Representatives, 24 March 1994, No. 5 1994, p. 2166). This was another attempt to get the Migration Reform Act 1992 correct.

The Bill created three new classes of visa to cover people legally in Australia but not eligible for a visa as proposed by the Migration Reform Act. These are: a special purpose visa, (for example admitting an otherwise ineligible person to attend a funeral); the absorbed person's visa; and the ex-citizens visa (for example, when a citizen renounces citizenship). The Bill removed the dichotomy between approval and grant so that there is one decision-making process leading to the granting of a visa. It also provided that protection visas may be granted as permanent visas. This reflected the government's decision of 1 November 1993 that persons recognised by Australia as refugees under the 1951 Convention would be granted permanent rather than temporary residence. A significant policy had changed within a year. The Bill placed the onus on applicants to know their entitlements. An officer is not under an obligation to tell an applicant the class of visa the applicant may be eligible for. This is the same approach that the Fraser Government took to the Social Security Act.

This Bill again drew attention to just how flawed the Migration Reform Act 1992 was. Under that Act, as has been pointed out, every non-citizen requires a visa to be in Australia. A non-citizen who does not hold a valid visa must be detained and is then subject to removal from Australia. There is no provision whereby a refugee can be treated other than as a non-citizen. Even a permanent resident of Norfolk Island now requires a visa. In the attempt to codify everything the Minister has no discretion in allowing persons into the country. A system of bridging visas was created to allow non-citizens to maintain lawful status in specified circumstances. A bridging visa is a temporary visa which provides lawful status to a non-citizen who would otherwise be unlawful, for example, during the processing of an application for a substantive visa, or while arrangements are made to leave Australia, or during other times when the non-citizen does not have a visa and the Department considers that it is not appropriate to detain the person. Under the Migration Reform Act 1992 it is not clear how diplomatic personnel or foreign armed services personnel coming to Australia for exercises were going to be admitted. They will now require a special purpose visa.

The Bill renumbered the Migration Act 1958 and its amendments. It was also renumbered in 1989. This makes it almost impossible to trace the history of a section of the Act and how that section has been amended without consulting two cross-reference tables. I know of no other Act where this has been done. This is just another difficulty in interpreting this Act.

So from 1 September 1994 refugees had to contend with a new Migration Act of 225 pages containing 506 sections, 657 pages of new migration regulations, 41 pages of transitional migration regulations, 1454 pages of migration instructions and 950 pages of policy guidelines (PAM3). Twenty-nine page of amendments to these regulations were gazetted on 17 August 1994. The recent comments of Meagher JA. "that Local Environment Plans are drafted in specialised bureaucratic jargon to whose authors neither logic nor clarity has urgent attraction" *Egan v Hawkesbury CC* (1993) 79 LGERA 321 are also especially applicable to the Migration Act 1958 and its Regulations. Francis Bennion, the author of one of the best books on statutory interpretation wrote fifteen years ago: "Our treatment of statute law remains where medicine stood when the leech was the universal remedy." (quoted in Mayhew, 1990 4-5).

The Migration Regulations 1994 are an example of the Minister and his Department refusing to submit to parliamentary scrutiny in relation to subordinate legislation. This is not the first time the Department has appeared reluctant to submit regulations

to parliamentary scrutiny. The same happened in relation to the 1989 Regulations. On that occasion the Joint Select Committee on Migration Regulations noted (1989,2):

> "The Committee has had less than four weeks to consider a major and incomplete body of legislation, the implementation of which may have serious consequences for people wishing to migrate to Australia.
>
> "The Committee is very concerned at the enormous potential for problems if the regulations are implemented in their present form. The view of the Committee is that there are fundamental problems with the regulations, both as to the extent to which they reflect current and announced Government immigration policy and also with regard to technical problems within the regulations."

How true were the Committee's observations for those regulations which were amended with regular monotony.

In May 1990 by resolution of the Commonwealth Parliament the Joint Select Committee became a Joint Standing Committee with power to inquire into and report upon:

> "(a) regulations made or proposed to be made under the Migration Act 1958;
>
> "(b) all proposed changes to the Migration Act 1958 and any related Acts; and
>
> "(c) such other matters relating to the Migration Act 1958, regulations or reports as may be referred to it by the Minister for Immigration, Local Government and Ethnic Affairs."

One might be excused for thinking that this Committee would have had the task of examining the Migration Regulations 1993 and the Migration Regulations 1994. The Minister referred neither Regulation to the Committee. In Estimates Committee F on 26 May 1994 (Senate, *Parliamentary Debates*, pp F37-39) Senator Short (Shadow Minister) asked when the regulations would be available. He pointed out that the Joint Standing Committee requested that "the committee be given the opportunity to look at and comment on the draft regulations to implement the MRA before finalisation ..." Senator Bolkus refused to give an undertaking the regulations would be forwarded to the committee, the excuse being there was not time - the same excuse given in 1989.

Unfortunately there is no requirement for public consultation and parliamentary scrutiny in relation to Commonwealth delegated legislation. The Senate Standing Committee on Regulations and Ordinances scrutinises delegated legislation to ensure:

> "(a) that it is in accordance with the statute;
>
> "(b) that it does not trespass unduly on personal rights and liberties;
>
> "(c) that it does not contain matter more appropriate for parliamentary enactment." (Senate Standing Committee on Regulations and Ordinances 1986, vii).

This committee has preferred to leave examination and comment on Migration Regulations to the Joint Committee. The proposed Legislative Instruments Bill provides for:

- the creation of a public register of all new and existing delegated legislation;
- delegated legislation made under legislation affecting business to be subject to prior public consultation processes before it becomes law;
- all delegated legislation to be subject to parliamentary disallowance.

Public consultation is only required where the particular legislative instrument directly affects business. Instruments falling into this category are contained in Schedule 2 to the Bill. The Migration Act 1958 is not listed. In New South Wales, pursuant to Subordinate Legislation Act 1989 all subordinate legislation is subject to public consultation. A Regulatory Impact Statement must be prepared on all principal regulations. This includes an assessment of the costs and benefits (including economic and social costs and benefits both direct and indirect), and costs and benefits relating to resource allocation, administration and compliance. It would be interesting to see such an assessment done on the Migration Regulations relating to refugees.

The Keating government's attitude to onshore asylum-seekers is very difficult to understand. If anything it seems to be one of panic. It has certainly persisted with the policy that immigration must be controlled and be seen to be controlled. It should be noted that between 1981 and October 1989 not one boat person reached Australia and claimed asylum. From November 1989 to 31 December 1994, in the second wave of the current phase, 1416 boat people have arrived by 33 small craft off Australia's northern coastline. Of these, 131 did not lodge applications for refugee status and were repatriated. This is indeed a small number when compared with the numbers

received annually by other countries not only in the Western World but also in Asia and Africa. However, there are few countries in the world which have gone to such lengths to discourage refugees arriving by boat. There is no evidence to support fears of a flood of boat people. If there were, our intelligence services in south-east Asia would alert us. No boat people are currently leaving Vietnam or Cambodia. To the contrary, economic opportunities in both countries are increasing. If anything the Government's generous treatment of the Chinese may well encourage an increase in "migration" to Australia. After all it is the Chinese who are currently buying tickets on boats headed for illegal entry to the United States of America. Division 4B of the Migration Act 1958 must seem anathema to Canada which operates within the scheme of a constitutional Charter of Rights and Freedoms.

