Penelope Mathew[*]

'THE TAMPA ISSUE' 13(2) *Public Law Review* (June 2002)

A Review Essay

This pithy collection of essays in the *Public Law Review* offers a quick but detailed analysis of the political and legal responses to the arrival in Australia of the Norwegian freighter, MV *Tampa* and the 433 asylum-seekers it had rescued from the Indian Ocean. Australia had coordinated the *Tampa* rescue, yet Australia refused entry to its territorial sea. The Captain of the *Tampa*, Arne Rinnan, eventually sailed the ship into Australian territorial waters having declared that the vessel was in distress — a decision well-justified given that it was carrying hundreds more people than it was licensed to do and there were a number of people on board who required medical treatment. Upon this entry, the Special Armed Services were deployed and they boarded the vessel. Eventually, a deal was reached with New Zealand and Nauru for the transfer of asylum-seekers to these countries. New Zealand was to accept those determined to be refugees for settlement there, while Nauru simply agreed to act as a processing point.

Applications for relief in the nature of *habeas corpus* were launched on behalf of the asylum-seekers. The actions were successful at first instance before Justice Tony North in the Federal Court,[1] and an attempt legislatively to validate the executive's action in the form of the Border Protection Bill (2001) failed to pass the Senate. However, the Full Federal Court, with Chief Justice Michael Black in dissent, held that the actions to remove the asylum-seekers were valid exercises of executive power and that the Commonwealth had not illegally detained the asylum-seekers.[2] Meanwhile, the events of 11 September 2001 (which occurred shortly after the judgment at first instance was rendered) created a climate in which the government could push through legislation validating the treatment of the *Tampa* asylum-seekers, and initiating further far-reaching changes to refugee law in Australia.

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* BA (Hons), LLB (Melb), LLM, JSD (Colum). Senior Lecturer, Faculty of Law, Australian National University. My thanks go to Adrienne Stone, Hilary Charlesworth and John McMillan for reading and commenting on an earlier draft of this paper.

1 *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452. The case and the appeal are both on a cd-rom accompanying the Public Law Review's 'Tampa issue', along with the legislation that followed.

2 *Ruddock v Vadarlis* (2001) 110 FCR 491.

On 26 and 27 September 2001, seven bills relating to refugees were passed. Among other things, these amendments:

- 'refined' the refugee definition;[3]
- introduced a privative clause which the government hoped would remove the possibility of meaningful judicial review in most immigration cases;[4]
- validated the actions in relation to the *Tampa* and introduced new powers to intercept boats;[5]
- excised certain territories from the 'migration zone' (the area in which valid applications for an Australian visa may be made) for the purposes of refugee law;[6]
- prevented 'offshore entry persons' (unauthorised entrants to the excised areas)[7] from applying for protection visas in Australia,[8] and permitted them to be taken offshore for processing of their claims to refugee status;[9] and
- created a new temporary visa category for offshore entry persons[10] which effectively prohibits family reunion, and another temporary visa for persons intercepted before they can become offshore entry persons which delays family reunion as a result of its temporary nature.[11]

The *Tampa* standoff proved to be one of the defining events in Australia in the year 2001, with the stance of the government on the issue helping it to win the federal election. The event is therefore worth reflecting on in light of the fact that the year also marked the 100th anniversary of the federation of Australia. As Kim

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3 *Migration Legislation Amendment Act (No. 6) 2001*, inserting ss 91 R and S into the *Migration Act 1958*.

4 *Migration Amendment (Judicial Review) Act 2001*, repealing and replacing s 474 of the *Migration Act*.

5 *Border Protection (Validation and Enforcement Powers) Act 2001*, sch 2, cl 7, amending s 245F(8) of the *Migration Act*, and sch 2, cl 2, inserting s 7A into the *Migration Act*.

6 *Migration Amendment (Excision from Migration Zone) Act 2001*.

7 See the definitions in s 5 *Migration Act* as amended by the *Migration Amendment (Excision from Migration Zone) Act 2001*.

8 S 46A *Migration Act*, inserted by the *Migration Amendment (Excision from Migration Zone) Act 2001*. Protection visas are the usual way in which Australia meets its obligations under the Refugee Convention.

