

The Management of Boat People

**Department of Immigration and Multicultural
Affairs**

Australian Protective Service

Australian Customs Service — Coastwatch

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of Australia 1998

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Canberra ACT

17 February 1998

Dear Madam President

Dear Mr Speaker

The Australian National Audit Office has undertaken a performance audit of the Department of Immigration and Multicultural Affairs, the Australian Protective Service and the Australian Customs Service – Coastwatch. In accordance with the Authority contained in the *Auditor-General Act 1997* I present this report of this audit and the accompanying brochure to the Parliament. The report is titled *The Management of Boat People*.

Yours sincerely

P. J. Barrett
Auditor-General

The Honourable the President of the Senate
The Honourable the Speaker of the House of Representatives
Parliament House
Canberra ACT

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Australian National Audit Office
GPO Box 707 Canberra ACT 2601
telephone (02) 6203 7537
fax (02) 6203 7798

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Audit Team

Dr Paul Nicoll

Dr Ian Maclean

Mr John Guilfoyle

Abbreviations / Glossary

ACS	Australian Customs Service
ACV	Australian Customs Vessel
ADF	Australian Defence Force
AD(JR)	Administrative Decisions (Judicial Review)
AFP	Australian Federal Police
AFZ	Australian Fishing Zone
ANCA	Australian Nature Conservation Agency
APS	Australian Protective Service, an agency within the Attorney-General's portfolio
bull-nosing	a half-cylinder shaped addition to the top of the walls of blocks at the Port Hedland IRPC designed to prevent roof access
case officer	an officer of the Department whose task it is within the primary process to decide whether an applicant for a protection visa is a refugee
CIS	Country Information Service
Coastwatch	Australia's coastal and offshore surveillance service, operated by ACS
CPA	Comprehensive Plan of Action
CPSU	Community and Public Sector Union
DFAT	Department of Foreign Affairs and Trade
DIMA	the Department responsible for immigration matters within Australia, currently known as the Department of Immigration and Multicultural Affairs; previously known as the Department of Immigration and Ethnic Affairs and the Department of Immigration, Local Government and Ethnic Affairs
DoD	Department of Defence

DPP	Director of Public Prosecutions
ESTLA Act	Environment, Sport and Territories Legislation Amendment Act 1997
FFV	foreign fishing vessel
fly-in	an APS officer who is posted to duty in another location, either for a few days or for a three-month tour of duty
HIV	Human Immunodeficiency Virus
HREOC	Human Rights and Equal Opportunity Commission
ICAO	International Civil Aviation Organisation
ICCPR	International Covenant on Civil and Political Rights
IDC	Immigration Detention Centre
IGC	Inter-governmental Consultations
IRPC	Immigration Reception and Processing Centre
JSCM	Joint Standing Committee on Migration
MAB-MIAC	The Management Advisory Board and its Management Improvement Advisory Committee
MOU	memorandum of understanding
NT	Northern Territory
OH&S	occupational health and safety
onshore protection visa application	an application for a protection visa lodged and determined within Australia
OPAC	Operations and Program Advisory Committee
PAM	Procedures Advice Manual
PFR	Post Flight Report - a report prepared at the conclusion of each Coastwatch surveillance flight containing a complete record of all sightings of interest to Coastwatch clients
PNG	Papua New Guinea

PRC	People's Republic of China
primary process	the first stage of the refugee determination system
protection visa	visa issued under section 36 of the Migration Act to a person to whom Australia has protection obligations under the Refugees Convention. The grant of a protection visa is, with the addition of health and character checks, equivalent to the former process of granting refugee status
RAAF	Royal Australian Air Force
RFP	Request for Proposal
RRT	Refugee Review Tribunal, the agency which undertakes administrative review of protection visas decisions
RSRC	Refugee Status Review Committee, the body which provided administrative review of the applications for refugee status before the establishment of the RRT on 1 July 1993
Refugees Convention	the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and the 1967 Protocol relating to the Status of Refugees done at New York on 31 January 1967. These two international legal instruments have been adopted within the framework of the United Nations
refugee determination system	the totality of the administrative and judicial processes through which a person may be found to be a refugee and issued with a protection visa
Review of immigration decision making	a review of immigration decision-making within the Immigration and Multicultural Affairs Portfolio carried out at the request of the Minister for Immigration and Multicultural Affairs. The Review Committee included the Principal Members of the Immigration Review Tribunal and the Refugee Review Tribunal. The report was provided to the Minister in September 1996 but has not been released
RRT	Refugee Review Tribunal
SIEV	suspect illegal entrant vessel
Sino-Vietnamese	people of Chinese background from Vietnam who settled in China as Vietnamese refugees before coming to Australia
unauthorised boat arrival	person arriving by boat who lacks authority to enter or remain in Australia

UNHCR United Nations High Commissioner for Refugees

UNHRC United Nations Human Rights Committee, a body established under the ICCPR

Summary and Recommendations

Summary

Background

1. All people who travel to Australia are subject to immigration control. The control of the relatively small number who arrive without authority to enter and who wish to remain in Australia is exercised under special procedures. This audit covers the management of a particular class of unauthorised arrivals; namely, those people who have come by boat to the north-west of Australia, and who intend staying.

2. The management of boat people is a complex and difficult area of public administration because of:

- ? the large number of operational, legal and policy issues involved together with the fact that these issues can be subject to very rapid change and require effective responses in very short time frames;
- ? the need for public sector agencies with different organisational cultures to co-operate closely on operational matters;
- ? the complexity of the definition of 'refugee' and the ongoing development of its application in law;
- ? the complex interaction between legislation and litigation in boat people issues;
- ? the high level of media, political and community interest in boat people, with strongly held and opposing views in the community; and
- ? often sensitive foreign relations considerations.

These features largely shape the nature of the administration and costs of this function.

3. The main factors that led the ANAO to undertake this efficiency audit were:

- ? the significant government resources devoted to the management of a relatively small number of boat people; and
- ? the high level of interest in the topic by the Commonwealth Parliament and the Australian community.

1. In this report, the ANAO examines the major functions involved in the management of boat people which are:

- ? detection;
- ? reception;
- ? detention;
- ? entry to the refugee determination system;
- ? the refugee determination system;
- ? removal; and
- ? prevention.

2. The settlement of boat people who are found to be refugees, or who are otherwise permitted to remain in Australia, was excluded from the audit as settlement raises quite different management and administrative issues.

Audit objective

3. The objective of the audit was to assess the economy, efficiency and administrative effectiveness, including accountability, of the management of boat people by the Department of Immigration and Multicultural Affairs (DIMA) and the providers of major related services to DIMA such as: the Coastwatch Service within the Australian Customs Service; and the Australian Protective Service (APS) within the Attorney-General's portfolio. DIMA's relationship with the Refugee Review Tribunal (RRT) was included in the audit but the RRT itself was not audited.

Audit methodology

7. The audit examined key issues in the management of boat people largely from a risk management perspective. The audit conclusions are presented in terms of:

- ? the economy, efficiency and administrative effectiveness, including the accountability, of operations - these conclusions are reported below; and
- ? the administrative functions which support the management of boat people, such as detection, reception of boats and costs - these and other conclusions are reported later under Key Findings (paragraphs 22-52).

8. Particular emphasis was placed on the management of the entry to, and the operation of, the refugee determination system as these are resource intensive and are keys to the effective administration of the Government's policy. The importance of entry to, and passage through, the refugee decision-making process was highlighted by the view, adopted in April 1997 by the United Nations Human Rights Committee, that Australia had violated the rights of a boat person under the International Covenant for Civil and Political Rights by detaining him arbitrarily for more than four years.

9. This is a report in two parts: the first of which covers all aspects of the management of boat people other than entry to, and passage through, the refugee determination system, and the second covers the latter issues.

10. Audit criteria developed for the audit were based on the Management Advisory Board and Management Improvement Advisory Committee (MAB/MIAC) risk management model principles and better practices.

Audit conclusions

Economy

11. Boat people represent less than 0.01 per cent of all arrivals in Australia. They place operational demands on DIMA which are significantly greater than other categories of arrivals. From July 1989 to June 1997 a total of 2590 boat people arrived in northwest Australia, including on Christmas Island, an average of about 325 people per year. Total Commonwealth expenditure on the management of boat people represents the equivalent of about 8 per cent of DIMA's budget. DIMA's actual expenditure on the management of boat people is approximately 6 per cent of its budget, as some agencies involved in the management of boat people pay their own costs. The management of boat people is thus a very resource intensive element of public administration, the economy of which is constrained by public policy and legislative parameters.

Efficiency

12. The average cost of the management of the boat people who arrived in 1989 has been estimated by the ANAO to have been in the order of \$150 000 per person in 1996 prices. In comparison, the average cost of arrivals in 1995-96 is estimated by the ANAO to have been \$15 000 per person. The reduction in average costs is due to a combination of:

? administrative changes within DIMA;

- ? legislative changes; and
- ? change in the composition of boat arrivals, which is outside the control of Commonwealth agencies.

Thus, significant efficiency savings have been made in the management of boat people in recent years, which in part is due to administrative changes.

13. While acknowledging these improvements, the audit highlighted opportunities to improve the efficiency of the management of boat people further in the areas of formalised arrangements for the provision of services by external agencies, security risk assessments, the use of legal resources and the development of DIMA's IT systems. Given its primary role in the management of boat people, DIMA should identify the full costs of their management, and develop cost models which enable the financial implications of changes in the policy to be evaluated. Recommendations 1, 4, 5, 6, 8, 13 and 14 address these issues.

Administrative effectiveness

14. The management of boat people is administratively effective in carrying out government policies such as the following:

- ? border and immigration control;
- ? mandatory detention of unauthorised arrivals. As mentioned earlier, the United Nations Human Rights Committee adopted the view in April 1997 that Australia had violated the rights of a boat person by detaining him for more than four years while his applications to remain in Australia were being considered;
- ? adherence to the requirements of the *Migration Act 1958* and the Refugees Convention in relation to those who lodge protection visa applications; and
- ? removal from Australia where the boat person does not engage Australia's

15. The ANAO concluded that improved timeliness and risk management of operations relating to the management of boat people would help improve administrative effectiveness. Recommendation 12 addresses those elements of this issue which are within DIMA's control.

16. As well, improvements in administrative effectiveness are possible through further investigation of the reasons for the lower approval rates in the primary process of the refugee determination system as it applies to boat people as compared to its administrative review stage. Recommendation 11 addresses this issue.

Accountability

17. DIMA satisfies its formal accountability obligations relating to boat people through its reporting to its Minister and Parliament.

18. Greater efforts by DIMA in the area of community awareness could lead to greater understanding by the general public of the way in which DIMA implements government policies. Such awareness raising would include clearer explanations of why some boat people are not considered for refugee status. In turn, this may reduce the complexity of management and some administrative costs. The latter could occur through reductions in the number of unauthorised attempts to enter Australia and in administrative costs associated with the appeals process.

19. Actions could include stronger reporting against policy objectives on a whole-of-government basis and better use of performance indicators. Recommendation 10 addresses these issues.

Recommendations

20. The ANAO has made 14 recommendations directed at improving the economy, efficiency, administrative effectiveness and accountability of the management of boat people. Most recommendations are directed at enhancing the management of risk in this complex and sensitive area of public administration. Other recommendations are oriented towards ensuring a clearer basis for agencies to provide services to the Department.

21. Of the 14 recommendations made, 13 were relevant to DIMA, two to APS and one to Coastwatch. DIMA agreed with 11 of the recommendations, including two with qualifications, and disagreed with two. The APS and Coastwatch agreed with the recommendations relevant to them.

Key Findings

In this section the ANAO first reports key findings by administrative function associated with the management of boat people. Secondly, key findings which apply to several functional areas, or which are not readily accommodated within the classification of administrative functions, are reported under the last heading 'General.'

Detection

22. DIMA and Coastwatch had different understandings about aspects of the surveillance service provided to DIMA by Coastwatch. The relationship between DIMA and Coastwatch would be strengthened if the agencies developed a Memorandum of Understanding, incorporating a performance agreement.

23. There are opportunities for analysing Coastwatch operational data to determine the probability that boats have arrived undetected. The analyses could be used to develop strategies to improve resource use in surveillance activities.

Reception

24. The legal basis for DIMA activity at Ashmore Reef in the Timor Sea was clarified by the Environment, Sport and Territories Legislation Amendment Act 1997.

25. Following the passing of the Environment, Sport and Territories Legislation Amendment Act in June 1997, DIMA has developed procedures for the application of the Migration Act to the Territory of Ashmore and Cartier Islands.

Detention

26. DIMA's difficulties in establishing an appropriate legal framework for the detention of boat people have been largely resolved by amendments to relevant legislation.

27. DIMA should provide advice to Ministers on options to address a provision in the Migration Act which has been found by the High Court to be unconstitutional, and on possible implications of that decision for a similar provision in the Act.

28. DIMA could enhance cost control and program delivery by entering into contractual or similar relationships on a more timely basis than in the past, and through making greater use of performance standards and indicators in those contracts or agreements. Contract performance could be monitored and reviewed more thoroughly.

29. There is scope to enhance operations at Port Hedland IRPC through, for example, improved staffing arrangements and proactive security risk assessments.

Removal

30. The return of boat people who have been unsuccessful in their claims for refugee status or who were ineligible for consideration is a sensitive, high risk and resource intensive process.

31. DIMA and APS are conducting the removal of boat people in a manner consistent with the Migration Act.

32. DIMA and APS have a comprehensive understanding and considerable practical experience in the removal of boat people.

Prevention

33. DIMA has adopted a range of measures appropriate to preventing boat people entering Australia as unlawful non-citizens.

Boat people and the law

34. More management information about the involvement of boat people in the legal system and the level of law-making resources applied to boat people

would assist DIMA to evaluate its administrative policy and processes in this area.

Entry to the refugee determination system

35. Until 1994, the majority of boat people entered the refugee determination system. Since then, legislative and administrative measures have reduced greatly the number and proportion of boat people entering the refugee determination system. Action could have been taken earlier to ensure consistency between clearly relevant international agreements, such as the Comprehensive Plan of Action, and the Migration Act.

36. The reduction in the number of boat people entering the refugee determination system has brought savings estimated by the ANAO at \$62m over several years. Continuation of these savings in respect of future boat arrivals may not be able to be sustained because under current approaches to policy and administration, their achievement would depend upon the circumstances and actions of future boat arrivals.

The refugee determination system

37. Boat people protection visa applicants have been less likely to be found to be refugees at the primary decision than at administrative review of that decision. In other words, applicants are more likely to be successful on appeal than in the original decision. This feature does not appear to be common in Commonwealth administrative decision-making systems. The Minister for Immigration and Multicultural Affairs has taken action to encourage greater consistency on refugee determination between the primary level decision makers within DIMA and the RRT.

38. Boat people have been held in detention for periods of several years as a result of delays in the operation of the refugee determination system. The time taken for both the primary decision and administrative review stages of the system has been reduced over the period since 1989, but cases which enter the judicial system can still take several years. As at September 1997, there were still unresolved cases dating as far back as 1991. The individuals concerned were not in detention.

39. The United Nations Human Rights Committee adopted the view in April 1997 that Australia had violated the rights of a boat person by detaining him for

more than four years while his applications to remain in Australia were being considered. The detention was viewed by the Committee as being arbitrary within the terms of the International Covenant for Civil and Political Rights. At least 17 people were in detention up to July 1997 for times longer than that which was viewed by the Committee as being arbitrary in this case. Each of these people has now been returned to his or her country of origin.

40. There are opportunities to improve management information on boat people through establishing greater consistency between relevant DIMA databases.

Costs

1. DIMA has taken steps toward identifying the full cost of the management of boat people by creating a Boats Sub-program within its budgeting and financial reporting structures, which captures many of its costs in managing boat people. Although DIMA had no explicit responsibility for monitoring whole of government costs of the management of boat people, it should attempt to assess the cost of services provided by Coastwatch, the Department of Defence, and other agencies involved in order to obtain a better estimate of total expenditure by Commonwealth agencies. Such an estimate would provide a firmer basis for the overall management of boat people.

2. The ANAO estimated total costs to government of the management of boat people were approximately \$40-50m in 1995-96, the equivalent of about 10 per cent of DIMA's annual appropriation in that year. The actual costs to DIMA were approximately 7 per cent of its annual appropriation, as some agencies paid their own costs. In 1996-97 these percentages fell to 8 and 6 per cent respectively. Boat people represent about 0.01 per cent of the total number of people who arrive in Australia annually. Management of boat people is thus in the order of one thousand times more resource intensive than the reception of ordinary arrivals, reflecting largely the different processes involved. The average cost per boat person arrival in 1995-96 was about \$15 000, reflecting the fact that in that year only about ten per cent of boat people entered the refugee determination system.

