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No. 41 2001–02

Border Protection Bill 2001

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Bills Digest
No. 41 2001-02

Border Protection Bill 2001

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Law and Bills Digest Group
30 August 2001

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Border Protection Bill 2001

Date Introduced: 29 August 2001

House: House of Representatives

Portfolio: Immigration and Multicultural Affairs

Commencement: *Retrospectively* from 9.00 a.m. on 29 August 2001.

Purpose

To put beyond doubt the domestic legal basis for actions taken in relation to foreign ships within the territorial sea of Australia.

Background

In March and April 1999, illegal entrants made undetected landings on the eastern coast of Australia, as far south as Scotts Head, New South Wales.¹ In response to public concern over the landings, on 12 April 1999 the Prime Minister established a Coastal Surveillance Task Force, chaired by the Secretary of the Department of Prime Minister and Cabinet, Mr Max Moore-Wilton.² The Task Force reported in June 1999. It noted that '[c]urrent maritime enforcement legislation does not implement fully the powers available under international law'³ and recommended that 'comprehensive legislative amendments be introduced to further strengthen maritime investigatory and enforcement powers against both Australian and foreign flag vessels'.⁴ The *Border Protection Legislation Amendment Act 1999* and the *Crimes at Sea Act 1999* emerged following this process.

On 26 August 2001, a routine surveillance flight by Coastwatch revealed the presence of a wooden fishing boat approximately 80 nautical miles northwest of Christmas Island. The vessel was carrying 438 would be asylum seekers en route to Australia before it broke down. The following day AUSSAR broadcast a call to any merchant ships in the vicinity to render assistance to the stricken vessel. A Norwegian freighter the *Tampa* responded to the call, intercepting the vessel and bringing its passengers aboard. The master of the *Tampa* reportedly, Mr Arne Rinnan, had intended to proceed to a port in Indonesia but was requested by the passengers to proceed to Christmas Island. Before the *Tampa* reached Australia's territorial waters it was instructed to remain in the contiguous zone.

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On 28 August the *Tampa* issued a distress signal seeking urgent assistance. On 29 August it proceeded into the territorial sea where it was interdicted by Special Air Service officers.

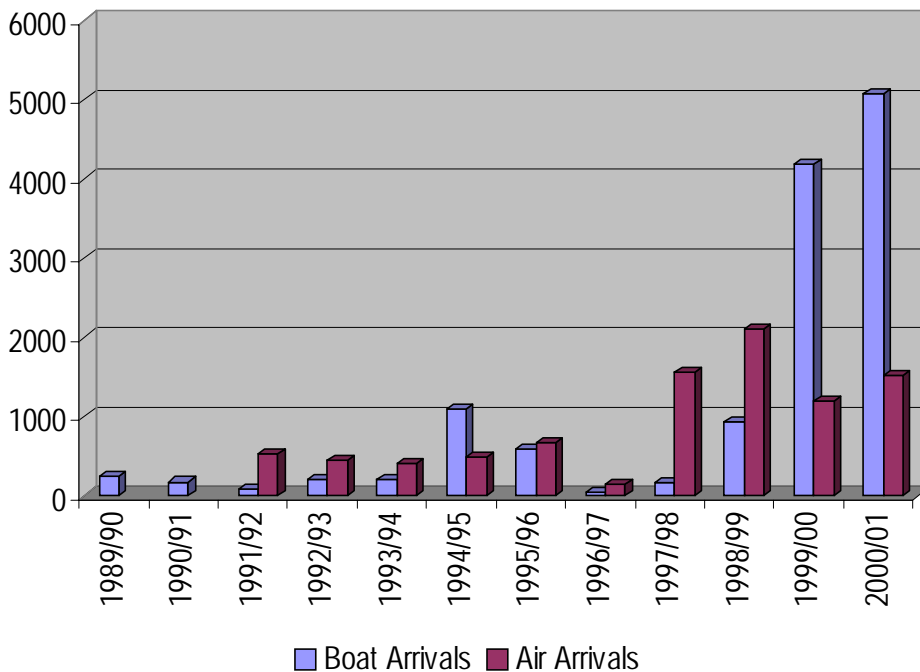
People Smuggling, Asylum Seekers and Border Protection

People Smuggling

People smuggling operations are transnational. They may involve structured, hierarchical and disciplined criminal groups or simply diverse criminal units whose alliances stretch across borders and jurisdictions. They are also likely to come into contact with and utilise other aspects of international crime such as drug trafficking, money laundering and fraud. As such they pose significant problems for law enforcement in Australia.

An overview of the global size and nature of people smuggling has been provided in a Parliamentary Library Current Issues Brief entitled 'Boat People, Illegal Migration and Asylum Seekers: in Perspective'.⁵ However, the following graph is illustrative:

Unauthorised Arrivals to 28 August 2001⁶



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The Global Response

Internationally, 'people smuggling' has become a hot topic in the context of pressure to control transnational organised crime. It has received the attention of the General Assembly,⁷ the Secretary General,⁸ the Economic and Social Council⁹ and the International Maritime Organisation.¹⁰ Countries are being urged to review their domestic legislative powers to deal with people smuggling offences.¹¹ In recognition of the connection between people smuggling and transnational crime, it is now the subject of a proposed protocol to a draft international convention on transnational organised crime.¹²

The United States Response

In the United States, 'people smuggling' has long been an issue of concern and has been addressed by presidential directives and specific legislative amendments. As early as 1953 President Truman instructed the government to adopt a coordinated response to illegal immigration.¹³ In 1981 President Reagan directed government agencies to interdict on the high seas vessels carrying would be illegal immigrants.¹⁴ President Bush gave a similar direction in 1992,¹⁵ as did President Clinton in 1993.¹⁶ In 1996 amendments were made to the Immigration and Nationality Act to increase penalties for people smuggling and to the Racketeer Influenced Corrupt Organizations Act to prescribe people smuggling and related offences as organised crime offences.¹⁷ In 1998 legislation was introduced to authorise the forfeiture of alien smuggling proceeds.¹⁸ The International Crime Control Strategy of 1998 suggests that the government is increasing its commitment to the issue.¹⁹

