FOLEY'S LIST

Victorian Bar – CLE Program

OCEANS APART – MARITIME LAW AND THE POLITICS OF PEOPLE SMUGGLING

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The Facts

1. On Sunday, 26 August 2001 a 20 metre wooden fishing boat the KM "Palapa 1" was sinking in the Indian Ocean about 140 kilometres north of Christmas Island.[1] It is interesting to note the position of Christmas Island relative to Indonesia and Australia. It is 2600 km north west of Perth, 2800 km west of Darwin and 360 km south of Java.

2. Christmas Island was named in 1643 by the Captain of an East India ship, The Royal Mary, who passed it on Christmas Day. It later became famous for mining guano, being bird droppings, used as fertiliser. The British took possession of the island in about 1888. The Japanese occupied the island during World War II from 1942 to 1945 and in 1958 the island was transferred from UK to Australia to become Commonwealth territory.[2] It is now referred to as a Non-Self Governing External Territory.[3]

3. A brief word on territorial limits. The United Nations Convention on the Law of the Sea 1982 (UNCLOS) sets out four principal maritime zones for

[1] These facts were taken the Judgment of North J in *Victorian Council for Civil Liberties Inc. and Anor v Minister for Immigration and Multicultural Affairs and Ors* (2001) 110 FCR 452 and the Judgment of French J in *Ruddock v Vadarlis* (2001) 110 FCR 491 at 522-523.
[2] Pursuant to the *Christmas Island Act* 1958 (UK). An account of the history of Christmas Island is derived from Dr Michael White, Australian Offshore Laws, Federation Press 2009 at 309-310.
[3] www.shire.gov.cx/location.html

signatory nations.[4] The maritime zones are the territorial sea (12 nautical miles from the baseline, generally the low water mark on the land), the contiguous zone (24 nautical miles), the exclusive economic zone (200 nautical miles) and the outer continental shelf. Relevantly Australia's sovereignty in respect of immigration matters extends only to the territorial sea and the contiguous zone. The definition of "migration zone" in section 5 of the *Migration Act* 1958 generally only includes land above the low water mark of the states or territories. However, in August 2001 Christmas Island was certainly within this zone.[5] At the time the wooden fishing boat KM "Palapa 1" was sinking 140 kilometres north of Christmas Island, it was well outside Australian territory for the purpose of the *Migration Act* 1958.

4. The MV Tampa was a 49,000 tonne container ship registered in Norway and operated by Wallenius Wilhelmsen Lines. The master of the vessel was Captain Arne Rinnan. On 26 August 2001 Captain Rinnan received a telephone call from Australian authorities asking him to rescue the people from the sinking fishing boat. He was apparently told by the authorities that the boat had 80 people onboard. Captain Rinnan agreed to assist and he was guided to the fishing boat by the Australian Coastguard.

5. At about 5pm on that Sunday evening Captain Rinnan and his crew rescued 433 people from the sinking fishing boat and took them up onto the deck of the MV Tampa. The subsequent court judgments are careful to refer to these people as "rescuees", but, most of them were refugees and were later resettled in either Australia or New Zealand.

6. On 27 August 2001 the MV Tampa was 13.5 nautical miles from Christmas Island.

7. Captain Rinnan and his crew were doing their best to assess the rescuees. You would remember the photographs and footage of the rescuees between

[4] Part of UNCLOS was given effect to by amendments to the *Seas and Submerged Lands Act* 1973 (Cth) effected by the *Maritime Legislation Amendment Act* (1994).
[5] Although it, and other external territories were exised from the migration zone on 27 September 2001 by the *Migration Amendment (Exision from the Migration Zone) Act 2001*

containers or the deck of the Tampa. The administrator of Christmas Island was ordered by the Commonwealth to ensure that no vessel left Flying Fish Cove or had any contact with the MV Tampa. Boat movements in Flying Fish Cove were prohibited.

8. On 27 August 2001, James Neill, a solicitor of Aus Ship P&I in Sydney, was engaged through the Ship Owners' Norwegian P&I insurers (Assuranceforeningen GARD) to act on behalf of the MV Tampa and Captain Rinnan. James Neill reported to the government that Captain Rinnan was concerned about the health and wellbeing of the rescuees taken on board. They were suffering from diarrhoea and were dehydrated. There were no adequate medical supplies.

9. On 29 August 2001 MV Tampa moved to about 4 nautical miles from the island, well within Australian territorial waters. In response, 45 SAS troops boarded the vessel.

10. On 31 August 2001 the Victorian Council for Civil Liberties Incorporated and a solicitor from Melbourne, Eric Vadarlis, commenced court proceedings in the Federal Court of Australia seeking, in general terms, that the rescuees be dealt with according to law and brought within Australia's migration zone and processed under the *Migration Act* 1958.

11. When that application was commenced James Neill briefed Noel Hutley QC from the Sydney Bar and myself as junior to represent, should there be a need, the interests of Wallenius Wilhelmsen, the owners of the MV Tampa and Captain Arne Rinnan. Neither Captain Rinnan, nor the owners of the MV Tampa were made parties to the Federal Court application nor did they appear. Nonetheless we were involved in monitoring the unfolding drama and every evening throughout that week and the following weekend we were in contact by satellite phone with Christmas Island reporting back to James Neill and the vessel owners and Captain Rinnan what was occurring in the Federal Court in Melbourne.

12. The trial of the proceeding was held on Sunday, 2 September 2001. Justice North had given a direction for Captain Rinnan to be available to give evidence and be examined by telephone.

13. During the proceeding the parties agreed that the refugees would be transferred to the HMAS Manoora and taken to Papua New Guinea for transhipment to Nauru and New Zealand under an offshore processing agreement reached with those countries.

14. The agreement between the parties was that the refugees' status on the HMAS Manoora was to be considered the same as if they remained on the MV Tampa.

15. Justice North gave judgment for the plaintiffs on 11 September and ordered the release of the rescuees and that they be brought to the Australian mainland.

16. An appeal from that order was heard on 13 September 2001 and allowed on 18 September 2001 by French and Beaumont JJ, Black CJ dissenting. The majority found there was no detention of the refugees and that the Minister and that the Commonwealth had acted within power.