On 1 November 1993 the Minister announced the grant of permanent residence to certain asylum-seekers namely nationals of the PRC, Sri Lanka and the former Yugoslavia. Applications were assessed on the basis of the applicants' status on 1 November 1993 and applied only to those who were granted a visa before 12 March 1992. The decision in effect meant such asylum-seekers were eligible for permanent residence without pursuing their refugee claims.

Included were better qualified people under 45, regardless of nationality and wherever they lived at the time who were granted a visa to Australia before 12 March 1992, who arrived in Australia and who have already applied for Determination of Refugee Status or were holders of concessional TEPs. This covered people who were waiting in the backlog of Determination of Refugee Status processing; have received a primary decision; have an outstanding appeal against a refusal.

An applicant for a class 815 PRC Permanent Entry Permit must be in Australia; apply on or before 30 June 1994; be in Australia on 1 November 1993 (or hold a return visa to Australia); have held an entry permit (Class 815 entry permit or class 830 processing entry permit); either be the holder of a class 437 TEP, or class 783 PRC Temporary Entry Visa or be a citizen of PRC who entered Australia on or before 30 June 1989 and was in Australia on 26 June; satisfy public interest requirements; pay fee of $560.

An applicant for a class 816 Special Permanent Entry Permit must either have applied for refugee status on or before 1 November 1993 or hold or have applied for a Sri Lankan TEP (class 435) or former Yugoslavia TEP (class 443); had a visa to come to Australia which was issued on or before 12 March 1992; be in Australia on 1

November; apply in Australia for a class 816 entry permit on or before 1 August 1994; have a good level of English; be under age 45 on 1 November 1993; meet education or business requirements; satisfy public interest requirements; pay fee of $830.

According to the Department of Immigration and Ethnic Affairs (1993b, 1) it was estimated that 37 500 persons would be given permanent residency under these provisions made up of about 28 500 pre-June 1989 PRC nationals, 1100 holders of the DPTEP and about 8000 DORS applicants and class 435/443 TEP holders. These people can later sponsor family so the full effect of chain migration could be around 60 000 persons by the year 2000. Successful refugee applicants will be counted against the humanitarian program. As at 7 November 1994, 29 055 applications covering 49 021 persons had been received (DIEA Fact Sheet 20, 7 November 1994).

It is interesting that an applicant for a Class 816 permit must be able to communicate in English. To qualify for Australian citizenship an applicant must be able to speak and understand basic English however the applicant does not need to be able to read and write in English. It is therefore more onerous to apply for the permit. (A class action by category 816 applicants on the grounds that the holding of English tests had made public the refugee-seeking status of applicants in breach of regulations on confidentiality was dismissed by the Federal Court on 18 November 1994).

The Class 816 permit is discriminatory in other respects. Persons aged over 45 are excluded. This is contrary to domestic law which prohibits discrimination on account of age. Presumably the decision reflected a desire in part to overcome the post-December 1989 bubble in the onshore refugee program and the pending numbers crisis before the Refugee Review Tribunal. I cannot see how the new class of entry permit will solve the problem. In my view most will apply for the permit and be rejected on language grounds. It is difficult to endorse the "better qualified" criterion given the extreme difficulties that many immigrants from non-English speaking backgrounds have already experienced in gaining recognition of their qualifications.

The 1 November Ministerial decision was flawed for several reasons. It did however have the great virtue of ending the uncertainty for the people concerned and for the spouses and dependent children who had joined them since June 1989. Given the Governments approach to applicants for refugee status from Cambodia it was an extraordinary decision, essentially taken to clean up the mess created by the former Prime Minister, Mr Hawke, when he gratuitously intervened in the debate at the time on the immigration status of Chinese students in Australia and, after a tearful speech

in Parliament, declared that no Chinese who had come to Australia as a student before 4 June 1989 would be forced to go back.

The second decision announced on 1 November 1993 - the creation of a new category of permanent resident - affected primarily, but not exclusively, Chinese asylum-seekers who had arrived after the Beijing massacre. After 4 June 1989, many thousands of Chinese continued to come to Australia as "students". Many were enrolled in private English-language schools. Like a great many of those who came before 4 June 1989, a number were of poor circumstances who had managed to borrow enough money (some at usurious interest rates from relations) to get a place in an English-language school in Australia but had no intention of returning to China. Because of the high rate of overstaying by such "students", controls on this category of entry have since been tightened. Before that necessary change was made, large numbers of "students" who had entered Australia after 4 June 1989 were claiming they should be allowed to remain just as those who had come before 4 June 1989, had been permitted to remain under the Mr Hawke's rash promise of sanctuary.

The "second wave" of Chinese were required, together with many applicants for refugee status from other countries, to be examined for their ability to communicate in a mixture of work and social situations as part of an overall assessment of their eligibility for permanent residence under the new category with its emphasis on skills, one of which is proficiency in English. By 1 November 1993, there were some 20 000 people in Australia seeking refugee status. Normally, it would have taken years to process such a number of applications although the RSRC had moved from one to six fully working committees. Each committee was producing at least 15 decisions per week (Personal Communication, DIEA). However there were strong objections from Chinese required to sit the English test. Such an attitude was hard to accept because the students were being given an exceptional opportunity. Those who fail the test will then be assessed for their eligibility as refugees. The Chinese are being accorded very fair treatment whilst the Department maintains control over who is being admitted. Why are not all applicants for refugee status treated in this way? This is discrimination in favour of the Chinese. Why cannot all refugees be treated equally?

The decision of 1 November 1993 is somewhat puzzling when one considers evidence presented by the Minister in *Wu v MIEA* (1994) 32 ALD 735 at 745. Cabled material from the Department of Foreign Affairs and Trade (DFAT) incorporating inquiries from numerous sources, indicated that illegal departers were not generally punished in China, at least to a degree that could properly be described as persecution. The

Department of Foreign Affairs and Trade information on the fate of other returnees indicated that the only classes of returnees detained for a significant time were recidivists, criminals and organisers.

The evidence referred to cable O. BJ50931 dated 23 June 1992 from the Australian embassy in Beijing and an update of 29 September 1992, cable O. BJ51854. The later cable stated:

> "We would note, as reported in O. BJ50931, we have encountered no evidence that the fact of an illegal departee's having applied for refugee status would lead of itself to harsh treatment. Illegal departure is regarded as being in an entirely different category from the very high-profile opposition activities or breaches of public trust that would be classified by the Chinese authorities as counter revolutionary activities or betrayal of the motherland."

Evidence was given that the Australian embassy in Beijing reported on 4 January 1993 that the *Jeremiah* passengers returned to China had been detained for 6 days and then returned to their families. The embassy's cable said that, while in detention, "they were questioned about the circumstances of their departure from China, the objective being, to learn more about the organisation that had arranged the departures". In a cable dated 5 April 1993 the embassy reported in relation to *East Wood* passengers returned from Hawaii:

> " ... is consistent with Australia's experience in dealing with Chinese authorities in relation to returnees. While some or all returnees may be detained briefly on arrival, to permit proper identification, travel arrangements to be made and (presumably) counselling, returnees are released within a few days, in accordance with Chinese. (sic)
>
> "In discussions I have had with Chinese officials at all levels they have stated that they are not concerned about people who have departed illegally. Indeed, most express some concern for those involved indicating that the money that returnees have wasted is more than enough punishment. The tone of the conversation changes markedly when the subject turns to organisers of illegal departures, with officials indicating a determination that these people should be prosecuted with the full force of the law."