3. According to ANAO estimates:

? DIMA's average cost of receiving, detaining and removing promptly from Australia a boat person who does not enter Australia's refugee determination system is \$11 000; and

- ? DIMA has made substantial improvements to the efficiency of the refugee determination system. This can be seen, for instance, in how for 1989 arrivals, the average cost to the government of a refugee determination was \$150 000. In comparison, for 1995-96 arrivals the average cost to government of a boat person who enters the refugee determination system is \$40 000, with the range being from \$9 000 to \$270 000.
4. Greater attention by DIMA to cost monitoring was essential to assist it to develop additional policy options in future years.
5. Cost models which identify the full cost per person can provide valuable insight into issues associated with the management of boat people. The full benefits of this approach will not be realised unless DIMA extends the analyses it has undertaken thus far.
6. In view of the relatively significant proportion of DIMA funds involved and because of the sensitivity of the relevant policies, DIMA could benefit from a review of the adequacy and organisation of its resources involved in the management of boat people.

General

7. This section reports key findings which apply across a number of administrative functions, or which are not readily accommodated within the classification of administrative functions. These key findings are described most conveniently in terms of the risk management perspective used to examine key issues in the audit.
8. DIMA had identified many risks to the success of the Government's objectives in the management of boat people. The principal operational risks for DIMA include:
- ? non-compliance with the Migration Act, the Refugees Convention, the International Covenant on Civil and Political Rights or other relevant international obligations, for example:
 - undetected arrival of boats;
 - non-refugees being granted protection visas; and
 - return of refugees to their places of persecution;
 - ? increases in unauthorised boat arrivals;
 - ? different objectives between the Federal Government agencies which share responsibilities for implementation of government policy;
 - ? damage to Australia's international reputation;

- ? unnecessary expense to government and taxpayers;
- ? changed perceptions of the nature of the refugee determination system;
- ? uncertainty about whether recent expenditure savings can be sustained; and
- ? community misunderstanding of government objectives.

Some of these risks are more amenable to departmental action than others.

1. Information provided to stakeholders on boat people involvement has not been sufficient to allow assessment of the degree to which Government policy objectives have been met. Assessment would be enhanced by data on numbers of boat people entering and not entering the refugee determination system, and data on the passage through the system of those entering it. Improved information for stakeholders could assist DIMA in achieving its objectives.

2. This information will also allow the identification of risks which are not readily apparent to individual agencies, because of role ambiguity or uncertainty between agencies. The differing functional responsibilities and interests of agencies increase the need for a whole of government approach to the analysis of risks associated with management of boat people.

3. Several of DIMA's IT systems apply to boat people. Inadequate integration between these systems did not permit efficient monitoring of some significant aspects of the Department's role.

4. The ANAO acknowledges that the management of boat people takes place in an environment where it is difficult to identify all of the significant risks, let alone analyse, assess, rank and control them. The challenge for DIMA in the future is to further develop its administrative system for the management of boat people in a way which remains consistent with government and departmental objectives, yet retains sufficient flexibility to respond to new risks as they emerge.

Recommendations

Set out below are the ANAO's recommendations with Report paragraph references and the auditees' abbreviated responses. More detailed responses and any ANAO comments are shown in the body of the report. The ANAO considers that the auditees should give priority to Recommendations No. 1, 3, 5, 10, 11, 12 and 14.

Recommendation 1
para. 2.30 A Memorandum of Understanding (MOU) should be developed between DIMA and Coastwatch incorporating a performance agreement setting out targets, indicators and respective responsibilities.

DIMA response

Not agreed.

ACS response

Agreed.

Recommendation 2
para. 3.30 DIMA reviews its operations in the Territory of Ashmore and Cartier Islands, with a view to developing efficient and effective procedures and training to ensure:

- ? the appropriate degree of immigration control; and
- ? that evidence provided to the Director of Public Prosecutions is admissible in court.

DIMA response

Agreed.

Recommendation 3
para. 4.5 DIMA should provide advice to Ministers on options to address a provision in the Migration Act which has been found by the High Court to be unconstitutional, and on possible implications of that decision for a similar provision in the Act.

DIMA response

Agreed.

Recommendation DIMA should ensure that where services are

4
para. 4.46 provided under contract, the contract and the performance standards for these services should be agreed before the service commences. The arrangements, standards and performance should be reviewed regularly.

DIMA response

Agreed.

Recommendation
5
para. 4.62 As part of a risk management approach DIMA should develop a system to identify, analyse, assess, rank and control risks associated with the detention of boat people.

DIMA response

Agreed.

Recommendation
6
para. 4.84 Proactive security risk assessments of the Port Hedland IRPC should be undertaken regularly to ensure their currency, especially during the current refurbishment program.

DIMA response

Agreed.

APS response

Agreed

Recommendation
7
para. 4.108 The APS should improve its pay information system to provide management with disaggregated personnel costing information for monitoring and control purposes.

APS response

Agreed.

Recommendation
8
para. 5.58 DIMA should monitor the legal resources it devotes to law-making and cases relating to boat people with a view to ensuring optimum use of those resources.

DIMA response

Not agreed.

Recommendation
9 DIMA should take steps to provide timely advice to government to ensure that the Migration Act remains

para. 6.28 consistent with relevant international agreements.

DIMA Response

Agreed.

Recommendation 10
para. 6.44 DIMA should strengthen its reporting to Parliament against program objectives relating to the management of boat people by, for example, developing performance indicators to assist understanding of the reasons for changes in costs and processing characteristics.

DIMA Response

Agreed.

Recommendation 11
para. 7.72 DIMA should investigate the causes of lower approval rates in the primary process as compared to the administrative review stage of the refugee determination system.

DIMA response

Agreed with qualifications

Recommendation 12
para. 8.31 In view of the relatively significant proportion of DIMA funds involved and because of the sensitivity of the relevant policies, DIMA should review the adequacy and organisation of its resources allocated to the management of boat people to ensure that improvements in efficiency and effectiveness continue, and to identify areas which require change.

DIMA response

Agreed.

Recommendation 13
para. 8.48 DIMA should develop its databases to facilitate extraction of information which is important to the management of boat people.

DIMA response

Agreed.

Recommendation 14
To improve its planning of policy and delivery

para. 8.60

options, DIMA should:

- ? estimate, as far as is practicable, the full costs of its expenditure on the management of boat people on both cash and accrual bases; and
- ? for predictive purposes, develop cost models based on accrual accounting concepts.

DIMA response

Agreed with qualifications.

Audit Findings and Conclusions

This part of the report is in two segments.

The first segment -

Chapters 1 to 5 cover all aspects of the management of boat people other than entry to, and passage through, the refugee determination system.

The second segment -

Chapters 6 to 9 cover entry to, and passage through, the refugee determination system.

1. Introduction

Background to the audit

1.1 All people who travel to Australia are subject to immigration control. The control of the relatively small number who arrive without authority to enter and who wish to remain in Australia engages special procedures. This audit covers the management of a particular class of unauthorised arrivals; namely, those people who have come by boat to the north-west of Australia, and who intend staying.

1.2 The management of boat people is a complex and difficult area of public administration because of:

- ? the large number of operational, legal and policy issues involved;
- ? the need for public sector agencies with different organisational cultures to co-operate on operational matters;
- ? the complexity of the definition of 'refugee' and the ongoing development of its application in law;
- ? the changing interaction between legislation and litigation in boat people issues;
- ? the high level of media, political and community interest in boat people, with strongly held and opposing views in the community; and
- ? often sensitive foreign relations considerations.

1.3 The main factors that led to the efficiency audit were the significant government resources applied to a relatively small number of boat people and the high level of interest in the topic by the Commonwealth Parliament and the Australian community.

1.4 In this report, the ANAO examines the major functions involved in the management of boat people. This includes detection, reception, detention, decision-making on refugee status, removal, and finally, costs. Particular emphasis has been given to refugee decision-making as it is resource intensive and has played a key role in the management of boat people.

Departmental objectives

1.5 The principal auditee was the Department of Immigration and Multicultural Affairs (DIMA). DIMA's aim is to pursue government objectives within the context of a specific legal framework. DIMA's objectives relevant to boat people are:

- ? to provide a framework for effective management of Australia's migration program and its borders;
- ? to meet Australia's commitment to alleviate the plight of refugees and others in humanitarian need through the delivery of the Government's Humanitarian Program and to protect those in Australia in accordance with the 1951 UN Convention and 1967 Protocol Relating to the Status of Refugees;
- ? to provide an independent review of decisions on migration and refugee status, which is fair, just, economical, informal and quick;
- ? to enforce entry and stay requirements and to facilitate the timely removal of unlawful non-citizens from Australia by providing for their lawful, appropriate and economical detention; and
- ? to prevent the entry into the Australian community of unauthorised boat arrivals and remove those who do not engage Australia's refugee or humanitarian protection.

1.6 DIMA pursues these objectives within the context of a legal framework which encompasses both Australian and international law. The principal Australian law governing the Department's operations in relation to boat people is the *Migration Act 1958*. International law has become part of the legal framework because Australia has become a signatory to certain international legal documents. Several documents are relevant to DIMA's management of boat people. Those most relevant to this audit are:

- ? the International Covenant on Civil and Political Rights (ICCPR), which includes standards for dealing with people in detention; and
- ? the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, and as amended by the 1967 Protocol relating to the Status of Refugees which was done at New York on 31 January 1967 (the 'Refugees Convention'). These documents establish the agreed definition of 'refugee' and provide for the protection of such people.

Historical setting

1.7 The arrival of boat people on Australia's shores over the last 25 years can be split into three periods:

- ? 1975 - 1981 - arrivals from Indo-China following the end of the Vietnam War. Very few of those departing Indo-China came directly to Australia - the vast majority stopped in countries of first asylum such as Malaysia, Indonesia, Thailand and China;
- ? 1982 - 1988 - there were no unauthorised boat arrivals detected in Australia, largely because of the establishment of an orderly departure program in Vietnam; and
- ? 1989 - present - boat arrivals resumed in small numbers and have continued to the present. The principal countries from which boat people have come during this period have been Cambodia, China, and lately, Iraq.¹

1.8 The audit focussed on the most recent of these three periods. In 1989, DIMA's administrative framework for managing boat people was not well developed. The administration of the legislative framework for the detention of boat people was found by the High Court to be defective, and the refugee determination system took a long time to respond efficiently. Although the first boat people in this period arrived in November 1989, it was not until April 1992 that their applications for refugee status were finalised. The boat people applied immediately to the Federal Court for an order setting aside DIMA's rejection of their applications on the grounds of denial of natural justice. DIMA consented to the application two days later and the decisions were referred back to the decision-makers for reconsideration.

1.9 DIMA's performance at that time set a baseline from which its substantial improvements since could be assessed.

Other reviews

1.10 The following Parliamentary reviews have been conducted in the last few years:

- ? Joint Standing Committee on Migration (JSCM), February 1994: *Asylum, Border Control and Detention* - the review assembled factual data and considered the policy of detaining unauthorised arrivals including boat

¹ Unauthorised boat arrivals from Iraq use other means of transport for the major part of their journey to Australia. The final stage of the journey, by boat, usually commences in Indonesia.

people. Recommendations were directed at improving current arrangements; and

- ? Joint Standing Committee on Migration Regulations, August 1992: Australia's Refugee and Humanitarian System: Achieving a Balance between Refuge and Control.

1.11 During the course of the audit the Human Rights and Equal Opportunity Commission (HREOC) undertook an investigation into the detention of boat people. This investigation has focused on matters which are largely outside the scope of the audit.

Audit objective

1.12 The objective of the audit was to examine and report to Parliament on the economy, efficiency, administrative effectiveness and accountability of the management of boat people by DIMA and the providers of major related services to DIMA such as: the Coastwatch Service within the Australian Customs Service and the Australian Protective Service (APS) within the Attorney-General's portfolio.

Audit scope

1.13 The audit examined the administration of the management of boat people by DIMA, Coastwatch and APS. DIMA's relationship with the Refugee Review Tribunal (RRT) was also included within the bounds of the audit but the Tribunal itself was not examined.

1.14 The scope of the efficiency audit was restricted to unauthorised boat arrivals in northwest Australia, including Christmas Island and Ashmore Reef. The audit excluded the Torres Strait because the origin of boat people and the detection regime in the Torres Strait differ from that between Darwin and Broome. Stowaways and ship jumpers were also excluded as were the crew of boats who did not intend to remain in Australia. The period reviewed was from the arrival on 28 November 1989 of a vessel codenamed *Pender Bay* to 30 June 1996. Reference is made to events since 30 June 1996 where relevant to issues identified in the review period.

1.15 The ANAO completed a preliminary study for the audit in September 1995. As a result of this study it was decided to proceed to a full performance audit. Field work for the audit commenced during the preliminary study and was scheduled to have been completed in June 1996. In April 1996 the

Minister for Immigration and Multicultural Affairs announced a review of immigration decision-making. A landmark decision by the High Court in May 1996 clarified the respective roles of administrative decision-makers within the Executive and judicial review.² The High Court's clarification, together with the opportunity to generate cost data to assist the Ministerial review, led to extension of the fieldwork in relation to the refugee determination system and its costs. Consequently, this High Court decision has meant that issues associated with the refugee determination system are far more significant than was possible to envisage when the audit began in September 1995.

1.16 The report is in two main parts, the first addressing the detection, reception, detention, and removal of boat people, and the second the refugee determination system.

Audit methodology

1.17 The principal audit criteria were derived from the MAB-MIAC risk management model, released in 1995 and applied to the management of boat people.

1.18 At the time of the audit, the agencies involved had not had the opportunity to formally apply the MAB-MIAC risk management model to their operations and specifically to the management of boat people. Notwithstanding this problem, as the model represents good management practice, the ANAO expected to observe elements of the model applied in at least an informal way.

1.19 The criteria³ were that management should have:

- ? identified the risks relating to the management of boat people;
- ? analysed the risks relating to the management of boat people;
- ? assessed and ranked the risks relating to the management of boat people; and
- ? controlled the risks relating to the management of boat people.

1.20 Most of the work for the audit was undertaken in Canberra. During the course of the audit members of the audit team visited the Port Hedland

² *Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors (1996)* 136 ALR 481. Cases cited in this report are listed at Appendix 1.

³ The process recommended by MAB-MIAC includes the preliminary step of Establishing the Context. The auditees are well aware of the context in which they operate, so no audit criteria were attached to this step.

Immigration Reception and Processing Centre in Western Australia, and the temporary centre that was established at the Royal Australian Air Force Curtin base near Derby, Western Australia. Other sites visited for consultation and observation were Darwin, Sydney, Melbourne and Perth. An ANAO officer also accompanied a flight returning boat people to Nan-ning, China.

1.21 As part of the audit, in addition to officers of the involved agencies, other interested parties consulted by the ANAO included:

- ? a number of boat people who have obtained permanent residence in Australia;
- ? the Department of Defence;
- ? Federal Court of Australia;
- ? Refugee Review Tribunal;
- ? the Australian, New Zealand and South Pacific Regional Representative of the United Nations High Commissioner for Refugees;
- ? General Counsel to DIMA (Attorney-General's Department officer); and
- ? various State government and community groups.

1.22 DIMA asked the ANAO not to interview boat people in detention. DIMA was concerned that any differences in outcome for the boat people might subsequently be believed by them to be due to the ANAO's intervention.

1.23 The Attorney-General's Department's Legal Practice Group was engaged to provide independent expert assistance in the collection and analysis of boat people cases. The consultant prepared a report on judicial and administrative review of boat people cases as well as providing statistical data.

1.24 The ANAO acknowledges the co-operation of DIMA, Coastwatch and APS in the conduct of this audit.

Audit cost

1.25 The audit was conducted in conformance with the ANAO Auditing Standards and cost approximately \$575 000.

Audit conclusion

1.26 In reaching conclusions relating to the objective of the audit, the ANAO acknowledged that the public policy and administrative issues which DIMA confronts in the management of boat people are very complex. The ANAO concluded as follows:

? **Economy:** Boat people represent less than 0.01 per cent of all arrivals in Australia. They place operational demands on DIMA which are significantly greater than other categories of arrivals. From July 1989 to June 1997 2590 boat people arrived in north-west Australia, including at Christmas Island, an average of approximately 325 people per year. In order to administer the policy of successive governments, total Commonwealth expenditure on the management of boat people represents the equivalent of almost 8 per cent of DIMA's budget, while DIMA's own expenditure on the management of boat people is approximately 6 per cent of its budget. The management of boat people is thus a very resource intensive element of public administration, the economy of which is constrained by public policy and legislative parameters.

? **Efficiency:** The average cost of the management of the boat people who arrived in 1989 was estimated by the ANAO to have been in the order of \$150 000 per person in 1996 prices. In comparison, the average cost of arrivals in 1995-96 was estimated by the ANAO to have been \$15 000 per person. The reduction in average costs was due to a combination of:

- administrative changes within DIMA;
- legislative changes; and
- change in the composition of boat arrivals, which is of course outside the influence of Commonwealth agencies.

