these boats in Australia, and that he and his team had perhaps done some work on them before. He wasn't too specific but he implied that these boats were destined for deep water.

P&P: *Did you have any indication of what the price of a ticket would have been?*

GH: It was a lot of money, many thousands of dollars to go to the US. Obviously one of the factors about a reluctance by some people to return home is that they have obviously paid a fee. A lot of these people have borrowed substantially to pay that fee on the promise that they'll get a job. Some of them have publicly stated they were promised a job in Australia or they were promised a job in Indonesia or wherever. Most would have entered into a repayment arrangement.

Acknowledgment
We thank Margaret Walker for her expert work in transcribing the interview tapes.

THE POLITICS OF THE REFUGEE ISSUE

Bob Birrell

Can liberal democracies manage their borders? Some might say that this is not problematic for Australia since it lacks a land bridge to the rest of the world. Yet the trauma suffered by all those involved in decisions about the fate of a few hundred Cambodian boat people indicates that many people perceive border control as a major problem. The Cambodian issue has generated more heat than that of the People's Republic of China (PRC) asylum seekers despite the larger numbers involved. One reason is that the Australian government was originally responsible for their entry and can prevent any further difficulties by simply cutting off the supply. This it has done since 1990 by restricting the issuance of student visas from the PRC.

The boat people represent a different challenge. One influential view within the Australian government is that if they are allowed to stay, even though some have their claims as refugees denied, this will send a signal to others to come by the same route. This is a route which the Australian government cannot interdict, nor even manage with any certainty, since it requires the cooperation of our Asian neighbours.

The preceding interview with Mr Gerry Hand indicates the limits of Australian government powers in dealing with unauthorised arrivals. His deep frustration with the government's inability to complete the review process, and return those who failed it to their country of origin speaks volumes on the issue. By late 1993 some 286 boat people remained in custody, with another nineteen having absconded. All of these had been declared not to be refugees according to the UN Convention on Refugees by the Government's Refugee Status Review Committee. Yet all have been able to delay their departure through judicial appeals.

The purpose of this article is to explore the political dynamics of these events. It examines the attitudes and tactics of those who have acted on behalf of the boat people and their influence on government policy. Why has the government found such difficulty in deciding who should be accepted as Australians? The question is central to Australian government immigration policy since it has long been a first principle of this policy that 'it is fundamental to national sovereignty that the Australian government should determine who will be admitted to Australia'.[1]

What we have been observing in recent years is a clash between two sharply different perspectives on immigration policy. Those urging a welcoming, compassionate attitude to the boat people in effect are endorsing a policy which allows would-be migrants themselves to make the decision who should join the Australian community. Some advocates dispute Australia's moral right to maintain barriers against the movement of oppressed peoples, whether bona fide refugees or not. On the other hand, those emphasising national sovereignty favour an immigration program in which the Australian government, on the basis of widely agreed criteria, decides who should be accepted.

The conflict between the two camps has been building since the 1970s when immigration law became subject to administrative law. We have seen a revolution in the rights of citizens to make administrators more accountable for their decisions since that time (as with ensuring citizens receive 'reasonable', 'correct' decisions which they can appeal through the judicial system). Immigration decisions, too, have been affected by this administrative revolution. All those resident in Australia can claim legal standing in our courts even if here illegally.

The issue came to a head in the late 1980s when Senator Ray was Minister for Immigration. The Australian government decided to recover what it perceived to be a loss of its decision-making authority over on-shore immigration decisions by codifying the decision-making process for all categories except refugees. The idea was to limit the scope for judicial appeals on administrative law grounds, particularly for family reunion, compassionate and humanitarian cases.[2] The effect of these measures was to curtail access to the latter two categories as grounds for permanent residence claims, and to make marriage claims more difficult. For example, the non-Australian party to a marriage with an Australian resident was required to leave Australia and apply from overseas.

These measures generated a sharp political backlash from ethnic and humanitarian groups prior to the March 1990 election which was to have a lasting impact on the management of the Department of Immigration, Local Government and Ethnic Affairs (DILGEA).

THE AFTERMATH OF THE 1990 ELECTION

Immediately after the election, Ron Brown, the Secretary of DILGEA was sacked and his Deputy, Tony Harris, transferred to the Industry Commission. The Prime Minister, Mr Hawke, took this action because he was anxious to make DILGEA more sensitive to ethnic and humanitarian community interests. The two officials removed were, in effect, being penalised for implementing a policy which

Senator Ray and the Labor Cabinet had defined as government policy.