Based on these reports it seems to me that there is no reason for PRC nationals to be granted refugee status unless there are special grounds in a particular case.

There is no shortage of critics who claim, with considerable justification, that Australia's current scheme is both inefficient and unfair.

A person who is legally in Australia, that is holds a valid entry permit, may apply for refugee status before their entry permit expires. If they become illegal they will not be eligible for a Processing Entry Permit (Schedule 2, Part 817.731).

A person who arrives at the border and makes a claim for refugee status is taken into custody until their refugee application is decided. Border applicants are not eligible for a Processing Entry Permit while their application is being processed. There is little doubt that but for the 1951 Convention and Australia's being a party border applicants would be ousted if the Department had its way.

Section 54K of the Act provided that boat people who arrived after 19 November 1989 and before 1 December 1992, did not have a valid visa and had been given an *identifier* were to be known as *designated persons*. Such persons are kept in detention until their refugee applications are decided.

Designated persons can be held in detention for up to 273 days. However, the time a boat person is held in detention could be much longer. The 273 days does not include time when the Department's decision-making process has been interrupted by third parties or the courts. It also does not include time taken in dealing with the application which is beyond the Department's control.

The refugee determination arrangements comprise two stages - primary and review. Current arrangements are policy based and therefore not enforceable. There is also a mechanism by which the Minister may exercise his discretionary powers under s. 115 of the Act to approve stay on humanitarian grounds. Where the RRT rejects an application the Department will assess the applicant for humanitarian consideration which is a discretion of the Minister only. Since this humanitarian discretion was introduced in 1991, the Minister has granted only a few entry permits on these grounds - 1991/92, 6 approvals; 1992/93, 24 approvals; 1993/94, 42 approvals; July 1994 to April 1995, 36 approvals. The Minister is required to table the reasons for his intervention in Parliament. The reason usually is that in the circumstances the Minister has decided that as a discretionary and humanitarian act to an individual with a genuine, ongoing need, that it is in the interest of Australia as a humane and generous society to grant the applicant a protection entry permit.

At the primary decision stage each application is assessed and a recommendation made by a DILGEA case officer. If the recommendation is negative, the assessment is forwarded to the applicant,who has 21 days to comment - 7 days if in custody. A decision is then taken by the Minister's delegate on the basis of the case officer's

assessment and, as appropriate, the applicant's and the UNHCR comments on the assessment. It has been held in a number of cases based on the decision of the Judicial Committee of the Privy Council in *Calvin v Carr* [1980] AC 574 that the court should not review the primary decisions. In the recent case of *Wu v MIEA* (1994) 32 ALD 735 Wilcox J held, and gave a thorough explanation of his reasoning, that any defect in the primary decisions would be cured by the review decisions, whether the defect be a denial of procedural fairness or other error of law.

Prior to 1 July 1993, at the review stage, the review application was considered by the Refugee Status Review Committee (RSRC) which comprised DIEA (Chair), DFAT, AG's and a community representative nominated by the Refugee Council of Australia. A UNHCR representative attended in an advisory capacity. All applicants refused refugee status at the primary level were able to seek formal review by an RSRC within 28 days of notification of the decision. If the RSRC's recommendation was negative, the applicant had 21 days (7 days if in custody) to comment on the recommendation. A decision on the grant of refugee status is taken by a senior DIEA delegate on the basis of the Committee's recommendation and the applicants' comments as appropriate. The RSRC was able to recommend to the Minister that persons who were unable to sustain a claim to refugee status be allowed to remain in Australia on humanitarian grounds. The RSRC was assisted by Ministerial Guidelines in making such recommendations. Persons granted refugee status were issued a Domestic Protection (Temporary) Entry Permit (DPTEP) valid for up to four years. A person who is recognised as a refugee may obtain a Certificate of Identity from DFAT to enable the person to travel overseas provided it can be shown it is not possible to obtain a passport from the country of nationality.

After 1 July 1993, where an application was refused at the primary stage, the applicant could appeal the decision to be Refugee Review Tribunal (RRT). Some 5000 case files were transferred from DORS to the RRT. The RRT examined claims against the Convention definition, providing a non-adversarial and informal setting to hear evidence. If the Tribunal is unable to make a decision favourable to the applicant on written evidence alone, it must give the applicant the opportunity for a personal hearing. The RRT may affirm or set aside, a decision made by the Department in relation to the grant of entry permits.

The system changed again from 1 March 1994. From that date all successful applicants for refugee status were eligible for permanent residence, a Protection Permanent Entry Permit (PPEP). All those previously granted a DPTEP were eligible to apply for permanent residence under the new arrangements. DPTEP holders who

did not apply for a PPEP needed to apply for a Protection Visa after 1 September 1994. Holders of a DPTEP will not automatically receive a Protection Visa, they will have to apply for it.

The Department tends to interpret the Act and the Convention very narrowly as does the Home Office (UK). Canada Immigration on the other hand seems to have taken a more liberal approach. The case of *Xiang v Minister for Immigration, Local Government and Ethnic Affairs* (Fed C of A, 22 April 1994, No. WAG 76/93) illustrates my contention. In that case Carr J set aside decisions of the Minister's delegate refusing the applicant refugee status and refusing the grant of a Domestic Protection (Temporary) Entry Permit. The applicant, a citizen of the People's Republic of China, had jumped ship in Dampier in Western Australia. His family had a history of being regarded as anti-revolutionary and had suffered harassment and other deprivations by government authorities. The applicant had participated in demonstrations during the pro-democracy movement in 1989 whilst the ship was in dock. During the voyage to Australia the political commissioner on the ship confiscated the applicant's seaman permit, seaman identification and technical certification. The applicant's brothers had since been arrested.

Carr J held that the Minister's delegate had erred in law within s 5(1)(f) of the ADJR Act 1977 in reaching findings that no weight should be given to the actions of the political commissioner, security on the ship and the political activity of the applicant's brothers, as evidence of persecution on the basis of political opinion. Moreover, the delegate failed to assess cumulatively the facts pointing to persecution within the definition of refugee in the Convention Relating to the Status of Refugees.

The individual claims which were not rejected included the family history of political dissent, the applicant's involvement in the pro-democracy demonstrations, a police visit, the detention of the applicant's brothers, and the applicant having jumped ship in such a context. The decision refusing refugee status was therefore *Wednesbury* unreasonable, ie, so unreasonable that no reasonable decision-maker could have reached it, bringing it within s5(2)(g) of the ADJR Act 1977.

There were as at 5 December 1994 432 boat people in Australia awaiting assessment for refugee status, of whom 385 were held in custody at centres in Port Hedland, Sydney, Perth and Melbourne. Detention costs in 1993/94 were $6M, that is about $15 000 p.a. for each detained refugee. About 160 detained Cambodian boat people returned to their homeland during January to July 1994 under the Government's special assistance program, which will make them eligible to immigrate legally to

Australia after 12 months. This leaves eight Cambodians still in detention at Port Hedland and Villawood who did not take up the offer and are locked in litigation with the Government in their attempt to stay.