Thus, significant efficiency savings have been made in the management of boat people in recent years which in part are due to administrative changes.

? **Administrative effectiveness:** the management of boat people is administratively effective in that Government policies in relation to boat people are being carried out. These include:

- border and immigration control;
- mandatory detention of unauthorised arrivals;
- adherence to the requirements of the Migration Act and the Refugees Convention in relation to those who lodge protection visa applications; and
- removal from Australia where the boat person does not engage Australia's refugee or humanitarian obligations.

A consequence of the administration of government policies is that the United Nations Human Rights Committee has formed the view that Australia has not complied with its obligations under the International Covenant for Civil and Political Rights.

- ? **Accountability:** accountability for the management of boat people could be improved, particularly through the provision of different types of information to Parliament and the public. Improved reporting by DIMA on its administrative processes could assist it to achieve its objective of control.

Recommendations

1.27 The ANAO has made 14 recommendations directed at improving the economy, efficiency and administrative effectiveness, including accountability, of the management of boat people.

1.28 Most recommendations are directed at enhancing the management of risk in this complex and sensitive area of public administration. Other recommendations are oriented towards ensuring a clearer basis for other agencies to provide services to DIMA. The ANAO is of the opinion that DIMA would benefit from the development of an integrated risk management approach to the management of boat people particularly in areas where the decisions it takes are highly complex.

2. Detection

The detection of boats carrying ‘boat people’ before their arrival in Australia comprises three distinct functions: intelligence, locating the boats and reception. In this chapter, the ANAO considers the first two of these functions.

Introduction

2.1 Part of Australia’s policy of immigration control is to detect boats suspected of containing people who do not have authority to land in Australia before the landing actually occurs. Such boats are called suspect illegal entrant vessels (SIEVs). Giving effect to this policy involves surveillance of the waters off Australia’s northwest coast. Surveillance operations normally involve three distinct functions:

- ? intelligence;
- ? location; and
- ? response.

Intelligence

2.2 Through a range of intelligence sources, relevant agencies are often aware of SIEVs long before they approach Australian waters. Certain factors facilitate the gathering of intelligence about SIEVs, including the fact that boats from the same source country generally follow the same route to Australia. Boats have usually followed the safest route, rather than the shortest.

2.3 Personnel involved in the location function in Darwin advised the ANAO that SIEVs have not sought to evade detection. In the vast majority of cases SIEVs have simply sailed straight to a port, usually Darwin.

2.4 Coastwatch seeks to locate SIEVs as early as practicable. There are three reasons for this: acting promptly on intelligence information minimises the search area; concern that any detection regime which operated on a basis other than seeking to locate SIEVs as early as practicable might encourage those who would aim to evade it; and quarantine concerns of the Australian Quarantine Inspection Service (AQIS).

2.5 Chart 1 shows the number of boats arriving in Australia by source country and by year of arrival. The most common source country for boats is China. SIEVs from China usually leave from Beihai, a port city in southern China. The Indonesian SIEVs have come mainly from the area around Kupang, the capital of West Timor.

Location

2.6 Primary responsibility for locating SIEVs lies with the Coastwatch Branch of the Australian Customs Service.

Coastwatch

2.7 Coastwatch provides a coastal and offshore surveillance and response service to a range of Government agencies, including DIMA. A major focus of Coastwatch activity is on the early sighting and identification of SIEVs.

2.8 The area under surveillance by Coastwatch approximates that of the Australian Fishing Zone (AFZ), which covers about 9 million square kilometres. The areas searched by Coastwatch in recent years are shown in Table 2.1. The increased area covered means that the area under surveillance by Coastwatch is now being searched more intensively. The increase in area searched has come about because of the increased capacity of new aircraft which were introduced by Coastwatch progressively through 1995-96. This threefold increase in area searched has been achieved at an increase in costs of 30 per cent. Moreover, the ability of Coastwatch to conduct night operations has also been increased.

Table 2.1
Area searched by Coastwatch, by year

Year	Area searched (m km ²)
1994-95	100
1995-96	148
1996-97	285

Source: Adapted from Coastwatch data.

2.9 Coastwatch operations are conducted primarily by a fleet of 14 aircraft, including one helicopter, dedicated solely to Coastwatch tasks. The fleet has been acquired and is operated by two civil aviation firms under contract to Coastwatch. Coastwatch also charters aircraft when required. In addition to these aircraft, the Royal Australian Air Force (RAAF) provides up to 250 flight

hours per year of
P3C Orion aircraft.

2.10 Rather than provide blanket coverage of large areas such as the Timor Sea, Coastwatch's role is to *locate* SIEVs. Coastwatch's success in discharging this role depends critically on the intelligence it receives. It is therefore cost effective for Coastwatch to exercise, as it does, a co-ordinating role in the assembly of intelligence information from the sources available to it and its clients.

Suspect illegal entrant vessels

2.11 Table 2.2 shows the number of SIEVs over the period covered by the audit, by year of arrival and by broad location of arrival.

2.12 Of the 40 boats which are known to have arrived at the north-western Australian coast over the period covered by the audit, four reached the shoreline without being detected. The arrival of three of these boats was reported to Coastwatch by members of the community within a few hours of landfall.

2.13 Two recent SIEVs were not detected before arrival by Coastwatch. Both were outside the scope of the audit. The SIEV *Telopea*, which arrived undetected on 13 June 1997, landed in the Torres Strait, outside the geographic scope of the audit (see paragraph 1.14). The SIEV *Urtica*, which dropped 15 unauthorised arrivals at Coral Bay in WA on 3 July 1997 and then departed, also was not detected beforehand. The *Urtica's* arrival was outside the period covered by the audit.

Table 2.2
Boat numbers by location and year of arrival

Year of arrival	Mainland (a)	Ashmore Reef	Christmas Island	Total
1989-90	3	-	-	3
1990-91	5	-	-	5
1991-92	2	-	-	2
1992-93	-	-	2	2
1993-94	5	-	1	6
1994-95	19	1	1	21
1995-96	3	3	8	14
1996-97	3	6	1	10

Total	40	10	13	63
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Source: Department of Immigration and Multicultural Affairs

Note: (a) 'Mainland' refers to the coast between Darwin and Broome and includes small islands adjacent to the coast.

Costs

2.14 Current Coastwatch funding arrangements provide for central block funding of Coastwatch. These arrangements were established because all Coastwatch clients receive benefits, in the form of surveillance services, from all Coastwatch flights. Coastwatch does not allocate its costs between client agencies. It therefore does not produce estimates of its costs which are attributable to boat people in particular or DIMA in general.

2.15 The ANAO has been advised by Coastwatch that, in normal times perhaps five per cent of Coastwatch activity is directed to SIEVs. In peak times, such as those which occurred in December 1994, up to 30 per cent of Coastwatch activity may be directed at boat people. When intelligence of an approaching SIEV is received, the search effort can be intense. Eight aircraft were made available for the search for the *Quokka* in December 1993. In the absence of any firm base for estimating costs, the ANAO estimates that an average of 10 per cent of Coastwatch costs could be attributed to boat people.⁴ For 1995-96, this amounted to approximately \$3m.

Coastwatch's risk management approach

2.16 Coastwatch advised the ANAO that it has decided to adopt a formal risk management approach along the lines of the MAB-MIAC model. The ANAO notes that, before adopting the model, Coastwatch operated in a way which used many elements of the model.

2.17 The principal risk in relation to the detection of boat people is that a SIEV will arrive undetected on Australia's shores. Coastwatch controls this risk on DIMA's behalf principally through its marine civil surveillance flights.

2.18 On some occasions Coastwatch has competing demands for its surveillance services from its clients. Coastwatch resolves these demands in consultation with its clients having regard to the nature of the threat, the reliability of the available intelligence, the distance from Australia, weather conditions and the availability of aircraft.

⁴ The use of an average in these circumstances means that for about 80 per cent of the time, the estimated cost will be approximately double the actual cost. For about 20 per cent of the time, however, the estimated cost will be about one-third of the actual cost.

2.19 An Operations and Program Advisory Committee (OPAC), comprising Coastwatch and its clients, meets monthly to determine broad surveillance requirements for the immediate future. The flights planned at OPAC meetings follow 'strategic' patterns which vary with the seasons and known areas of interest. Flight patterns are varied at short notice to respond to intelligence or emerging situations. Coastwatch's ability to analyse and assess risks and respond quickly is a vital and effective element of its approach to the control of risk.

2.20 Neither Coastwatch nor DIMA analyses information on the method of detection (for example, marine surveillance flight, Navy patrol boat or community report), nor on how close the boats were to the Australian shoreline when detected. Analyses of how close boats were to the shore when first detected would enable estimates to be made of the likelihood of undetected arrivals having occurred in the past. If most SIEVs were first detected far out to sea, the probability of there having been undetected arrivals is small. If, however, many boats were first detected close to the shore, the likelihood of there having been undetected arrivals is greater.⁵ Information from such analyses of whether boats were first detected far from, or close to, the Australian shore, would enhance program performance monitoring. It would also assist Coastwatch in setting priorities and in analysing and controlling risk through its allocation of resources among the various methods of surveillance available to it.

2.21 DIMA has advised that, as the detection of boats is not one of its functions, it is unclear how its program performance monitoring could be enhanced by the analysis of such information.

2.22 Coastwatch notes that it is not its responsibility to undertake such analyses, but agreed it could do more to encourage clients such as DIMA to undertake them. In its response to Recommendation 1 below, Coastwatch has indicated it is in the process of establishing a capacity to evaluate past detections.

2.23 The ANAO view is that this is an instance where different functional responsibilities and interests across agencies have inhibited use of a whole of government approach to risk analysis. Both DIMA and Coastwatch would benefit if these analyses were undertaken and notes that the recent introduction by Coastwatch of electronic transfer to clients of Post Flight Reports (PFRs) may facilitate such analyses. The division of responsibilities between the two agencies in the conduct of such analyses would be best

⁵ This conclusion is valid for the search strategy used by Coastwatch, that of seeking to locate SIEVs as early as possible, but may not be valid for all search strategies.

determined by the agencies themselves in the context of a Memorandum of Understanding (MOU), as recommended later in this Chapter.

Performance

2.24 The use of risk management helps improve performance. Coastwatch reports performance in terms of detection and non-detection of SIEVs⁶ in ACS' annual reports. Use of non-detection as a performance indicator needs to be tempered with an assessment of the quality of intelligence information available to Coastwatch and client agencies.

2.25 During the audit the ANAO became aware of a misunderstanding between Coastwatch and DIMA on performance indicators. When the specifications for the new Coastwatch contract were being developed in 1993, DIMA had indicated to Coastwatch that it would like 30 hours notice of the arrival in port of a SIEV. This requirement had been an important part of the development of the contract specifications. Coastwatch management referred to this requirement many times during the audit. DIMA, however, indicated to the ANAO that it was unaware of the 30 hour notice requirement: its advice to the ANAO was that it wanted as much notice as possible.

2.26 DIMA has advised that the misunderstanding was the result of staff changes in the relevant area at the time of the audit. DIMA has also advised that whilst 30 hours notice of the arrival in port of a SIEV would seem ideal, it appears to be an unrealistic expectation given the environment in which Coastwatch operates.

2.27 In the view of the ANAO, it would assist Coastwatch in meeting DIMA's needs if DIMA were to establish what it considered to be a realistic target for notice of arrival in port of a SIEV. More generally, the ability of both parties to monitor, assess and improve the service provided by Coastwatch to DIMA would be enhanced if the two agencies established an MOU setting out responsibilities and incorporating a performance agreement.

2.28 DIMA considers care would need to be taken in developing any performance agreement to ensure that it did not foster an overly cautious response to information provided on suspected unauthorised boat arrivals or lead to increased expenditure on surveillance that is not cost-effective. DIMA has advised that it receives feedback on Coastwatch services at OPAC meetings. DIMA has advised further that a high level interdepartmental committee enquiring into coastal surveillance was recently convened. All

⁶ 'Non-detection of SIEVs' refers to SIEVs detected after arrival.

agencies, including DIMA, advised that they were satisfied with the level of service.

2.29 There are at present no performance measures agreed between DIMA and Coastwatch which indicate whether the service provided by Coastwatch is or is not acceptable, and if not acceptable, the costs and benefits of corrective action. An MOU incorporating a performance agreement based on risk management principles would be an appropriate means to develop and monitor performance. The performance agreement should take account of the costs and benefits of implementing performance measures.

Recommendation No.1

2.30 A Memorandum of Understanding (MOU) should be developed between DIMA and Coastwatch incorporating a performance agreement setting out targets, indicators and respective responsibilities.

DIMA response

2.31 Not agreed. Coastwatch services to DIMA are frequently not as a result of specific tasking by DIMA but are part of its general surveillance role and are thus inextricably linked with its service to a number of other agencies. Attempts to arbitrarily differentiate and notionally cost the value of Coastwatch services to DIMA would be non-productive and would fragment the valuation of overall Coastwatch performance.

2.32 In addition, the performance measure of detection is critically dependent on the intelligence Coastwatch receives. Any surveillance other than routine tasking by other agencies is linked directly to the overall intelligence received. Since this intelligence has been gathered from a wide variety of sources, its quality is likely to be variable. In the circumstances, it would be unsatisfactory for Coastwatch performance to be evaluated solely on detections or indeed on instances of 'non-detection.'

ACS response

2.33 Agreed. The ACS agrees that there would be merit in developing and MOU between DIMA and Coastwatch covering all aspects of the detection, surveillance and response to Suspect Illegal Entry Vessels (SIEVs).

2.34 With regard to analysis of past detections in order to enhance risk management of future events, Coastwatch is in the process of establishing a

new position in its Planning and Liaison sub-section to provide, inter alia, a capacity for post-task evaluations. These evaluations will contribute to the ability of Coastwatch to more closely monitor client service delivery outcomes as measured against expectations.

3. Reception

This chapter covers procedures that occur from the detection by Coastwatch of a suspect illegal entrant vessel (SIEV) to the arrival of the boat people at an immigration detention centre.

Introduction

3.1 Surveillance operations, as mentioned in Chapter 2, involve three distinct functions:

- ? intelligence;
- ? location; and
- ? response.

3.2 The intelligence and location functions relating to the surveillance of suspect illegal entrant vessels (SIEVs) were considered in Chapter 2. In the case of boat people, the response element of the surveillance function is linked closely to arrangements for their reception. Accordingly, this third element of surveillance is considered in this chapter. The focus here is on the boat people themselves, rather than on the vessels in which they come to Australia.

Response

3.3 The decision on whether a detected boat is to be regarded as a SIEV is taken by the Tactical Response Group, a standing committee of interested agencies convened by Coastwatch. If the Group decides that the boat is a SIEV, Coastwatch co-ordinates the initial response. The initial response involves a Coastwatch response vessel, which is either an Australian Defence Force (ADF) patrol boat or an Australian Customs Vessel (ACV). Under arrangements between the Department of Defence (DoD) and Coastwatch, DoD makes 1800 patrol boat days available each year for civil surface patrol and response. This resource is managed by Coastwatch on behalf of Coastwatch clients.

3.4 For SIEVs sailing in the Timor Sea, the response takes the form of shadowing by the Coastwatch response vessel. 'Shadowing' involves positioning the response vessel between the SIEV and the coast.

3.5 Under arrangements which have applied since 1995, response teams use a separate vessel to intercept and board unauthorised boats at the entrance to the port to which the boat is heading. The response team consists of officers of DIMA, ACS, AQIS and an interpreter. The response team undertakes initial processing of the people on the boat. Health, customs and quarantine matters are dealt with first. Then DIMA and ACS officers interview the master and crew of the vessel. These arrangements provide improved resource use as compared to the previous arrangements, where the response team was on board the Coastwatch response vessel.

3.6 An exception to this is where a SIEV is detected at Ashmore Reef. In this case, DIMA officers continue to be part of the response team. Reception arrangements at Ashmore Reef are discussed later in this chapter.

3.7 When DIMA officers board a SIEV, they determine first whether anyone on board is an Australian citizen or has a visa to enter Australia. If not, they are taken into immigration detention as a person known or reasonably suspected of being an unlawful non-citizen under section 189 of the *Migration Act 1958*. A nominal roll is then prepared, listing personal details and family relationships of passengers and crew.

3.8 The Darwin Office of DIMA has developed a 'Boarding Guide' which explains clearly and concisely the first contact processes and responsibilities of DIMA officers.

3.9 The ANAO observed the reception process in the case of one SIEV - from the arrival of the boat people at Darwin on board an ADF patrol boat to their induction into the Port Hedland Immigration Reception and Processing Centre (IRPC). In this instance the co-ordination of resources at the operational level at Darwin both within DIMA and between agencies was, in the view of the ANAO, effective and efficient.

Ashmore Reef

3.10 Uncertainty surrounding the application of the Migration Act to Ashmore Reef (see Figure 1), which is part of the Territory of Ashmore and Cartier Islands, has created administrative difficulties for DIMA in relation to boat people.