9 S 198A *Migration Act*, inserted by the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001*.

10 Visa sub class 447: see cl 447 of the *Migration Regulations 1994*, inserted by the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001*.

11 Visa sub class 451: see cl 451 of the *Migration Regulations 1994*, inserted by the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001*.

Rubenstein points out in her contribution to this volume of the *Public Law Review*, it would appear that Australia is still defining itself by its capacity for keeping certain foreigners out, in much the same way as at the turn of the last century.

> Stopping people from getting into the country, or restricting their right to apply for permanent residence depending upon where they arrive within Australian territory, affects their ability to apply for citizenship. Australia's identity through this practice is formed more by who is excluded rather than by who is included.[12]

It is also, Rubenstein points out, a return to a time of fictions in which Australia pretends that certain persons do not exist for the purposes of Australian law.[13]

The John Howard campaign launch firmly told voters 'we decide who comes to this country and the circumstances in which they come'. No one would deny that Australia has the right to regulate immigration. However, the case of the refugee is recognised as a partial, emergency exception. The circumstances in which asylum-seekers come to Australia are not simply regulated by Australia but dictated to a large degree by external factors.

Refugees are forced either to flee or to remain abroad because they have a well-founded fear of serious human rights violations in their countries of origin. Article 1A(2) of the 1951 *Convention Relating to the Status of Refugees*[14] (Refugee Convention) defines a refugee as someone who:

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality or is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

The treatment of a refugee, as established by the Convention, responds both to the reality of forced migration — it will occur no matter how much we wish it would not — and the basic moral insight that to return a person to a place of persecution is to become an accomplice to that mistreatment. Thus in Article 33(1), the Convention provides that

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12 K Rubenstein, 'Citizenship, Sovereignty and Migration: Australia's Exclusive Approach to Membership of the Community' (2002) 13(2) *Public Law Review* ('The Tampa Issue') 102, 103.

13 Ibid 108–9.

14 *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, *as amended by Protocol Relating to the Status of Refugees*, 31 Jan 1967, 606 UNTS 171.

> [n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Australia contributed to the drafting of this international treaty and voluntarily, in an exercise of its sovereign powers, ratified it. Indeed, Australia's instrument of ratification meant that the Convention received the full complement of ratifications to bring the treaty into force. The Convention and its amending Protocol now have between them a total of 143 parties, 136 States being party to both instruments.

Of course, much of the government's rationale for the actions taken with respect to those on board the *Tampa* has centred on whether there was another place in which protection could have been sought. Australia's view was that Indonesia — the country from which the asylum-seekers on board the *Tampa* had originally sailed — or Norway — the State whose flag the *Tampa* flew — should take responsibility for the asylum-seekers.

The particular issues concerning the question of responsibility for asylum-seekers rescued at sea are addressed from the perspective of refugee law by Graham Thom, who is the Australian refugee co-ordinator of Amnesty International, and from the perspective of the law of the sea by Don Rothwell. Both acknowledge the lacuna in international law concerning which state — the flag state, the state nearest the site of the rescue or the next scheduled stop for the ship in question — should be responsible for those rescued at sea and who cannot or will not (with good reason) return home. However, as they argue, many factors point to disembarkation of the asylum-seekers in Australia as the appropriate solution.[15] These include the proximity to Christmas Island; the number of asylum-seekers on board the *Tampa*, which would have made it difficult, perhaps impossible, to go to the scheduled port of call in Singapore; and the control exercised over the ship by Australian authorities.

Thom goes on to raise questions concerning rejection of refugees at the frontier, adequate refugee status determination procedures and the obligation not to penalise refugees for unlawful entry,[16] questions which, in order to be given full consideration require both space (which was clearly restricted) and a detailed examination of the Pacific Solution in light of the competing arguments for a choice

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15 G Thom, 'Human Rights, Refugees and the MV Tampa Crisis', 110 'The Tampa Issue', 113–4; D Rothwell, 'The Law of the Sea and the MV Tampa Incident: Reconciling Maritime Principles with Coastal State Sovereignty', 118 'The Tampa Issue', 120–1.