Despite threats of detention and deportation there are still a number of boat people coming to Australia. This number increased significantly during November and December 1994. In May 1994, 58 Chinese arrived at Christmas Island, of whom all except one are in detention. In June 1994, 51 Chinese nationals and Vietnamese arrived in Darwin of whom 47 have been granted refugee status. In July 1994, 17 Vietnamese arrived in Broome and 25 Chinese arrived in Darwin, all of whom are in detention. In September/October, three boats containing 62 Vietnamese ex-Galang arrived. All have departed. In November, four boats containing 304 PRC/Vietnamese arrived. All but 13 ex-Galang are in detention (Personal Communication, DIEA).

On 8 June 1994, the Migration Legislation Amendment Bill (No. 2) 1994 was introduced into the Senate. The Bill operates with retrospective effect from 1 November 1989 to ensure that action taken under the Migration Act to detain unauthorised arrivals was validated. The Bill also attempts to strengthen provisions limiting the level of compensation payable to persons unlawfully detained. The legislation was described by the Government as a necessary response following a number of High Court decisions. It was strongly attacked by the Australian Democrats who described it as "an abuse of Parliament" and "morally repugnant".

As openly admitted in the Second Reading Speech and in the Explanatory Memorandum the Bill targets a limited group of people namely those Cambodians who were illegally detained by the Minister of Immigration between November 1989 and 6 May 1992 when s 54L was proclaimed. The purpose was apparently to circumvent legal action by these people to recover any compensation for this period of illegal detention. The case for the legislation made by the Minister was that the Minister acted in good faith in detaining those people under section 88 of the Migration Act 1958. Section 54RA was enacted in December 1992 with the intention of limiting any claim to compensation for unjust detention to $1 per day. The recent High Court decision in *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 119 ALR 629 lead the Government to believe that a High Court challenge to section 54RA would succeed, thus opening the way for the Cambodians to claim just compensation. About 483 people were at various times held in detention under section 88 during the period in question. Some of these are applicants in *Ly Sok Pheng v MILGEA*, a claim for unlawful detention which was due to be heard in the High Court in October 1994 but postponed until April/May 1995 because of the

confusion surrounding the legislation. The Bill would effectively intervene in that case by removing the basis for the claim retrospectively. The result would be the claimants would never have had a claim. The proposed amendments will prevent compensation claims by retrospectively declaring that detention was lawful when it was in fact unlawful. The amendments will survive constitutional challenge because of the "reading down" clause.

Article 9.4 of the ICCPR states:

> "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

In my view, s. 54RA(1) contravenes Article 9.4. Article 9.5 states:

> "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

Is not the $1 per day contemptuous of this provision?

This, truly, is a disgraceful piece of legislation. The Liberal Party has always opposed retrospective legislation and on 30 August 1994 decided to oppose the Bill although earlier it had supported it. So repugnant was the retrospectivity of this legislation that in my view the Opposition should have used it as grounds to cancel the bipartisan approach to immigration (including refugee) policy. Indeed the Bill established a dangerous precedent in rewriting history through retrospective legal fictions. The Bill is not prospective at all and has no application to any future unauthorised arrivals. However the Bill said one thing - do not dare to incur the wrath of the Minister for Immigration and his Department. It targeted a specific group of Cambodians, about 350 in number, who have suffered prolonged detention in Australia and attempted to deprive them of the right to have a claim for compensation heard in court. It strikes at the very basis of the argument that the Common law provides an adequate protection against infringement of civil liberties by government. Potential compensation claims were estimated at between $48 million and $96 million (*Canberra Times*, 29 August 1994). If the Government believes it is not liable for compensation it should defend the matter in the courts, not change the law.

Section 88 plainly was a provision for very short term detention of illegal entrants. The requirement that detainees be put on the vessel on which they arrived as soon as it

departed clearly indicates that this section was specifically designed for illegal entrants who had no claim to stay in Australia while their claims are assessed. Provision for detaining such persons existed under section 92 of the Act but this required that they be brought before a Magistrate. Some boat people were detained under section 92 in 1992. It appears that rather than acting in good faith in detaining the Cambodians under section 88 it was rather a deliberate attempt by the Minister or Departmental officers to avoid bringing the Cambodians before a Magistrate pursuant to section 92. If not, it is proof of Departmental incompetence. So, rather than attempting to correct a technical error, this legislation was an attempt to cover up by retrospective legislation the unlawful behaviour of the Minister and his officers. It is difficult to accept this is proper justification for retrospective legislation.

Reference has previously been made to section 54RA which would appear to have unjustly deprived a specific group of people from claiming just compensation for unlawful detention. The *Parliamentary Debates* on the Bill which inserted section 54RA would support the view that many members of the Parliament supported the legislation because they believed it was proper for the Parliament not to support large compensation payments for illegal entrants. The compensation legislation limited future compensation claims to $1 per day. This legislation attempted to rewrite history by declaring certain persons were lawfully detained when they were in fact detained illegally. This would have been an extremely dangerous precedent in retrospective justification of illegal behaviour by the executive arm of Government.

The legislation sought to pre-empt a High Court decision on the validity of legislation which was admittedly targeted at a limited group of people and involving a finite level of compensation. It seems inappropriate for legislation to be enacted which will circumvent a full and proper hearing of these claims in the courts. My concern with this Bill is that it would create a precedent so that whenever unlawful administrative action has been taken by the Executive, the Parliament may retrospectively act to cure it. If the Government was consistent it should have over-ruled the decision in *Mabo v the State of Queensland* [1992] 175 CLR1. It could then, if it so wished, have created some form of native title by legislation.

The Senate Standing Committee for the Scrutiny of Bills reported that it considered the rationale for making the legislation retrospective did not justify validating unlawful imprisonment. The Bill on 22 June 1994 was referred to the Senate Standing Committee on Legal and Constitutional Affairs which held a public hearing on the Bill and issued its report on 30 August 1994. At the hearing the Bill was condemned by the Law Council of Australia and many other groups. The

Government members recommended that the Bill be passed. Opposition members and the Democrat Senator recommended that the Bill be rejected. The Bill was finally rejected by the Senate on 9 November 1994. However, it is understood that the Government will re-present the Bill for further consideration.

Despite this condemnation in an article entitled "Move to stop refugee compensation claims" (*Canberra Times*, 29 August 1994), Campbell reported a poll conducted by Senator J. McKiernan (Labor, Western Australia) of 200 voters in two Western Australia electorates. He said 99 per cent of respondents opposed access to the legal system for boat people whose refugee-status applications had been rejected by both the Department and the Refugee Review Tribunal. He said 100 per cent of respondents supported legislation to remove the right to compensation. Acknowledging his survey was small and might not be seen as independent, the Senator called on a major media outlet to conduct a public survey on the boat people issue. His plea does not seem to have been taken up. Nor was his survey reported in the *Sydney Morning Herald* or *The Age*.

One must question the purpose of such a survey. The results must be regarded as questionable if not just biased. As Chairman of the Joint Standing Committee on Migration, McKiernan has merely pushed the Bolkus line. His "survey", no doubt, was aimed at support for what has been shown to be regressive legislation.