The new Secretary of DILGEA, Mr Chris Conybeare came from Mr Hawke's own Prime Minister's and Cabinet Department. After this appointment DILGEA did annul some of its tougher regulations, including the requirement that non-resident marriage partners apply for permanent residence off-shore. Nevertheless this was a passing phase, as within a short time after his appointment as Minister in April 1990, Mr Gerry Hand made it clear that there would be a high degree of continuity with the policies of his predecessor, Senator Ray. One indication of this was the appointment of a new Deputy Secretary to replace Tony Harris in mid-1990. The official chosen was Wayne Gibbons, who had played an important role in the codification process while Senator Ray was Minister.

COPING WITH THE BOAT PEOPLE

As is evident from the preceding interview with Mr Hand, the boat people issue dominated his time during 1990 to 1992. During 1990 a number of boats arrived and the expectation was that more would be on their way. It seemed that Australia faced a significant boat people movement which required new administrative procedures.

The key decisions were taken by Cabinet in mid-1990. Despite the difficulties experienced with judicial appeals on administrative law grounds, the government decided to maintain an administrative approach to refugee determination. This involved a primary review by DILGEA officers, followed on appeal by a review tribunal also composed mainly of government officials.[3] But in order to meet refugee advocates concerns, a community representative was added. At this time there was no serious consideration of an alternative approach involving the creation of a tribunal independent of DILGEA with determinative decision-making powers (not subject to judicial appeal). It was only later that the merits of this strategy were recognised.

When the mid-1990 decision was made DILGEA was given legal advice that this administrative approach would stand up to judicial review, provided that it was laced with 'lashings of natural justice'. As Mr Hand emphasises, the government made a genuine effort to ensure the system was 'fair but firm'. One reason was their anxiety, born of long experience in fighting judicial appeals on administrative law grounds, that there must be no deficiencies in their procedures if they were to withstand judicial scrutiny. However, the government underestimated the tenacity of refugee advocates in pursuing judicial appeals. To understand why, we need to examine the social base and standpoint of these advocates.

THE REFUGEE LOBBY

Media discussion of the boat people issue has been dominated by those in sympathy with their cause. It has attracted many well known human rights advocates, including Jesuit leader Father Frank Brennan, Justice Einfeld of the Federal Court, and Brian Burdekin, the Human Rights Commissioner. The social welfare branches of the Catholic Church (like the St Vincent de Paul Society), the Anglican and Uniting Churches have also lent their organisational weight in support of the boat people. Their sometimes passionate advocacy has given moral legitimacy to the boat people's claims. Representatives from these groups form the backbone of the

peak advocacy group, the Refugee Council of Australia.

It seems that, for the religious groups, the boat people embody all the characteristics those anxious to minister to the weak look for. They arrive as 'helpless victims' washed on to our shores, where they confront a government apparently obsessed with the 'selfish' goal of protecting Australia from sharing its abundant resources with the downtrodden.

It is no wonder Mr Hand soon fell out with the humanitarian leaders he consulted with when setting up the refugee review processes. He wanted a system that would identify genuine refugees, but would exclude those who were not. His hope was that this would signal to a grumpy domestic public that our borders were secure and to would-be boat people that Australia was no easy touch.

To the committed advocate any rejection was suspect. The fact that the asylum seekers had taken to boats to leave a troubled area was enough to deserve our compassion. We therefore do not need elaborate inquiries to establish their bona fides. Justice Einfeld, for example, refers to the boat people as 'victims of inhumanity' and as 'people who have suffered so grievously'.[4] Margaret Piper, Executive Director of the Refugee Council defines them as 'people who have been traumatised and tortured in their homelands'.[5] Father Brennan describes the boat people, including those whose claims as refugees have been rejected, as 'asylum seekers fleeing dehumanising situations'.[6] To Father Reitmeyer, Coordinator of the Australian Catholic Refugee Office, the boat people have been 'victimised by years of persecution in their native land'.[7]

Refugee advocates are therefore reluctant to consider alternative possibilities such as whether these people actually derived from Cambodia or that those rejected might include the better-off members of the communities they come from. How else would they establish the connections and finance needed to purchase a boat place? Perhaps their departure may not be due to persecution but because their source of income was threatened by the military struggle within Cambodia. I am not asserting that this hypothesis is the correct interpretation, but rather that it is a plausible alternative to the humanitarian view that they are victims. There is no published data which would enable a firm judgement to be made because the case records and decisions on the boat people's claims are confidential.