17. Leave to appeal to the High Court was refused on **27 November 2001** as there remained no utility in the matter. No possibility of the relief by *Habeas Corpus* arose as all of the rescuees had been transferred by the HMAS Manoora out of the jurisdiction (by agreement) and were now in Papua New Guinea or New Zealand or Nauru.

18. The issue of interest is the rescue.

The master's version

19. In the judgment of Justice North[6] His Honour records that once the rescuees were on board Captain Rinnan enquired of the Australian Coastguard where

[6] (2001) 110 FCR 452 at 457

the rescuees should be taken. His Honour records that the Coastguard responded that they did not know. Captain Rinnan then headed on course for Indonesia. At that time it is recorded that several of the rescuees objected and threatened to commit suicide if Captain Rinnan did not change course for Christmas Island. What then occurred is best recounted in Captain Rinnan's own words[7] in an interview on the ABC's 7.30 Report with Kerry O'Brien as follows:

"KERRY O'BRIEN: Arne Rinnan, you've had some time over the past few days, at least in relative calm, to reflect on last week's saga.

Looking back, is there anything that you would have done differently?

CAPTAIN ARNE RINNAN, MV TAMPA: No, I would have been doing exactly the same thing if I was in the same situation one time more.

KERRY O'BRIEN: Can we just revisit a few of the key moments in the drama, from the moment that you were first asked to rescue that sinking boat until you had them on board, were you communicating only with Australian authorities, or Indonesian authorities, as well?

CAPTAIN ARNE RINNAN: We got one telephone call from a rescue centre in Indonesia.

That is correct, but when we asked for written instruction, we never received it and we tried to call them back, there was no response.

KERRY O'BRIEN: So who was it who told you, or directed you to head for Merak in Indonesia to unload your passengers?

CAPTAIN ARNE RINNAN: That was the rescue centre, Australia.

KERRY O'BRIEN: So that came from Australia?

CAPTAIN ARNE RINNAN: That is correct.

[7] Transcript of the 7.30 Report for 6 Sept 2001 at www.abc.net.au/7.30/content/2001/s360554.htm

KERRY O'BRIEN: What exactly was the duress that you felt you were under when you decided to change course from Merak and instead head for Christmas Island?

CAPTAIN ARNE RINNAN: Well after the rescue operation was finished, completed, then I got five of these survivors on the bridge and they was talking in a very aggravated and highly-excited manner, and they went all into my face and the body language was a kind of threatening.

I had also a few Norwegian on the bridge and everybody felt the same way and they told us also that they will jump overboard if we do not head for Christmas Island, they will go crazy, whatever that will mean.

So to avoid an ugly situation, I went for Christmas Island.

KERRY O'BRIEN: And did you make the judgment that they meant what they were saying, or was it simply that you weren't prepared to take the risk and call their bluff?

CAPTAIN ARNE RINNAN: OK, I'm not a big gambler.

I do not like to have a lot of people in the water around the ship, if we headed for Merak, so I decided to go to Christmas Island.

That was the closest and the first port.

KERRY O'BRIEN: When Australian authorities expressly denied you permission to enter Australian waters at Christmas Island, what was so bad about the condition of asylum seekers in your opinion that prompted you to defy authorities and come well inside that 12 mile limit?

CAPTAIN ARNE RINNAN: We stayed outside the 12 mile limit for some time and we asked for medical assistance and we were promised but nothing showed up and the condition amongst the survivors got worse.

And in the end we had about 10 unconscious people down there, one pregnant woman was in pain and we contacted a medico in Norway and they described the situation as a massive crisis.

And then I had no option than to break Australian law, and to go inside the 12 nautical mile.

KERRY O'BRIEN: But, in fact, when the SAS went on board and took medical officers with them, the feedback from them was there was not one single serious medical condition.

How do you explain the discrepancy between your view of their condition and that of the medical officers who came on board?

CAPTAIN ARNE RINNAN: Well, we on board the ship, the Norwegian freighter, we are limited medical education and this was the best of knowledge.

We opened the eyelids of these unconscious people and we only saw the whites in the eyes, there was no pupil.

KERRY O'BRIEN: Australia's Immigration Minister Philip Ruddock said at the time that you had misrepresented the state of health of those passengers?

CAPTAIN ARNE RINNAN: I have no comments to that question.

That is his opinion.

KERRY O'BRIEN: And you obviously reject his opinion?

CAPTAIN ARNE RINNAN: That is correct.

KERRY O'BRIEN: From a distance, the image of SAS troops boarding the Tampa sounded very dramatic.

Was it dramatic, or was it a fairly calm, straightforward exercise in the circumstance?

CAPTAIN ARNE RINNAN: Well, it was not expected that the defence should board the ship fully armed, because we have only been asking for a medical assistant.

So when we were approaching Christmas Island I was informed by the harbour master that one boat is coming out to assist me.

So we prepared one pilot ladder on the starboard side, and when the boat was alongside, it was coming out with very fast speed.

That was the first time we saw it was only soldiers on board.

They told me to go outside 12 nautical miles, which I refused.

KERRY O'BRIEN: Why wasn't it possible for you to go back into international waters if those troops were promising you -- and the Australian Government -- were promising you medical and food aid to alleviate conditions, as well as trained manpower from those troops to control any potentially angry or hysterical asylum seekers?

CAPTAIN ARNE RINNAN: Well, after we had rescued these people we had 438 extra people on board and that means the ship is unseaworthy and I don't think your soldiers would follow us all the way to Merak, if that had been the case.

KERRY O'BRIEN: Looking back, do you have any sympathy for the Australian position in this whole situation?

CAPTAIN ARNE RINNAN: The only thing I can say is that I was surprised and I'm a little bit disappointed, besides that I have no comments on how the Australian Government handled this matter.

KERRY O'BRIEN: An experience I imagine that you'll never forget?

CAPTAIN ARNE RINNAN: This is the first time and I hope it will be the last time."

20. Captain Rinnan's conduct during the exercise saw him become somewhat of a hero both in Australia and Norway and he and his crew were awarded the Nansen Refugee Award for 2002 by the United Nations High Commissioner for Refugees (UNHCR). He also received a medal of honour from the King of Norway and was Captain of the Year in 2001, awarded by the Nautical Institute and Lloyd's List Shipping Journal.