16 G Thom, ibid 114.

as to the place of asylum on the one hand, and the possibility that states may rely on so-called 'safe third countries', or 'protection elsewhere', on the other.

Rothwell undertakes a rigorous analysis of Australia's actions from the law of the sea perspective and his conclusion is damning. Rothwell argues convincingly that neither Article 25(3) of the UN Convention on the Law of the Sea,[17] which provides for a temporary, non-discriminatory right to close the territorial sea and bar innocent passage for security purposes, nor Article 25(1), which enshrines the right of coastal states to prevent passage which is not innocent, may be relied upon. The *Tampa* did not pose a threat to Australian security,[18] nor, given the Captain's clearly justifiable decision to declare that his ship was in distress, could the *Tampa*'s passage properly be viewed as anything other than innocent.[19] Rothwell also condemns the use of Special Armed Service forces as unwarranted.[20]

> Ultimately, Australia's response to the *Tampa* incident in law of the sea terms is difficult to justify, especially given Australia's central role in that event. The … acts of closing the territorial sea and refusing entry, failing to respond to a ship in distress, and using military forces against a merchant ship to protect Australia's sovereign rights are unprecedented.[21]

Many of the problems with the reaction to the *Tampa* infect the legislative responses that followed. In particular, it is difficult to see where, other than Australia, asylum-seekers sent offshore and who are determined to be refugees will go in the longer term. The legislation permits interception[22] in order that asylum-seekers can be required to return to Indonesia as first port of call and it defines those who do manage to enter Christmas, Cocos or Ashmore and Cartier islands as offshore entry persons who may be required to go on to Nauru or Papua New Guinea.[23] These provisions rest on the proposition that Australia is only required to prevent *refoulement* of refugees, that is, return to a place of persecution. As there is no express right of admission contained in the Refugee Convention, it is possible to argue that protection may be offered elsewhere. However, as Nauru and Papua New Guinea, the countries on which asylum-seekers are held, have agreed only to act as processing points and there is no clear final destination for the asylum-seekers, it is likely that Australia has merely deferred its responsibilities. Although

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17 10 December 1982, 1833 UNTS 3.

18 See D Rothwell, above n 15, 122.

19 Ibid 126.

20 Ibid 125–6.

21 Ibid 127.

22 See above n 5.

23 See the description of the interception and associated powers at above nn 6 to 9, and accompanying text. (Papua New Guinea and Nauru have both been declared suitable offshore destinations for asylum-seekers by the Minister for Immigration under s 198A of the *Migration Act*.)

political leaders, including Prime Minister John Howard, have indicated that Australia may accept some, and only some, of those determined to be refugees under the Pacific Solution,[24] it has agreed to ensure that all asylum-seekers are removed from Nauru and Papua New Guinea.[25] If no other country comes forward to take persons determined to be refugees, it is submitted that Australia will have to take responsibility for them. Indeed, the figure of subsequent grants of Australian visas to asylum-seekers sent offshore supports this view. Available figures show Australia as having taken the largest numbers of these asylum-seekers, with New Zealand taking the second-largest number, and few other countries making offers.[26]

There are also numerous legal questions concerning the reliance on 'protection elsewhere' under the new legislative arrangements in Australia. First, when Australia interdicts boats at sea, there is no readmission agreement with Indonesia, the country to which they are expected to return, and Indonesia is not a party to the Refugee Convention. Thus, there are insufficient safeguards against eventual *refoulement*. Second, the conditions in which asylum-seekers are held on Nauru and Papua New Guinea (they are detained) violates international standards regarding the right to liberty and Australia may retain some responsibility for that treatment because it funds the detention centres.[27] Third, the lower level of rights attaching to the rolling temporary visa on which offshore entry persons may be admitted to Australia, the most egregious feature of which is the denial of family reunion, means that Australia may be in violation of international standards concerning non-discrimination and family unity.[28]

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24 See, for example, Prime Minister John Howard's comment that while Australia would take some asylum-seekers, it would not take them all, on 'Lateline', ABC TV, 31 July 2002.