The Presidential Directive of 1993 heralded a stern response to people smuggling:

[We] will take the necessary measures to preempt, interdict and deter alien smuggling into the U.S. Our efforts will focus on disrupting and dismantling the criminal networks which traffic in illegal aliens. We will deal with the problem at its source, in transit, at our borders and within the U.S. We will attempt to interdict and hold smuggled aliens as far as possible from the U.S. border and to repatriate them when appropriate. We will seek tougher criminal penalties both at home and abroad for alien smugglers. We will seek to process smuggled aliens as quickly as possible.²⁰

The Australian Response

In Australia, 'people smuggling' has recently been addressed by amendments to the *Migration Act 1958*. In July 1999 the *Migration Legislation Amendment Act (No. 1) 1999* was passed to create people smuggling and related offences. In November the *Border Protection Legislation Amendment Act 1999* was passed to expand Australia's capacity to board, search and detain ships and to detain persons aboard foreign vessels at sea.

The *Migration Legislation Amendment Act (No. 1) 1999* makes it an offence for a person to carry non-citizens to Australia without documentation.²¹ It also makes it an offence for a person to organise or facilitate the bringing or coming to Australia of a group of 5 or more persons where s/he knows they would become illegal immigrants.²² It is also an

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offence to present false or forged documents, to make false or misleading statements or to pass documents to help a group gain illegal entry into Australia.²³ In addition, it is an offence for a person to make a false or misleading statement about his or her ability or power to influence a decision or to make a false or misleading statement about the effect of his or her actions on a particular decision.²⁴ And it is an offence to enter an arrangement in which s/he undertakes for a reward that a particular decision will be made.²⁵

In introducing the *Border Protection Legislation Amendment Bill 1999*, the Minister for Immigration and Multicultural Affairs drew a strong correlation between domestic and international responses to people smuggling, particularly the response of the United States:

Australia is not alone in adopting a more active approach to people smuggling. The United States ... has announced its intention to broaden the scope of its border enforcement powers beyond its territorial waters... The fact is that if we are not at the forefront in dealing with these issues through legislation of the sort that I am proposing, and other measures, we will be seen as a more attractive destination to the people smugglers who are arranging this sort of trafficking.²⁶

Australia's Maritime Zones

At the outset, a distinction should be made among the various maritime zones recognised under domestic and international law. A convenient guide is given by the *United Nations Convention on the Law of the Sea* (UNCLOS).²⁷

- *Internal Waters*: sea on the landward side of the 'territorial baseline'.²⁸
- *Territorial Sea*: sea within 12 nautical miles (nm)²⁹ of the 'territorial baseline'.³⁰
- *Contiguous Zone*: sea to 24 nm.³¹
- *Exclusive Economic Zone*: sea to 200 nm of the 'territorial baseline'.³²
- *Continental Shelf*: seabed and subsoil up to 350 nm³³ (or as agreed between two state parties to UNCLOS with 'opposite or adjacent coasts').³⁴

For completeness it is worth mentioning various zones created under domestic law.

- *Adjacent Areas*: areas of sea adjacent to each State and the Northern Territory. The outer limits are prescribed in regulations under the *Seas and Submerged Lands Act 1973*.³⁵
- *Migration Zone*: includes land above the low watermark and sea within the limits of a port in a State or Territory but does not include the sea within a State or Territory or the 'territorial sea' of Australia.³⁶ The zone includes Christmas Island and Ashmore Reef.³⁷

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The relevant zones are represented in the following diagram and indicative map.

Figure 1: Maritime Zones Recognised under International Law³⁸

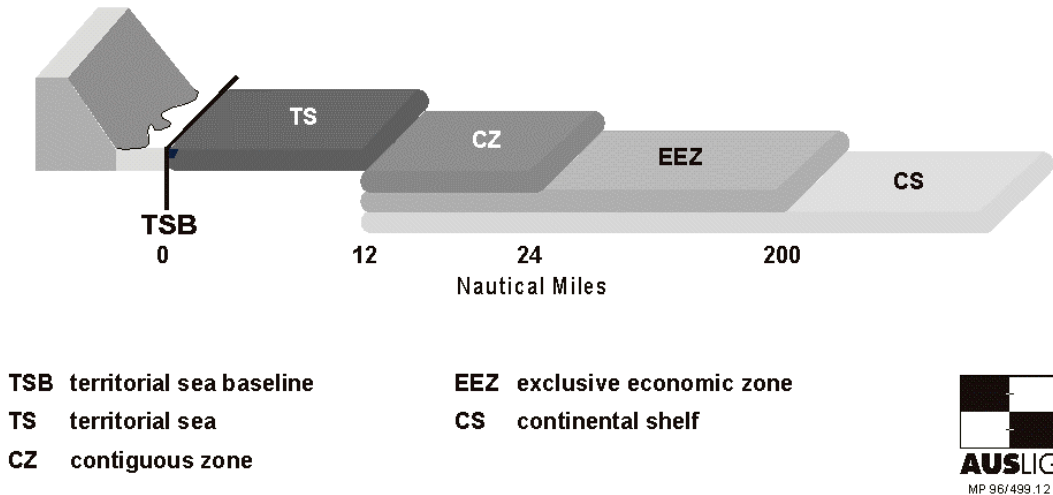
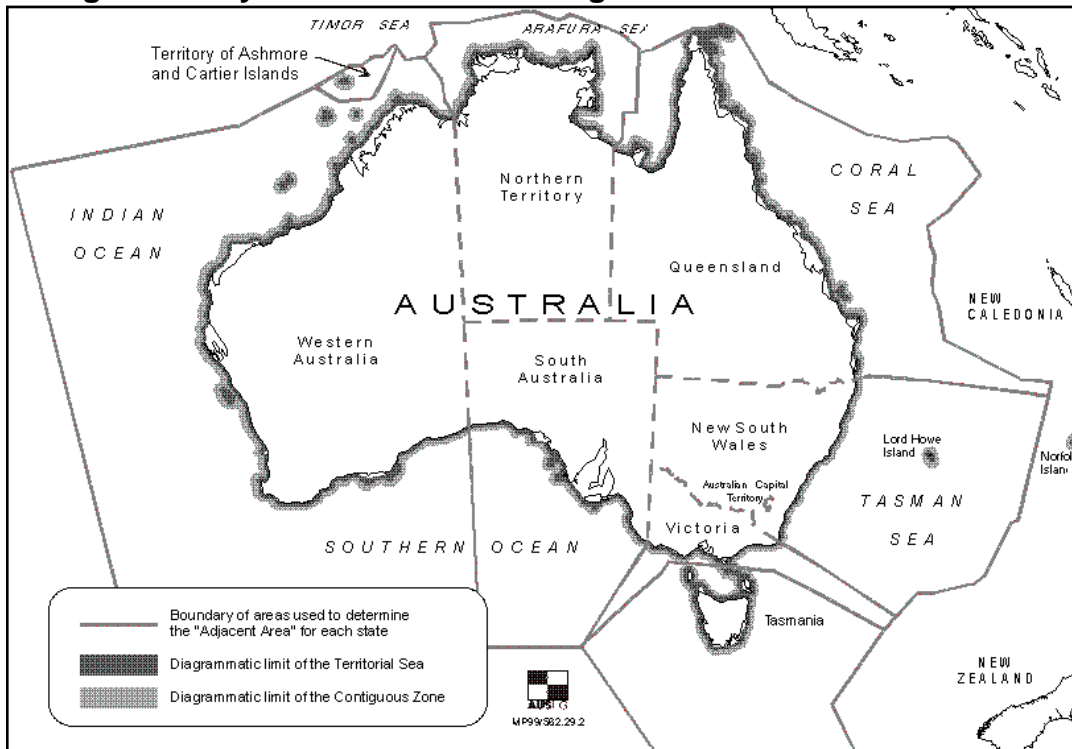