21. Jessie Taylor will explain to you issues arising from legislative changes introduced to deter what is now called "people smuggling". What I would like to discuss is the issues around why Captain Rinnan rescued the 433 persons from the sinking fishing vessel. Jessie will discuss what would happen should a similar situation arise now under the present provisions of the *Migration Act* 1958 including the amendments to that Act put in place by the *Anti-People Smuggling and Other Measures Act* 2010 **& the current Deterring People Smuggling Act 2011.**[8]

Why Rescue?

22. I have no doubt that the present audience would agree that there is a duty on every seaman to rescue a ship or person in distress, whether on the high seas or in territorial waters. English *jurisprudence* and international convention law would tend to support this approach.

23. Just after the American War of Independence an appeal came to Sir W. Scott sitting in the British Admiralty Court from the Vice Admiralty Court at Halifax. There the trading schooner Eleanor had been condemned for trading as a British vessel with American ports, then a crime. One of the defences run by the owners of the vessel was that they had to seek refuge in Halifax for the purpose of repairing the vessel and not for the purpose of any trade (the allegation being that the trade was being conducted illegally). Sir W. Scott said in his Judgment, refusing the appeal against the condemnation of the schooner:

> "It has been said, that even upon the supposition that this is to be taken as an alien ship, yet whatever may have been the imprudence of conduct on the part of the owner, she would be entitled to the rights of hospitality if driven into a British port in distress; and certainly if the distress were real whether Hall [the master] is a British subject or not, and whatever may be the character attaching to the ship, she would be entitled to that benefit. **Real and irresistible distress must be at all**

[8] No. 50 of 2010.

> **times a sufficient passport for human beings under any such application of human laws**."[9] (emphasis added)

24. In *Scaramanga and Co v Stamp and Gordon*[10] the Court of Appeal in 1880 considered an appeal concerning the question whether a ship is entitled to the perils of the sea exception when its cargo is destroyed while going to the rescue of another vessel. A ship carrying a cargo of wheat, the Olympus, went to the aid of another vessel, the Arion, which was in distress. In towing the Arion the Olympus deviated from her voyage and was grounded and her cargo lost, it was found, due to the perils of the sea. In the Court of Appeal the obligation to rescue persons was discussed by Cockburn LCJ:[11]

> "The impulsive desire to save human life when in peril is one of the most beneficial instincts of the humanity, and nowhere more salutary in its results than in bringing help to those who, exposed to destruction from the fury of winds and waves, would perish without assistance. To all who have to trust themselves to the sea, it is of the utmost importance that the promptings of humanity in this respect should not be checked or interfered with by prudential considerations as to injurious consequences which may result in respect of a ship or cargo from the rendering of the needed aid. It would be against the common good, and shocking to the sentiments of mankind, that the shipowner should be deterred from endeavouring to save life by the fear lest any disaster to ship or cargo consequent on so doing should fall on himself. Yet it would be unjust to expect that he should be called upon to satisfy the call of humanity at his own entire risk. Moreover, the uniform practice of the mariners of every nation, except such as are in the habit of making the unfortunate their prey, to succour others who are in danger, is so universal and well known, that there is neither injustice nor hardship in treating both the merchant and the insurer as making their contracts with the shipowner as subject to this exception to the general rule of not deviating from the appointed course."

[9] The "Eleanor" Edw.135 at 160; 165 ER 1058 at 1067
[10] (1880) Asp. MLC 295; 5CPD 295
[11] (1880) Asp. MLC 295 at 299

However, the situation is different where only property was being saved:

> "Deviation for the purpose of saving property stands obviously on a totally different footing. There is here no moral duty to fulfil, which though its fulfilment may have been attended with danger to life or property remains unrewarded."

Thus the deviation in the present case was not authorised as it was only for the purpose of saving the other vessel and its cargo.

25. There is, however, a difference between the moral obligation on a mariner, and a legally enforceable duty. Recognising the moral duty, impetus, instinct or desire of mariners to rescue persons in need is not to say that the law imposes a duty of care upon a stranger to rescue.

26. One summer's day in 1931, David Warshauer from Brooklyn, and his brother-in-law headed out from Oceanside, Long Island headed for Sheepshead Bay in a 16ft motorboat. They were swept out to sea and the boat ran out of fuel. They drifted for five days without food or water.

27. On the sixth day they saw an Italian passenger liner passing within hailing distance. They raised distress signals which were seen but the passengers and crew merely waved back to them and proceeded on their way. They were picked up two days later by the Coastguard. The brother-in-law died and Mr Warshauer was severely crippled by a gangrenous infection in both feet. He sued the shipping line for failing to stop, but it was held that the ship owner was not liable in damages to a stranger in peril on the high seas in respect of which the ship's master had failed to give aid.[12] (By an act of 1912 (giving effect to the Salvage Convention), the master could be held criminally liable for failing to rescue).

28. In Australia the position is clear that common law does not cast any duty upon a man to go to the aid of another who is in peril or distress where the peril or

[12] *Warshauer v Lloyd Sabaudo* 71 F 2d 146

distress is not caused by that person. "The dictates of charity and compassion do not constitute a duty of care." [13]

29. Of course, where the peril is caused by the person failing to rescue, a duty of care may be imposed, for example where a boat owner navigating a vessel loses a passenger overboard through his reckless navigation. In those circumstances, there is a duty owed in respect of the passenger overboard.[14]

INTERNATIONAL OBLIGATIONS

SOLAS

30. There are now many international conventions and treaties that impose obligations upon member states relating to rescue at sea.[15] The first of these was the United Nations International Convention for the Safety of Life at Sea (SOLAS). It was first passed in 1914 in response to the sinking of the Titanic.

31. The 1974 version of the SOLAS Convention is incorporated as Schedule 1 to the *Navigation Act* 1912 (Cth). For all intents and purposes the main body of the Convention forms part of the law of Australia, however it is difficult to determine which of the subsequent protocols or amendments might also be part of the law of the Commonwealth.