25 See, for example, the 'Statement of Principles' signed by the President of Nauru and Australia's Minister for Defence on 10 September 2001 (copy on file with author). Memoranda of Understanding were subsequently entered into with both Nauru and Papua New Guinea.

26 M Saunders, Refugee Policy 'a life saver', *The Australian*, 2 Oct 2002, 7; Human Rights Watch, '*By Invitation Only': Australian Asylum Policy*, December 2002, Vol 14, No 10(C), 74.

27 For arguments concerning the legal obligations on Nauru and the arguments concerning Australia's contributions to the asylum-seekers' detention through its funding of the detention centres, see P Mathew, 'Interception – the Legal Issues', address to the International Association of Refugee Law Judges, October 2001. An offer for publication by the *Georgetown Immigration Law Journal* has been accepted and it is hoped the paper will be available in published form later in 2003.

28 For the human rights arguments concerning Article 31 of the Refugee Convention and other relevant human rights instruments, see P Mathew, 'Australian Refugee Protection in the Wake of the *Tampa*' 96 *American Journal of International Law* 661 (2002). Similar arguments may be made concerning the attempted avoidance of

Australia's stance does great damage to refugee protection. If every state pushed the lack of a right to enter to the same extreme as Australia, refugees could ultimately be condemned to return to the place of persecution. 'Protection elsewhere' would translate to 'protection nowhere' and returns would become standard procedure. Alternatively, asylum-seekers could become 'refugees in orbit', condemned to wander the earth seeking sanctuary, or, as is the case with those on Nauru and Papua New Guinea, they could be 'warehoused' in a manner that does not recognise their full humanity.[29] It is bad enough that we have to mark the 50th anniversary of the Refugee Convention's adoption by acknowledging that its protection is still needed for around 12 million persons, with another 7 to 8 million being of humanitarian concern to the United Nations High Commissioner for Refugees. It is sad, to say the least, that Australia marked this milestone by using the silences at the margins of the Convention to eat into its very heart.

As many of the contributors are at pains to stress, what is being done to important Australian norms and procedures is as concerning as the harm done to international legal norms and meaningful protection for refugees. Pringle and Thompson ask, who is the 'we' referred to in Howard's election campaign advertisement? While the government argues that it is the majority of Australians, Pringle and Thompson argue that the executive has arrogated too much power to itself in the legislative amendments which underpin the 'Pacific Solution', ignoring the role that parliament should play and that the Courts have a role in assuring that excesses are not committed in the name of efficient exercises of executive power.

As mentioned, between 26 and 27 September 2001, Parliament passed no less than seven bills relating to refugees. Given that the Judicial Review Bill, which contained the controversial privative clause, had languished on the legislative agenda for two years and the previous (in some respects, more objectionable) version of the Border Protection Bill had failed to pass the Senate, it is important to question whether the parliamentary process operated as it should. Did it provide a proper forum for full debate of important issues by the elected representatives of the people? Alternatively, did the events of 11 September 2001, and latent xenophobia simply enable the executive to use parliament to consolidate its own position at the expense of the other two arms of government? Pringle and Thompson favour the latter explanation.[30] They support their conclusions with a thorough scrutiny of the

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these obligations in the case of intercepted asylum-seekers who are later brought to Australia on a visa sub class 451.

29 The term 'warehousing' is used by Hathaway and Neve: J C Hathaway and R A Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection', 10 *Harvard Human Rights Journal* 115 (1997), 130–1.

30 See H Pringle and E Thompson, 'The Tampa Affair and the Role of the Australian Parliament', 128 'The Tampa Issue', 136.

parliamentary debates and the provisions of the legislation itself. The legislation confirms the view adopted by the majority of the Full Federal Court that the executive has powers to repel foreigners,[31] and contains a broad and general privative clause[32] along with some smaller ouster clauses[33] seeking to remove certain decisions from the scrutiny of the Courts. As Pringle and Thompson argue, the *Tampa* and its aftermath have revealed stresses in our constitutional system

