



**COMMONWEALTH  
LAW CONFERENCE 2025**

6th - 10th April

Session E7: 9 April 2025, Julian Bay, Malta

*"I had no choice but to flee – surely I must be welcome to seek to live here?"*

**Does the rule of law apply on the high seas?**

Australia's Law, Practice & Policy concerning Asylum Seekers at Sea



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# Overview

- **What laws apply on the high seas?**
  - International Treaties
  - Customary International Law
  - Relevant Australian Domestic Laws
- **(Non)-application of rule of law at sea by Australia for asylum seeker boat arrivals**
  - Australian Law, Practice & Policy re: Asylum Seekers at Sea (Boat Arrivals)
    - 2001 “Tampa Affair”
    - 2001 – 2007: Pacific Solution
    - *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1
- **Case Study: *Refoulement* of Vietnamese Asylum Seekers**
  - Returning refugees to country of persecution via “boat turn-back” policy
  - Prosecuted in Vietnam for organising others to flee “illegally”
  - Ultimately accepted as refugees by Canada and resettled there
- **Deterring Boat Arrivals through crime and punishment**
  - “People Smuggling” offences pre-2010
  - “People Smuggling” offences post-2010

# What Laws apply on the High Seas?

- International Treaties
  - **Universal Declaration of Human Rights 1948 (UDHR)** – Art 14 right to seek asylum
  - **Convention Relating to the Status of Refugees** (aka the **1951 Refugee Convention**) and related Protocol Relating to the Status of Refugees 1967
  - **Convention Relating to the Status of Stateless Persons 1954**
  - Safety of Life at Sea Convention (SALAS)
  - United Nations Convention on the Law of the Sea (UNCLOS)
  - Search and Rescue Convention (SAR)
  - International Convention on Civil and Political Rights (ICCPR)
  - Convention against Torture & other Cruel Inhumane or Degrading Treatment/Punishment (CAT)
  - Convention on the Rights of the Child (CROC)
- Customary International Law
  - Principle of *non-refoulement*
  - Rescue at sea / saving lives at sea
  - Prevention and reduction of statelessness (as an emerging customary practice)
- Australia
  - *Maritime Powers Act 2013* (Cth)
  - *Migration Act 1958* (Cth)

# Australian Law, Practice & Policy: Asylum Seekers at Sea (Boat Arrivals)

- **2001 “Tampa Affair”**

- Howard government refused permission for the Norwegian freighter “MV Tampa”, carrying 433 refugees who were rescued in international waters (and 5 crew), to enter Australian waters (24 Aug 2001)
- Captain of MV Tampa declared a state of emergency (with 4 pregnant women, and numerous cases of dehydrated and ill persons) and proceeded to enter into Australian territorial waters without permission (29 Aug 2001)
- PM ordered MV Tampa to be boarded by Australian special forces
- *Border Protection Bill 2011*
  - Introduced on 29 Aug 2001; with retroactive effect
  - Affirmed sovereignty to “determine who will enter and reside in Australia”
  - Powers to use reasonable force to remove any ship in the territorial waters of Australia
  - Bill passed through Lower House but rejected by Senate

# Australian Law, Practice & Policy: Asylum Seekers at Sea (Boat Arrivals)

## 2001 – 2007: Pacific Solution

- Aimed at deterring asylum seekers to enter Australia by boat)
  - PM Howard: "we will decide who comes to this country and the circumstances in which they come"
- **Operation Relex** conducted to prevent arrival of "Suspected Illegal Entry Vessels" (SIEVs) into Australia
- *Migration Legislation Amendment (Excision from the Migration Zone) (Consequential Provisions) Act 2001*
  - Redefined Australia's "migration zone" by excising islands from Australian territory
  - Removed asylum seekers who were intercepted ("offshore entry persons") to be taken to offshore detention centres in third countries such as Nauru, Manus Island and PNG ("declared countries") whilst their refugee status was determine.
  - Most asylum seekers were Hazara ethnic group from Afghanistan; or were from Iran, Iraq, China and Vietnam, with some from Sri Lanka and Myanmar
- Effect of excising migration zone includes no access to judicial review for adverse decisions, in excised areas

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  - Cases: those sent to Australian mainland for medical treatment
  - Human Rights Reports of serious abuse, inhumane treatment, self harm and mental health problems for asylum seekers on offshore detention centers