32. Chapter V, regulation 10 of the SOLAS Convention provides:

> "(a) The master of a ship at sea, on receiving a signal from any source that a ship or aircraft or survival craft thereof is in distress, is bound to proceed with all speed to the assistance of the persons in distress informing them if possible that he is doing so. If he is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, he must enter in the logbook the reason for failing to proceed to the assistance of the persons in distress.

[13] Per Windeyer J in *Hargrave v Goldman* (1963) 110 CLR 40 at 66
[14] *Horsley v MacLaren (The Ogopogo)* (1971) 22 DLR (3d) 545
[15] In this analysis I have considered a paper delivered by Dr Richard Barnes of The University of Hull in 2010.

(b) The master of a ship in distress, after consultation, so far as may be possible, with the masters of the ships which answer his call for assistance, has the right to requisition such one or more of those ships as he considers best able to render assistance, and it shall be the duty of the master or masters of the ship or ships requisitioned to comply with the requisition by continuing to proceed with all speed to the assistance of persons in distress.

(c) The master of a ship shall be released from the obligation imposed by paragraph (a) of this Regulation when he learns that one or more ships other than his own have been requisitioned and are complying with the requisition.

(d) The master of a ship shall be released from the obligation imposed by paragraph (a) of this Regulation, and, if his ship has been requisitioned, from the obligation imposed by paragraph (b) of this Regulation, if he is informed by the persons in distress or by the master of another ship which has reached such persons that assistance is no longer necessary.

(e) The provisions of this Regulation do not prejudice the International Convention for the unification of certain rules with regard to Assistance and Salvage at Sea, signed at Brussels on 23 September 1910, particularly the obligation to render assistance imposed by Article 11 of that Convention."

33. In addition 2006 amendments to the Convention have inserted Regulation 33 into Chapter V of SOLAS as follows:

> "Contracting governments shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from a ships' intended voyage, provided that releasing the master of the ship from the obligations under the current regulation does not further endanger the safety of life at sea …".

34. It is not entirely clear to me whether Regulation 33 has been adopted into the law of Australia. I was unable to find reference to it on the AMSA website.

UNCLOS

35. The next international instrument is United Nations Convention on Law of the Sea 1982 (UNCLOS). Parts II, V and VI of the Convention are included as a

schedule to the *Seas and Submerged Lands Act* 1973 (Cth). Those are the parts of the Convention that relate to the delineation of territorial sea, contiguous zone, exclusive economic zone and the continental shelf provisions. Article 98 of UNCLOS provides:

> "Duty to render assistance
>
> 1. Every state shall require the master of a ship flying its flag, insofar as he can do so without serious danger to the ship, the crew or the passengers:
>
> (a) to render assistance to any person found at sea in danger of being lost;
>
> (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, insofar as such action may reasonably be expected of him;
>
> (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.
>
> 2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements co-operate with neighbouring States for this purpose."

Salvage Convention

36. In 1998 Australia also adopted the International Convention on Salvage 1989. This overtook the 1910 Convention. Article 10 provides:

> "Duty to render assistance
>
> 1. Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.
>
> 2. The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1.

3. The owner of the vessel shall incur no liability for a breach of the duty of the master under paragraph 1."

37. There are also numerous resolutions of the International Maritime Organisation (IMO) relating to stowaways and the trafficking of migrants by sea.

38. The International Convention on Maritime Search and Rescue 1979 attempts to define a place of safety for the purpose of termination of rescue obligations. The unclear issue is the extent to which the nearest coastal state may have any responsibility under these conventions to take or land refugees.

39. The UNHCR and the IMO jointly published a guide to principles and practice of rescue at sea insofar as it relates to migrants and refugees. The publication advances the more recent amendments to SOLAS and the SAR Convention aimed at maintaining the integrity of those services and co-ordinating rescue attempts. The publication is intended to advise and assist masters in their obligations in relation to persons rescued at sea and refugees.

40. The inevitable conclusion is that the law recognises a moral obligation to rescue. Numerous international conventions (most of which represent the law in Australia) recognise the same obligation and try and provide a framework in which rescue, assistance and safety regulations should be developed and employed to assist in the circumstances.

Laws Against People Smuggling

41. At the time of the Tampa incident there were offences under the *Migration Act* 1958 then in place which led to the prosecution and conviction of the people smugglers involved in the MV Tampa incident. The refugees that were picked up by the MV Tampa had come from the wooden vessel KM Palapa 1 which had set out from Java on 23 August 2001. The master and a crew member of the KM Palapa 1 were prosecuted in the District Court of Western Australia for offences against section 232A of the *Migration Act* 1958. The charge was:

> "Between about 23 August and 26 August 2001 at Indonesia and the seas between Indonesia and the territory of Christmas Island [the defendants] facilitated the bringing to Australia of a group of five or more people to whom subsection 42(1) of the *Migration Act* 1958 applied and did so reckless as to whether the people had a lawful right to come to Australia …".

42. The master and the crew member were convicted and received sentences of seven years (with a minimum of three years) for the master and four years imprisonment (with a non-parole period of 18 months) for the crew member. On appeal to the Court of Appeal[16] the Court of Appeal upheld the conviction and sentences and dismissed a crown appeal seeking increased sentences on the basis that the sentence of the primary judge was not plainly wrong. Although on appeal Justice Anderson indicated he would have thought much increased sentences were warranted.

The Anti-People Smuggling Amendments

43. Notwithstanding the offences which already existed under the *Migration Act* 1958 and the fairly heavy penalties available for the offence of people smuggling the Labor government in 2010 introduced amendments to the *Migration Act* pursuant to the *Anti-People Smuggling and other Measures Act* 2010. That Act replaced the existing offences relating to people smuggling and introduced section 233A to 233E to the *Migration Act* (1958) which introduced a redefined offence of people smuggling and an offence of aggravated people smuggling.

44. The amendments introduced an offence of people smuggling (section 233A) where it is an offence to:

(a) organise; or

(b) facilitate;

(c) the bringing or coming to Australia; or

(d) the entry or proposed entry into Australia;

(e) of a non-citizen with no lawful right to come to Australia;

[16] *Rv Disun* (2003) 27 WAR 146

(f) "absolute liability" applies;

(g) penalty is imprisonment for 10 years or 1,000 penalty units or both.

