Usage) Act on 2 December 1993. The Act extinguishes native title without compensation, and substitutes statutory 'rights of traditional usage' which have negligible legal strength. (See Richard Bartlett, 'Inequality Before the Law in Western Australia' (December 1993) 3(65) *Aboriginal Law Bulletin.*) This Act is likely to be invalid due to inconsistency with the *Racial Discrimination Act* 1975 (Cth) and with the *Native Title Act* 1993 (Cth), and a challenge has already been launched.

By contrast, in Queensland Premier Goss introduced legislation designed to be complementary to the Commonwealth's *Native Title Bill.*

On 18 November 1993 Mr Hewson, Leader of the Federal Opposition, committed the Opposition to opposing the Bill. The Opposition announced that it was ready to accept the existence of native title as declared by the High Court, that validation of existing titles must be accompanied by 'just terms' compensation to native title holders, that the principles of the *Racial Discrimination Act* should apply to ensure that native title holders were treated on a non-discriminatory basis, but that the responsibility for 'land management' should remain with States and Territories. In other words, the only need perceived by the Opposition was for Commonwealth legislation to facilitate the validation of past grants of interests over native title land. The Government's proposal, they said, went beyond that limited objective and represented 'a grab for control over the constitutional responsibility for land management'.

The debate in the Senate was the longest in its history, before being brought to a close on 21 December 1993. Senate amendments which generally improved the position of Aboriginal and Torres Strait Islander people were agreed to by the House of Representatives on 22 December. The Bill received the Royal Assent on Christmas Eve and commenced operation as the *Native Title Act* 1993 on 1 January 1994.

Constitutional challenges to the *Native Title Act* are possible. Political opposition from some State and Territory Governments, mining companies and others are likely to ensure that the Act does not have a smooth time in 1994. At least the legislative process heralded in October 1992 was completed by the end of 1993, the International Year of the World's Indigenous Peoples.

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IMMIGRATION

A brighter horizon for refugees

Things are looking better for many onshore asylum seekers. ANTHONY REILLY comments.

The establishment of the Refugee Review Tribunal (RRT) in the middle of 1993, and Minister Nick Bolkus's 1 November 1993, announcements mean that 1994 will be a much brighter prospect for many refugee applicants than any year since 1989. Nonetheless there are areas of concern which need to be addressed to ensure a just and equitable system, including the continuing detention of undocumented boat arrivals.

The Refugee Review Tribunal (RRT) was established in 1993 to review a refusal of refugee status to a person who applied after arriving in Australia. The RRT now has permanent Registries in Sydney and Melbourne, each with around 20 full-time Members and additional part-time members.

The RRT replaces the Refugee Status Review Committee (RSRC), the unwieldy multi-headed monster that previously made recommendations to the Minister on refugee review applications. The RSRC's membership included representatives from the Department of Immigration and Ethnic Affairs and the Department of Foreign Affairs and Trade, thus rendering it subject to political influences. There were no hearings or interviews of applicants prior to decisions being made. Many applicants felt extremely frustrated and uncertain about how and why their futures were being decided.

The RRT promises to be a vast improvement on this situation. Section 166C of the *Migration Act* 1958 states that:

> The Tribunal in carrying out its functions under this Act is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

With a view to pursuing this objective, s.166C further states that in reviewing a decision the Tribunal:

> (a) is not bound by technicalities, legal forms or rules of evidence; and
>
> (b) must act according to substantial justice and the merits of the case.

Early signs indicate that the Tribunal is sticking to the above aims. For example, a number of former community legal centre workers have been appointed as members of the Tribunal including John Vrachnas, Ros Smidt and Jonathon Duignan from the Immigration Advice and Rights Centre in Sydney, Lesley Hunt from the South Brisbane Immigration and Community Legal Service, and Phillipa Macintosh of the Refugee Advice and Casework Service in Sydney. While I may be accused of naivete in thinking they won't all have degenerated into fascist mad dogs by next Chinese New Year, the inclusion of such reformist tendencies in the Tribunal augurs well for the development of a compassionate and expansive body of refugee law in Australia.

The first RRT hearings in Brisbane were held in early November 1993. The conduct of the hearings was simple – after an initial explanation by the member to the applicant of what lay ahead, any outstanding procedural matters were dealt with. The member then proceeded to question the applicant and any witnesses. Opportunities were provided to witnesses to discuss matters about which they had not been questioned. Submissions were invited from the applicant's legal representative at the conclusion of each witness's evidence and of the hearing itself.