- **2013 - Operation Sovereign Borders**

- "Stop the boats" campaign – implemented a "zero tolerance" of "Illegal Maritime Arrivals" with offshore detention
- "boat turn-backs" from 18 Sept 2013 under Abbot government

# High Court finds detention at sea lawful

## ***CPCF v Minister for Immigration and Border Protection*** [2015] HCA 1 (28 Jan 2015)

- 157 Tamil asylum seekers (50 children), on board an Indian flagged vessel intercepted by a Customs vessel within Australia's contiguous zone on 29 June 2014 and detained at sea for almost a month
- Plaintiff challenged the lawfulness of his detention on the high seas
- High Court majority (4:3 being French CJ, Crennan J, Gageler J and Keane J) held that the detention of asylum seekers at sea was legal under domestic law
- s72(4) of the *Maritime Powers Act* 2013 (Cth) states that a maritime officer may detain a person on a detained vessel and take the person, or cause the person to be taken, to a place outside Australia.
- Keane J remarked:
  - "Australian courts are bound to apply Australian statute law 'even if that law should violate a rule of international law'. International law does not form part of Australian law until it has been enacted in legislation. In construing an Australian statute, our courts will read 'general words ... subject to the established rules of international law' unless a contrary intention appears from the statute. In this case, there is no occasion to invoke this principle of statutory construction. The terms of the Act are specific. They leave no doubt as to its operation [para 462]."
- Minority (Hayne and Bell JJ jointly, and Kiefel J separately), held that the detention was not authorised by either the statutory or non-statutory powers of the executive.
- Case turned on statutory interpretation without much weight being given to Australia's obligations under international refugee law or customary international law.
- Case highlights the need for a National Human Rights Bill, so that Australian courts can interpret statute in accordance with customary human rights norms



## Case Study: *Refoulement* of Vietnamese Asylum Seekers at sea

- Between March 2015 - July 2016, Australian navy intercepted 113 Vietnamese asylum seekers on 3 boats, summarily determined that they were not owed protection, and “turned back the boats”, forcibly returning the asylum seekers to Vietnam
- Refugee status involves questions of mixed fact and law – recognition of status occurs only after a legal assessment
- 8 March 2015: Tran Thi Thanh Loan, her husband, Mr Ho Trung Loi, and 4 children were amongst 46 asylum seekers who fled from Vietnam on their family-owned fishing boat, with her husband as master. Reasons for leaving were:
  - Government had seized their land
  - Her husband had been attacked by Chinese naval forces, when fishing in the Spratly and Paracel Islands in April 2014
  - They were Catholics were suffered systemic discrimination
- 20 March 2015: Intercepted by Border Protection Command, with boat confiscated, and detained at sea until 18 April 2015, whilst undergoing “*enhanced screening*” by immigration officers at at sea
- They were deemed not to invoke Australia’s protection, and turned back at sea, to be forcibly returned to Vietnam (*refouled*).
- They had no access to lawyers and no access to any appeal process
- She and her husband were prosecuted in Vietnam upon return for for the crime of “Organising for others to flee abroad illegally” under article 275(1) of the *Criminal Code of Vietnam*
  - 29 June 2015: Arrest warrant issued for husband. He was prosecuted and sentenced to 2 years
  - 21 July 2016: Prison sentences upheld following appeal against sentence
  - 5 Aug 2016, Tran Thi Than Loan was sentenced to 36 months for the same offence (for organising others and buying supplies)
  - 15 Aug 2016, she was granted reprieve as sole carer of her 4 children, with her sentence postponed a year, after husband’s release
- Later accepted by Canada on refugee / humanitarian grounds following second escape attempt in Feb 2017
- Arrived and detained in Indonesia; assessed by UNHCR and determined to meet refugee definition; resettled in Canada.
- See “Vietnam’s Modern Day Boat People” by Shira Sebban (2024)