45. Reference in section 233A to the offence being one of "absolute liability" makes reference back to section 6.2 of the *Criminal Code* 1995 (Cth). There absolute liability is defined as:

> "(1) If a law that creates an offence provides that the offence is an offence of absolute liability:
>
> (a) there are no fault elements for any of the physical elements of the offence; and
>
> (b) the defence of mistake of fact under section 9.2 is unavailable."

46. Absolute liability differs from strict liability (section 6.1) because with strict liability the defence of mistake of fact is **available**. Which means that a person will be liable **even where they reasonably by mistake** believed a state of affairs existed when it did not (section 9.1).

47. Thus, one might be without a defence to the new offences even though you ensured that the persons you were carrying were holding passports, where those passports turned out to be forgeries. Or it seems now you would be liable if you picked up a person in danger at sea and carried them to Australia, **reasonably** believing that person had a valid claim to refugee status.

48. Section 233B introduced an aggravated offence of people smuggling where the additional matters arise:

(a) there is an intention to exploit the person after entry into Australia; or

(b) the person is subjected to 'cruel, inhumane or degrading treatment'; or

(c) in committing the offence a danger of death or serious harm arises or the perpetrator is reckless as to such danger.

Again the penalty is 20 years imprisonment or 2,000 penalty units.

49. Section 233C is also termed an "aggravated offence of people smuggling" indicating perhaps, the haste with which it was drafted. This offence relates to bringing into Australia five or more non-citizens. The penalties are 20 years in jail or 2,000 penalty units. Again it is an offence of "absolute liability".

50. Section 233D is the offence of supporting the offence of people smuggling. This involves providing "material support or resources to another person that aids that person to people-smuggle". Frankly, the provisions are drawn so broadly that it could include the hull insurer or shipping line Wilhelmsen in respect of the importation into Australia of the Tampa rescuees.

51. Section 236B specifies mandatory minimum penalties for the offences I have mentioned. Usually 5 years for people smuggling; 8 years if it is aggravated or a repeat offence.

52. It is not clear that there was any need at all, beyond politics, for the introduction of the people smuggling offences. The *Migration Act* 1958 had included sections 229 to 233A for many years which offences covered the situation where a master, owner, agent, charterer or operator of a vessel brings into Australia a non-citizen, not in possession of a visa who section 42 of the Act applies.

53. Section 230 of the Act is the anti-stowaway provisions also making the master, owner etc liable for an offence where a stowaway is brought into Australia and not immediately turned over to authorities. These existing offences are also subject to absolute liability but only carry fines, not terms of imprisonment. Perhaps that was the impetus for the new people smuggling provisions.

54. Of course the 2010 Act repealed the previous offence for people smuggling which led to the imprisonment of the master and crew member of the vessel that brought the Tampa rescuees to Australia. Those persons were tried and imprisoned for substantial terms.

55. Captain Arne Rinnan brought 433 refugees on the MV Tampa into the territorial waters of Australia off Christmas Island. The new offence of people smuggling would have Captain Rinnan imprisoned for up to 20 years but at least for the five year mandatory term, regardless of the circumstances in which those non-citizens were brought into Australia and regardless of the knowledge of Captain Rinnan as to whether or not they had a lawful right to come into Australia at all. An issue which would be well beyond a Danish sea captain or any other sea captain.

56. In the second reading speech for the Anti-People Smuggling and Other Measures Bill 2010 the Attorney-General, Robert McLelland, said that:

> "The report [UNHCR – Global Trends Report] indicates that people seeking asylum in Australia reflects a worldwide trend driven by insecurity, persecution and conflict.
>
> However, when looking for settlement in stable, democratic nations such as our own, asylum seekers often fall prey to people smugglers.
>
> People smuggling is exploitative and dangerous. People smugglers are motivated by greed and work in sophisticated cross-border crime networks. They have little regard for the safety and security of those being smuggled, endangering their lives on unseaworthy and overcrowded boats."

57. Neither the explanatory memorandum or the second reading speech[17] canvas or discuss the position of a valid or bona fide rescue at sea with the need to bring those people into the territory of Australia or offload them in Australia. There is a plain conflict between the no-fault nature of the anti-people smuggling laws and the mariner's duty or obligation to rescue and the other treaty obligations which Australia has as noted above.

58. The answer of course is to except a rescue at sea from the purview of these offences. It would be a breach of Australia's international obligations for it to enforce legislation which would prevent the necessary rescue of persons at sea. In September 2011 the Chief Judge of the County Court referred a

[17] 24 February 2010 Hansard House of Representatives page 1645

criminal prosecution to the Court of Appeal. The defendant raised as his defence that he had brought people to Australia who did have a lawful right to enter the country, being the right to seek asylum.

The 2011 Amendments

59. Not many Australians know the name Jeky Payara. He's not a person of influence or high profile, but he is a young man whose life has been thrown into chaos by Australia's approach to punishing people smugglers. It was his matter that was to be dealt with on a question of law by the Court of Appeal on Thursday 3 November, to test whether the right to seek asylum was a lawful right to enter Australia for the purposes of the Migration Act, and whether that defence would be available to Mr Payara in his proceedings in the County Court. At the eleventh hour, a Bill was introduced into parliament with a view to closing off this defence.

60. The Deterring People Smuggling Bill 2011 was introduced into the House of Representatives at 6.15 in the evening on 1 November 2011. It was moved by the Minister for Home Affairs that the Bill be debated immediately, with a view to passing it as quickly as possible. This motion was strongly opposed by various members of the House who raised their concern at what appeared to be an unnecessarily expedited process. Without regard to their concerns, the Bill was passed that evening, and transmitted to the Senate the following day. On 3 November 2011 the Senate referred the Bill to the Senate Legal and Constitutional Affairs Committee. Submissions were invited by email after close of business on 3 November, and were due 9 November 2011, giving stakeholders only three business days in which to respond to the Bill. Twenty-three submissions were received.[18] Public hearings were held in Canberra on 11 November 2011.