Figure 2: Key Maritime Zones Recognised under Domestic Law³⁹



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Australia's Maritime Jurisdiction

In describing Australia's maritime jurisdiction, a distinction can be drawn among what may be called '*prescriptive*', '*enforcement*' and '*adjudicative*' powers and between '*physical*' and '*personal*' jurisdiction:⁴⁰

- *prescriptive powers*: The common law gives the Commonwealth a power to enact laws having an extraterritorial effect. The Constitution also gives the Commonwealth a power to enact laws with respect to matters that are external to Australia
- *enforcement powers*: International law gives Australia a jurisdiction to enforce its laws within a prescribed distance of its coast arising out of its territorial sovereignty and 'sovereign rights' recognised in international law ('*physical jurisdiction*'). It also recognises a jurisdiction to enforce laws upon its own citizens or own ships arising out of the nexus between a sovereign nation and its citizens ('*personal jurisdiction*'), and
- *adjudicative powers*: International law generally recognises a jurisdiction to prosecute offenders located within Australia where there is a sufficient link between Australia and the alleged criminal conduct. The principles are generally recognised in common law.

These distinctions are not always rigidly followed in international law or constitutional law. However, they do provide a useful template for considering jurisdictional issues.

Prescriptive Powers

At common law, it is generally accepted that the States and the Commonwealth may enact laws having an extraterritorial effect so as to secure 'peace, order and good government'.⁴¹ Thus, the Commonwealth has a power to control overseas acts of its citizens,⁴² and the States and the Commonwealth have the power to control overseas acts of foreigners where they come within the physical limits of Australia.⁴³ There need only be a link between the subject matter of a statutory offence and the enacting government.⁴⁴ Similarly, under the Australian Constitution, the Commonwealth has the power to enact legislation dealing with matters, things, circumstances and persons outside Australia, provided there is sufficient connexion between Australia and the matters, etc to which the law relates.⁴⁵ The power is not confined to laws that are consistent with the requirements of international law,⁴⁶ or with the legislative competence recognised by international law.⁴⁷ There may be a presumption that a statute will not interfere with the sovereignty of other nations.⁴⁸

Enforcement Powers

The *United Nations Convention on the Law of the Sea* ('UNCLOS') gives Australia certain rights over foreign ships that enter into the maritime zones:

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- *Internal Waters*: a country may enforce laws with respect to any issue within its internal waters. It may arrest any person or investigate any crimes committed within the internal waters (except vessels and persons subject to sovereign immunity).⁴⁹
- *Territorial Sea*: foreign ships generally have a right of 'innocent passage' through the territorial sea. Equally, a criminal jurisdiction 'should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime' committed during passage through the territorial sea.⁵⁰ However, a state has a *right of visit* over ships entering the territorial sea (see below). It may also adopt laws and regulations to prevent infringement of its '*customs, fiscal, immigration or sanitary laws and regulations*'.⁵¹ It may arrest persons or investigate crimes aboard *foreign ships passing through the territorial sea after leaving internal waters*.⁵² It may even exercise these powers in respect of crimes committed *before the ship entered the territorial sea* but only if it has *entered the internal waters*.⁵³ It may arrest persons or investigate crimes on board merchant ships and government ships operated for commercial purposes passing through the territorial sea where the *consequences of the crime extend to the state* or where the crime disturbs the '*peace of the country or the good order of the territorial sea*'.⁵⁴ Acts that disturb the 'peace, etc.' of the coastal state include '*the loading or unloading of any commodity, currency or person*' contrary to its immigration laws and regulations.⁵⁵
- *Contiguous Zone*: a state may exercise the control necessary to *punish or prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations* within its territory or territorial sea'.⁵⁶
- *Exclusive Economic Zone*: a state may exercise a limited jurisdiction over foreign ships whilst exercising its sovereign rights to 'explore, exploit, conserve and manage the living resources in the 'exclusive economic zone''.⁵⁷ A state may arrest and detain foreign vessels for *violations of fisheries laws and regulations* but it may not imprison persons without a specific agreement with the 'flag state'.⁵⁸ A state may also exercise a jurisdiction over artificial islands (eg offshore installations) with respect to '*customs, fiscal, health, safety and immigration laws and regulations*'.⁵⁹ It may establish safety zones around these installations up to 500m and exercise a limited jurisdiction to ensure the safety of structures and navigation.
- *Continental Shelf*: enforcement is limited to the exercise of sovereign rights 'for the purpose of exploring it and exploiting its [non-living] natural resources'.⁶⁰ The status of the waters above the shelf is unaffected⁶¹ and there is no reference to criminal jurisdiction.
- *High Seas*: enforcement is limited to rights of 'hot pursuit' and 'visit'. The former allows warships to pursue and detain a foreign ship beyond the territorial sea or contiguous zone if they reasonably believe that it has violated the laws of the state.⁶² The latter allows warships to board a foreign ship where there is reasonable ground to suspect that it is a 'ship without nationality',⁶³ or is engaged in piracy or slave trading.⁶⁴