# Detering Boat Arrivals: “People Smuggling” offences pre-2010

- “People smuggling” offences introduced by *Migration Legislation Amendment Act (No 1) 1999* (Cth)
  - s232A Migration Act, carried minimum mandatory 5 years (8 years if recidivist) for organising/facilitating entry of 5 or more “unlawful non-citizens”
  - s233(1) set out similar offence for cases involving less than 5 people
- No requirement of exploitation for financial or other gain – contrary with international definition
- To organise or facilitate the bringing or coming into Australia of people, it is not necessary that the people actually entered Australia - *R v Ahmad* (2012) 165 NTR 1 / *The Queen v Ahmad* [2012] NTCCA 1
- No distinction made of the roles of an “organizer” or “facilitator” vs crew member of vessel
  - eg Indonesian fishermen who cook noodles for passengers; cleaning or fixing the boat engine; master steering the boat – all fall within categories
  - Query the intended deterrent effect for the top level offenders who do not fall within the purview of law
- In reality, the top-level organisers do not get caught as they do not do the dirty work
  - No extradition treaty between Australia and Indonesia means they do not face punishment in Australia
- An asylum seeker who “organises” or “facilitates” the entry of other asylum seekers(eg family members) by boat, into Australia, is also prosecuted for “people smuggling” offences
- Mandatory prison sentences – 3 years for first offenders; 5 years for recidivists – means judges do not have discretion to take into account the role of the accused or their personal circumstances
- Australian courts and prisons became inundated from large numbers of persons convicted of “people smuggling” offences.

# Deterring Boat Arrivals: “People Smuggling” offences post-2010

- *Anti-People Smuggling and Other Measures Act 2010* (Cth)
  - commenced on 1 June 2010, repealing s 232A, s 233, s 233A, s 233B, s 233C and s 234 of the *Migration Act*.
  - Introduced new s233A, s233B, s233C, s233D, s233E, s234A, s236A and s236B
- **s 228B – Circumstances in which a non - citizen has no lawful right to come to Australia**
  - s228B(1): a non-citizen has no lawful right to come to Australia if (a) they do not hold a visa; (b) not covered by an exception; and (c) not permitted by Regs to travel without visa
  - s228B(2): To avoid doubt ... **includes a non - citizen seeking protection or asylum (however described)**, whether ... Australia has, or may have, **protection obligations** ... because the non-citizen is or may be a refugee ...
- **Offence provisions:**
  - s229 - Carriage of non - citizens to Australia without documentation – 100 penalty units
  - s230 - Carriage of concealed persons to Australia (strict liability) – 100 penalty units
  - s233A – people smuggling – occurs if a person:
    - organises or facilitates the bringing/coming/entry or proposed entry, into Australia, of an “unlawful” non-citizen - (max 10 years)
    - Absolute liability applies to element of person being a non-citizen – s233A(2)
  - **s233C** – aggravated offence (at least 5 people)
  - **s233B** – aggravated offence (involving exploitation, danger of death or serious harm)
  - **s234A** – aggravated offence of using false documents / false or misleading information relating to non - citizens (at least 5 ppl)
  - s236B – Mandatory minimum sentences apply to offences under s233B, s233C and s234A
    - 8 years mandatory minimum penalty (max penalty 20 years and/or 2000 penalty units)
- On 27 August 2012, due to inundation on Australian courts and prisons with those convicted of “people smuggling” offences, AG Nicola Roxon directed CDPP not to ‘institute, carry on, or continue to carry on a prosecution for an offence under s 233C of the Migration Act against a person who was a member of the crew on a vessel involved in the bringing or coming, or entry or proposed entry, of unlawful non-citizens to Australia’ unless the persons is a repeat offender, has a role beyond that of a crew member, or if a death occurred in relation to the venture.’

# Conclusion

- Rules of customary international law *should and do* apply on high seas
- Enactment of laws authorising these measures are in direct contravention of Australia's international human rights & refugee obligations:
  - detaining boats at sea, "turning around boats", and returning asylum seekers to the country from which they flee
  - excising Australia's migration zone and transporting asylum seekers to offshore detention centers where they have no access to judicial review
- However, unlike in civil law jurisdictions, in Australia, international treaties must be incorporated into domestic law to have effect.
- Migration law is an area where excessive executive "power creep" is exercised – a phenomenon where the expansion of government power and discretion is given to the executive, with limited ability for courts to protect human rights and civil liberties through the common law - eg:
  - *Al-Kateb v Godwin* [\[2004\] HCA 37](#), (2004) 219 [CLR](#) 562: High Court held indefinite administrative detention of a stateless asylum seeker was lawful.
- A **national Bill of Rights** is much needed in Australia to ensure that the highest court of Australia can interpret legislation in accordance with codified (internationally recognised) human rights standards.