[18] Senate Legal & Constitutional Affairs Committee: Report on the Inquiry into the Deterring People Smuggling Bill 2011

The Purpose of the Act

61. The purpose of the Act is to 'clarify' the existing provisions dealing with people smuggling offences in the Migration Act. As already discussed, the current provisions state that a person will have committed an offence if the person or people he or she bring into Australia "had or has no lawful right to come to Australia". In the context of the Act, the government and opposition hold out that this definition was always intended to refer to a person not holding a visa to enter Australia when s/he entered. The Act 'clarifies' that the right to seek asylum is not a lawful right for the purposes of the people smuggling provisions of the Migration Act. The Act also allows for its own operation effective from 16 December 1999, the day on which the words "lawful right to enter Australia" were inserted into the Act.

62. It is clear that Captain Rinnan of the Tampa would have been caught by these provisions and – if charged and convicted – sentenced to a long period of imprisonment in Australia, most likely sharing his time between immigration detention centres and jails. As a matter of fact it appears that Captain Rinnan is still at risk of being caught by the provisions, as the Act now has them operating retrospectively to December 1999.

Retrospectivity

63. It is well established in Australian domestic law that "an offence should be given retrospective effect only in rare circumstances and with strong justification".[19] In the words of a publication of the Attorney-General's department, "the Federal Parliament and successive governments have only endorsed retrospective criminal offences only in very limited circumstances. People are entitled to regulate their affairs on the assumption that something which is not currently a crime will not be made a crime retrospectively through backdating criminal offences. Exceptions have normally been made only where there has been a strong need to address a gap in existing offences,

[19] *Framing Commonwealth Offences, Infringement Notices & Enforcement Powers*, Attorney-General's Departmnt, September 2011, p5

and moral culpability of those involved means there is no substantive injustice in retrospectivity".[20]

64. Prior to the current Parliament, only on three other occasions had retrospective criminal legislation been enacted in Australia. These have been to establish:

(a) The 'bottom of the harbour' tax evasion offences in the *Crimes (Taxation Offences) Act 1980*;

(b) War Crimes offences inserted into the *War Crimes Act 1945* by the *War Crimes (Amendment) Act 1988*; and

(c) Anti-hoax offences inserted into the *Commonwealth Criminal Code Act 1995* by the *Criminal Code Amendment (Anti-Hoax and other measures) Act 2002*.

65. There is a great deal of concern that the public interest in seeing people smugglers convicted and imprisoned is not sufficient to justify the imposition of retrospective criminal liability. There is also concern about the introduction of a Bill into parliament with the apparent intention of frustrating judicial consideration of important questions of law.

66. During inquiry hearings, Professor Sarah Joseph from the Castan Centre for Human Rights Law said,

> *It does seem that it arguably could be a retrospective attempt to tell the judges how they are to interpret those words. That could be a breach of Chapter III. If you are asking me about the morality of that, I would still maintain that if parliament made a mistake, parliament can prospectively fix that. But to retrospectively fix that is a breach of the rule of law.*[21]

[20] Ibid.

[21] Senate Legal & Constitutional Affairs Committee Report

67. This matter is also dealt with in international law. Article 15 of the ICCPR, to which Australia is a party, relevantly provides:

> (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed…
>
> (2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

68. This is a non-derogable right. Under no circumstances – including a state of emergency – are States permitted to suspend this right. The prohibition arises from the basic principle that people must be able to know what the law is, so that they can abide by it.[22]

69. The prohibition on retrospective criminal law is also recognised under Article 11(2) of the Universal Declaration of Human Rights, Article 7(2) of the African Charter on Human and People Rights, Article 9 of the American Convention on Human Rights, Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, sections 8 and 9 of the United States Constitution and Article 22 of the Rome Statute of the International Criminal Court. The broad recognition of this right underscores its centrality to the protection of human rights and respect for the rule of law.

Who is being prosecuted?

70. As at 15 March 2011, there had been 353 people arrested and charged with people smuggling offences in Australia. 347 of those people were crew. Only 6 had had any involvement whatsoever in organising passage for asylum

[22] Human Rights Law Resource Centre Submission to Senate Legal & Constitutional Affairs Committee, November 2011.

seekers.[23] This is clearly because most organisers would not allow themselves to be apprehended in Australian waters and subject to the long periods of detention that would await them. To this fate, they throw young, usually vulnerable and always poor fishermen. The people who pilot boats into Australian waters are seen as their bosses – the real smugglers - as dispensable.

71. Around 60 people charged with people smuggling are being kept in Victoria. Victoria Legal Aid states that many of their clients have been kept in detention for ten months before being charged. Around Australia the delay between apprehension and charge sits at around 6 months.

72. In VLA's submission to the Senate Legal & Constitutional Affairs Committee, it stated that people smuggling accused in Victoria have a prima facie entitlement to bail. They tend to have no prior convictions, no history of breaching bail, they pose a low risk of re-offending and face a likely delay of 1-2 years before trial. However, in the case of people charged under these provisions, there is no practical possibility of freedom. If they are bailed, they will be returned to immigration detention. As VLA points out, when delays to trial are added in, there will be people who are ultimately acquitted at trial who will have spent three years in custody.[24]

Mandatory sentencing

73. If convicted of the offence of aggravated people smuggling, people face a mandatory minimum 5 year prison term (3 on the bottom), or 8 years (5 on the bottom) for a repeat offence. Trial judges have consistently spoken out against the imposition of mandatory minimum sentences.

74. Victoria Legal Aid has called for "a sounder and fairer model [which] would differentiate between the criminality of those who crew the bots and the

[23] Victoria Legal Aid Submission to Senate Legal & Constitutional Affairs Committee, November 2011.
[24] Ibid

organisers of people smuggling".[25] Such a model does not appear to be on its way any time soon.

Impact on communities back home

75. In their position as solicitors for many people accused of people smuggling offences, Victoria Legal Aid has taken steps beyond the call of duty. VLA staff travelled to Rote Island (Indonesia) to establish the age of a number of their clients who had claimed to be under the age of 18, but who had not been believed following wrist X-ray analysis (which is archaic and has been internationally discredited).[26]

76. While successfully confirming that a number of their clients are under 18 (in fact 45% of them are under 30 years old), they also witnessed the extreme poverty from which many accused come. VLA also noted the generational poverty that is arising as a result of breadwinners from remote communities being removed and imprisoned in Australia for 3 years or more.