3.11 Ashmore Reef, which is about 15km in diameter, contains three islands with a combined area of 112 hectares. Until July 1997, Australia did not exercise immigration control over the islands, which are uninhabited. The islands, reef and the surrounding waters and seabed form the Ashmore Reef National Nature Reserve. Provided vessels conform to the exclusion zones and fishing restrictions of the Reserve, they have freedom of passage through the area.

3.12 On ten occasions from 1995 to 1997 (see Chapter 2, Chart 1), small Indonesian fishing vessels have brought people seeking to enter Australia to Ashmore Reef. Before considering the particular administrative difficulties posed by these arrivals for DIMA, the circumstances of one arrival are described in the following case example.

Case example

Four nationals from a Middle Eastern country entered into an arrangement with a fishing boat owner in Kupang, the capital of West Timor, to take them to Australia. The boat owner organised a small motorised fishing boat, crewed by three Indonesian fishermen, and instructed the crew to let the passengers off at Ashmore Reef. The intention was that they would attract the attention of the next Coastwatch aircraft, and in due course an ADF patrol boat would come. By the time the patrol boat arrived, the fishing boat would have returned to Kupang.

After a 20-hour journey from Kupang, the boat arrived at Ashmore Reef. Three tiny islands on a reef did not correspond to the passengers' expectations of Australia. They declined to get off the boat. Had they done so, their lives would have been at great risk as there is no potable water on the islands. A stand-off ensued and the fishing boat remained at Ashmore Reef. A Coastwatch aircraft spotted it the next day. The ADF patrol boat arrived after two further days and took all those on board to Darwin. The fishing boat, which had developed engine trouble, was towed to Darwin.

The crew were interviewed on arrival in Darwin jointly by Customs and DIMA for intelligence purposes, and later in the presence of the Indonesian Consul, for the purposes of preparing a prosecution brief for the NT Director of Public Prosecutions (DPP).

The Office of the DPP subsequently declined to initiate proceedings in the case because:

- ? prosecution under that Act could not succeed because the Navy had no power of arrest and no power under the *Migration Act*, and
- ? the tape of the interview undertaken for the purposes of preparing a prosecution brief was inadmissible as evidence because procedures specific to the Northern Territory⁷ had not been followed.

⁷ The Anunga rules.

3.13 The difficulty for DIMA has been whether the crew of boats which bring people to Ashmore Reef breach section 233 of the Migration Act, which provides that:

A person shall not take any part in:

(a) the bringing or coming to Australia of a non-citizen under circumstances from which it might reasonably be inferred that the non-citizen intended to enter Australia in contravention of this Act.

3.14 The term 'enter Australia' is defined in the Migration Act as entering the 'migration zone.' The 'migration zone' includes:

- ? the land area of the States and Territories; and
- ? sea which is within the limits of a State or Territory and within a prescribed port.

3.15 Section 6 of the Migration Act, however, provides that the restricted definition of 'enter Australia' does not limit the meaning of 'to Australia' in the Act, nor does it mean that the Act does not extend to parts of Australia outside the migration zone.

3.16 Up until July 1997, the Migration Act did not specifically include the Territory of Ashmore and Cartier Islands, and thus Ashmore Reef. The question of whether the Act applied to Ashmore Reef thus depended on the more general question of the extra-territorial operation of the Migration Act.

3.17 In July 1995, DIMA received advice casting doubt on the extra-territorial operation of certain parts of the Migration Act, including section 233.

3.18 In November 1995, a charge brought under section 233 of the Migration Act against a person who had brought people to Ashmore Reef failed because the Migration Act was considered not to apply to the Territory of Ashmore and Cartier Islands.⁸

3.19 Following this case, and the case example mentioned above, DIMA relied on charges brought under the *Crimes Act 1914* to prosecute those who brought unlawful non-citizens to Ashmore Reef. This Act is operative at Ashmore Reef. The laying of charges under the Crimes Act made it desirable that arrests be made by members of the Australian Federal Police (AFP), who then formed part of the response team.

⁸ Another charge brought against the same individual was successful.

3.20 DIMA and the Director of Public Prosecutions (DPP) have advised that these revised arrangements were effective.

3.21 The provisions of the Crimes Act under which charges were laid against people who brought 'others' to Ashmore Reef are rather general in character. The DPP advised DIMA that, where criminal conduct occurs which may be prosecuted under general or specific provisions, it is preferable that the more specific provisions be used. Accordingly, advice was provided to the Government to amend the Migration Act so that it applied to the Territory of Ashmore and Cartier Islands and thus to Ashmore Reef.

3.22 Section 7 of the Migration Act provides that the Act extends to prescribed Territories. The Territory of Ashmore and Cartier Islands became a prescribed territory in July 1997, following the passage of the *Environment, Sport and Territories Legislation Amendment (ESTLA) Act 1997*. The extension of the Migration Act to the Territory of Ashmore and Cartier Islands established a legal basis for border control and the orderly management of persons arriving at Ashmore Reef.

3.23 There were different outcomes for the master and crew of vessels bringing passengers seeking to enter Australia to Ashmore Reef. In what appear essentially similar circumstances the master and/or crew have:

- ? dropped off their passengers and left or been allowed to leave;
- ? been arrested but allowed to leave when charges could not be laid (the case example above); or
- ? the master has been arrested, charged, a conviction obtained, and a term of imprisonment served.

3.24 DIMA has advised that, in its view, most of the causes of variation in these cases were outside its control.

3.25 In the ANAO's view, there was a risk that these inconsistent outcomes may enhance the perception among Indonesian fishermen that dropping unlawful non-citizens at Ashmore Reef is a risk worth taking. DIMA has suggested that, even where firm action is taken through the courts, the gain is sufficiently great as to make it a worthwhile proposition for boat owners and crew. Those who bring unlawful non-citizens to Ashmore Reef often use old fishing boats, most of which are on their last passage. The boats are insured, and their seizure or abandoning are of little consequence to their owners, who also receive advance payment from the passengers.

3.26 As full immigration control over Ashmore Reef is neither necessary or desirable, DIMA has advised that it has developed appropriate procedures on

the way in which it will apply the Migration Act in the Territory of Ashmore and Cartier Islands.

Prosecution briefs

3.27 Before it obtained legal advice that the Migration Act did not apply to Ashmore Reef, and prior to the passage of the ESTLA Act, DIMA was responsible for the preparation of briefs for the NT Director of Public Prosecutions (DPP) arising from its operations at the Reef.

3.28 From receipt of that advice until the date of effect of the ESTLA Act, the Australian Federal Police (AFP) were called on at least three occasions to exercise their powers under the *Crimes Act 1914* in relation to the arrest of persons from vessels located at Ashmore Reef, and for the preparation of briefs for prosecution purposes.

3.29 Now, however, following the passage of the ESTLA Act, responsibility for managing SIEVs at Ashmore Reef has reverted to DIMA. Once again it is required to prepare briefs for the DPP. The difficulties with the preparation of the prosecution brief mentioned in the case example therefore need to be addressed by DIMA.

Recommendation No.2

3.30 DIMA reviews its operations in the Territory of Ashmore and Cartier Islands, with a view to developing efficient and effective procedures and training to ensure:

- ? the appropriate degree of immigration control; and
- ? that evidence provided to the Director of Public Prosecutions is admissible in court.

DIMA response

3.31 Agreed. Amendments to section 7 of the Migration Act 1958 came into effect on 7 July 1997. As a result, the Territory of Ashmore and Cartier Islands is now included in the migration zone and normal immigration procedures apply.

3.32 DIMA staff in Darwin are being trained in the preparation of briefs of evidence to the DPP to ensure admissibility in court.

The initial entry interview

3.33 After arrival in Australia, boat people are interviewed twice by DIMA officials. The first interview is by local officials at the point of entry, and seeks to gather preliminary information on the identity of the boat people and intelligence about the journey to Australia. This interview is conducted jointly with the ACS interview mentioned earlier in this chapter.

3.34 The second interview is by members of an entry task force formed by DIMA following advice of the imminent arrival of a SIEV. The entry task force comprises suitably trained, available officers from central and regional offices. Bilingual staff, and those with training in investigation skills and intelligence gathering, are also seconded to these task forces. The task force normally travels to the place of detention, usually Port Hedland Immigration Reception and Processing Centre (IRPC); their arrival is timed to coincide with that of the boat people. Each boat person is interviewed individually. Based on the information obtained, senior officers in Canberra responsible for refugee determination consider whether the boat person has made any claims which, *prima facie* may engage Australia's protection obligations under the Refugees Convention.⁹

3.35 While DIMA minimises costs by using staff based in Darwin and Perth to the extent possible, the number of boat people arriving often requires staff from other offices to be assigned to the entry task force.

Initial accommodation, food and transfer

3.36 The ANAO observed the reception procedures for the arrival of one boat. This boat was typical of boats landing at Ashmore Reef in terms of the size of the boat and the number of people on board. The first night's accommodation and food were arranged by the Darwin Regional Office of DIMA. The accommodation consisted of thin foam mattresses on a bare concrete floor. Chinese takeaway meals were served. Cordial and tea also were available. These arrangements were economical and generally effective.

3.37 The office had developed a manual for its staff which explained very clearly staff responsibilities for on-arrival processes.

⁹ This decision is examined in Chapter 6.

3.38 The following morning the boat people were transported to the Port Hedland IRPC by charter aircraft. DIMA prefers to use charter aircraft rather than lower cost transport such as a coach because:

- ? of the considerable distances involved;
- ? there is lower risk of detainees escaping;
- ? of reduced stress among the detainees who may have histories of torture and trauma; and
- ? the shorter travel time means lower guarding costs.

3.39 Passengers on the *Iris* and *Juniper*, which arrived at Ashmore Reef on 7 and 9 September 1996 respectively, were transferred not to Port Hedland IRPC but to the Immigration Detention Centre at Villawood in Sydney. DIMA brought these people to Sydney because of operational factors in existence at the IRPC at that time and also because the initial entry interviews indicated that the people had made claims which, *prima facie*, may have engaged Australia's protection obligations. DIMA believed it would be more economical to process these people through the refugee determination system in Sydney than in Port Hedland. The ANAO commends this approach to risk management and encourages DIMA to extend it wherever the expected benefits (including savings) exceed the costs.

Costs

3.40 Although the period of time involved in the reception process rarely exceeds one week, it is very resource-intensive. It generally involves:

- ? either an Australian Defence Force (ADF) patrol boat at an effective cost in 1995-96 of \$57 000 per day used by Coastwatch;¹⁰ or
- ? an Australian Customs Vessel (ACV) costing about \$15 000 per SIEV; and
- ? funding for DIMA of \$2336 per boat person for its expenditure on the reception function.

3.41 The latter amount is provided for by an Interim Boat Resource Agreement for 1996-97 between DIMA and the Department of Finance. This Agreement has been continued into 1997-98. Expenditure by DIMA on

¹⁰ This figure is based on ADF expenditure of \$64.6m on patrol boat activities for Coastwatch in 1995-96, distributed over 1131 patrol boat days used by Coastwatch in that year, as compared to the 1833 made available. The ADF has advised that the current full cost recovery rate attributed to patrol boats is such that ADF expenditure on patrol boats for Coastwatch in 1997-98 is likely to approach \$95m.

reception costs is reported as part of the expenditure on its Sub-Program 8.3 Boats.

3.42 Some of the reception costs for which DIMA is funded under the Boat Resource Agreement are the responsibility of the Darwin Regional Office of DIMA. Such costs include accommodation, meals, storage of mattresses, chairs and interview tables used in the reception process, and transport of these items to the place of accommodation when required, and air fares to Kupang in Indonesia for the return of the crew of some boats.

3.43 The ANAO calculated the average reception cost incurred by the Darwin Regional Office per boat arrival in 1993-94, when there were approximately 100 arrivals, at \$325 per person. In 1994-95, when there were approximately 900 arrivals, the average cost was \$175. Excluded from these figures are the more significant costs of the custody of boat crew in the Darwin Correctional Centre while consideration is given to laying charges; guarding and escort services by the Australian Protective Service; and the transfer of the boat people to a detention centre.

3.44 Additional Commonwealth expenditure on the reception function for boat people is incurred by ADF and Australian Customs Service Border Management Program, both in providing vessels used in support of Coastwatch and in providing staff for the Customs intelligence function described earlier.

3.45 The Department of Defence estimated that the cost of its patrol boat contribution to Coastwatch response operations at \$64.6m in 1995-96.¹¹ As described in Chapter 2, the ANAO estimates that about 10 per cent of Coastwatch operations are attributable to boat people activities. On this basis the ANAO estimates that approximately \$6.46m of the Department of Defence contribution to Coastwatch response operations is attributable to boat people.

3.46 ACS keeps records of the occasions on which its marine fleet is called upon by Coastwatch to respond to SIEVs. There were ten such occasions in 1994-95 and one in 1995-96. The average cost of these responses, using cost estimates supplied by ACS, was \$15 000 per SIEV. The cost of the ACS marine fleet used in support of Coastwatch activities relating to boat people is estimated by the ANAO at \$45 000 per year.

¹¹ Other contributions by the Department of Defence to Coastwatch operations are not normally relevant to boat people.

3.47 The cost of border management activities in support of the management of boat people was not estimated separately but is believed by ACS to be less than the contribution by the Customs marine fleet.

3.48 The reception of boat people involves substantial costs to the Government. Chapter 8 summarises all the cost estimates.

4. Detention

This chapter discusses the roles of DIMA and APS in the administrative detention of boat people.

Introduction

4.1 In this chapter, the ANAO examines the legal basis for detention, and describes some of the complexities DIMA has had implementing the legislation. The arrangements which have been put in place by DIMA are then canvassed. Finally, the ANAO examines DIMA's experience of administering detention in practice.

Immigration detention and the law

4.2 Administrative detention is distinguished from the more common punitive detention in that its purpose is to achieve some legitimate non-punitive object.¹² Detention of unlawful non-citizens for the purposes of expulsion or deportation¹³ or determining an application for legal entry has been found by the High Court to be within the power of the Executive arm of government:¹⁴ in effect, to achieve legitimate non-punitive objects.

4.3 The development of those sections of the *Migration Act 1958* relating to immigration detention over the period covered by the audit reveals the complexity of the legal and administrative issues facing DIMA. There have been difficulties in establishing an appropriate legislative framework for the immigration detention of boat people. The major issues are described in Appendix 7.

4.4 Appendix 7 describes a situation where a section of the Migration Act has remained effectively unchanged more than five years after the High Court has found it to be unconstitutional. The ANAO recommends that DIMA

¹² *Koon Wing Lau v Calwell and Anor* (1949) 80 CLR 533, per Latham J, referred to in Commonwealth Ombudsman, *Investigation of complaints concerning the transfer of Immigration detainees to State prisons*, December 1995, p 71.

¹³ The term 'removal' is now used in the *Migration Act 1958* and by DIMA to describe these processes.

¹⁴ *Chu Kheng Lim and Ors v Minister for Immigration, Local Government and Ethnic Affairs and Anor* (1992) 176 CLR 1; (1992) 110 ALR 97.

provides advice to Ministers on options to address such provisions in the Migration Act.

Recommendation No.3

4.5 DIMA should provide advice to Ministers on options to address a provision in the Migration Act which has been found by the High Court to be unconstitutional, and on possible implications of that decision for a similar provision of the Act.

DIMA response

4.6 Agreed. The matter raised refers to section 183 of the Migration Act. The repeal of section 183 is an option which DIMA will consider; however, this section is already inoperative and a nullity as a result of the High Court's decision in the *Chu Kheng Lim and Ors* case (1992).

4.7 It is important to note that the High Court in that case did not find that keeping unlawful non-citizens in detention was unconstitutional or otherwise unlawful.

4.8 ANAO response: The recommendation refers principally to section 183. The ANAO's consultant raised a question about the constitutional validity of sub-section 196(3). The ANAO notes that the validity of this provision has not been tested.

The current legislative basis for detention

4.9 The main provisions of the Migration Act in relation to immigration detention of boat people since September 1994 have been:

- ? mandatory detention of unlawful non-citizens, that is, those in, or attempting to enter, Australia without a valid visa;¹⁵ and
- ? continuation of detention until the detainee is removed from Australia, deported or granted a visa.¹⁶

4.10 An unlawful non-citizen in immigration detention may be released where:

¹⁵ Section 189.

¹⁶ Sub-section 196(1).