> between the judiciary which treasures separation of powers as the essence of Australia's democratic system, and the executive arm of government which views judicial review with overt hostility if it involves a challenge to the policy direction of the government. Moreover, the parliamentary checks on executive impulse collapsed under the onslaught of public opinion driven by hysteria, created by the executive and whipped up by the media. Even the protection of a non-government controlled Senate failed because the Opposition opted out of its role as opposition and critic of government.[34]

Simon Evans also writes about the violation of the fundamental ideal of the rule of law. Evans recognises that definitions of the rule of law can vary, and may include superficial versions that can be met by a 'tyrannous regime'.[35] He adopts a reasonably 'thin' variant of the rule of law, according to which the government is subject to the law and the limits to governmental power are enforceable by the law,[36] and where laws are clear, certain and general.[37] He finds that the response to the *Tampa* fails to pass muster. The idea that there is a mysterious executive power to repel foreigners which exists in the face of an elected legislature, a legislature which had already enacted detailed legislative immigration powers, does not sit with the idea that the government is subject to the law, or that the law is clear, certain and general.[38] Evans points out that

> [t]he argument is even stronger if one adopts a version of *democratic* constitutionalism as a standard. Notwithstanding the dominance of the executive in Parliament, enacting legislation requires greater openness, scrutiny and democratic deliberation than the exercise of prerogative powers,

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31 S 7A *Migration Act*.

32 S 474 *Migration Act*.

33 See, for example, s 494AA *Migration Act*, which bars legal proceedings in relation to offshore entry persons, but which contains the proviso that '[n]othing in this section is intended to affect the jurisdiction of the High Court under section 75 of the *Constitution*'.

34 H Pringle and E Thompson, above n 30, 142.

35 S Evans, 'The Rule of Law, Constitutionalism and the MV Tampa', 94 'The Tampa Issue', 95.

36 Ibid 96.

37 See Evans' summaries of the theories of Raz and Fuller, ibid 95–6.

38 Ibid 97–9.

> and the exercise of powers under statute is susceptible to more effective channels of judicial review than the exercise of prerogative powers.[39]

The odd man out in this debate is John McMillan. In his view, the issues should have been treated as non-justiciable as a matter of law, an argument which he acknowledges was not seen as relevant by the Court.[40] He suggests that the United States Supreme Court decision in *Sale v Haitian Centers Councils*[41] provides a precedent, without noting that the case has been roundly criticised for the Court's holding that the Refugee Convention's protection extends only to State territory and not to jurisdiction exercised on the High Seas.[42] As a decision which adopts a distorted construction of the relevant law, *Sale* should not be viewed as particularly persuasive in Australia.

McMillan accurately notes the difficulties of the *Tampa* litigation:

> The ambiguity of the plaintiffs' rescue mission was ... confounded by the Government's early announcement of an agreement reached with the governments of Nauru and New Zealand. Thereafter, was it still in the best interests (or, indeed, the preference) of *all* 433 rescuees to be transferred (most likely) to the Woomera or Curtin Detention Centres rather than to Nauru or, in the case of an unspecified 150 people promised conditional asylum by New Zealand to that country?[43]

McMillan does not acknowledge, however, that this problem was created by government. The Government has failed to amend the mandatory detention policy, despite the policy's inability to serve as a deterrent,[44] and its condemnation by the UN Human Rights Committee as a violation of the right to liberty.[45] The Government also insisted that it should decide what would happen to the asylum-seekers, rather than allowing them a voice in their fate or to speak to independent advisers who could help the asylum-seekers make informed decisions. Naturally, the use of remedies designed to uphold the rule of law becomes difficult when basic

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39 Ibid 99.

40 J McMillan, 'The Justiciability of the Government's Tampa Actions' 89 'The Tampa Issue', 89.

41 *Sale v Haitian Centers Council Inc.* 113 S.Ct. 2549.

42 For criticisms of *Sale*, see G S Goodwin-Gill, *The Refugee in International Law* (2nd ed 1996) 143; A C Helton, 'The United States Government Program of Intercepting and Returning Haitian Boat People to Haiti: Policy Implications and Prospects', 10 *New York Law School Journal of Human Rights* 325 (1993), 339–42.