77. Families left behind report payments from the people smuggling 'organisers' of 1-3 million rupiah (AU$100-300). Most women in the villages said that the money their menfolk had been paid before leaving had already been spent on food and repayment of debt. VLA reports that in one village, they met 12 women who had male family members (between 14 and 75 years old) in detention in Australia on people smuggling charges. All of the families with school-age children reported having to remove at least one child from school, so they could enter work to support the family.

The effect on asylum seekers

78. It is clear that in Australia's public discourse on this issue, demonisation of people smugglers is demonisation of asylum seeker by proxy. Phrases like "scum of the earth" "worst people on earth" and "they deserve to rot in hell"

[25] Ibid
[26] Ibid

cannot in good conscience be employed against vulnerable asylum seekers, so we see them used to describe the people who transport asylum seekers, in the hope of tarring both groups with the one dirty brush.

79. In his submission to the inquiry, Professor Ben Saul wrote "the effect of criminalising those who smuggle refugees is to prevent the refugees themselves from reaching safety, unless some effective, alternative or substitute protection is provided for them elsewhere. It is therefore disingenuous to suggest that criminalising people smuggling does not prejudice the position of refugees".[27]

80. It is to deter and deny refugees that these amendments have been made. This Act offends international law, arguably breaks domestic law and contorts the rule of law and the separation of powers doctrine beyond recognition. *Polyukovich* says that retrospective laws ordinarily cannot be made, but in that case an exception was made on the basis of "the seriousness of the offence (war crimes), its status under law at the time of its commission and the moral culpability of the purported offenders". Through fear, misinformation and politicking, the Australian government has itself convinced that accused people smugglers are on a similar moral platform to war criminals.

81. The Explanatory Memorandum that accompanied the 2011 Bill states that:[28]

> The offences deal with the serious crimes of people smuggling and aggravated people smuggling, and do not affect the treatment of individuals seeking protection or asylum in Australia. As such, the amendments are consistent with Australia's obligations under international law and do not affect the rights of individuals seeking protection or asylum, or Australia's obligations in respect of those persons.

82. In reality, however, the Bill clearly affects the rights of individuals seeking protection. It imposes harsh penalties for people smuggling, despite the fact

[27] Senate Legal & Constitutional Affairs Committee: Report on the Inquiry into the Deterring People Smuggling Bill 2011
[28] *Deterring People Smuggling Bill 2011 Explanatory Memorandum*, p. 6.

that those entering Australia have a lawful right to do so under the Refugee Convention.

83. Article 31 of the Refugee Convention provides that:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

84. *Vienna Convention on the Law of Treaties* requires Australia to perform this obligation in good faith.[29] This requirement is not met where a State "seeks to avoid or 'divert' the obligation which it has accepted, or to do indirectly what it is not permitted to do directly."[30] The Bill clearly seeks to undermine Australia's good faith obligation under the Refugee Convention to allow asylum seekers to seek protection in Australia.[31]

Senate Legal & Constitutional Affairs Committee Report

85. The Committee canvassed all of the issues discussed here. The recommendation of the committee was that the Bill be passed, with one reservation, being its concern that the Explanatory Memorandum did not sufficiently outline the extraordinary circumstances that would justify the enactment of retrospective criminal law.[32] The Committee recommended that

[29] *Vienna Convention on the Law of Treaties, 1969*, article 26.

[30] See submission by Bassina Farbenblum and Associate Professor Jane McAdam to the Senate Legal and Constitutional Affairs' inquiry on the *Anti-People Smuggling and Other Measures Bill 2010* (submission no. 23), p. 16, citing UNHCR's submissions in *R v Immigration Officer at Prague Airport, ex parte European Roma Rights Centre* [2004] UKHL 55, [2005] 2 AC 1, available as UNHCR, "Written Case" (2005) 17 International Journal of Refugee Law 427, para 32.

[31] Human Rights Law Resource Centre Submission to Senate Legal & Constitutional Affairs Committee, November 2011.

[32] Submission to Senate Legal & Constitutional Affairs Committee, November 2011:
2.48 In conclusion, the committee considers that the Bill falls into the very limited circumstances where it is appropriate for the Parliament to consider passing legislation which would affect ongoing legal proceedings because the Bill implements the clear intention of the Parliament in relation to serious people smuggling offences. However, the committee shares the concerns raised by several submitters and witnesses that the Bill could be perceived as a precedent for future proposed legislation directed at ongoing legal proceedings which are relevant to the Australian Government.

the Bill pass, but recommended "that the Explanatory Memorandum to the Bill be revised and reissued to explicitly articulate the exceptional circumstances necessary for the introduction of the Bill, its retrospective application and its application to current legal proceedings".

86. The Australian Greens unsurprisingly issued a dissenting report, citing what they called "a great reservoir of concern and disapproval and concern among the Australian community, human rights advocates and legal experts about the proposed amendment ant the legislation it seeks to amend".