- ? the unlawful non-citizen has been in immigration detention for more than six months since lodging a valid application for a protection visa, a primary decision on the application has not been made, and the Minister believes it would be in the public interest for him or her to exercise his or her personal, non-compellable discretion to grant the unlawful non-citizen a bridging visa;¹⁷ or
- ? the unlawful non-citizen has lodged a valid application for a protection visa, satisfies health and public interest criteria such as character and national security, and: is under 18 years of age, is over 75 years of age, has a special medical need that cannot be cared for in a detention environment; or is the spouse of an Australian resident.^{18, 19}

International comparisons

4.11 Information on the detention practices of 19 countries in response to unauthorised arrivals and asylum seekers was reviewed as part of the JSCM report *Asylum, Border Control and Detention* (see Chapter 1). A majority of countries in the review initially detained unauthorised arrivals. Many countries released detainees once their identity was established, usually with regular reporting conditions and after a surety had been paid. The ANAO notes that conditional release of unauthorised arrivals carries fewer risks in countries where citizens are required to have identity papers. Countries with similar legal systems to Australia, that is, New Zealand, Canada, the UK and the USA, do not apply mandatory detention.

4.12 The ANAO sought more recent advice on the detention of applicants for refugee status in comparable jurisdictions.²⁰

4.13 In New Zealand migration policy does not rely on the detention of asylum seekers or others who have entered the country illegally. Refugee applicants in Canada are also not held in detention unless a clear risk to public safety is evident. An applicant for refugee status in the United Kingdom can be detained pending decision, or granted temporary entry status.

4.14 DIMA has suggested to the ANAO that the differences between Australia and these other countries relate primarily to geography, and to historical and political factors.

¹⁷ Sections 72 and 73.

¹⁸ Release is also possible in limited other circumstances.

¹⁹ Migration Regulation 2.20.

²⁰ Information obtained as part of a consultancy undertaken for the ANAO by the Attorney-General's Department.

Human Rights and Equal Opportunity Commission

4.15 A recent example of the complexity in the law relating to detention is the decision of the Federal Court in a case brought by HREOC against DIMA.²¹ The issue concerned the delivery of sealed envelopes to detainees, which HREOC is empowered to do under paragraph 20(6)(b) of the *Human Rights and Equal Opportunity Commission Act 1986*. DIMA argued that the power provided by paragraph 20(6)(b) of that Act was confined to communications from the Commission arising out of or related to a complaint made by a detainee to the Commission. It was not a general power for the Commission to communicate with detainees on any matter within its purview. However, the Court ruled that that paragraph gave a detainee the right to have delivered to him or her a sealed envelope without the necessity of a prior complaint to the Commission. The decision was appealed by DIMA, and subsequently settled out of court between the parties.

4.16 The Government then sought to have the Commonwealth Parliament amend the Migration Act to clarify the intention of the Government and Parliament in situations where the Human Rights and Equal Opportunity Commission Act and the Migration Act appear to conflict.²²

4.17 The ANAO appreciates that in the environment within which DIMA is obliged to operate, there will always be legal challenges and the possibility that decisions of the court might go against the approach used by DIMA. The ANAO supports DIMA's general approach of identifying and evaluating these risks as far as it is possible to do so. DIMA could consider establishing a formal risk management framework incorporating a systematic approach to the development of the legislation to minimise the legal difficulties experienced.

Administrative arrangements for the detention of boat people

4.18 In this section the ANAO considers first the arrangements for the establishment and operation of detention facilities for boat people, and then arrangements with the Australian Protective Service (APS), DIMA's tied provider to date in the provision of the immigration detention function.

²¹ *Human Rights and Equal Opportunity Commission and Anor v Secretary of the Department of Immigration and Multicultural Affairs* (1996) 137 ALR 207.

²² Migration Legislation Amendment Bill (No 2) 1996.

Immigration Reception and Processing Centres

4.19 Section 273 of the Migration Act provides that the Minister may cause detention centres to be established and maintained. Before 1991, boat people were held in immigration detention centres in Sydney, Melbourne and Perth and in a variety of temporary arrangements. Since October 1991, DIMA's principal detention centre for boat people has been its Immigration Reception and Processing Centre (IRPC) at Port Hedland in Western Australia. The Port Hedland IRPC has a capacity of some 700 detainees.

4.20 Temporary IRPCs may also be established when the number of boat people in detention exceeds the capacity of the Port Hedland IRPC.

4.21 All custodial (ie, guarding) services relating to boat people have thus far been provided by the Australian Protective Service (APS), an agency within the Attorney-General's portfolio which provides custodial and security services to Commonwealth agencies. DIMA exercises overall control of the IRPC through a centre manager and two other staff. DIMA contracts directly for catering and linen services and the provision of assistance to those detainees who apply for protection visas ('application assistance'). DIMA has found it convenient to arrange for the provision of other services at the IRPC through APS. In addition to custodial services, the APS manages and arranges for medical, educational and welfare services to detainees.

4.22 The Government indicated in the 1996-97 Budget Papers that it would be moving to competitive tendering for the provision of the immigration detention function, including at Port Hedland IRPC. In April 1997 DIMA issued a Request for Proposal (RFP) for the provision of these services. APS decided, after taking advice from the Australian Government Solicitor, Business and Commercial, not to submit a proposal. The successful tenderer is expected to commence the provision of services in 1997-98.

Other detention facilities

4.23 As the need arises, facilities other than the IRPC are used for the detention of boat people. Small numbers of boat people are detained at other immigration detention centres, police holding facilities, or prisons, usually following convictions for criminal offences, or while being charged with escape or assault. In March 1996, of the 338 boat people then in detention, five were in the Perth Immigration Detention Centre (IDC) and three in prison in Canning Vale, WA.

4.24 In 1995 the Commonwealth Ombudsman reviewed the appropriateness of transferring people detained under the Migration Act and who have

psychiatric and/or behavioural problems to penal and psychiatric institutions.²³ In the light of this review, the ANAO did not see a need to audit this area.

Boat people in detention

4.25 The number of boat people in administrative detention fluctuates with boat arrivals and processing times. Table 4.1 shows the number of boat people in immigration detention as at 30 June in recent years. The periods of detention have ranged from a few days to more than five years in a few cases. Reasons for prolonged periods of detention are discussed in Chapter 7.

Table 4.1
Boat people in detention as at 30 June, by year

Year	Boat people in detention as at 30 June (a)
1992	422
1993	290
1994	211
1995	810
1996	281
1997	312

Source: DIMA annual reports, various.

Note: (a) Includes Australian-born children of boat people in detention.

4.26 Table 4.2 shows the mean number of days in detention by year of arrival for boat people who had ceased to be in detention in June 1996, and, separately, for those who were still in detention as at that date. The two figures for each year of arrival provide a broad indicator of variation in the mean time in detention. Those still in detention represent the longer end of the range of detention times.

4.27 Boat people arriving in 1989-90 spent, on average, 1201 days in detention. There is no directly comparable figure for 1995-96 as not all boat people who arrived in that year had completed their detention at 5 March 1996. However, those who had completed their detention had spent an average of 16 days in detention. Those who were still in detention had spent, on average, 104 days in detention.

4.28 The dramatic decline in mean time in detention for those that have been released can be attributed to:

²³ Report of the Commonwealth Ombudsman, December 1995: *Investigation of complaints concerning the transfer of Immigration detainees to State prisons.*

- ? the Safe Third Country Agreement with the People's Republic of China (PRC) signed on 25 January 1995. The Migration Act²⁴ prevents these people from lodging applications for protection visas in Australia as they have already been granted protection by a safe third country; and
- ? faster processing of protection visa applications by DIMA.

4.29 DIMA has been effective in reducing the time boat people spend in detention.

Table 4.2
Boat people detention time as at June 1996

Year of Arrival	Mean days in detention (no longer in detention)	Mean days in detention (still in detention)
1989-90	1201	n.a.
1990-91	701	n.a.
1991-92	446	n.a.
1992-93	120	1366
1993-94	224	758
1994-95	255	546
1995-96 (a)	16	104
1989-96	369	530

Source: Department of Immigration and Multicultural Affairs

Note: (a) Data for this year relate to only to boat people arriving before 20 May 1996.

n.a. not applicable

Relationship between DIMA and APS

4.30 The relationship between DIMA and the APS has a number of important features. These are discussed below.

Relationship

DIMA's use of APS at detention centres was mandated by the Government.

Organisational cultures

4.31 The APS has expressed the view to the ANAO that it and DIMA have quite different organisational cultures. DIMA, according to this view, separates

²⁴ Sub-Division AI of Division 3 of Part 2 of the Migration Act.

departmental responsibilities into component functional responsibilities, and integrates these functional responsibilities in a consultative manner. APS, however, has a 'command-and-control' style of operation. This style vests the full authority of the organisation in the operational commander. This style facilitates rapid response to uncertain situations, and in particular to crises.

4.32 According to APS, these differing operating styles can make it more difficult for the two organisations to interact both in normal circumstances and in emergencies. For example, in an emergency, the number of briefings requested by DIMA officers with functional responsibilities for boat people can impede the exercise of 'command-and-control' by the responsible APS officer.

APS role definition

4.33 The APS executive was aware of a potential conflict of interest between its roles as a source of professional security advice to government and as a quasi-commercial provider of security services. The potential for such a perception is particularly acute where, as with DIMA, the relationship is mandated by government.

4.34 The ANAO understands that this issue was resolved in a review of the APS undertaken within the Attorney-General's Department in 1997.

Memorandum of Understanding

4.35 One way of reducing these potential difficulties is to establish a clear, formal and appropriately detailed agreement between the agencies. The agreement should set out matters such as performance standards and procedures. In its 1989 report, *The Future of Immigration Detention Centres in Australia*, the Australian Institute of Criminology recommended that a memorandum of understanding (MOU) be developed between DIMA and APS for the management of IDCs. The Commonwealth Ombudsman, in a 1995 report,²⁵ made a similar recommendation. The Ombudsman's report noted that serious progress on the development of the MOU did not occur until after her investigation had commenced. An MOU was signed in October 1995, fulfilling one of the recommendations of the draft report.

4.36 As indicated earlier, the Port Hedland IRPC was opened in October 1991. In view of the very substantial upgrading of the relationship between them which the Port Hedland IRPC represented, DIMA and APS should have

²⁵ Commonwealth Ombudsman, *Investigation of complaints concerning the transfer of Immigration detainees to State prisons*, December 1995, page 76.

used the opportunity to establish an MOU at that time. In the ANAO's opinion, the delay in negotiating the MOU was excessive.

4.37 The ANAO also notes that the MOU specifies that:

the APS Station Commander shall be responsible for all aspects of security at the Centre...

4.38 The term 'security' is not defined in the MOU. Given the very close relationship between DIMA and the APS at Port Hedland IRPC and other detention centres, the ANAO suggests there would be benefit in future agreements defining more precisely what is meant by 'security.' In one instance noted by the ANAO, management of the two agencies appeared not to agree on what constituted 'security.'

Performance standards

4.39 In addition to the provisions of the Migration Act, the administration of immigration detention by DIMA should be carried out consistently with the International Covenant on Civil and Political Rights (ICCPR), which sets out obligations which are of relevance to the detention of persons.

4.40 The detailed administration of immigration detention within DIMA is also supported by Migration Regulation 5.35 and Migration Series Instruction 92. These documents set out procedures and guidelines for the care and management of immigration detainees. They cover matters such as the duty of care, medical attention and treatment, the use of force, and documentary requirements in relation to detainees, including their transfer to other institutions or locations.

4.41 The ANAO expected these requirements to be reflected in the MOU between DIMA and APS. The MOU requires the APS to observe Australia's international obligations under the Refugees Convention, the ICCPR and two other international agreements.

4.42 The only other direct statement on standards is:

all protection services shall be linked to standards of performance which ensure that these services achieve the objectives of DIMA's Corporate Plan 1994-96.

4.43 There is, however, provision for the development of performance criteria against which the operational and managerial performance of APS at each centre can be measured. At the commencement of this audit, there were no performance standards agreed between DIMA and APS for the delivery of

the detention function. DIMA advised the ANAO in February 1997 that performance indicators were to be implemented shortly.

4.44 The APS has advised that performance indicators, intended for inclusion in the MOU, were compiled in consultation with DIMA. These were given to DIMA in a final form approved by APS, but were never ratified by DIMA. The APS has further advised that in the absence of agreed performance standards, it applied its own standards in the form of accreditation to the ISO 9002 international quality assurance standard.²⁶

4.45 There would have been clear benefits if DIMA and APS had developed performance standards earlier. Moreover, the MOU should ideally have incorporated performance standards at the outset, rather than leaving them to be developed later by the agencies signing the MOU. The RFP for the contract for the provision of the immigration detention function mentioned earlier in this chapter contains performance standards which are to be required of the contractor.²⁷

Recommendation No.4

4.46 DIMA should ensure that where services are provided under contract, the contract and the performance standards for these services should be agreed before the service commences. The arrangements, standards and performance should be reviewed regularly.

DIMA response

4.47 Agreed. Immigration Detention Standards have been developed by the Department with input from the Commonwealth Ombudsman. These standards form a key part of the contractual negotiations with the service provider. The contract for the delivery of the detention services specifies the performance standards which the contractor is required to deliver, how these standards will be measured and also provides for regular review of the standards and measures.

4.48 Service delivery has commenced at Villawood IDC on the basis of a Letter of Understanding with the preferred tenderer pending final agreement on the terms of the contract. The Letter of Understanding includes the Immigration Detention Standards and performance measures.

²⁶ ISO 9002: *Quality systems - model for quality assurance in production, installation and servicing.*

²⁷ Examination of the performance standards in the RFP was outside the scope of the audit.

Risk sharing

4.49 Opportunities for cost savings were taken up slowly and incompletely because DIMA and APS found it difficult to agree on risk-sharing. In April 1996 APS advised DIMA that considerable savings in APS guarding costs were available if local staffing from Port Hedland could be increased. However, the two agencies found it difficult to agree on which of them would be responsible for any termination arrangements that might ensue for such staff should DIMA's guarding requirements in Port Hedland decrease in the future. In October 1996 the two agencies proceeded with the cost saving proposal on the basis that any subsequent termination costs would be a whole of government responsibility.

The cost of boat people in detention

4.50 The total of administrative and property operating costs for the detention of unauthorised boat arrivals in the 1995-96 financial year has been estimated by DIMA at \$21 million for 174 032 detainee days. In 1994-95 this cost figure was estimated at \$14.45 million for 208 112 detainee days.²⁸

4.51 The average daily cost per detainee therefore increased from \$69 in 1994-95 to \$105 in 1995-96. The reasons provided by DIMA for the increase relate to the fact that a second IRPC was in operation during 1995-96; the need for a higher level of security; and a \$2m upgrade program at Port Hedland.²⁹

4.52 Administrative and property costs for the Port Hedland IRPC for 1996-97 have been estimated by DIMA at \$20.7 million, including \$7.2 million for capital works. These figures relate to most, but not all, of the cost of detaining boat people in 1996-97, as some boat people were detained in centres other than the Port Hedland IRPC.

4.53 A dispute has arisen between DIMA and APS over guarding costs in 1996-97. Following the change in government in March 1996, DIMA sought reductions in guarding costs for immigration detention, including at Port Hedland IRPC, of 15 per cent in 1996-97 as compared to 1995-96.

4.54 In April 1996, APS proposed to DIMA a series of measures which, if implemented, would have reduced 1995-96 costs by 15 per cent, based on the 1995-96 prices agreed between the agencies as part of their MOU for the provision of guarding and other detention-related services.

²⁸ DIMA Annual Report 1995-96, p43.

²⁹ *ibid.*

4.55 DIMA accepted some of these proposals in time for them to be implemented before the 1996-97 year commenced, others it accepted part way through the financial year,³⁰ and some it rejected.

4.56 The APS has advised that after paying a number of monthly accounts in accordance with the MOU between them, DIMA began deducting amounts from the payments of the monthly accounts such that by the end of 1996-97 it had paid 15 per cent less than the amount charged by APS during the year.

4.57 The amount in dispute was described as potential revenue in a note to the APS financial statements for 1996-97.

4.58 The dispute appears to raise questions about the ability of MOUs to provide a business dispute resolution mechanism between Commonwealth agencies analogous to that provided by contractual arrangements between private parties. These questions are heightened when one, or both, of the agencies is outside the Budget sector and operates in a quasi-commercial manner.

The operational aspects of detention of boat people

4.59 In this section the ANAO examines the operational aspects of detention of boat people, by examining a series of risks which face DIMA and the APS, and the control mechanisms which have been put in place.

Risk management

4.60 APS and DIMA have developed a series of measures to control security risks encountered in the detention of boat people. In particular, the Emergency Procedures Manual used at the Port Hedland IRPC sets out criteria for the identification of different levels of threats and the responses to them.

4.61 The ANAO suggests that the adoption of a systematic approach to risk management along the lines of that recommended by MAB-MIAC would strengthen DIMA's preparedness for risks other than security, and could lead to other approaches to the control of security risks, as outlined later in this section.

³⁰ See the preceding section on *Risk sharing*.

Recommendation No.5

4.62 As part of a risk management approach DIMA should develop a system to identify, analyse, assess, rank and control risks associated with the detention of boat people.