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Adjudicative Powers

International law recognises a jurisdiction where a valid nexus exists between the alleged criminal conduct and the state. The nexus will exist if the offence occurs or the offender is present within the territory ('territorial principle') and where the results of the conduct are felt within the territory ('extra-territorial principle'). It may also recognise a jurisdiction based on the offender's nationality ('nationality principle'), the victim's nationality ('passive personality principle') and the need to protect the interests of the state (the 'protective principle'), but there is a degree of uncertainty.⁶⁵ These powers are closely related to the enforcement powers above which deal with the 'territorial principle',⁶⁶ the 'extra-territorial principle'⁶⁷ and, to a limited extent, the 'protective principle'.⁶⁸

These principles are generally recognised in domestic jurisprudence, within the limits outlined above. So, for example, the common law explicitly recognises the categories of 'territorial jurisdiction'⁶⁹ and 'extra-territorial jurisdiction'.⁷⁰ Except in relation to the Commonwealth, it would not ordinarily recognise the 'passive personality principle'.⁷¹ Neither would it ordinarily recognise the 'protective principle', although there have been cases in which, having recognised an extraterritorial jurisdiction over a principal offence, it has recognised a jurisdiction over inchoate offences, such as attempt and conspiracy. This has occurred on the basis that intended results or the intended victim were within the territory and it was necessary to protect 'peace, order and good government'.⁷² More recently it has recognised a wider extraterritorial jurisdiction over ordinary and inchoate offences where there is a 'real and substantial link' between the offence and the territory. This approach has been adopted in Canada in relation to overseas offences⁷³ and has recently been endorsed in Australia in relation to interstate offences.⁷⁴ (But there may be doubt as to whether this approach would or should apply to international offences.⁷⁵)

Innocent Passage

The concept of 'innocent passage' is difficult to pin down. Under UNCLOS, 'innocent passage' must be *innocent* in the sense that it must be 'not prejudicial to the peace, good order or security of the coastal state'.⁷⁶ It must also be *passage* in the sense that it must be 'continuous and expeditious',⁷⁷ although stopping and anchoring is accepted if they are 'incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress'.⁷⁸

However, this simplified description belies more complex views regarding the meaning of 'innocence' in international customary law. O'Connell gives four theories of 'innocence':

- passage is innocent if no act is done which threatens the coastal state
- passage is innocent if no act is done which threatens the interests of the coastal state
- passage is not innocent if a ship carries persons or goods dangerous to the coastal state, and

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- passage is not innocent if acts are done which arouse the concern of the coastal state

Rather than resolve these four theories, UNLCOS simply adopts the above formulation, requires that passage must 'take place in conformity with this Convention and with other rules of international law' and lists certain activities that do not constitute innocent passage. O'Connell suggests that the composite definition 'is a gloss which conceals the doctrinal differences, which are nonetheless imported into the text by the reference to passage taking place in conformity with "other rules of international law"'.⁷⁹ Moreover, the reference to 'peace, good order or security' makes jurisdiction and innocence 'the reverse and obverse of each other' such that 'the way is opened to enlarge the control exercised by the coastal state over passing shipping beyond that allowed in customary law'.⁸⁰

UNCLOS provides that a coastal state may 'take the necessary steps in its territorial sea to prevent passage which is not innocent'.⁸¹ Churchill and Lowe indicate that while there is no *express* right to exclude foreign ships 'this right undoubtedly exists in customary law'.⁸²

A key issue in the present context is the range of circumstances that may be considered to constitute a disturbance of the 'peace and good order' and the interpretation given to the relevant jurisdictional limitations in UNCLOS. UNCLOS states that a criminal jurisdiction 'should not be exercised on board a foreign ship passing through the territorial sea'.⁸³ The history of the relevant provision in the convention suggests that it is not intended to be a prohibition but an appeal for caution, given the uncertainty that may surround the nature of crimes that disturb the 'peace' and 'good order' of the territorial sea or the coastal state.⁸⁴ This view seems to have been adopted in the United States and the United Kingdom.⁸⁵

Distress

As indicated, UNLCOS appears to permit stopping and anchoring within the territorial sea where that is 'rendered necessary by *force majeure* or distress' or 'for the purpose of rendering assistance to persons ... in danger or distress'. State practice appears to support a right of entry to designated international ports for foreign ships in distress seeking safety. It is generally presumed that 'the ports of every State must be open to foreign vessels and can only be closed when the vital interests of the State so require'. But it may be 'very doubtful whether this presumption has acquired the status of a right in customary law'.⁸⁶ Moreover, it is unclear how this presumption sits with the apparently enlarged control given to states in the exercise of jurisdiction over foreign ships within the territorial sea.