43 J McMillan, above n 40, 92.

44 Ten years of mandatory detention did not stop boats from arriving. Indeed, it was a (relatively speaking) small rise in arrivals which prompted the introduction of temporary protection visas and, finally, the Pacific Solution itself.

45 *A v Australia*, U.N. Doc. CCPR/C/59/D/560/1993 (Human Rights Committee, 30 April 1997).

human rights do not play the role that they should as one of the underlying premises of legislation.

McMillan's concern is whether and which *Australian citizens* could continue to have their voices heard on the issue once the matter had reached the courts. He laments that the advocates who brought the case on behalf of the *Tampa* asylum-seekers 'transferred the dispute from a public and political forum, in which all had a voice, to a legal forum in which a selected few had a voice'.[46]

Strictly speaking, this is inaccurate. The talkback radio, which McMillan appears to endorse as a good forum for discussion of policy,[47] would continue. What is distinctive about the 'conversation' in the courts is two-fold. First, it would settle the issue — either for or against the government. This McMillan views as an attempt to make the courts a forum for policy-making,[48] rather than a valuable check on governmental power, even though parliament retained the power to come back with legislation, which it duly did, and which, provided it passes constitutional muster, is the last word on the matter. However, it is the second distinctive feature of the judicial hearing of the issues which exposes the problems in McMillan's argument. Despite the fact that the Government's action had meant that the advocates could not take instructions from their clients, the court was the *only* forum in which, if not the voices, then the echo of the asylum-seekers' claims to be treated as persons before the law could be heard in Australia. As stated by one of the two judges in the majority in the Federal Court appeal, the advocates had 'sought to give voices to those who are perforce voiceless and, on their behalf, to hold the Executive accountable for the lawfulness of its actions'.[49]

Unpopular minorities are those who need to use rights arguments in fora like the courts which are not dominated by the majority and which, in theory, will pay attention to the core entitlements of the individual, rather than permitting others to decide on the entitlements of that person. This is no less true for the stranger at the door, than the person who is part of the polity. Indeed, it is odd that those who argue for the right of Australians to make all decisions concerning these strangers, without giving them any sort of hearing, are so concerned about the elite nature of the conversation that would occur in the courts that they cannot acknowledge the elitist elements of their own position.

Of course, citizenship carries special entitlements. However, Australians should recognise that they are fortuitously citizens of a prosperous country in which rights, while often not well protected by law, are generally well enjoyed. Moreover,

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46 McMillan, above n 40, 93.
47 Ibid.
48 Ibid.
49 *Ruddock v Vadarlis*, above n 2, 549 (French J).

membership in the exclusive club which citizenship confers does not justify a failure to recognise common humanity across borders, particularly when Australia's elected executive has committed Australia to the obligations contained in the Refugee Convention and it has not withdrawn from the Convention.[50] There are rights which inhere in us all by virtue of our humanity. The ancient remedy of *habeas corpus* is a partial recognition of that fact.[51] A person may not be deprived of liberty without a valid basis in law. Only if one believes that aliens are not to be treated as persons before the law — a proposition that runs counter to both international and domestic principles — should the courts be *barred* from adjudicating issues such as those raised in the *Tampa* litigation.

In the hearings before the Federal Court much of the argument centred on whether preventing persons from entering Australia when they had no right to do so could be regarded as illegal detention. This argument mirrors the arguments in international law concerning the Refugee Convention's failure to deal with the issue of entry. The problem with the argument in both its manifestations — the domestic (relief in the nature of *habeas* is not applicable in this situation) and international (Australia is not responsible for these refugees) — is that the principle of *non-refoulement* will mean that in some circumstances Australia *will* have to take responsibilities for refugees and permit them to enter and to enjoy the rights set out in the Refugee Convention and other human rights instruments. Granting permission to enter will be a necessary step towards ensuring basic obligations to treat human beings with dignity, obligations that cannot be avoided unless, perhaps, there is another country willing to permit entry to its territory.