Mr Hand had hoped that the decisions brought down by the review procedure put into operation in 1991 would be accepted, even if many of the claims were rejected. But given the advocates' assumptions about the legitimacy of the boat people's cause, this was a forlorn hope. They pursued their cause through the courts and the media. The fact that during 1992 the first of at least 300,000 persons who had fled to the Thai border regions began returning to Cambodia, had no apparent impact on the advocates' position. Yet the UN Convention criteria for refugee status requires that the claimant show a well-founded fear of persecution on his or her return. It is the contemporary situation that determines a claim, not events in the past. Statements from UNHCR delegates indicating satisfaction with Australian procedures did not seem to matter. For example, in June 1992 the head of the UNHCR Bangkok office was reported as saying that 'Australia's record on processing

asylum applicants was well-balanced, fair and deservedly reputable'.[8]

By mid-1992 those who had failed to win refugee status had experienced long periods in detention. This detention became the focus of a new source of alleged injustice. Almost all those submitting evidence to the Joint Standing Committee on Migration's 'Inquiry into Detention Practice' regard this policy as immoral (since it deprives people of their human rights) or even 'barbaric' in Justice Einfeld's words.[9] Advocates now believed they had an additional claim on the Australian government justifying the boat people's claims on humanitarian grounds. This was despite the fact that the advocates themselves, had contributed to their time in custody through delays in submitting refugee claims and subsequent judicial appeals.

Whatever the dangers that boat people might abscond, the decisions to keep them all in custody pending resolution of their cases now looks like a mistake. It has fuelled the indignation of those who regard the boat people as an oppressed minority. It has enabled some advocates to exercise a form of moral blackmail against the government. Claims that those in detention have suffered physical and mental deterioration have added to pressure on the government to resolve the issue. Yet such resolution has proved to be impossible while further judicial appeals are prosecuted. The *Canberra Times* journalist, Margo Kingston, who has written with passion as an advocate of the boat people, illustrates the point. In response to Senator Bolkus's refusal to release a group of boat people in June 1993 (and his remark on Lateline that the crisis had caused him to miss some of the Wimbledon tennis) she wrote,

> 'Deterrence lives. As a result, Australia may soon witness suicides and the forced removals of desperate people. Then we can get back to the tennis.'[10]

THE ILLEGITIMACY OF NATIONAL BORDERS

By early 1993 the government was under tremendous pressure to take a softer line on the boat people even though this might have been interpreted overseas as a signal inviting further voyages. These concerns, too, have been dismissed by most refugee advocates. While it would overstate the case to argue that all adhere to a systematic view on the issue, most reject official concerns about such 'signals' and the accompanying worries about national sovereignty. To many advocates, Australia should be conceived as part of a global community with obligations to all members. In their view, as one of the world's richer nations Australia is obliged to be generous in accommodating those seeking a haven here.

This doctrine is most explicitly spelled out in the teachings quoted by Catholic advocates. A recent Catholic Social Justice Council document argues that ideas about national sovereignty and national borders are outmoded. The document appeals to notions of global distributive justice. It asserts, 'in Catholic social teaching ... there is no warrant for a doctrine of absolute rights to borders ... Australians belong to one human family or "global village", and as such have mutual obligations to promote participation and development rights of all people around the world, irrespective of national boundaries'.[11]

The Pope's teachings on duties to foreigners are continually cited, including a recent statement in March 1993 that there is a 'right to asylum,

the right to settle in a new country'.[12] According to the Society of St Vincent de Paul the ideal of solidarity 'implies that all people and all nations are necessarily interdependent. It calls into play an attitude of hospitality which accepts without question people in need of assistance'.[13]