DIMA response

4.63 Agreed. DIMA is anticipating that discussions concerning the development of a comprehensive risk assessment and management plan associated with the detention of unlawful non-citizens will be undertaken in consultation with the new service provider at the Port Hedland Immigration Reception and Processing Centre (IRPC) and Immigration Detention Centres.

Security

4.64 A principal risk at the IRPC is that of security. The APS maintains a log of security incidents at Port Hedland and RAAF Curtin IRPCs. The ANAO obtained a copy of the log from APS in November 1995. The log recorded 411 security incidents at the Port Hedland IRPC from its inception in October 1991 to November 1995. The temporary IRPC at the RAAF Curtin Base recorded 62 incidents from its inception in April 1995 to November 1995. The main security risks are described below.

Disturbance

4.65 The chief security risk is that of major disturbance.

4.66 The security incident log records eleven disturbances at Port Hedland IRPC and one at Curtin over the periods indicated above.

4.67 A major disturbance occurred at Port Hedland on 29 June 1995 and the following days when a group of 50-70 residents climbed onto the roof of G Block. Following this disturbance, DIMA installed internal security fencing with lockable gates which APS could shut to prevent the formation of large groups of detainees. At about the same time the opportunity was taken to upgrade the perimeter fencing, which has reduced the number of escapes. DIMA has also undertaken other work to reduce roof access (see below).

Escape

4.68 Another risk is that of escape. For much of the period since it opened in 1991, the Port Hedland IRPC has been a low-to-medium security facility. One of the consequences of this low security rating was that breaching the perimeter fence was not difficult. The incident log examined by the ANAO

recorded 84 instances of escape or attempted escape at Port Hedland IRPC between October 1991 and November 1995. The ANAO's inspection revealed a further 27 incidents where a breach of the perimeter was either mentioned explicitly but not coded as an escape, or where a breach could reasonably be inferred.³¹ On this basis there were about two perimeter breaches per month recorded as incidents over the first four years of the IRPC's existence.

4.69 The vast majority of the incidents recorded as escapes were in fact clandestine, temporary visits to the outside world. Most boat people found outside the perimeter were within one kilometre of it. The most common destination was the beach adjacent to the IRPC. Clearly, the principal deterrent to escape was not the fence but the remote location of the IRPC.

4.70 Some breaches of the perimeter fence were genuine attempts at escape. On seven separate occasions boat people hid themselves in freight trains at Port Hedland. The only trains at Port Hedland are ore trains to Mount Newman, deep into the WA desert. One group of train jumpers was recaptured 175 km south of Mount Newman.

4.71 The method of detecting absent detainees could be improved. The principal control mechanism is the daily lunch time check, which involves a fingerprint reader. Following lunch there is an attempt to locate those who have not presented. The fact that a detainee fails to present for a meal does not necessarily mean they have absconded. There is a search of their rooms, and then other places where APS staff consider them likely to be within the IRPC. Where a detainee cannot be found, WA Police are advised of an escape.

4.72 In an escape which occurred in November 1995, APS detected one person unaccounted for and notified WA Police and other agencies. Later that afternoon, a report was received from Geraldton that two individuals had aroused suspicion and been taken into custody. It was only after a photograph of the second person had been faxed to Port Hedland IRPC that DIMA and APS could confirm that there had been a second escapee.

4.73 The ANAO notes that the perimeter fencing has been upgraded, and that breaches of the perimeter are now more difficult.

4.74 The frequency of perimeter breaches does not mean that the detention function was administratively ineffective. As mentioned above the principal deterrent to escape was the remote location of Port Hedland. That being the case, a higher level of security to prevent escapes is not necessarily cost-effective.

³¹ For example, a group of detainees cleaning fresh fish at 4.25 am, with fishing tackle nearby.

Self harm

4.75 The APS analysis of the incident log records 11 suicide attempts to November 1995, all at Port Hedland and none of which was successful. The risk management issue for DIMA is the range of materials which should be made available to detainees in the interests of their welfare, versus their potential for abuse.

Demonstrations

4.76 There were 11 demonstrations at Port Hedland and one at RAAF Curtin. The APS has advised that, while most of these demonstrations were peaceful, some have been extremely violent. In these latter demonstrations, APS staff have been placed in life threatening situations and have sustained injuries.

4.77 The APS classification does not refer to incidents of roof access. The ANAO analysis identified five definite, and one possible, roof incidents at Port Hedland and one at Curtin. The blocks at Port Hedland are of a two-storey construction whereas Curtin had single-storey huts.

4.78 The earlier roof-top demonstrations seem to have been fairly small scale involving up to ten people.

4.79 There was one incident where several detainees jumped off the roof. Two of these detainees were injured, with one being permanently crippled.

4.80 A serious rooftop demonstration occurred at Port Hedland on 29 June 1995 when 50-70 detainees gained access to the roof of G Block via the external stairs. Figure 2 shows the end of a block at the Port Hedland IRPC as they were at the time of this demonstration. It is clearly not difficult to access the roof. Preventive measures were being installed at the time of the demonstration. Those installed at the ends of blocks are shown in Figure 3. Those installed on the sides of blocks are shown in Figure 4. There have been no roof-top incidents since these preventive measures were completed.

Other IRPC security issues

Emergency procedures

4.81 The Emergency Procedures Manual used at the Port Hedland IRPC was designed for all IRPCs and IDCs. It was developed following the incident described above at the Port Hedland IRPC in June 1995. The manual is notable in that it sets out criteria for the identification of different levels of threats and the responses to them. ANAO review of the Emergency

Procedures Manual at Port Hedland IRPC found the risk control assessment to be incomplete and potentially contradictory in respect of procedures for dealing with packages suspected of being bombs. The APS has advised that the major documentation supporting its operations at Port Hedland IRPC is its APS Station Orders. These Orders are specific to the Port Hedland IRPC.

Key security

4.82 Another security matter that arose during the audit was that of key security. In January 1996 an APS officer serving at the Port Hedland IRPC detected an APS master gate key 'hanging above the counter' of a local delicatessen. The officer reported that the shop assistant had advised that the key had been there 'for over two months.' The consequences of an IRPC master gate key being obtained by an unauthorised person are potentially very serious as there are several perimeter gates at the IRPC which are locked but unguarded. The key control system should be able to identify the individual who has responsibility for each key. Under its quality assurance procedures, APS has implemented a key register at the IRPC and IDCs which is designed to prevent a repeat of this incident.

Refurbishment program

4.83 A major refurbishment program is under way at the Port Hedland IRPC. In the view of the ANAO it would be prudent to undertake reviews of the security risk assessment as the work is being done to ensure that assessment continues to reflect the actual situation at the IRPC. Such assessments would provide an opportunity to address the issues mentioned above.

Recommendation No.6

4.84 Proactive security risk assessments of the Port Hedland IRPC should be undertaken regularly to ensure their currency, especially during the current refurbishment program.

DIMA response

4.85 Agreed. The Immigration Detention Standards against which the service provider will have to maintain a satisfactory performance, specify a stringent requirement for safety and security of the Port Hedland detention facility, detainees, staff and visitors. To achieve this, security risk assessments will have to be made regularly and kept current.

APS response

4.86 Agreed.

Reducing risks associated with the detention of boat people

4.87 An important part of managing the risks at the IRPC is not merely to be able to respond to emergencies, but to reduce their likelihood of occurring. DIMA and the APS have developed reporting systems and procedures designed to ensure effective day-to-day and emergency risk management. These include:

- ? close monitoring of detainees 'at risk' for behavioural, medical or other reasons, including regular reports by IRPC nursing staff;
- ? the establishment of an IRPC advisory committee and regular attendance by detainee representatives at its meetings;
- ? close interaction between staff and detainees as part of the daily routine of the Centre, with a view to early identification and remedying of potential behavioural problems;
- ? isolation in an observation area for detainees assessed as a security risk or who exhibit inappropriate behaviour; or, as a last resort;
- ? removal from the Centre of detainees with psychiatric and/or behavioural problems where there is a need to protect other detainees.

4.88 DIMA has advised that, through these measures, it gained early warning in 1996 of a planned mass escape.

4.89 DIMA also involves the detainees in the operation of the IRPC through a Block Leader Scheme and a Work Incentive Scheme (eg, work in the kitchen is accounted for in points which are redeemable at \$1 per point for small items from local stores). The main purpose of such schemes is to give detainees an opportunity to work for reward within the IRPC, to reduce boredom, and to provide a reason to co-operate with DIMA and APS. The provision of education for school-age children and optional English classes for adults serves to engage the students in the Centre.

4.90 An expert committee was convened by DIMA late in 1994 to report on security at Port Hedland IRPC. The committee included a senior APS officer and two consultants. In its report the committee commented that in other areas of its members' expertise, the more control detainees had over their daily activities and benefits, the better their behaviour. The committee felt that use of this strategy in the IRPC could aid compliance and security at the IRPC. The committee continued:

the boredom and monotony of life in the IRPC has the potential to be the catalyst for problems amongst or with residents. Residents are considered to have far too much unproductive time in which to ponder, speculate and react to rumours as to their fate.

4.91 The committee recommended a greater range of activities to limit the amount of unproductive time for detainees. DIMA has taken a number of steps, such as encouraging detainees to establish and maintain vegetable gardens, to implement this recommendation, but more could be done to reduce 'unproductive time'. This could lead to reduced stress and likelihood of major incidents, and hence lower guarding costs.

4.92 DIMA also could consider the greater use of strategies aimed at reducing risks and thus possibly guarding and related costs. Specific consideration could be given to self-harm in detention, and mental problems occasioned or aggravated by detention that may lead to significant costs. If detainees are subsequently granted permanent entry, any ongoing medical costs would be largely borne by Australia.

4.93 One possible strategy would be ensuring a greater understanding among boat people of the decision-making processes being applied to them and encouraging detainees to become even more involved in the operation of the IRPC.

4.94 The above suggestions could be taken up as part of the implementation of Recommendation 5.

IRPC procedures

4.95 The MOU between DIMA and APS states that:

the APS shall be responsible for the updating of the booklet, Rules and Information for Detainees, given to detainees during their induction into the Centre. The booklet ... shall set out the rights and responsibilities of detainees as well as services available in, and background information on, the Centre.

4.96 During a visit by the ANAO to the Port Hedland IRPC in January 1996, boat people being inducted into the IRPC did not receive a copy of this booklet. A welfare officer briefed the boat people on procedures, through an interpreter, shortly after they arrived at the IRPC. At the briefing session observed by the ANAO the boat people were not provided with a written copy of the procedures, nor did they have writing material with which to take notes.

4.97 The topics covered by the briefing session included: welfare and medical officers, food, the Block Leader Scheme, the Work Incentive Scheme,

educational arrangements, the Property Office, banking facilities, block hygiene, personal hygiene, recreational facilities, visitors and low noise times.

4.98 DIMA advised the ANAO in February 1997 that the IRPC Procedures Manual for new arrivals and existing detainees was being finalised, and that once finalised, it would be translated.

4.99 In the view of the ANAO, the fact that a booklet outlining IRPC procedures was not being distributed to people being inducted into the Centre, well over a year after the signing of an MOU requiring an existing booklet to be updated, suggests the need for greater attention to the review of performance under the MOU, Recommendation 4 refers.

APS staffing

4.100 The provision of appropriate cost-effective security at remote locations is not straightforward. APS operates a four-shift roster which provides 24-hour coverage. In an emergency, two shifts can be rostered on duty.

4.101 DIMA and APS have developed a matrix which enables APS staffing levels to be varied in response to assessed levels of security threat and detainee numbers at the IRPC.

Overtime

4.102 The ANAO sighted evidence at Port Hedland IRPC which indicates problems with APS management of overtime. In addition to their 14 standard twelve-hour shifts over a four-week cycle, APS staff can volunteer for overtime shifts. Overtime shifts organised in advance are paid at standard overtime rates of pay. In one case referred to in the APS files at Port Hedland, an officer worked two double shifts and two single shifts in four consecutive days.³² The officer was asleep on duty on the fourth day.

4.103 Having arranged to work an overtime shift, officers sometimes cancel. APS management may then be obliged to re-arrange shifts at short notice. Where shifts are changed with less than seven days notice, overtime penalty rates are payable. This poses a risk that officers might collude to effectively swap overtime shifts so as to attract the overtime penalty rate rather than the overtime rate, thereby increasing costs.

³² The case may have been at another APS station. Most other stations work eight-hour shifts.

4.104 It is important for good personnel management to be able to monitor and analyse the level of overtime worked by APS officers. The risk relates to the quality of the custodial services provided by the APS as the amount of overtime worked may detract from work performance. Excessive levels of overtime can result in occupational health and safety (OH&S) concerns.

4.105 APS guards regularly work in excess of standard hours, and at times of increased activity (eg, a removal flight) they can be required to work large amounts of overtime. APS management has advised that substantial overtime and the associated payments are expected by APS staff and are significant reasons for working at the Port Hedland IRPC.

4.106 APS's pay information system makes it difficult to determine the extent of overtime worked by individuals at particular locations and across the service. APS has advised that overtime at Port Hedland is at least 40 per cent of the base salary.

4.107 The limitations of the APS pay information system reduces the level of assurance about the integrity of the guarding services provided. It also restricts APS management's ability to control costs and manage OH&S matters. APS management must ensure that its staff are capable of undertaking the overtime it arranges.

Recommendation No.7

4.108 The APS should improve its pay information system to provide management with disaggregated personnel costing information for monitoring and control purposes.

APS response

4.109 Agreed. The APS is currently analysing an information technology system which will improve the ability to provide comprehensive and detailed reports regarding pay information.

4.110 DIMA has also raised concerns with APS about the effect of APS staff working 12 hour shifts for extended periods. The APS is negotiating with the

Community and Public Sector Union (CPSU) for a return to eight hour shifts at Port Hedland IRPC.³³

³³ And at the Perth Immigration Detention Centre.

Conclusion

4.111 In relation to the detention of boat people, the ANAO has concluded:

- ? a formal risk management approach would assist DIMA in coping with risks attaching to the detention of boat people;
- ? DIMA should provide advice to Ministers on options to address a provision in the Migration Act which has been found by the High Court to be unconstitutional, and on possible implications of that decision for a similar provision of the Act;
- ? DIMA should ensure where services supporting its management of boat people are provided under either a contract or an MOU, the contract or MOU, and the performance standards for these services, should be agreed before the service commences. The arrangements, standards and performance should be reviewed regularly;
- ? the detention of boat people is resource-intensive;
- ? there is scope for greater use of risk control strategies associated with the detention of boat people, including the provision of a copy of IRPC procedures, in an appropriate language;
- ? security risk assessments at the Port Hedland IRPC should be performed regularly; and
- ? the APS should improve its pay information system to provide management with disaggregated personnel costing information (eg. overtime worked by individual officers in specified periods). This data should be used for monitoring and control purposes.

5. Other Issues

This chapter deals with three specific issues relating to the management of boat people - removal, prevention, and boat people and the law.

Removal

Introduction

5.1 The *Migration Act 1958* provides that unlawful non-citizens in detention are subject to removal from Australia.

5.2 Although it normally takes place over a relatively short period of time, removal is a high risk, resource-intensive operation, which may also involve foreign policy considerations.

5.3 The number of boat people removed from Australia in each financial year since 1989-90, is shown in Table 5.1.

Table 5.1

Numbers of boat people removed, by financial year

1989-90	1990-91	1991-92	1992-93	1993-94	1994-95	1995-96	1996-97	Total
-	6	35	189	130	322	1073	291	2046 (a)

Source: DIMA

Note: (a) 154 of these removals were on the basis that they could subsequently return to Australia under the Special Assistance Category of the Humanitarian Program. See Table 5.2.

The removal process

5.4 Section 198 of the *Migration Act* requires the removal 'as soon as practicable' of immigration detainees, including boat people, where:

- ? the detainee has not made a valid application for a substantive visa,³⁴ that can be granted when the applicant is in Australia; or
- ? the detainee has made a valid application for a substantive visa that can be granted when the applicant is in Australia, and that application has been finally determined.

³⁴ That is, a visa other than a bridging visa or a criminal justice visa.

5.5 Before a detainee can be removed from Australia, DIMA must obtain travel documents for him or her from the country to which the detainee is to be returned. In most cases, this is a straightforward process taking a few days. For some countries the process can take several months.

5.6 The policies of some countries can have the effect of imposing detention costs on Australia. For example, where travel documents are not issued until all nationals on a boat are being returned, there can be delays in removal in some instances with a consequent increase in detention costs.

5.7 Removal can also be delayed if the removee is of medical concern because of conditions which are life-threatening, serious communicable diseases which are still in an infectious state, or advanced or difficult pregnancies.

5.8 A nurse is provided during the removal journey, where necessary, to allay medical concerns. This action enables removals to be effected in some circumstances where there might otherwise be delay.

5.9 Removal is not delayed in the case of serious communicable diseases which are no longer in an infectious state, conditions for which there is no medical treatment, or conditions where treatment is required but where removal may nevertheless be effected safely.