Over time various international conventions have addressed the obligation to rescue persons and ships in distress at sea.⁸⁷ However, while they tend to support the existence of the general presumption above, they have not addressed the issue of disembarkation. Moreover, they have not given any guidance as to how the obligation to rescue is to be balanced against territorial sovereignty particularly in relation to asylum seekers. This situation has led the United Nations High Commission for Human Rights to admit that:

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While ... there is a clear duty for ship's masters, their owners and their Governments to rescue asylum-seekers at sea, there is no obligation under international law for the flag State of a rescuing vessel to grant durable asylum to rescued refugees. It is, of course, correct that by boarding a vessel, the refugee comes under the jurisdiction of the flag State which is considered to exercise jurisdiction over the ship on the high seas. There is, however, no valid legal basis for considering that by boarding a vessel a refugee has entered the territory of the State exercising jurisdiction over the ship.⁸⁸

Border Protection Powers

As indicated the *Border Protection Legislation Amendment Act 1999* amended the *Migration Act 1958* to provide for the boarding, chasing or use of force against foreign ships and the detention and arrest of persons at sea for customs and migration purposes.

Under the new Division 12A, the commander of a Commonwealth ship may request to board a foreign ship within the 'territorial sea', 'contiguous zone' and, in limited circumstances, the 'high seas'. In the territorial sea the request may be made 'for the purposes of the Act'.⁸⁹ In the contiguous zone, it may be made if s/he wishes to identify the ship or if s/he reasonably suspects that it 'is, will be or has been involved in a contravention, or an attempted contravention, *in Australia* of [the Migration Act]'.⁹⁰ In the exclusive economic zone and the high seas it may only be made if s/he reasonably suspects that it is a 'mother-ship' that 'is being or was used in direct support of, or in preparation for, a contravention *in Australia* of [the Migration Act]',⁹¹ if it is registered with a country that has a relevant agreement or arrangement with Australia⁹² or if it seems to be unregistered or flying the flags of two countries (ie a 'ship without nationality').⁹³

Where the request is ignored, the Commonwealth ship may pursue the foreign ship to 'any place outside the territorial sea of a foreign country'.⁹⁴ In the process, it may use any reasonable means, consistent with international law, including the use of necessary and reasonable force and, 'where necessary and after firing a gun as a signal, firing at or into the chased ship to disable it or compel it to be brought to for boarding'.⁹⁵

Having boarded a ship, an 'officer', which includes any person who is in command, or a member of the crew, of the relevant ship or a member of the Australian Defence Force,⁹⁶ may exercise a range of powers over it and the crew:

- *in Australia*: The officer may search the ship and inquire regarding 'a contravention, an attempted contravention or involvement in a contravention or attempted contravention of [the Migration Act], *either in or outside Australia*'.⁹⁷ S/he may arrest a person who s/he reasonably suspects has committed, is committing or attempting to commit, or is involved in the commission of, an offence *in or outside Australia*.⁹⁸
- *outside Australia*: The officer may search and inquire as above. However, where the ship is 'outside Australia' s/he may only arrest a person that s/he reasonably suspects has committed, is committing or attempting to commit, or is involved in the

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commission of, an offence *in Australia*'.⁹⁹ Likewise the officer may also detain a ship and a person aboard a detained ship but only if s/he reasonably suspects that the ship 'is, will be or has been involved in a contravention *in Australia*'.¹⁰⁰ The officer may also detain a *ship* and bring it or cause it to be brought to a port or other place if s/he reasonably suspects that the ship 'is, will be or has been involved in a contravention *in or outside Australia*'. In addition s/he may detain a person aboard a detained ship, *separate them from the vessel*, and bring them or cause them to be brought within the 'migration zone'.¹⁰¹

- *on the high seas*: On the high seas, but outside the territorial sea of other countries, there are few powers, although an officer may exercise powers consistent with any agreement or arrangement¹⁰² and may at least search 'ships without nationality'.¹⁰³

Australia's Refugee Obligations

Practically, once a ship enters the migration zone, or indeed, the territorial sea, it might be expected that the passengers will claim refugee status. Australia is obliged not to expel or return persons who have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion to a place in which their life or freedom would be threatened on account of these reasons.¹⁰⁴ Australia is also obliged not to expel a refugee *lawfully* in its territory 'save on the grounds of national security or public order',¹⁰⁵ and only in accordance with 'due process of law'.¹⁰⁶

With respect to the *Tampa* incident, these obligations seem to have a peculiar operation. Under the *Migration Act 1958* it is an offence to 'enter Australia' without a valid visa. Under the Act to 'enter Australia' is to 'enter the Migration Zone'. The 'Migration Zone' only includes the physical territory of Australia and seas within a State or Territory port. However, under the Act, a criterion for a protection visa is that 'the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol'.¹⁰⁷ The *Migration Act 1958* does not define 'in Australia' but it expressly provides that the expression 'enter Australia' is not intended to confine the ordinary meaning of 'in Australia'. Under the *Acts Interpretation Act 1901* 'Australia' is taken to mean 'the Commonwealth of Australia and, when used in a geographical sense, includes the Territory of Christmas Island'.¹⁰⁸ References to 'Australia' include the 'coastal sea' of Australia¹⁰⁹ and 'coastal sea' includes the 'territorial sea'.¹¹⁰

Thus, arguably, a person within the territorial sea is 'lawfully' in Australia, in the sense that 'Australia' is defined under domestic law. As such, the person is a person to whom Australia owes protection obligations 'under the Refugees Convention as amended by the Refugees Protocol'. As such, the person meets the key criteria for a protection visa. This leads to the curious proposition that a person meets the key criteria for a protection visa if they are within the territorial sea, but they have committed no offence by being there, and may not intend to commit any offence, as they have not entered Australia.

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Clearly, there is some ambiguity surrounding the meaning of 'territory' and the issue of precisely when our international refugee obligations arise. In addition, there are issues associated with the question of whether anchorage within the territorial sea (for the alleged purpose of allowing asylum claims) is consistent with innocent passage and therefore lawful presence within Australia. Moreover, there are obvious procedural difficulties associated with making valid applications for protection visas under the *Migration Act 1958* whilst in the territorial sea.