Such doctrines fundamentally challenge the ideas about national sovereignty integral to the Australian Government's position. They help explain the collision course the government and the boat people advocates have been on. Many advocates see no need to worry about sending signals overseas since they do not feel we should deter needy people from coming here, even if uninvited. Nor do they accept the argument that if Australia is seen to be a soft touch it might trigger an influx. Yet it may well be that the U.S.A. has experienced the brunt of recent boat people arrivals precisely because it is well known that United States policy has been to release illegals claiming asylum, and that once released few attend subsequent asylum hearings. Instead, they disappear 'into the ranks of the nation's illegal immigrant population'.[14]

POLITICAL DEVELOPMENTS SINCE THE MARCH 1993 ELECTION

In the month after the election, the Department of Immigration and Ethnic Affairs (DIEA) was shaken by the following events: an internal raid aimed at securing documents related to the boat people; the initiation of a Federal Police inquiry into allegations of misconduct against a senior DIEA officer (allegations to the effect that documents relating to a boat people case being heard before the Federal Court had been destroyed); the removal of Gibbons and Simington, the senior officers responsible for implementing Mr Hand's 'firm but fair' policy from line responsibility on refugee issues; and the appointment of officers from the Prime Minister's and Cabinet and Attorney General's Departments to replace the officers sidelined or stood down.

These events raise many questions about the public administration of such an important area of government policy. Yet so far the only detailed reporting of what occurred has been published in the *Canberra Times*.[15] There has been no systematic public inquiry as to the origin of these events and their implications for public policy on immigration issues. There are some remarkable similarities with events after the 1990 election. Is this just a coincidence? Was there a similar concern to placate the grievances of the ethnic and humanitarian lobby? If the latter, is there any evidence that government policy has changed consistent with this possibility? What do these administrative upheavals mean for officers' willingness to provide independent advice?

THE APRIL EVENTS

I begin with a brief outline of the events since few readers would have seen the *Canberra Times*' account, or read the Hansard Report of the Senate Estimate hearings on Immigration and Ethnic Affairs in September and November 1993 when the issues were probed. However, the full story remains to be told, since certain key documents, notably the Federal Police Report have not been made public.

The announcement that there was to be a Federal Police inquiry into the document shredding allegation was made on 2 April 1993, the same day that documents relevant to Federal Court proceedings were seized by

DIEA officers outside the Department's legal branch. These events were the result of an allegation by a DIEA staff member. This officer (or whistleblower) alleged that in the course of a meeting earlier in 1993 (at which several officers were present) a senior officer of the legal branch made a comment which the whistleblower interpreted as indicating that certain documents had been destroyed which might have affected the Deputy Secretary. The context here, was that Mr Gibbons had not at the time been called to appear in the Federal Court case about to be resume in Melbourne, and therefore that officials may have been concerned about documents which could require his appearance.

The allegation had been communicated to Mr Conybeare some days before 2 April.[16] He apparently did not take action which satisfied the whistleblower, whereupon on 31 March, the whistleblower communicated the allegation direct to the solicitors representing the boat people in the Federal Court. Mr Conybeare discussed the matter with the lawyers in Melbourne on 1 April, then according to his testimony before the Senate Estimates Committee, held a brief primary investigation based on 'discussion and interviews with a number of officers of the department'[17] before deciding what to do. On this basis Mr Conybeare said, 'I formed the view that there was sufficient corroborative evidence to warrant further investigation by a specialist group'.[18]

The 'specialist group' turned out to be an outside agency — the Federal Police. Yet according to an Administrative Circular on Internal Investigation Guidelines (negotiated between management and unions) and distributed to DIEA staff in December 1992, allegations of staff 'misconduct' were to be investigated, at least initially, by DIEA's Internal Investigation Section. The procedures governing these investigations, including the rights of those subject to allegations, were laid out in this Administrative Circular. These arrangements were in effect pre-empted by the decision to launch a Federal Police inquiry.

Soon after, on 6 April, DIEA staff were told that Gibbons and Simington were to be removed from line responsibility in relation to refugee issues. Later in April it was announced that Mr Denis Richardson the head of PM&C's social policy division was to move to DIEA to take up a temporary Deputy Secretary position. On 5 July Mr Gibbons took up a temporary Deputy Secretary position in the Department of Employment, Education and Training (DEET), with his salary coming from DIEA's budget. There is some controversy about whether Gibbons movement to DEET can be interpreted as unwilling. The issue was traversed during the September Estimates hearing. Mr Conybeare argued that Gibbons moved to a DEET because he was looking to advance his career outside DIEA. According to Mr Conybeare, the move 'was with that officer's full agreement and with complete satisfaction'.[19] This judgement was greeted with some incredulity at the Senate hearings.