Is this the same McKiernan who wrote:

> "I reiterate, we must remember there are millions of people living in appalling refugee camps in many parts of the world. Let's not forget them. You can be assured your government will not." (Crock 1993, 7).

Speaking to the Report of the Senate Standing Committee on Legal and Constitutional Affairs, Senator McKiernan launched into a personal attack on Richard Egan of the Indo-Chinese Association of Western Australia. He connected Mr Egan with "that sinister, sectarian and bigoted organisation - the National Civic Council". In a letter dated 6 September 1994 headed "Secret Organisations" to refugee organisations McKiernan wrote:

> "In the 'West', Mr Egan is known only in the refugee area. To the best of my knowledge, he has never made a single public utterance on behalf of the National Civic Council. The clandestine nature of the National Civic Council, with its concealed membership and sly and underhand tactics, ensured that Mr Egan's true full time role in life is disguised and kept hidden.

> "I hope that you were not aware of Mr Egan's deception.
>
> "I trust that you do not condone the use of a refugee organisation for purposes that are deceptive and underhand.
>
> "I do look forward to you and your organisation publicly disassociating yourselves from Mr Egan and the National Civic Council. A condemnation of his use of a refugee as a front would also be appropriate. A copy of your statement being sent to me would be appreciated."

Mr Egan joins a long and distinguished list of people who have been smeared because of their support for refugees who have been incarcerated by the Labor Government. Their crime - standing up for human rights and dignity. Being linked with the National Civic Council is akin to being branded a Communist in the McCarthy era. This is yet another example of someone who dares to criticise the Minister and his Department and the consequences thereof. Who would want to be a refugee in Australia, 1995?

The Migration Legislation Amendment Bill (No. 3) 1994 which was similar to the No. 2 Bill, was introduced on 21 September 1994. This Bill repealed section 54A thereby removing the $1 per day limit for compensation for unlawful detention. The Minister said the change would serve to focus the Opposition's mind. If the Opposition opposes this Bill the Government will accuse it of supporting open slather compensation even though the $1 per day limit would probably be overturned by the High Court as unjust. Passage of this Bill would therefore be unlikely to solve the Government's problem and would simply continue the debilitating and unsatisfactory legal wrangles that have been the hallmark of this area of Government policy in recent years. The Bill was still before the Senate in January 1995. The Coalition indicated it would oppose the Bill as had the Democrats, Independents and Greens. On the same day Migration Legislation Amendment Bill (No. 4) 1994 was introduced. This Bill, also retrospective legislation, sought to deny asylum-seekers who have had access to protection in a third country, under the international Comprehensive Plan of Action for Indo-Chinese Refugees, the right to apply for protection in Australia. In effect, the legislation will prevent people who are denied refugee status in another country, under processes accepted by UNHCR, from seeking the same status in Australia. It applied retrospectively to a group of 17 Vietnamese boat people who arrived in Darwin and Broome in mid-July 1994 from Galang Camp in Indonesia. The camp is home to some 8000 Vietnamese, many of whom have been screened out as non-refugees and are facing forced repatriation to their homeland. The UNHCR regional representative in Australia (*Canberra Times*, 13 July 1994) requested the

Australian Government to refuse to let the Vietnamese renew refugee applications in Australia. UNHCR considered such a move would undermine international efforts.

This view was also supported by the Indo-China Refugee Association President Marion Le who said it was vital that "Australia took a tough stand on the group, given that they already had been found not to qualify as refugees at an Indonesian camp". She urged the Government to remove the 17 Vietnamese from Australia. However the Australian Government quite properly pointed out it was obliged to consider any applications for refugee status ab initio as reported in the *Canberra Times*, 15 July 1994. What UNHCR and Ms Le ignored was that the Government alone determines refugee status. Furthermore they were making a case for refusal of refugee status to be portable. They were also ignoring the offshore program under which those refused status elsewhere are taken. Eventually the Government heeded their advice and Amendment Bill (No. 4) was introduced. If UNHCR and a Refugee Association are not going to plead the causes of refugees, who is? UNHCR had at stake its reputation in the CPA and its control of the international situation - this seems to be more important than the individual.

This legislation introduced the term "safe third country" into the Migration Act 1958. Reference was previously made to this term in the discussion on Europe. I reiterate that this policy leads to asylum-seekers being shuffled from one country to another until, finally, they are returned to the country from which they originally fled. This is a procedural manipulation to avoid responsibility for fairly assessing a refugee's plea for help. It is yet another example of the downward spiral of Australia's policies with respect to asylum-seekers. What is particularly odious about introducing this concept into Australian law is that few countries in Australia's region are signatories to the 1951 Convention.

SACKVILLE DECISION

December 1994/January 1995 saw Australian refugee law and policy in turmoil. What occurred was, in many respects, a microcosm of the sorry saga of the development of refugee policy and law in Australia. On 6 December 1994 Sackville J in the Federal Court, *MIEA v A and B and Others* (Fed. Ct. of A NG 327/94 unreported) upheld a finding of the Refugee Review Tribunal on 20 May 1993 that a Chinese couple belonged to a "particular social group" made up of "those who, having only one child, do not accept the limitations placed on them or who are coerced or forced into being sterilised." He also accepted the tribunal's findings that some people who wished to have another child were at risk of being subjected to forcible

sterilisation and that such forcible sterilisation was a form of persecution. This decision had the effect of widening very substantially the definition of refugee under the 1951 Convention. This raises the question: should a woman who can establish that she has a well founded fear of persecution on her return to China involving forced abortion and/or sterilisation be granted asylum and be granted refugee status? If this is to be answered in the negative then, I would submit, being a homosexual should not be regarded as grounds for refugee status. I refer to my discussion of "particular social group" in chapter 2. Sackvilles' judgement is very similar to a decision by the Canadian Federal Court of Appeal (*Cheung v Minister for Employment and Immigration* (1993) 102 DLR (4th) 214). It must be emphasised that an applicant for asylum in such a case must **prove (on an equally shared basis) persecution based on membership of a particular social group.**

In line with perceived Government policy that unfavourable decisions are appealed, the Federal Government lodged an appeal. Subsequently, the Minister for Immigration and Ethnic Affairs, Senator Bolkus, announced he would introduce legislation to overturn the decision. Until now the courts have had the responsibility for interpreting the 1951 Convention. Bolkus' proposal created a dangerous precedent in that governments in future will be able to pick and choose their obligations to refugees under the Convention. Do Bolkus' actions mean that any expansion of the definition of "social group" by the courts will be overturned by legislation?

This decision is indicative of the mess refugee law in Australia is in. The decision raises a number of important legal and policy issues. It is difficult, on public policy grounds, to support Sackville's decision. To do so, would be saying any Chinese woman or couple who disagreed with China's population policy could claim refugee status under Australian law. For a number of years it has been evident that the Department of Immigration and Ethnic Affairs has resented the involvement of anyone, other than it, in decision making. It would seem that when decisions are handed down against the Department, legislation is introduced and rushed through Parliament to overturn the decision. On the other hand, the Courts have stretched the definitions in the Act and the 1951 Convention to grant refugee status. It seems, in many respects, that courts are moving to the view that the government cannot decide refugee policy without such complex laws that they are incomprehensible.