Aside from these considerations there is the question of whether our international refugee obligations can be dissected in such detail. Moreover, there is the issue of whether our sovereignty and maritime jurisdiction necessarily override our refugee obligations. It is significant to note that the Joint Committee of Public Accounts and Audit in its recent review of Coastwatch concluded that "pushing boat people back to sea" is not a viable option. Australia cannot ignore its international responsibilities. Instead Australia must work within the conventions and contribute to solving the problem at its source'.¹¹¹

Main Provisions

The Border Protection Bill 2001 stands as a separate piece of legislation. It does not amend the border protection provisions in the *Migration Act 1958* or *Customs Act 1901*.

Proposed subsection 4(1) allows an 'officer' to direct the master of a ship or any person aboard a ship within the territorial sea to take the ship outside the territorial sea. Reasonable means may be used to give such a direction (**proposed subsection 4(3)**). Where a direction has been given, an 'officer' may detain the ship and take it or cause it to be taken, including by reasonable means or force, outside the territorial sea (**proposed section 5**). An 'officer' may also return persons to the ship (**proposed section 6**).

It is significant that this power extends to *any* ship within the territorial sea, regardless of whether it is carrying persons seeking asylum or is otherwise engaged in any activity which is 'prejudicial to the peace, good order or security' of Australia.

Proposed subsection 4(2) provides that directions are not reviewable in *any Australian court*. **Proposed section 8** provides that proceedings may not be commenced in *any court* to prevent a ship or a person from being removed. **Proposed section 7** provides that civil or criminal proceedings in relation to any resulting enforcement action may not be brought *per se*. **Proposed section 10** provides that the Bill overrides any other law.

It is worth noting that, whatever the effect of these provisions, it is undeniable that a person with sufficient standing could bring a challenge under the constitutionally entrenched judicial review jurisdiction of the High Court.¹¹² The issue for the High Court however may be whether the jurisdiction has been indirectly bypassed. Specifically, the provisions above may effectively widen the definition of what is a valid decision or valid conduct under the Bill, thereby frustrating the practical effect of the constitutional writs.¹¹³

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Proposed section 9 provides that protection visa applications cannot be made while a direction is in force, with the caveat that the Minister may personally permit applications to be made from specified individuals.

An 'officer' includes the following when authorised by the Prime Minister or the Minister:

- the Secretary or an employee of the Department
- an officer under the *Customs Act 1901*
- a member of the Australian Federal Police, and
- a member of the Australian Defence Force (**proposed section 3**).

Concluding Comments

The *Tampa*

The international law rules applying to the situation surrounding the *Tampa* are unclear. Clearly, the stricken fishing vessel would qualify as a ship in distress for the purposes of international law. As at 28 August 2001 the *Tampa* would not seem to have qualified as a ship in distress, although this would arguably have been contended by the ship's master. Moreover, as one commentator has pointed out on 29 August, the *Tampa* would qualify 'should ... the conditions on board the vessel eventually deteriorate to such an extent that it could reasonably be regarded as itself being in distress'.¹¹⁴ Whether those conditions could be alleviated by *in situ* assistance whilst the *Tampa* is beyond the territorial sea is unclear.

The Prime Minister has indicated that the boarding of the *Tampa* and the request that it proceed back to international waters (the contiguous zone) 'uphold international law', implying that clear rules apply.¹¹⁵ However, at least one academic commentator has stated that the Prime Minister's assertion is a 'gross over-simplification of the legal situation'.¹¹⁶

Endnotes

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- 1 L. Kennedy, 'Call to stop the people smugglers', *Sydney Morning Herald*, 12 April 1999, p 36.
 - 2 The Task Force also included the Chief of the Defence Force (Admiral Chris Barrie), the Secretary Department of Defence (then Paul Barratt), the Secretary Department of Immigration and Multicultural Affairs (Bill Farmer), the Chief Executive Officer Australian Customs Service (Lionel Woodward) and the Director General Office of National Assessments (Kim Jones).

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- 3 Prime Minister's Coastal Surveillance Task Force, *Report of the Prime Minister's Coastal Surveillance Task Force*, June 1999, Paragraph 34.
- 4 Ibid, Recommendation 17. 'Foreign flag vessels' are vessels registered under the law of a foreign country.
- 5 *Current Issues Brief*, No. 13 1999-2000.
- 6 Source: Department of Immigration and Ethnic Affairs, 'Fact Sheet No. 81' [20/04/00] at <http://www.immi.gov.au/facts/81boats.htm#2>, updated by personal communication with officers in the Department of Immigration and Multicultural Affairs and media reports including Editorial, 'Island relief as boat people turned away', *The Age*, 28/08/01. The figures for 'unauthorised air arrivals' appear in Fact Sheet No. 81 which is updated as at 29 August 2001. However, it seems clear that the figures for boat arrivals are not up to date, so it may be assumed that the figures for air arrivals are also dated to some extent.
- 7 *Measures for prevention of the smuggling of aliens*, Resolution 51/62 of 12 December 1996.
- 8 *Oceans and the law of the sea, Report of the Secretary-General*, Document A/52/487, 20 October 1997; *Oceans and the law of the sea, Report of the Secretary-General*, Document A/53/456 5 October 1998; Unedited, advance text of the report of the Secretary-General to the 54th General Assembly on "Oceans and the law of the sea" (agenda item 40), United Nations A/54/... General Assembly Dist. General, October 1999.
- 9 *Official Records of the Economic and Social Council*, 1998, Supplement No. 10 (E/1998/30), annex III.
- 10 International Maritime Organisation Assembly, Resolution A.867(20); Report of the 76th session of the IMO Legal Committee, October 1997, LEG 76/12
- 11 Ibid, Article 6.
- 12 Draft Protocol against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Draft Convention against Transnational Organized Crime, 13 May 1999, A/AC.254/4/Add.1/Rev.1.
- 13 Proclamation 3004, 'Control of persons leaving or entering the United States', January 17, 1953, 18 FR 489, 3 CFR, 1949-1953 Comp., p. 180.
- 14 Proclamation 4865, 'High seas interdiction of illegal aliens', September 29, 1981, 46 FR 48107, 3 CFR, 1981 Comp., p 50. Executive Order 12324, 'Interdiction of illegal aliens', September 29, 1981, 46 FR 48109, 3 CFR, 1981 Comp., p. 180.
- 15 Executive Order No.12807, 'Interdiction of Illegal Aliens', May 24 1992, <http://www.uscg.mil/hq/g-o/g-opl/mle/eo12807.pdf> [03/03/00]. This Executive Order replaced Executive Order 12324. It appears to be current as at 30 March 2000.
- 16 Presidential Decision Directive No. 9, June 18, 1993, op cit.
- 17 Illegal Immigration Reform and Immigration Responsibility Act, Title II: Enhanced Enforcement And Penalties Against Alien Smuggling; Document Fraud.
- 18 International Crime Control Act.