PUBLIC ISSUES

a) Implications for the Public Service

The issue of unilateral management decisions on career movements is a sore point amongst DIEA staff because the Department's leaders have been emphatic about the importance of according natural justice to the migrants they deal with. None of those affected by the 'whistleblower's' allegations, including the officer directly

accused had the opportunity to have their side of the story heard before the Federal Police inquiry was initiated.

During the Senate Estimates hearing, Mr Conybeare acknowledged that 'no-one was saying at any stage that they had seen anyone shredding documents'.[20] Nor was it alleged that the officer accused actually said documents had been destroyed. Rather the whistleblower interpreted certain remarks to have this meaning. A preliminary Internal Investigation would seem reasonable in these circumstances. Mr Conybeare has since argued that the allegations 'were of extraordinary importance and weight for the department'. Because of this it was his judgment 'that the matter be dealt with and put in the hands of an outside, independent body as quickly as possible'.[21] As it turned out, the subsequent Federal Police Inquiry concluded in August that there was no evidence that documents had been shredded or any other misconduct on the part of the officer accused.

Another concern is the pattern appearing in DIEA's history whereby senior officers implementing strict policies on immigration control, even though under the direction of the government and the Minister in charge, seem to be vulnerable in a post-election context. Can we expect independent advice from public servants in such a politicised environment?

There are also major budgetary implications of the administrative upheaval in DIEA. As of November 1993 there were three Deputy Secretaries on DIEA's payroll (including Mr Gibbons) as compared to one prior to the 1993 election. DIEA is also paying for the advice of seconded senior Attorney General's Department officers. As well, the administrative costs of indexing and securing all the files involved in the investigation have been very high.

b) Policy Implications

There was no public indication of a change in immigration or refugee policies until 19 October, when Senator Bolkus announced that the government intended to offer the remaining boat people still in custody, permanent residence on humanitarian grounds. However, those who decide to take up the offer must first return to Cambodia for a year before they make their claim. Then on 1 November it was announced that all of those granted a visa before 12 March 1992 and who had applied for asylum on refugee grounds (the majority of whom were PRC students who arrived in Australia after the Tien an men massacre) would be granted permanent residence if they satisfied certain educational and English language criteria. In the case of the post-Tien an men students the government has repeatedly told them that though they could apply for asylum on refugee grounds they would not receive any special concessions. For example in a joint statement of 22 June 1990 the Prime Minister, Mr Hawke and Mr Hand declared in reference to these students that,

> 'the government assumes they will return home when their entry permits expire, like any other temporary residents. These people went through revised exit procedures before leaving China, and they entered Australia on a temporary basis, in full knowledge of the conditions in their country'.[22]

These policy changes undermine the integrity of Mr Hand's 'firm but fair' refugee review arrangements. They send a signal to those making asylum claims (all persons present in Australia, even if illegally, can make

such a claim) that a negative judgement on their claim is not the end of the matter. If they can hang on in Australia, as through judicial appeals, then they may be offered an alternate avenue to permanent residence.

On 16 September the government announced the appointment of twenty-three full-time and eight part-time members of a new Refugee Review Tribunal. How credible will the decisions of this very expensive body now be? Those rejected may well feel some injustice when they know that others in the queue of some 20,000 seeking asylum have received permanent residence because of their educational or English language credentials.

What prompted the government to capitulate to the pressures for a softer line on asylum claims? It seems that the government considered that the 'fair but firm' procedures put in place by Mr Hand, with all their care to provide for procedural justice had failed. The political and financial costs of sustaining these procedures have become insupportable. No end seemed in sight for the completion of the backlog of refugee claims given the endless delays being experienced through judicial review. By 1993 over fifty per cent of the Federal Court's time was being taken up by immigration cases and the proportion was still rising.

It would have taken political nerve and intense commitment to have maintained the original 'firm but fair' line. Perhaps the retirement of Mr Hand and the sidelining of the key staff involved in establishing the system removed some of the commitment needed to have held the original position.

We are a long way from the end of this story. Australia's refugee review procedures will have to be restructured again if refugee claims are to be dealt with fairly and quickly, and those rejected returned to their homeland. The following article on German government action indicates one such alternative.

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