The reality is that there will often be no other country willing to accept unwanted refugees. Further, there are human rights arguments that may be made in favour of some choice as to the country of asylum. The arguments are particularly strong where the asylum-seeker has family in Australia and can only unify the family by seeking refuge in Australia.[52] In any event, Australia should be *required* to take some refugees. Despite the Government's rhetoric that the 'Pacific Solution' is all about Australia taking its fair share, and *only* its fair share,[53] the number of

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50 Denunciation or withdrawal from the Convention is permitted by Article 44 and the amending Protocol (see above n 14) contains a similar provision in Article XI.

51 Whether the law itself is valid is not necessarily a matter fully addressed by the remedy of *habeas corpus*. The law's validity may be measured by different criteria according to constitutional or international law as is demonstrated by a comparison between the High Court's decision in *Lim's* case (*Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1) and the Human Rights Committee's decision in *A v Australia* (above n 45).

52 See 'Refugee Protection in the Wake of the *Tampa*', above n 28, 675–6.

53 See above n 24.

unauthorised arrivals in Australia is very small.[54] The total number of refugees sheltered by developed countries such as Australia is only around a fifth of the world's refugee population.[55] In general, it is developing countries — those least well equipped to shelter refugees — which bear responsibility for refugees.

Australia's policies reinforce the *status quo*, and the rhetoric that Australia should focus on those most in need, and that they are necessarily in offshore refugee camps,[56] does not justify maltreatment of those who do, against fearsome odds, manage to arrive in Australia. It is to those people that Australia owes *legal* obligations under the Refugee Convention. At best, the offset of offshore refugees against onshore arrivals masks a desire to have complete control over who arrives and how they do it — which, despite the initial 'success' of the Pacific Solution in terms of boat arrivals may yet prove an impossible goal if only because the Pacific Solution is economically unsustainable.[57] At worst, the rhetoric may represent a desire to offload refugee problems exclusively on other countries. This is unneighbourly and it stubbornly refuses to recognise that refugees have made and continue to make a valuable contribution to Australia.

Moreover, the fact that Australia has a right to control entry to its territory does not mean that it may simply treat persons who seek to enter illegally in any manner it sees fit. At a bare minimum, if Australia wishes not to take responsibility for asylum-seekers, there must be somewhere else to go and appropriate safeguards for

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54 In the period between July 1, 2000, and June 31, 2001, there were 1508 unauthorised air arrivals and 4141 unauthorised arrivals by boat in Australia: Department of Immigration and Multicultural and Indigenous Affairs, Fact Sheet 70, Border Control (Nov. 19, 2001), available at <http://www.immi.gov.au/facts/70border.htm>.

55 According to Papademetriou, the West takes about 18 per cent of the total refugee population: D G Papademetriou, 'Migration', 109 *Foreign Policy* 15 (Winter 1997–8) 23.

56 The Minister for Immigration has stated that places in the offshore humanitarian program have been 'stolen' by onshore claimants for refugee status: M Saunders, 'Court System too generous to Boat People, says Ruddock', *The Australian*, 26 April 2001, 5, col 1.

57 The majority report of the Senate Legal and Constitutional Committee's inquiry into the Migration Zone Excision stated that:

> By the end of May 2002, $56.2 million had been spent on Nauru and Manus [in Papua New Guinea]. Another $138 million has been allocated to build the facility at Christmas Island, out of a total Budget allocation for 2002-03 of $353 million for 'unauthorised boat arrivals'. The Committee considers that the so-called 'Pacific Solution' is not a cost-effective way to deal with this issue.

Senate Legal and Constitutional References Committee, Migration Zone Excision: an examination of the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, October 2002, [7.40].

the satisfactory treatment of the asylum-seekers. The executive committee of the program of the United Nations High Commissioner for Refugees, of which Australia is a member, has said so on a number of occasions.[58] Holding 433 asylum-seekers on a ship designed for 50 sailors until such time as the 'vagaries of diplomatic relations'[59] determine that there is another place for the asylum-seekers to go may violate the right not to be arbitrarily detained and/or the right to humane treatment while in detention.