This raises another question. Has the process of judicial review of policy decisions gone too far? Administrative review and appeals tribunals were originally established to provide cheap and quick reviews of decisions by the bureaucracy. These tribunals now are generally anything but quick and cheap. They have become burdened by the

law and the intricacies of procedure which must be followed are such as to trap decision-makers in a legal maze. The Department of Immigration and Ethnic Affairs tends to see this as an expansion of judicial interference in policy making and executive decisions, and, as has previously been pointed out, has been successful in dismantling much of the process of judicial review of executive decisions. There is a need for a review process of arbitrary decisions by Ministers and bureaucrats. However, arbitrary and ad hoc decision making by the judiciary is not the answer. Litigation has certainly increased. In 1982/83 only 51 court applications were made involving Portfolio matters. By 1988/89 this had risen to 124 and in 1992/93 to 469 applications. As at March 1995 there were 407 cases in the High Court, Federal Court and the AAT (Personal Communication, DIEA).

A NEW WAVE?

December 1994/January 1995 saw the arrival of some 700 Chinese and Vietnamese by boat from Beihai in South China. According to Jupp (1994) the "Department of Immigration was advised a year ago that there were likely to be movements of former Indo-Chinese out of South China in reaction to slum clearance and forced sterilisation. They chose to dismiss such warnings".

The arrival of these boats caused panic which was mainly whipped up by the media and some politicians who referred to an imminent invasion. Reports of a flood of 20 000 boat people ready to depart China (*Australian*, 3 January 1995) created further alarm. However, the number of arrivals is very small when the movements of refugees in Africa, for example, are considered. What was not addressed was the failure of government policy to stem the flow. Both the Government and Opposition have continued to justify the holding of asylum-seekers on the grounds that this would deter others from coming. The policy is obviously not working, yet the Government has continued in the belief that detention of unauthorised arrivals was sending a clear signal back to Asia. In my view a very confused signal has been sent back to Asia. Reference is made to the decision, taken and reaffirmed at Prime Ministerial level, to permit some 20 000 Chinese students to remain here, regardless of whether or not they were genuine refugees. This decision has no doubt helped to create a climate in which the trade in people is flourishing. The result is certainly not the fault of Bolkus or his department. The message we need to send is that we have a fair but tough determination system. What we must be careful not to do is further the impression that we have resurrected the White Australia Policy.

Official reactions were predictable. The Federal Government "asked China to try to stem the flow of boat people streaming to Australia" (Riley 1994). The Chinese Government warned "that China was under no obligation to repatriate the boat people if they were refused refugee status by Australia." China pointed out "that the present situation was directly triggered by the Australian Government's granting of refugee status to some of the former Vietnamese refugees in mid-1994." (Riley, 1995). Senator Bolkus announced he "would change the law, to apply from yesterday, (30 December 1994), to ensure that unauthorised arrivals are not able to abuse our system" (Kingston 1994). The boat people were not supported by UNHCR. Pierre-Michel Fontaine (*Sydney Morning Herald*, 3 January 1995), UNHCR representative in Australia, was reported as saying "his organisation was still unaware of any human rights violations in Beihai. No-one was being forced to leave China, although talks were going ahead between various parties to allow them to return to Vietnam if they wished". Mr. Henry Domzalski, an officer of UNHCR in Australia, was reported as saying "Vietnamese boat people have no claim to asylum in Australia."

He added:

> "They went to China as refugees, and China gives them protection, but they have decided to leave for reasons that are economic ... As caretakers of international protection for such people, we would be pleased to tell the world that China is not overreacting ... Claims that the boat people are entitled to refugee status because of Chinese policy limiting families to one child are ignorant" (*SMH*, 5 January 1995).

So, there was not much support for the refugees from the organisation set up to protect them. Maybe Fontaine and Domzalski were not aware of decisions of the Refugee Review Tribunal which have stated that many people from the Beihai area have not obtained adequate protection in China. For example, in case N94/5015, UNHCR provided evidence to the Tribunal that some Sino-Vietnamese did not get household registration in China and suffered significant hardship as a result. UNHCR is quoted (p. 11 of Judgment):

> "Such a person, without proper house registration, would certainly, as you state, be 'vulnerable to exploitation' and discriminated against ... "

Could it be that UNHCR's views are somewhat clouded by its involvement in the Comprehensive Plan of Action (CPA) and will prop up the CPA at any cost? UNHCR certainly did not obtain direct information from the Sino-Vietnamese as no representative of UNHCR had visited the Port Hedland detention centre, where the

asylum-seekers are detained from July 1994 to February 1995. Fontaine admitted this at a meeting at RACS on 9 February 1995.

New, and enforceable, policies towards boat people are clearly necessary. However, the primary issue is to address the root causes. While we need a mechanism for returning those not granted asylum in Australia, our negotiations with China should include discussions to ensure that accepted standards of human rights are observed for the Sino-Vietnamese in Beihai.

Maybe, the Migration Act 1958 should be amended to preclude the grant of permanent residence to persons arriving on unscheduled shipping or aircraft. The 1951 Convention does not require Australia to give permanent residence to those granted refugee status. By denying permanent residence, it would no longer be attractive for non-genuine asylum-seekers to come to Australia. Australia is not required to grant residence to boat people who are not refugees. Section 181 of the Migration Act, which came into force on 1 September 1994, provides for such people to be removed from Australia without the need for a deportation order. From my experience in interviewing refugees, I have formed the view that few genuine refugees would not prefer to return home one day.

Voluntary as opposed to forced repatriation is a matter of some debate. There are those who argue that repatriation in any form is ultra vires the Convention. However, it must be recognised that not all countries are signatories to the Convention. Nevertheless applicants must be screened.

Pursuant to the Comprehensive Plan of Action on Indo-Chinese Refugees (CPA), in 1989, it was agreed that the countries of first asylum in Asia would be responsible for screening procedures with the assistance and monitoring of UNHCR. With the exception of the Philippines, none of the countries concerned were parties to the 1951 Refugee Convention. Nevertheless, all agreed to adopt screening processes in large with the 1951 Convention. The CPA aimed to determine the refugee status of all asylum seekers, resettle those found to be genuine refugees and repatriate those found not to be refugees. Of the 839 202 Vietnamese asylum seekers who arrived in the CPA area since 1975, 754 253 have been resettled, 72 244 have been voluntarily repatriated. Screened out non-refugees will be forcibly repatriated by 30 June 1996 as no funds are available

to UNHCR for CPA activities after that date. Whilst they are being forcibly repatriated, UNHCR is monitoring the returnees to ensure there is no mistreatment. Repatriation grants ($US 410 per person) are paid. UNHCR is meeting its mandated function - providing international protection (cf UNHCR 1995, 9).

In such mass influxes of refugees, a CPA style solution seems to be the most favoured option.

The Act lacks authority to refuse to accept an application where clearly the application is an abuse of process or is manifestly unfounded. There is also a need to provide for arrangements to review case decisions in the light of changing circumstances in countries of origin. Fines for putting deliberate untruths in applications need to be substantially increased.