During the hearings the Tribunal proved flexible in providing additional time for applicants to submit documentary evidence they had not been able to obtain by the date of hearing. A welcome initiative was the provision to the applicant and his legal representative of any adverse official country information, with the opportunity to provide a written

response to the material when requested.

Despite the good early signs, there are aspects of the Tribunal's processes which cause concern.

Problematic definitions

The definition of 'a refugee' which forms the basis of decision making has quite variable parameters. For example, a person of Croatian ethnicity whose village in the former Republic of Yugoslavia has been blown apart and later occupied by Serbian Forces would only be granted refugee status if it could be shown that she was unable reasonably to relocate to another part of Croatia. The term 'reasonably' is open to a wide variety of interpretations and there is no settled formula for determining the issue. As well the interpretation of 'persecution' varies enormously, particularly in differing political and cultural contexts.

A further problem relates to consideration of 'humanitarian grounds'. The RSRC was able, in circumstances where it did not consider an applicant should be recommended for refugee status, to recommend that the applicant be accepted on humanitarian grounds. With the RSRC now a thing of the past, no other body has been given this power. The RRT is not empowered to consider humanitarian grounds; applicants must write to the Minister directly, requesting an exercise of discretion on humanitarian and any other relevant grounds.

Although this is available for applicants with legal representation, it is unfair for those without legal representation who may be unaware of the Minister's discretionary powers. The area needs clarification urgently. The most effective response would be the creation of a new class of protection visa on broad humanitarian, rather than refugee, grounds.

Inadequate appeals

An applicant's chances of success may be dependent as much on the lottery of which member is allocated to the file as on the merits of the case. The outcome of a review application may depend entirely on a member's individual approach to the definitions. And each of the differing interpretations, provided they remain within the accepted parameters, will be perfectly proper at law – thus judicial review offers no solution.

The only avenue for reconsideration is referral of cases which involve 'a principle of sufficient importance or generality' by the Principal Member of the Tribunal to the Administrative Appeals Tribunal (s.166HA of the *Migration Act* 1958). The President of the AAT is able to remit the referred case back to the Tribunal if the matter is not considered sufficiently important. An overview of the new procedures distributed by the Department states that 'It is expected that only a very small number of cases will be referred in any year'. Accordingly, this referral procedure is unlikely to solve the problem.

Perhaps a procedure could be introduced allowing applicants to refer specific findings in a decision to a panel of members or to the Principal Member for a determination as to whether the finding is reasonable. Such a determination could be made on the papers as no further hearing of evidence would be required. Another solution might be hearings conducted by more than one member.

The plight of detainees

Before concluding, a brief comment on the 1 November 1993 announcements. The decision was timely and welcome to grant permanent residence to successful refugee applicants and to those Chinese who were granted four-year PRC entry permits in 1989. The additional decision to grant permanent residence to refugee applicants under 45 years of age with English language skills and appropriate qualifications came like a ray of light through a grey dawn, if only because there will finally be a result for many applicants who have been waiting up to four years for a decision.

But one has to ask why the decision did not include those undocumented boat arrivals still languishing in detention across the country? The Government appears to be continuing its discriminatory attitude towards those refugee applicants who arrive in Australian waters without travel documents. As previously argued in an article in this journal in June 1993[1] the Government argument that such discrimination is necessary to deter future arrivals has no demonstrable basis.

Given the substantial and positive progress refugee law has made recently, perhaps it would not be unreasonable to ask the Government to go one step further and redress one of the most serious blights on our human rights record. One small step for Nick Bolkus, one huge step for the detained.

Reference

1. Reilly, A., 'Incarcerating refugees: From killing fields to killing time', (1993) 18(3) *Alt.LJ* 126.

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LAW & SOCIETY

'Shifting boundaries'

BARBARA ANN HOCKING and ESTHER STERN report on the diverse range of papers at a recent conference.

The 1993 Law and Society Conference was held at Macquarie University from 10-12 December, with the theme: 'Shifting Boundaries'. This brief gives an account of the many parallel sessions held over the weekend, although it refers only to some of the papers and sessions attended by the authors. This is not intended to be an exhaustive summary of the range of excellent and diverse papers presented during the conference.

Racism as terrorism

This session involved a range of interesting papers on a variety of fluidly connected political themes. **Melinda Jones** addressed the issues of racism, speech and democracy, drawing a challenging net around our apparent attempts to separate their interconnections. **Tamsin Clarke** commented persuasively on the limitations of the Commonwealth's *Racial Discrimination Act*. **Ian Duncanson** astutely and anecdotally provided the audience with an analysis of the Rule of Law and Other Stories. **Scott**