Despite McMillan's claim that it is fatuous to suggest that the *Tampa* asylum-seekers could have been disembarked on Australian territory in the interim since this course of action would have pre-empted the solution that the Government was trying to impose (that is, a solution where the asylum-seekers go elsewhere),[60] it is exactly the kind of response that could have been adopted. It is the appropriate response if Australia is serious about complying with international human rights standards. The fact that under Australia's legal system the asylum-seekers had certain rights upon entry into the migration zone is bad luck for the Government. Australia had attempted in 1999 to set up procedures for precluding visa applications by persons who had a safe third country to which to return[61] and had been faced with the reality that it could not secure re-entry agreements. (Apparently Pakistan, approached in relation to the return of 200 or so Afghan asylum-seekers from Australia despite the fact that Pakistan — a country that is not party to the Refugee Convention — has given temporary shelter to over 2 million Afghans, quipped that it would be happy to accept these asylum-seekers if Australia would help out with the Palestinian refugee problem.) What *is* fatuous is to insist on the mantra 'no right to enter' when *non-refoulement* necessarily means that entry must sometimes be permitted.

The courts should not be denied the power to question such fatuity, merely because the executive has decided to steer this stubborn course. The applications on behalf of the *Tampa* asylum-seekers attempted to remedy a situation in which human

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58 See the executive committee conclusions numbers 15, 58, and 85. All 'ex com' conclusions are available at the United Nations High Commissioner for Refugees website: <http://www.unhcr.ch/cgi-bin/texis/vtx/home>.

59 This phrase was used by the European Court of Human Rights in *Amuur's case*: *Amuur v France* (1996) EHRR 533 [48]. In that case, France's detention of a number of asylum-seekers at an airport, which France treated as an 'international zone', while it attempted (successfully in the end) to get another country to accept their return, was held to violate the right not to be detained arbitrarily.

60 J McMillan, above n 40, 91.

61 See s 91N of the *Migration Act*, inserted by the 1999 *Border Protection Legislation Amendment Act*. For analysis of this and related provisions, see P Mathew, 'Safe for Whom? The Safe Third Country Concept Finds a Home in Australia', in Susan Kneebone (ed) *The Refugees Convention 50 Years On: Globalisation and International Law* (2003) 135 (forthcoming).

rights were put at risk by the strong-arm tactics of government in so far as domestic law was capable of providing a remedy. Australians should be loath to deny the Courts the ability to hear such claims and force the executive to pursue its policies in a rights-respecting way. This is a discussion worth having and the courts are the place to have it.

Not satisfied with preventing review in similar situations in future, the Government hoped to remove effective judicial review in almost all immigration cases except for instances of narrowly defined jurisdictional error, with the introduction of the general privative clause in s 474 of the *Migration Act*. In other words, conversations about immigration decisions and any individual rights involved therein were to be had by anyone in Australia, *except* the Courts. Fortunately, the High Court has the last word on such attempts to sideline it, and it is apparent from the Court's decision in *Plaintiff s157/2002 v Commonwealth of Australia*[62] that it has not been silenced, and certainly not to the degree that the government had hoped: the rule of law cannot simply be legislated away in this fashion.

Returning from the subject of the importance of judicial review to the importance of academic endeavour, I hope it is evident to the reader, as it is to me, that my disagreement with McMillan's analysis merely highlights the valuable nature of a collection such as this. Each of the contributions to this volume of the *Public Law Review* provokes further thought and all combine to make a worthy contribution to our understanding of the *Tampa* issue.

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62 [2003] HCA 2 (Unreported, Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne & Callinan JJ, 4 February 2003) 83, 106 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), holding that the privative clause is constitutionally valid but that denial of natural justice constitutes jurisdictional error and, accordingly, that the privative clause did not protect the decision in relation to which review was sought. Chief Justice Gleeson, who emphasised general principles of statutory construction, including the presumption that Australian legislation will be construed so as to be compatible with international law where possible and that an intention to violate human rights can only be imputed to parliament where the language is 'unmistakable and unambiguous', concurred in the answers given in the joint judgment to the questions in the case stated: ibid, at 43 (Gleeson CJ). Justice Callinan agreed that proceedings for mandamus or prohibition were not excluded by the privative clause in this case: ibid 40 (Callinan J).