1995 AMENDMENT BILLS

On 31 January 1995, the first day of the 1995 Parliamentary Session, Minister Bolkus introduced Migration (Amendment) Bills Numbers 1, 2 and 3 of 1995. This again re-enforces my contention that migration/refugee law is in the state of constant change and resultant confusion. The Bills increase the power of government at the expense of the Courts. Many of the amendments were prompted by judicial decision. By 28 March, five Bills had been introduced.

The main purpose of Amendment Bill No. 2 was to backdate to 30 December 1994 the effect of the regulation made on 27 January 1995 which made China a safe third country in respect of a specific group of people. This meant applications for protection visas made by the Sino-Vietnamese were invalidated. A further provision was included so that, in future, visa applications made during a 'transitional period' before commencement of an agreement between Australia and a Safe Third Country could be invalidated. The Minister may determine this provision does not apply if "it is in the public interest to do so" to a particular non-citizen. The Bill seems to have been designed to act as a deterrent to would-be applicants irrespective of their merits. The Bill did not state how ministerial consideration of 'public interest factors' could be triggered. The Bill was assented to on 17 February 1995.

The retrospective operation of so many amendments to the Migration Act is a matter of concern. All legislation impinges on existing rights and obligations. Conduct that

could formerly be engaged in will have to be modified to fit in with the new law. The leading Australian case on this question is *Maxwell v Murphy* (1957) 96 CLR 261 where Dixon CJ at 267 summarised the approach of the courts as follows:

> "The general rule of the Common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events."

Fullagar J in *Fisher v Hebburn Ltd* (1960) 105 CLR 188 at 194 said:

> "There can be no doubt that the general rule is that an amending enactment - or, for that matter, any enactment - is prima facie to be construed as having a prospective operation only. That is to say, it is prima facie to be construed as not attaching new legal consequences to facts or events which occurred before its commencement."

The Department has a fairly novel approach to retrospectivity as shown in evidence to the Senate Legal and Constitutional Legislation Committee on 6 February 1995. In effect the Department's view was that as the Minister had given notice of a proposed amendment in a press release the amendment was not a retrospective amendment when it was backdated in the legislation. (*Parliamentary Debates*, Senate - Legislation, 6 February 1995, pp. L & C 182-183). It would seem this legislation, in particular, reflected an attempt to legislate matters in a press release rather than give a considered view and draft legislation to deal with a significant refugee problem. After consideration and recommendation by the Senate Legal and Constitutional Legislation Committee the Bill was passed.

Migration Legislation Amendment Bill (No. 3) 1995 proposes to narrow that definition of a refugee to exclude particular categories of claimants who would otherwise be protected. Persons who have a well-founded fear of forcible sterilisation for violating China's "fertility control policy" are not to be considered as refugees within the meaning of the Migration Act 1958. The amendment applies to claims related to "a fertility control policy of a foreign government" and is retrospective to 30 December 1994. Some of these claims would have been lodged some years ago. DIEA should be encouraged to record on databases the main claims so that such claims can be statistically allotted and analysed. It is grossly unfair to change the rules of assessment once it is underway without prior notice. In effect, the Bill overruled the Sackville decision. This is another example of the Department showing scant respect for due process of law. If it does not agree with a decision of a superior

court, it introduces legislation to overrule that decision. Maybe the Chinese legal framework would appeal to the Department - judicial decisions of courts are not sources of law in the PRC. This Bill is best described as a spiteful piece of legislation aimed specifically at one group for the political purpose of deterring other similar claims. Subsequently, Bill (No. 3) 1995 was withdrawn and replaced by Bill (No. 4) 1995. Bill No. 4, **almost** identical to Bill No. 3, made it clear that refugee status would not be denied to persons who seek it as a member of a particular pre-existing social group, or on any other of the grounds contained in the 1951 Convention where a person has a well founded fear of persecution because of fertility control policies.

Existing legislation permits repeat applications but requires decision-makers to consider new material only. The proposed amendments will rule out repeat applications. However, it confers on the Minister a non-compellable discretion to allow further applications "in the public interest". The NGOs claim this amendment will result in deportations where circumstances in the relevant countries have changed substantially. It is difficult to support the NGOs' view. The Department has indicated that repeat applications are being made frivolously to prevent removal. The need for a third consideration seems unnecessary. The RRT would consider changed circumstances. What must be recognised is that refugee determination is an extremely costly process. A final decision must be made on each case and appeal processes must not be permitted to drag on indefinitely. It should be noted that Drummond J in *Li Shi Ping v Minister for Immigration, Local Government and Ethnic Affairs* (1995) 35 ALD 395 held that section 54P(3) does not proceed on the basis that a person can make only one application for recognition as a refugee and there is nothing in section 54Q(3) that ties the concept of "application custody" to any one particular entry application.

Amendment Bill (No. 5) 1995 introduced into the House of Representatives on 30 March further implemented the Government's response to recommendations of the Joint Standing Committee on Migration Report on Asylum, Border Control and Detention by providing the Minister with a discretion to determine that a person is an "eligible non-citizen".

These amendments, together with others in recent years, raise the question as to how committed is Australia to the 1951 Convention and its 1967 Protocol. As a signatory, Australia has an obligation to consider the claims of people who seek asylum onshore whether they are legally or illegally in the country. If Australia does not consider it has an obligation to consider generally the claims of asylum-seekers onshore or specifically to consider the claims of those persons persecuted or in fear of

persecution owing to membership of a particular social group it should no longer be a signatory to the 1951 Convention or alternatively, limit by reservation its interpretation of its obligations.

Australia should take this Convention very seriously. It was Australia that triggered the coming into effect of the Convention. It was the country which provided the sixth instrument of ratification. Furthermore, no other country has ever denounced the Convention or its Protocol. Unfortunately the obligations of this Convention, and for that matter Treaties in general, are not understood by the public as the public is permitted no role on treaties. Action to sign or ratify treaties is taken at the Federal Cabinet's absolute discretion subject only to authorisation from the Governor-General-in-Council. Treaty making in Australia and Canada, as in Britain, forms part of the royal prerogative, the residue of authority left in the Crown. Objective assessment of any potential social and economic consequences such treaties might have on Australian domestic affairs is never undertaken nor adequately explained. Each time the Commonwealth ratifies a treaty or convention, it is to all intents and purposes effectively altering Australian law without reference to Parliament. The substance of treaties is usually drafted by an international organisation, considered by Australian diplomats and bureaucrats and accepted by executive government without benefit of parliamentary scrutiny. It is difficult for the Australian people to have any affinity with such an enactment. Treaty ratification should be subject to approval by the Prime Minister, State Premiers and Chief Ministers. Furthermore, the treaty's impact and subsequent value to Australia should be monitored.

On 1 February 1995, Minister Bolkus announced an agreement with China under which China would take back the 700 boat people. Without creating a precedent, China accepted responsibility for resettlement of the illegal immigrants. The Australian Government agreed to provide the Chinese Government with documents showing that the boat people are registered as Vietnamese refugees; pay for the costs of returning the illegal immigrants by air and associated costs; and providing some resettlement assistance. (Riley 1995b). Repatriation is, of course, as I have pointed out elsewhere, a desirable durable solution. I am informed by Fontaine (Personal Communication 1995) that UNHCR will monitor the refugees on their return to China as it has monitored refugees repatriated from Hong Kong and Japan. There has been no evidence of repatriated refugees being persecuted. In fact, the very opposite has occurred. Repatriated refugees have been assisted with housing and income generating and job creation schemes have been initiated to assist in their resettlement.