87. The Greens' dissenting report ends with a swift kick:

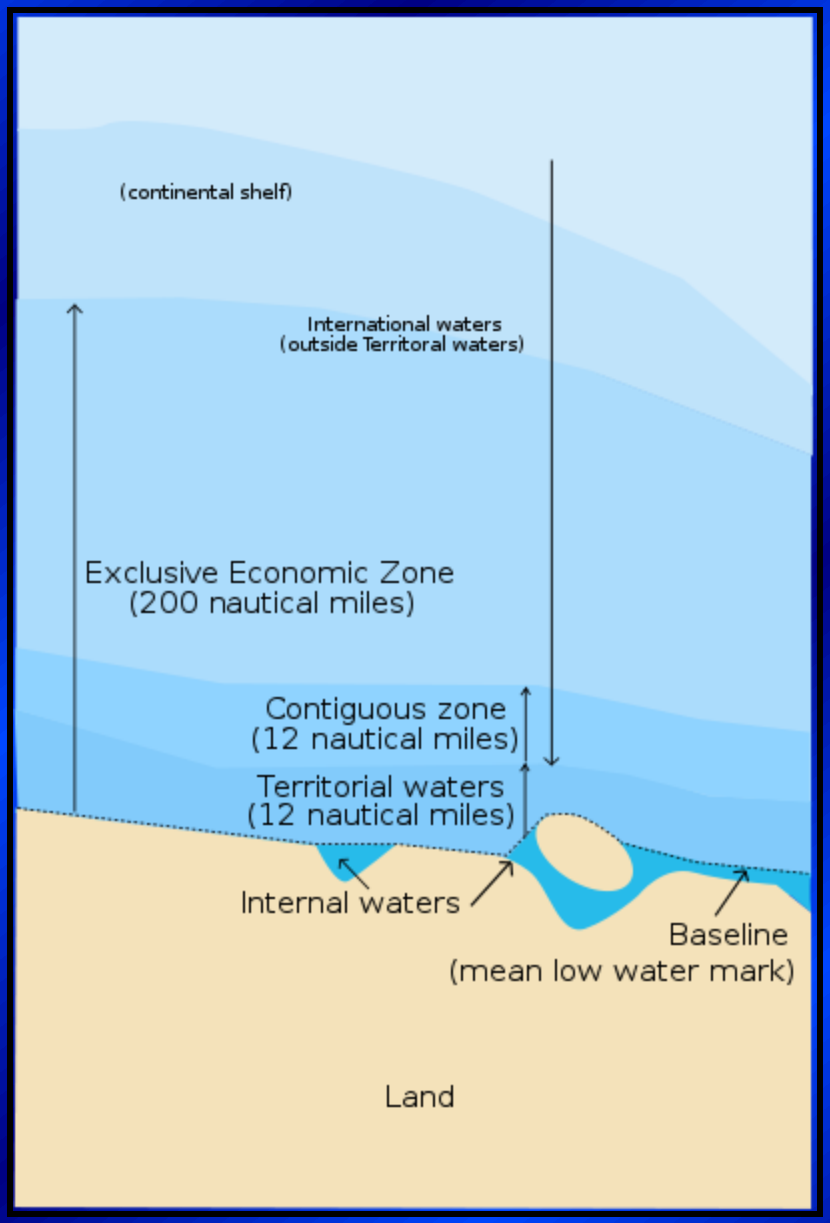
> It seems to be that successive Australian governments are so desperate to appear strong on border protection that they will make regular wild departures from due legal process. This amendment is a sorry example of such departure and should not, in good faith and legal propriety, pass the Senate.

88. Despite this – and many other – strong objections, the Bill passed the Senate on 25 November 2011, to become Act 135 of 2011.

89. We await the flow-on effect of this Act becoming law. At present owners, masters, crew and other interested parties are validly concerned about the ambit of Australia's people smuggling laws, which are totally at odds with duty to rescue persons in peril at sea, and various international human rights and humanitarian obligations.

2.49 Currently, there does not appear to be a sufficiently detailed policy to guide decisions regarding when it is appropriate for the government of the day to introduce retrospective legislation or legislation which may influence the outcome of ongoing legal proceedings. Accordingly, the committee believes that the guidelines in the Department of Prime Minister and Cabinet's Legislation Handbook and the Attorney General's Department's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers should be examined by the Australian Government to ensure that the articulation of policy is as clear as possible in relation to the introduction of retrospective legislation and legislation relevant to ongoing legal proceedings, with an emphasis on ensuring that the rule of law and the separation of powers are respected.


THAILAND
CAMBODIA
VIETNAM
PHILIPPINES
BRUNEI
MALAYSIA
Singapore
Equator
1300 km
INDONESIA
SOLOMON ISLANDS
PAPUA NEW GUINEA
Christmas Island
970 km
3900 km
Cocos Islands
Darwin
INDIAN
2600 km
Tropic of Capricorn


(continental shelf)
International waters
(outside Territoral waters)
Exclusive Economic Zone
(200 nautical miles)
Contiguous zone
(12 nautical miles)
Territorial waters
(12 nautical miles)
Internal waters
Baseline
(mean low water mark)
Land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SOME CASES

1. The “Eleanor” Edw. 135; 165 ER 1058

2. *Scaramanga & Co. v Stamp and Gordon* (1880) Asp. MLC 295; 5 CPD 295

3. *Warshauer v Lloyd Sabaudo* 71 F 2d 146

4. *Hargrave v Goldman* (1963) 110 CLR 40

5. *Horsley v MacLaren (The Ogopogo)* (1971) 22 DLR (3d) 545

INTERNATIONAL OBLIGATIONS

United Nations Convention for the Safety of Life at Sea 1974, (SOLAS), Chapter V, Articles 10 and 33

United Nations Convention on the Law of the Sea 1982 (UNCLOS), Article 98

International Convention on Salvage 1989, Article 10

International Convention on Maritime Search and Rescue (SAR Convention) 1979

IMO resolutions


IMO
UNHCR
RESCUE AT SEA
A guide to principles and practice
as applied to migrants and refugees

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NEWS

SMUGGLING

Law status referred to Court of Appeal

THE status of a key people-smuggling law has been referred to the state's highest appeal court.

Indonesian man Jeky Payara, 20, pleaded not guilty to a charge of aggravated people smuggling after steering a boat to Christmas Island carrying 49 asylum seekers last year. His test case in the Court of Appeal could undermine prosecutions of alleged people smugglers.

Chief Judge Michael Rozenes's decision to refer the matter, before a County Court trial could proceed, came after the accused's Victoria Legal Aid lawyer, Saul Holt, argued that alleged smugglers were legally entitled to assist genuine refugees. Similar issues have been referred to the Northern Territory's highest court. More than 350 men face people-smuggling charges, including 53 in Victorian courts.

FARAH FAROUQUE

ANTI-PEOPLE SMUGGLING CASES

- *Fonseka v the Queen [2003] WASCA 111*
- *Bahar v The Queen [2011] WASCA 249*
- *Nguyen v The Queen [2005] WASCA 22*
- *Ahmadi v The Queen [2011] WASCA 237*
- *Kia v The Queen [2011[WASCA 104*
- *The Queen v Mahendra [2011] NTSC 57*
- *The Queen v Alif, Amin and Zolmin [2011] QDC 247*
- *The Queen v Ahmad [2011] NTSC 71*
- *R v Husen Baco & Ors [2011] NTSC 75*