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- 19 'The Administration plans to enhance border law enforcement through deployment of advanced detection and monitoring capabilities and investment of greater resources': International Crime Control Strategy – June 1998, Chapter 1 Introduction and Overview, at <http://www.fas.org/irp/offdocs/iccs/iccstoc.html>.
- 20 Presidential Decision Directive 9, June 18, 1993 at <http://www.fas.org/irp/offdocs/pdd9.txt>.
- 21 Section 229.
- 22 Section 232A.
- 23 Section 233A. Also ss 22, 23 and 234.
- 24 Section 334.
- 25 Section 335.
- 26 Border Protection Legislation Amendment Bill 1999, Second Reading Speech, House of Representatives, *Debates*, 22 September 1999, pp 10149-10151.
- 27 10 December 1982, UN Doc A/Conf 62/122; 21 ILM 1261 (1982). The convention came into force on 16 November 1994.
- 28 Article 2(1). In general, the territorial baseline is the low-water line along the coast.
- 29 A nautical mile is equal to 1,852 metres: Schedule 1.(1) of the *Seas and Submerged Lands Act 1973* and see Australian Surveying and Land Information Group, 'Maritime Boundaries', at <http://www.auslig.gov.au/marbound/mile.htm> [25/1/00].
- 30 Article 3.
- 31 Article 33.
- 32 Articles 55 and 57.
- 33 Article 76.
- 34 Article 83.
- 35 The *Seas and Submerged Lands Act 1973* provides for the inner limits (baselines) and outer limits (breadth) of the territorial sea to be determined by proclamation in accordance with international law (s 7). The inner limits of the territorial sea were proclaimed as early as 1974 (Proclamation in Gazette S 89A, Thursday, 24 October 1974, and Proclamations in Gazette No. S 29, Wednesday, 9 February 1983 and Gazette No. S 57, Tuesday, 31 March 1987). The outer limit of territorial sea was left to be determined according to common law until the full 12 nm limit was proclaimed in 1990 (Proclamation in Gazette No. S 297, Tuesday, 13 November 1990).
- 36 Section 5(1).
- 37 Section 7.
- 38 In the diagram 'coastal waters' corresponds to 'internal waters'. Map courtesy Australian Surveying and Land Information Group, Department of Industry, Science and Resources, Canberra, Australia. Crown Copyright © www.auslig.gov.au.

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- 39 Map courtesy Australian Surveying and Land Information Group, Department of Industry, Science and Resources, Canberra, Australia. Crown Copyright © www.auslig.gov.au.
- 40 See generally D. O'Connell, *The International Law of the Sea Vol. II*, Clarendon Press, Oxford, 1984, Chapter 24 and Ivan Shearer in S. Blay, R. Piotrowicz and B.M. Tsamenyi, *Public International Law: An Australian Perspective*, Oxford University Press, Melbourne, 1997, pp 162-164.
- 41 *Croft v Dunphy* [1933] AC 156.
- 42 *Bonser v La Macchia* (1969) 122 CLR 177, per Windeyer J at 226.
- 43 *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1936) 56 CLR 337, per Dixon J at 375.
- 44 *Pearce v Florenca* (1976) 135 CLR 507 at 518.
- 45 This power draws from the external affairs power in s 51(xxix) of the Australian Constitution which was discussed in *Polyukovich v The Commonwealth* (1991) 172 CLR 501.
- 46 *Polities v The Commonwealth* (1945) 70 CLR 60 and *Fishwick v Cleland* (1960) 106 CLR 186.
- 47 *Horta v The Commonwealth* (1994) 181 CLR 183 at 195.
- 48 *R v Treacy* [1971] AC 537, per Diplock LJ at p 561; *Libman v The Queen* [1985] 2 SCR 178, per La Forest J at 208-214.
- 49 See generally *Halsbury's Laws of Australia*, 'Title 215 – Foreign Relations' [215-175].
- 50 Article 27(1).
- 51 Article 21.
- 52 Article 27(2).
- 53 Article 27(5).
- 54 Article 19(2).
- 55 Article 19(2)(g).
- 56 Article 33.
- 57 Article 73(1).
- 58 Article 73(3). A 'flag state' is a ship's country of registration.
- 59 Article 60(2).
- 60 Article 77(1).
- 61 Article 78(1).
- 62 Article 111.
- 63 That is, it is not registered under the laws of another country.
- 64 Article 110.