What of the future? The number of primary applications on-hand decreased from 21 723 at 1 July 1992, to 15 370 at 30 June 1993 and 12 892 at 30 June 1994, of that number 9077 are Chinese - mostly students who applied after the Beijing massacre. There were 3087 new primary applications received during 1992/93 and 5259 during 1993/94 - an average of 438 new applications per month. This compares with 3367 applications received in 1989/90, 14 051 in 1990/91 and 9787 in 1991/92. Australia's humanitarian program is summarised in Table 3 below. The cost of processing onshore refugee applications in 1992/93 was $42M, in 1993/94 was $22.6M and an estimated $50.744M in 1993/94. (DIEA, *Fact Sheet* No. 19, 7 November 1994). $16.3M was spent on the Asylum-Seeker Assistance Scheme. This is about $28 000 per onshore asylum application. On the other hand, the cost per refugee offshore is about $2800. The cost of processing onshore claims is quite substantial as is also the case in Canada and the United Kingdom.

TABLE 3

HUMANITARIAN PROGRAM

(PLANNING LEVELS AND OUTCOMES)

	1991/92		1992/93		1993/94		1994/95	1995/96
	Planning Level	Outcome	Planning Level	Outcome	Planning Level	Outcome	Planning Level	Planning Level
Refugee and Incountry	5 600	6 784	3 000	3 204	4 000	4 315	4 000	4 000
Special Humanitarian			2 550	2 324	2 650	2 524	2 500	3 800
Special Assistance	4 000	2 363	5 250	5 414	6 350	5 840	6 500	5 200
Humanitarian Onshore	2 400	2 862	1 200	903		91		
Onshore Refugees						1 300		
TOTAL	12 000	12 009	12 000	11 845	13 000	14 070	13 000	13 000

SOURCE: Department of Immigration and Ethnic Affairs *Annual Reports* and *Media Statements*

In announcing the 1994/95 program, Senator Bolkus said that current priority areas under the program were Indo-China, the former Yugoslavia and the Middle East.

Submissions on the size of the 1994-95 humanitarian intake were made by the ACTU and the Refugee Council of Australia. The ACTU (1994, 5) recommended that the Humanitarian Program be increased to 14 000.

It is the Department's policy to develop and promote measures which will lead to the rapid resettlement of refugees and the early, safe and dignified return of non-refugees to their countries of origin, thereby helping them to move out of refugee camps and detention centres and into positions where they can re-establish their lives. This policy includes drawing attention to the problems of illegal movements and disseminating information on alternative legal avenues for migration in the hope that refugees will look to countries other than Australia for asylum.

Adverse change in the Asia-Pacific Region could lead to a massive increase in the number of asylum-seekers arriving in Australia. Sri Lanka is in a state of civil war, Burma may be slowly coming out of a state of oppression. Fiji has already experienced two coups. In the Australian Governments paper entitled "South-North Migration: An Australian Perspective" (1990, 5) presented to the Ninth International Organisation for Migration Seminar, 1990 it was predicted that there will be an exodus from Hong Kong when it becomes part of China. It was further noted (1990, 8) that Kiribati and Tuvalu may join Atlantis at the bottom of the sea. The "Four Corners" television program (23 March 1992) reported on the high level of internal migration in China and concluded that it was not unreasonable to assume that sooner or later the same pressures will cause an international population movement. India has a population growth which outstrips economic growth. It too may produce irregular migrants. During a visit to Vanuatu in 1992 many Australians working there informed me of the desire of the local population to have the same visa/permit status as New Zealand has with Australia and if this was not forthcoming the islanders "would just come here". Australia should pay more attention to experts on population movement and political developments in the region. In contrast, Canada Immigration is well briefed on population movement, potential and actual.

Whatever the nature of future population movements to Australia or whatever the causes, many of those who arrive will claim that they are entitled to Australia's protection under international law. It is likely that Australia will only have an international law obligation of protection in relation to a small proportion of those claimants. However, those few must be identified and protected. As a proponent of human rights, Australia may have to consider the settlement of such people from a broader perspective than the Convention definition of refugee. It may have to regard

the refugee as a person wherever located who is denied in part or whole basic human rights.

The Minister and his officers would do well to recall the words of Smithers J in *Ates v Minister of State for Immigration and Ethnic Affairs* 5ALN67:

> "But in the administration of good government there is not only room, but a legal duty to consider, even on occasions with compassion the circumstances of particular cases ... The law must be administered by the Minister in the best interest of Australia; so to do extends to Australia's interest broadly regarded and embraces, on occasion and according to circumstances, the taking of decisions by reference to a liberal and even compassionate outlook appropriate to a free and confident nation and conscious of its reputation as such."

Similarly in *Fuduche v MILGEA* (1993) 117 ALR 418 at 426, "Australia's true interests" were taken to include recognition of "Australia's moral obligations, particularly to its own people, and Australia's national interest in behaving in a civilised manner".

It is quite clear that the refugee program is driven by political considerations. The frequent changes to legislation show a lack of policy and a struggle for control. Each time a court delivers a judgment contrary to the policy objectives of DIEA the government responds with harsher legislation and more complex regulations. There is no denying determining whether refugee status should be granted is a hard decision. The Australian Act and Regulations have endeavoured to routinise decision-making. Deportation, for example, is obligatory. It is not based on an individualised decision. On the other hand, in Canada, immigration officers have to make hard decisions.

There is an urgent need to update refugee policy in Australia particularly in two areas. First, the increase in numbers is leading to arbitrary decisions as to who to select as offshore refugees. Other than real need, it seems that other considerations such as capacity for settlement including English language and employment skills are taken into account. Second, Australia's offshore efforts to prevent or minimise refugee situations are minimal in terms of both diplomacy and overseas aid. Further efforts at assisting voluntary repatriation and providing assistance to countries of first asylum are needed. Third, acting as though refugees are no different from other immigrants is creating many problems especially for vulnerable groups such as unaccompanied minors, victims of torture and trauma and women at risk. As has previously been pointed out resettlement in a third country, such as Australia, is generally seen as the least desirable option. If it is the solution adopted, Australia must develop a policy

which acknowledges the special needs of refugees and provide services in an organised fashion.

This chapter has shown how obsession with control has influenced the development of legislation relating to refugees over a long period. The Liberal Party Opposition shares this obsession. In an exchange in the Senate Estimates Committee (*Parliamentary Debates*, Senate, 23 June 1994, pp. F228-229), Senator Short expressed concern that any athlete or official accredited by the International Olympic Committee had to automatically receive a visa to enter Australia for the Sydney Olympics 2000. Short asked:

> "How strict will the entry conditions be on athletes? For example, will athletes be required to meet the normal conditions in relation to character and criminal record and things like that?"

Later, Short said:

> "That requirement by the IOC - which we had to agree to in order to get the games - means that Senator Bolkus, as Minister for Immigration, has lost the fundamental right of determining who shall or shall not enter Australia. That is the practical impact is it not?"

I rest my case.

CANADA

REFUGEE STATUS DETERMINATION PROCESS