5.10 Policies or conditions in the country of origin, or the availability of necessary advanced medical treatment, do not of themselves affect the decision to remove a person.

Advice to detainee

5.11 All people subject to removal are advised of their status by DIMA, and of the reason for it. Where a detainee has been identified as being at risk of attempting self-harm or of harming others at the place of detention, this advice needs to be conveyed with sensitivity to these risks.

5.12 DIMA provides the detainee subject to removal with an opportunity to raise any matters which might render him or her unavailable for removal. Once that opportunity has passed, the detainees and their advisers are aware that the detainees are subject to removal at any time.³⁵

³⁵ In providing this opportunity to detainees, the Department is being guided by the decision of the Full Federal Court in the *Albatross* case, *Wu Yu Fang v Minister for Immigration and Ethnic Affairs* (1996) 135 ALR 583.

Preparations for removal

5.13 If the number of people to be returned to a country at about the same time is sufficiently large, DIMA finds it operationally convenient and cost-effective to effect the removal by charter aircraft. This has generally been the case for boat people.

5.14 The chartering arrangements can be complex. In some cases the prime contractor is an international air charter service with expertise in arranging flights to the boat people's country of origin. The contract with the air charter service requires it to select a carrier for the flight acceptable to DIMA.

5.15 For security reasons, travel arrangements made by DIMA are kept confidential until departure has been effected.

5.16 DIMA's policy is that removees undergoing a course of medical treatment for a serious communicable disease, but who are no longer in an infectious state, are provided with sufficient medication to complete their course of treatment together with a letter outlining their case history and treatment. Such people are counselled before departure to seek medical advice in their country of origin. In some cases the consequences of failure to continue treatment are potentially serious both for the removee and for public health globally, as there is a potential for strains of disease to develop which are resistant to the treatment which has been partly completed.

5.17 The Pilbara Public Health Unit, which provides medical screening services and communicable disease follow-up to detainees in the Port Hedland IRPC, has advised the ANAO that procedures for notifying it of the departure of boat people under its care have impeded the provision of optimal disease control measures. This raises the issue of the limits of DIMA's responsibilities for boat people. The issue is whether the duty of care to a person in detention who is undergoing medical treatment and who is about to be removed from Australia, extends to providing optimal disease control measures as distinct from providing care as if the removee were to remain in Australia.

5.18 In addition to preparations for the flight itself, DIMA prepares for possible last minute applications to the Federal Court seeking orders restraining it from removing a detainee from Australia. The Australian Government Solicitor is briefed and on call in case such an application is made at the last minute before departure.

5.19 Security escort services must be provided for charter aircraft. International Civil Aviation Organisation (ICAO) regulations require a minimum of one security escort for every 2.5 removees over the age of sixteen years.

Removal operations

5.20 Removal flights are high risk operations. The principal risks are to security and that a last-minute application will be made to the Federal Court seeking an order restraining DIMA from removing a person from Australia.

5.21 Removees remain in the care and control of DIMA until they are handed over to the government of their country of origin. As such, Australia's treatment of them continues to be subject to the ICCPR which governs the treatment of people in detention.

Security

5.22 Some boat people being removed become highly distressed. There are risks that distressed individuals might harm themselves, other detainees, or DIMA or APS officers. DIMA officials have characterised some of these behavioural problems as a search by some removees for a 'lever' with which to force the Government to prevent or delay their removal.

5.23 There is also a risk of group demonstrations, as for example in June 1995 when a removal operation led to a demonstration on the roof of G block at Port Hedland IRPC. This demonstration was mentioned in Chapter 4.

5.24 DIMA and APS now control these risks effectively by implementing one or more of a range of strategies.

'Eleventh hour' applications for court orders

5.25 With every removal there is a risk that an application will be made to the Federal Court in the days, hours or even minutes before the removal is effected seeking an order restraining DIMA from removing the person(s) from Australia. Where such applications are successful, there will be a requirement for further consideration of the removee's case. Should the decision to remove the person be affirmed, removal costs can double.

5.26 DIMA controls these risks by making the preparations described in the preceding section. In addition, it has a policy of proceeding with removal until the moment a court order restraining removal is made. DIMA is not obliged to, and does not, delay departure while a court hearing of an 'eleventh hour' application is occurring. DIMA acts very closely on the advice of the Attorney-General's Department on such occasions.³⁶

³⁶ Appendix 8 gives an example of where a court criticised the Department's removal of a boat person.

Removal statistics

5.27 Table 5.2³⁷ shows the number of boat people that arrived and the number returned, by year of arrival. It should be noted that returns increased following the passage of the 'safe third country' legislation and the signing of the MOU with China.³⁸ This table also makes it clear that in some years the proportion of boat arrivals who have ultimately been allowed to remain in Australia is quite high.³⁹ It is only in relatively recent years that the majority of boat people have been returned permanently to their countries of origin.

Table 5.2
Removals of boat people by year of arrival

Year of Arrival	Number of boat people arrivals (a)	Number of boat people removed (b)
1989-90	243	133 (c)
1990-91	172	61 (d)
1991-92	68	9
1992-93	184	155
1993-94	200	48
1994-95	1099	994
1995-96	590	569
1996-97	186	128
Total	2742	2097

Source: Department of Immigration and Multicultural Affairs

Notes: (a) Includes babies born after arrival in Australia. These babies have been included in the year of arrival of their mother. (b) To 30 July 1997. (c) Of which 122 people departed under an agreement with the Government whereby they subsequently returned to Australia under the Special Assistance Category of the humanitarian component of the immigration program. (d) Of which 32 people departed under the conditions noted in (c) above.

³⁷ Information obtained from DIMA as part of a consultancy undertaken for the ANAO by the Attorney-General's Department.

³⁸ *Migration Legislation Amendment Act (No 4) 1994, Migration Legislation Amendment Act (No 2) 1995* and certain associated changes to migration regulations. See Chapter 6.

³⁹ Including those allowed to return to Australia under the Special Assistance Category of the Humanitarian Program.

Costs

5.28 DIMA has advised that the average cost per removal in 1995-96, excluding detention in the period leading up to removal, was \$5416 per person. 1073 people were removed in that year, hence the total removal cost was approximately \$5.8m. This amount is included in the \$30.786m reported by DIMA as expenditure on its Boats Sub-program in 1995-96.

5.29 The Interim Boat Resource Agreement for 1996-97 between the DIMA and the Department of Finance provided for funding of \$6657 per removal. DIMA has advised that this funding arrangement covers certain costs which are not related directly to removal costs, accounting for the difference from the average 1995-96 removal cost mentioned previously.

Conclusions on removal

5.30 In relation to the removal of boat people from Australia, the ANAO has concluded:

- ? the return of boat people who have been unsuccessful in their claim for refugee status or were ineligible for consideration is a sensitive and resource intensive procedure;
- ? that DIMA and APS are conducting the removal of boat people in a manner consistent with the *Migration Act*; and
- ? DIMA has a comprehensive understanding of removal issues and this expertise is being used to control many of the risks that have been encountered.

Prevention

Introduction

5.31 In assessing DIMA performance in relation to preventing or discouraging unauthorised boat arrivals, it is important to appreciate that Australia pursues its objectives of immigration control at the same time as it honours its obligations under the Refugees Convention. This policy is to eliminate as far as possible all breaches of its immigration controls, including avenues known to be favoured by people who are subsequently found to be refugees.

5.32 In this section the ANAO considers the steps which have been taken by DIMA to discourage unauthorised boat arrivals from coming to Australia. These steps are important because prevention is likely to be much more

economical for the Australian taxpayer than the processes described elsewhere in this report.

Prevention measures

Government-to-government arrangements

5.33 Government-to-government arrangements, such as the MOU with China or the Comprehensive Plan of Action (CPA)⁴⁰, can act as long-term deterrent or as preventive measures.

5.34 Other government-to-government arrangements can be more immediate. Over Christmas 1994 when boat arrivals from Beihai in Southern China peaked, the co-operation of the Chinese Navy was sought and obtained in preventing boat people from leaving Beihai Harbour. The arrival on Ashmore Reef of people wishing to enter Australia without authority has led to a request to Indonesia to do what it can to prevent such movements.

5.35 DIMA has also encouraged closer liaison and sharing of intelligence in the region. It has advised that there continues to be useful exchanges of information with officials from other countries concerning third country nationals in their territory and the activities of persons who may be arranging illegal travel to Australia.

5.36 Australia is a member of the Inter-governmental Consultations (IGC) on Asylum, Refugee and Migration Policies. The IGC has set up a Trafficking Information Exchange System to pool information about people involved in organising illegal international movements, routes and *modus operandi*. This should enable participating countries to pursue action against traffickers. The IGC will also share information about returning unsuccessful applicants to countries of origin.

Previous outcomes

5.37 Community representatives and DIMA officials have both expressed to ANAO the view that the single most important factor leading up to the peak in unauthorised boat arrivals around Christmas 1994 was the outcome, in terms of permanent entry to Australia, for previous boat arrivals. Permanent entry for Sino-Vietnamese arrivals in recent years is shown in Table 5.3.⁴¹ Of the 128

⁴⁰ See Chapter 6 for a description of these measures.

⁴¹ One boat which arrived in 1994-95 and which had a small minority of Sino-Vietnamese on board, has been excluded from Table 5.3 (the *Cockatoo*) as the available data do not classify removals by ethnicity.

arrivals in 1993-94, 122, or 95 per cent, were granted permanent entry to Australia.⁴²

5.38 In the following year, 1994-95, the number of Sino-Vietnamese arrivals increased substantially to 824. Twelve of these people, or one per cent, were granted permanent entry to Australia. The predominant factor behind this change in outcome - legislative change preventing the access of Sino-Vietnamese to the refugee determination system - is discussed in Chapter 6. The following year, 1995-96, there was a major reduction, to 46, in the number of Sino-Vietnamese boat people. None of these people was granted permanent entry to Australia. In 1996-97, there were no Sino-Vietnamese boat arrivals.

Table 5.3

Permanent entry for Sino-Vietnamese boat arrivals

Year of Arrival	Number of arrivals	Permanent entry
1993-94	128	122
1994-95	824	12
1995-96	46	-
1996-97	-	-

Source: Department of Immigration and Multicultural Affairs

Prompt return

5.39 The prompt return to their country of origin of boat people who do not engage Australia's protection obligations can be an effective means of discouraging unauthorised boat arrivals. By the end of May 1996, some 240 of the 290 Chinese nationals who had arrived at Christmas Island on four boats early in the same month had been returned to China. In the ANAO's view, this prompt return may be a contributing factor in the reduced number of Chinese nationals seeking to come to Australia as boat people in 1996-97 - only 111 Chinese nationals arrived as boat people in that year.⁴³

⁴²The proportion of resolved cases resulting in permission to settle in Australia may have been even higher before the run date of Table 5.1, 5 March 1996, as the grant of refugee status usually takes less time than its refusal.

⁴³ This figure does not include 139 Chinese nationals who landed as boat people in the Torres Strait, outside the area covered by the audit.

Public announcements

5.40 In December 1994 a DIMA official went to Beihai and arranged for a series of radio and television announcements emphasising that Australia did not allow people to land on its shore and enter Australia. People who did so would be returned to China. These initiatives were followed by the visit of the then Minister for Immigration and Ethnic Affairs in January 1995, coupled with the signing of the Memorandum of Understanding with China. As noted above, very few boat people in 1995-96 claimed to be Sino-Vietnamese.

5.41 The total number of people who came from China to Australia in boats (both PRC nationals and Sino-Vietnamese) fell by about 40 per cent in 1995-96 compared to the previous year. There was, however, in 1995-96, an almost complete shift in unauthorised boat arrivals from Sino-Vietnamese in 1994-95 to PRC nationals in 1995-96.⁴⁴

Conclusion on prevention

5.42 Based on these observations the ANAO suggests that:

- ? high acceptance rates, for whatever reason, stimulate unauthorised boat arrivals;
- ? delayed return may also stimulate arrivals, but not as strongly;
- ? prompt return discourages unauthorised boat arrivals; and
- ? the almost complete switch in unauthorised boat arrivals from Sino-Vietnamese in 1994-95 to PRC nationals in 1995-96 suggests an awareness of developments in Australia.

5.43 In relation to preventing boat people entering Australia as unlawful non-citizens, the ANAO has concluded that the Department has adopted a range of appropriate measures.

Boat people and the law

5.44 Boat people use a significant proportion of the legal resources of DIMA, both in terms of law-making and in defending or prosecuting cases.

⁴⁴ See Chart 2 in Chapter 7.

Law-making

5.45 DIMA does not maintain information on the resources it devotes to law-making in relation to boat people.

5.46 Table 5.4 indicates that of the 31 times the Migration Act has been amended since 1989, on 11 occasions (35 per cent) the amendment has affected the processing of boat people (see Appendix 2). On four of these occasions the amendments were included in broader change to either the refugee determination system or the migration system as a whole; on the other seven occasions the amending legislation was devoted entirely to boat people.

Table 5.4

Migration law-making since 1989

Indicator	Overall	Boat people-related		Boat people-exclusive	
		(number)	(%)	(number)	(%)
Amendments to Migration Act	31	11	35	7	23
Pages of amending legislation	429	294	69	55	13
Pages of explanatory memorandum	502	207	41	62	12
Amendments to Migration Regulations	106	25	24	n.a.	n.a.

Source: Attorney-General's Department Legal Practice Group

n.a. not available

5.47 The amending legislation varies greatly in both length, which can be measured by the number of pages of amending legislation, and complexity, which can be proxied by the number of pages of Explanatory Memorandum. The amending legislation related exclusively to boat people accounted for 14 per cent of the length of the legislation and 12 per cent of the length of the explanatory memorandums. The corresponding figures including the four other items of legislation are 69 per cent and 41 per cent respectively. The latter figures naturally incorporate much material that is not relevant to boat people.

5.48 The final indicator identified is amendments to the Migration Regulations. These Regulations have been amended on 106 occasions since 1989. The Attorney-General's Department estimates that on 25 (24 per cent)

of these occasions the amendment has had an effect on the management of boat people.

5.49 While it is not possible to measure with precision, the ANAO estimates that the law relating to boat people has required in the order of 20 per cent of DIMA's law-making resources since 1989. Law-making costs were excluded from the ANAO's estimates of the total cost of boat people. The proportion reflects the importance attached by the Government to immigration control and its commitment to respond quickly with legislation to emerging situations in this area. The ANAO suggests that DIMA monitor the use of its law-making resource to ensure it gets best value from the resources devoted to boat people.

Cases

5.50 The tables in Appendix 3 indicate substantial involvement by boat people in cases involving the Minister and DIMA. Boat people cases represent eight per cent of the Department's total caseload of cases lodged from July 1993 to June 1996.⁴⁵ Boat people represent nine per cent of the Department's case load at the Federal Court,⁴⁶ 36 per cent of the Department's case load at the Full Federal Court,⁴⁷ and 38 per cent of the Department's case load at the High Court.⁴⁸

5.51 These percentages probably underestimate DIMA's case effort on boat people. Firstly, the figures are based on cases *lodged*. As boat people cases are invariably not funded by the boat people themselves, the likelihood of cases lodged proceeding to hearing and judgment is probably greater for boat people than for other immigration cases.⁴⁹

5.52 The second factor is that some boat people cases - typically those involving detention rather than the refugee decision - involve relatively large numbers of applicants (typically all of the arrivals on a particular boat) as compared to the normal migration case of one or two applicants. Cases involving many applicants can be expected to incur higher processing costs.

5.53 Boat people cases arise in a complex and dynamic legislative environment. The ANAO suggests that DIMA monitors the resources it

⁴⁵ 144 boat people cases out of a total of 1714. Cases going to higher courts are counted at each court in the Department's records.

⁴⁶ 109 cases out of a total of 1244.

⁴⁷ 25 cases out of a total of 70.

⁴⁸ 10 cases out of a total of 26.

⁴⁹ About 40 per cent of immigration cases lodged do not proceed to a hearing.

devotes to boat people cases with a view to ensuring it gets best value from them.

5.54 The Government has moved recently to restrict the access of protection visa applicants to the courts. As discussed in Chapter 7, this will have the effect of reducing the costs associated with boat people and the law.

Management information and reporting

5.55 DIMA maintains a database on litigation in which it is involved. This database provides management information about this litigation, at the level of individual cases and in aggregated form for management purposes. The database identifies cases in which the litigants are boat people.

5.56 There are, however, important gaps in the information available. One such gap is the proportion of boat people whose applications for protection visas are rejected by the Refugee Review Tribunal (RRT) which applies for judicial review of that decision. This proportion is crucial to estimates of the total cost of the management of boat people. This issue is discussed further in Chapters 7 and 8. Another gap is the resource devoted to law-making in relation to boat people discussed above.

5.57 It would assist DIMA to reduce some of the complexity of the environment in which it operates if it increased the information it provides to stakeholders about boat people and the law. This issue is taken up in the final chapter.