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- 65 See generally Shearer, *op cit*, pp 165-179; Matthew Goode, 'The Tortured Tale of Criminal Jurisdiction', *Melbourne University Law Review*, vol. 21(2), pp 411-459 at pp 413-414 ['Goode, 1997(b)']; and *Halsbury's Laws of Australia*, 'Title 215 – Foreign Relations' [215-380 and 215-385].
- 66 The power to arrest persons and investigate crimes within the 'internal waters' and 'territorial sea' (relating to the loading and unloading of commodities) are examples of the 'territorial principle'.
- 67 The power to arrest persons and investigate crimes within the 'territorial sea' (relating to disturbing the peace) is an example of the 'extra-territorial principle'.
- 68 The powers to prevent the infringement of immigration laws within the 'contiguous zone' and the 'exclusive economic zone' are examples of the 'protective principle'.
- 69 *Broken Hill South Ltd (Public Officer) v Commissioner of Taxation (NSW)* (1937) 56 CLR 337 per Dixon J at 375; *Mynott v Barnard* (1939) 62 CLR 68 per Latham CJ at 75 and Starke J at 89; *Helmets v Coppins* (1961) 106 CLR 156. See also *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1.
- 70 *Ward v R* (1980) 142 CLR 308.
- 71 *Lipohar v The Queen; Winfield v The Queen* [1999] HCA 65 (9 December 1999), per Kirby J, at para 178. This is because individuals do not have any particular status as residents of a State or Territory in contrast to the Commonwealth of Australia which is a unique legal entity having its own criminal jurisdiction and being recognised in international law.
- 72 *Liangsiriprasert v United States* [1991] 1 AC 225 at 251; *R v Manning* [1999] QB 980 at 1000; *Lipohar*, *op cit*, per Gleeson CJ at para 35; per Gaudron, Gummow and Hayne JJ at para 123; per Callinan J at para 269. Although the approach in *Liangsiriprasert* was criticised in Goode, 1997(b), p 436 and *Lipohar*, *op cit*, per Kirby J, paras 175-176. The previous cases were *Board of Trade v Owen* per Tucker LJ, at 625-626 (conspiracy to defraud); *Department of Public Prosecutions v Doot* [1973] AC 807, per Wilberforce LJ at pp 817-818 and Salmon LJ at p 832-833 (conspiracy to defraud); *DPP v Stonehouse* [1977] 2 All ER 909 (attempt). See also comments in *R v Hansford* (1974) 8 SASR 164, per Wells J at p 195; *McNeilly v The Queen* (1981) 4 A Crim R 46; *R v Millar* [1970] 2 QB 54; *R v El-Hakkaoui* [1975] 2 All ER 146 discussed in Goode, 1997(b), *op cit*, at pp 433-436. Aside from *Liangsiriprasert* **all** of these cases could be viewed as examples of crimes where some element of the principal offence occurred within the territory.
- 73 *Libman v The Queen* [1985] 2 SCR 178.
- 74 *Lipohar*, *op cit*, per Gleeson CJ at para 35; per Gaudron, Gummow and Hayne JJ at para 123; per Callinan J at para 269.
- 75 For example, in a recent discussion paper, the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General called for submissions on this issue on the basis that 'it can be argued that the quite extensive geographical extension to the criminal jurisdiction of a State and Territory advocated in this Discussion Paper are more clearly appropriate to intra Australian cases and not international cases': MCCOC, *Chapter 4: Damage and Computer Offences – Discussion Paper*, January 2000, p. 177: http://law.gov.au/publications/Model_Criminal_Code/damage.pdf [13/03/00].

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- 76 Article 19(1).
- 77 Article 18(1).
- 78 Article 18(2).
- 79 O'Connell, *op. cit.*, p. 271.
- 80 *Ibid*, p. 274.
- 81 Article 25(1).
- 82 R Churchill and A. Lowe, *The Law of the Sea*, Manchester University Press, Manchester, 1988, p. 73.
- 83 Article 27(1).
- 84 See O'Connell, Vol. II, *op. cit.*, p 960.
- 85 *Ibid* and see *Pianka v R* [1979] AC 107.
- 86 Churchill and Lowe, *op. cit.*, p. 52.
- 87 Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea signed in Brussels on 23 September 1910 (Article 10); 1958 Geneva Convention on the High Seas (Article 12); International Convention on Maritime Search and Rescue by the Inter-Governmental Maritime Consultative Organization in 1979; UNCLOS (Article 98).
- 88 High Commissioner for Refugees, 'Problems Related to the Rescue of Asylum-Seekers in Distress at Sea', EC/SCP/18, 26 August 1981 at <http://www.unhcr.ch/refworld/unhcr/scip/18.htm>.
- 89 Subsection 245B(2).
- 90 Subsection 245B(4).
- 91 Subsection 245B(5).
- 92 Subsection 245B(6).
- 93 Subsection 245B(7).
- 94 Subsection 245C(1).
- 95 Subsection 245C(6).
- 96 Subsection 245F(18).
- 97 Paragraph 245F(3)(f)(3)(d)(iii).
- 98 Paragraph 245F(3)(f)(i).
- 99 Paragraph 245F(3)(f). Arrests within the 'contiguous zone' must be made in accordance with Australia's international obligations: Subsection 245F(4).
- 100 Paragraph 245F(8)(c).
- 101 Subsection 245F(9).
- 102 Subsection 245G(4).

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- 103 Subsection 245G(6).
- 104 Australia's obligations to refugees are contained in the *Convention relating to the Status of Refugees* of 28 July 1951 and the *Protocol relating to the Status of Refugees* of 31 January 1967. This specific obligation (against 'refoulement') is contained in the *Convention relating to the Status of Refugees*, Article 33(1).
- 105 Ibid, Article 32(1).
- 106 Ibid, Article 32(2).
- 107 Section 36.
- 108 Section 17.
- 109 Section 15B(1)(b).
- 110 Section 15B(4).
- 111 Parliament of Australia. Joint Committee of Public Accounts and Audit, *Review of Coastwatch*, Report No. 384, August 2001, para. 6.24, p. 92.
- 112 Significantly, this issue is acknowledged by the Government: Senator Chris Ellison, Border Protection Bill 2001, Second Reading Debate, Senate, *Hansard*, 30/08/01, p. 26595.
- 113 The issue of 'privative' or 'ouster' clauses, and the potential restraints on these provisions, is discussed more fully in Krysti Guest, 'Migration Legislation Amendment (Judicial Review) Bill 1998', *Bills Digest No. 90 1998–99* at <http://www.aph.gov.au/library/pubs/bd/1998-99/99bd090.htm>.
- 114 Dr Jean-Pierre Fonteyne (Senior Lecturer in Law, the Australian National University), 'Asylum-seekers afloat in uncertainty', *The Canberra Times*, 29/08/01.
- 115 The Hon. John Howard, MP, 'Illegal Immigration: MV Tampa', Ministerial Statement, House of Representatives, Debates, 29/08/01, p. 30266.
- 116 Fonteyne, op. cit..

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