Recommendation No.8

5.58 DIMA should monitor the legal resources it devotes to law-making and cases relating to boat people with a view to ensuring optimum use of those resources.

DIMA response

5.59 Not agreed. While many of the provisions of the Migration Act affect boat people, they are equally applicable to other non-citizens. As a result, it would be difficult and resource intensive to try and identify the proportion of resources applied to legislative work affecting boat people only.

5.60 ANAO response: The ANAO suggests that DIMA implement the recommendation for at least a trial period to ascertain the level of resources involved and then decide whether it is cost effective to continue to do so. The

ANAO considers that implementation of that part of the recommendation referring to boat people cases should be straightforward as DIMA already flags such cases. (These flags were used to generate the information in Appendix 3.)

This is the second segment of Part Two which covers entry to, and passage through, the refugee determination system.

6. Entry to the refugee determination system

This chapter describes the system for entry to the refugee determination system as it applies to boat people. It then examines the dynamic environment which led DIMA to establish this system. Finally, the ANAO looks at the consequences of some recent changes.

Current mechanisms for entry to the refugee determination system

6.1 Most non-citizens in Australia may seek the protection of the Australian Government by applying for a protection visa.⁵⁰ The grant of a protection visa to a person enables that person to remain in Australia permanently. Protection visas are granted to non-citizens who are deemed to be refugees in terms of the Refugees Convention (see Abbreviations/Glossary). Protection visas are the mechanism by which Australia discharges the obligations it has accepted under the Refugees Convention not to return to their country of origin those people who have a well-founded fear of persecution for one or more of the reasons listed in the Convention.

6.2 Most boat people who become permanent residents in Australia do so because they have been granted protection visas. Entry to the refugee determination system is therefore an important issue for boat people. Entry to this system is also an important issue for DIMA, first, because it is the mechanism through which Australia begins to discharge its obligations under the Refugees Convention. Secondly, as the process of determining whether to grant a protection visa can be very resource-intensive, it is appropriate to ensure as far as possible that those who do not have claims which, *prima facie*, may engage Australia's protection obligations, do not make an application for a protection visa.

6.3 DIMA has established an entry screening process to identify boat people who have claims which, *prima facie*, may engage Australia's protection obligations. DIMA ensures that those so identified apply for a protection visa by assisting them to lodge an application.

⁵⁰ Exceptions relate to non-citizens for whom there is a 'safe third country,' as discussed later in this chapter, and to repeat applications, which are discussed in Chapter 7.

The entry screening process

6.4 The entry screening process consists of three steps:

- ? an initial entry interview;
- ? the preparation of a summary of the interview; and
- ? an assessment of whether the boat person has made claims which, *prima facie*, may engage Australia's protection obligations.

The initial entry interview

6.5 The initial entry interview is conducted by DIMA officers as part of the reception process (see Chapter 3). Interviews are normally held shortly after arrival at the place of detention. The interviews are taped and an accredited interpreter is used.

6.6 To ensure consistency, DIMA interviewers are provided with a standard interview format. The ANAO, with the agreement of DIMA and the boat persons being interviewed, observed four initial entry interviews. The standard format for the interview was followed.

6.7 At the interview, the DIMA officer confirms biographical data collected at first contact and then enquires:

- ? about the boat person's reasons for leaving his or her country of origin;
- ? why he or she chose to come to Australia; and
- ? whether there are any reasons why the boat person does not wish to return to his or her country of origin.

Interview summary

6.8 The interviewing officer prepares an interview summary. The summary is used by senior managers in DIMA to determine whether, as indicated above, the boat person has made any claims which, *prima facie*, may engage Australia's protection obligations.

6.9 The ANAO listened to four taped interviews and found the interview summaries to be substantially accurate accounts of the interviews. The ANAO drew to the attention of DIMA one instance where the summary did not include what may have been relevant information on the tape.

Decision

6.10 The ANAO also examined 113 interview summaries. Ninety of these summaries related to boat people who had arrived in the first six months of

1996. The remainder related to boat people from the *Albatross*, a boat which arrived in 1994.

6.11 In 112 cases DIMA assessed that the boat person did not present information which *prima facie* may engage Australia's protection obligations. It did not facilitate the lodgment of protection visa applications by these boat people.

6.12 DIMA has advised the ANAO that the vast majority of boat people report essentially economic reasons for coming to Australia. The summaries examined by the ANAO support this advice. Typical reasons for coming to Australia advanced by boat people, and regarded by DIMA as not being claims which *prima facie* may engage Australia's protection obligations, included better job prospects, better education for children, etc.

6.13 The refugee determination process (described in Chapter 7) involves a thorough investigation of claims and an assessment against the Refugees Convention.

6.14 Boat people who do not apply for a protection or other visa are unlawful non-citizens and must be removed from Australia as soon as practicable under section 198(5) of the Migration Act.

Access to assistance in applying for a protection visa

6.15 In some cases, new arrivals at Port Hedland IRPC appear to have been assisted in applying for protection visas by detainees of longer standing. The 44 members of the *Teal* group not assisted to apply for protection visas by DIMA were kept in separate detention at Port Hedland IRPC until 1 June 1996. Their protection visa applications were lodged one month after they were allowed to mix with detainees of longer standing at the IRPC.

6.16 DIMA contracts registered migration agents to assist boat people to apply for protection visas where it, as a result of the entry screening process, has assessed that the boat person has made claims which, *prima facie*, may engage Australia's protection obligations.

6.17 Section 193 provides that the Minister and his officers are not required to:

- ? advise an immigration detainee as to whether he or she may apply for a visa;
- ? give the person any opportunity to apply for a visa; or
- ? allow access to advice in connection with applications for visas.

6.18 All immigration detainees who apply for protection visas are provided by DIMA with assistance from registered migration agents in the processing of their applications. This assistance is described in Chapter 7. There is no legislative basis for this assistance, but it assists DIMA in ensuring that the applicant's most complete case is put forward promptly. Such action reduces the risk of challenges, in court and elsewhere, to the integrity of the refugee determination system.

6.19 As the application assistance scheme has developed since 1989, the time taken for protection visa applications to be lodged has reduced from 179 to 20 days,⁵¹ consistent with the objectives of this assistance.

Dynamic environment

6.20 The management of boat people takes place in a dynamic environment characterised by lack of predictability, changing legislation, and differing source countries and circumstances of the boat people themselves. Where emerging events indicate that the operation of the refugee determination system might fail to meet, or extend beyond, Australia's obligations under the Refugees Convention, DIMA has two means of responding:

- ? advise the Government to introduce amending legislation into the Parliament; and
- ? adjust its administrative procedures relating to the operation of the refugee determination system.

6.21 These two types of response are discussed in turn.

Legislative amendments to the refugee determination system

6.22 Examples of situations where DIMA has advised the Government to amend legislation, together with the amending legislation, are mentioned below. The changes or proposed changes in legislation represent developments in or extensions to government policy. The situations were:

- ? failed Indo-Chinese asylum seekers from the Indonesian detention camp at Galang came to Australia and sought to have their cases for refugee status considered afresh. (*Migration Legislation Amendment Act (No 4) 1994*);
- ? Ethnic Chinese from Vietnam who had been accepted as refugees for many years in the People's Republic of China sought admission to Australia as refugees. (*Migration Legislation Amendment Act (No 4) 1994, Migration*

⁵¹ See Table 7.7.

Legislation Amendment Act (No 2) 1995, and Migration Regulations (Amendment) No 3 of 1995); and

? the issue of whether the powers of HREOC could be used to assist or encourage boat people in detention to lodge applications for protection visas. (*Migration Legislation Amendment Bill (No 2) 1996*).

6.23 In relation to the first situation, the need for the urgent introduction and passage of legislation would have been avoided had DIMA been more timely in recommending to the Government changes to the Migration Act. DIMA was involved in the development of the Comprehensive Plan of Action (CPA), a UN-sponsored agreement on the processing of Indo-Chinese asylum seekers in camps in south-east Asia, which Australia signed in 1989. The CPA included a provision that asylum seekers who had had their claims assessed in one country did not have the right to have their claims re-assessed by other countries. This exclusionary provision was not incorporated in the Migration Act until after the first arrivals from Galang in 1994. Therefore, there was a five-year gap between the time when the exclusionary provisions could have been incorporated and when they actually were.

6.24 DIMA's response in the two latter situations was prompt.

6.25 DIMA advice to the Government recommending a legislative response is generally limited to groups who previously encountered the refugee determination system in another country. In the case of the people from Galang, they were refused refugee status in Indonesia; in the case of the Sino-Vietnamese, they had been granted refugee status by China.

6.26 The reason for this is the principle that irrespective of the merits of their claim to refugee status against their country of origin, people who are already under the protection of a third country have no claim to the protection of Australia under the Refugees Convention.⁵² The effect of the legislation referred to above was to incorporate this principle into Australia's refugee determination system.

6.27 The legislation has created categories of people who are ineligible to apply for protection visas. Some 123 boat people who were granted refugee

⁵² Article 1E of the Refugees Convention states: "This Convention shall not apply to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."

status under the previous system⁵³ would have been ineligible under the changed system.⁵⁴

Recommendation No. 9

6.28 DIMA should take steps to provide timely advice to government to ensure that the Migration Act remains consistent with relevant international agreements.

DIMA response

6.29 Agreed. The advice provided to the Government by the Department includes assessments of international law and, in this respect, there is close liaison with the Attorney-General's Department. This mechanism helps to ensure that the Migration Act remains consistent with relevant international agreements.

Administrative change to entry to the refugee determination system

6.30 The principal administrative change introduced by DIMA in recent years has been the establishment of the entry screening process, described previously, which identifies those who make claims which, *prima facie*, may engage Australia's protection obligations.

6.31 The decision to establish the entry screening process was a response to the significant number of unauthorised boat arrivals around Christmas 1994. DIMA's concern was that under the procedure which had previously been used, all boat arrivals would make a protection visa application, even though they may not have been seeking protection from persecution.

6.32 Where a person had previously encountered a refugee determination system in another country, such as CPA legislation, legislation to prevent a further application in Australia was appropriate and consistent with Australia's international obligations under the Refugees Convention. However, where a person seeking protection from persecution had not previously had their status

⁵³ 119 Sino-Vietnamese and four covered by the CPA.

⁵⁴ The Minister has a discretion to allow people in the excluded categories to enter the refugee determination system. As for other discretions under the Migration Act which may only be exercised personally by the Minister, the Act provides that the receipt of a request to exercise the discretion does not compel the Minister to consider the request.

determined, to prevent an application would have been inconsistent with Australia's international protection obligations.

Consequences of change

6.33 Table 6.1 shows, by year of arrival, the numbers of boat people who have been admitted to the refugee determination system since 1989-90. Until 1994-95 it was generally the case that most boat people entered Australia's refugee determination system. As shown in Table 6.1, in the years 1989-90 to 1993-94, before the entry screening process was introduced, of 866 boat arrivals, 732 (85 per cent) entered the refugee determination system. In 1995-96, after the entry screening process had been established, of 550 boat arrivals, only 12 (2 per cent) were assisted to enter the refugee determination system by DIMA.⁵⁵ The proportion of boat people entering the system has fallen sharply due both to the legislative changes introduced by the Government and to the administrative changes introduced by DIMA. In the view of the ANAO, reporting the percentage of boat people who enter the refugee determination system is desirable as an element of program reporting. It is, however, inappropriate to set a performance target based on this measure because of variations in the source country and circumstances of boat arrivals.

Table 6.1

Entry of boat people to refugee determination system

Year of arrival	Entering refugee process (number)	Not entering refugee process (number)	Total (number)	Percentage entering refugee process (%)
1989-90	242	1	243	100
1990-91	152	20	172	88
1991-92	68	-	68	100
1992-93	71	113	184	39
1993-94	199	-	199	100
1994-95	162	935	1097	15
1995-96	61 (a)	528	589	10
Total	955	1597	2552	

⁵⁵ Interpretation of data for 1994-95 is complicated by the fact that this was a transitional year for the introduction of both legislative and administrative changes.

Source: DIMA

Note: (a) Twelve of the 1995-96 arrivals entered the refugee determination system with the assistance of DIMA. The other 49 lodged valid protection visa applications while in immigration detention at the Port Hedland IRPC, even though DIMA formed the view as a result of their initial entry interviews that they did not, *prima facie*, engage Australia's protection obligations.

6.34 Based on a cost model developed by the ANAO for this audit and which is explained in Chapter 8, expenditure on boat people as a result of the legislative and administrative changes outlined above is estimated to have been, since 1994-95, and will in future be, significantly less than what it would have been in the absence of any change to the refugee determination system. Savings which have or will accrue to the Commonwealth - as a result of the legislative changes in respect of people who have already been denied access to the refugee determination system - are estimated by the ANAO at about \$40m over several years. Further savings as a result of the changed administrative practices of DIMA are estimated by the ANAO at \$22m, also over several years.

New risks

6.35 DIMA's entry screening processes have created substantial savings. Nevertheless, in the view of the ANAO, these processes have also created new but lesser risks which need to be managed:

- ? changed perceptions of the refugee determination system; and
- ? cost containment for future boat arrivals.

Changed perceptions of the refugee determination system

6.36 Screening boat people for entry to the refugee determination system has substantially altered the way in which most boat people are managed by DIMA. As indicated above, 85 per cent of boat people entered the refugee determination system before screening was introduced.

6.37 The screening test is used to facilitate the entry to the refugee determination system of those boat arrivals who make claims which, *prima facie*, may engage Australia's protection obligations. The outcome of the screening process, and its effect on the management of boat people, will obviously depend on the circumstances of the boat arrivals. In 1995-96, the first full year of operation of the screening process, two per cent of boat arrivals were helped by DIMA to enter the refugee determination system.

6.38 There is a risk to DIMA that the screening process will be perceived as a de facto refugee determination system which lacks important features of the actual refugee determination system such as the provision of assistance to the applicant and the availability of administrative and judicial review. (These features are described in Chapter 7).

6.39 In view of this new risk, DIMA needs to improve its reporting to provide assurance that it is continuing to meet its program objectives relating to boat people and to refugee determination.

6.40 DIMA could monitor the screening process by recording the proportion of facilitated entries to the refugee determination system who are found, ultimately, to be refugees. Of 21 boat people whose entry to the refugee determination system was facilitated by DIMA, 19 have been found to be refugees.⁵⁶

6.41 Some boat people who are assessed by DIMA as not making claims which *prima facie* may engage Australia's protection obligations, nonetheless apply for a protection visa.

6.42 Of 49 boat people who have applied for a protection visa in these circumstances, none has been found to be a refugee.

6.43 More generally, the ANAO believes that accountability to Parliament for, and community understanding of, DIMA's position and processes would be enhanced if it were to report on the extent to which unauthorised arrivals are assisted to apply for protection visas, and the methods it uses to manage the risks attendant to the approach it adopts.

Recommendation No.10

6.44 DIMA should strengthen its reporting against program objectives relating to the management of boat people, by, for example, developing performance indicators to assist understanding of the reasons for changes in costs and processing characteristics.

DIMA Response

6.45 Agreed. DIMA plans to continue to strengthen its reporting against program objectives and is looking at developing performance indicators,

⁵⁶ A larger number of 'facilitated entry' cases is still pending.

resource management systems and the establishment of a new performance monitoring regime with the forthcoming new detention service provider.

Cost containment for future boat arrivals

6.46 In the view of the ANAO, it may be difficult to maintain the savings identified above arising from the risk control measures adopted by the Parliament and DIMA.

6.47 Costs associated with protection visa processing can be contained, to the extent that only those who, *prima facie*, may engage Australia's protection obligations, apply. Where a person who is assessed as not making claims which, *prima facie*, may engage Australia's protection obligations, nevertheless lodges a protection visa application, DIMA is obliged to have the application determined, thus incurring processing costs. The risk to costs is that more boat people who are assessed as not making claims which *prima facie* may engage Australia's protection obligations, will apply for protection visas. There are recent examples with groups from individual boats, and other circumstances, where this has occurred.

Conclusion

6.48 In relation to the entry of boat people to the refugee determination system, the ANAO has concluded:

- ? until 1994, the majority of boat people entered the refugee determination system;
- ? legislative and administrative changes since 1994 have reduced greatly the number and proportion of boat people entering the refugee determination system;
- ? this reduction has brought savings estimated by the ANAO at \$62m in terms of expenditure which would have been incurred had boat people, who have already been removed from Australia, entered the refugee determination system instead; and
- ? DIMA's entry screening processes have created substantial savings. Nevertheless, in the view of the ANAO, these processes have also created new, but lesser, risks which need to be managed:
 - changed perceptions of the nature of the refugee determination system; and
 - the savings which have already been obtained in respect of past boat arrivals may not be obtainable for future boat arrivals.

7. The refugee determination system

In this chapter, the ANAO examines processes associated with the refugee determination system for boat people.

Introduction

7.1 Refugee determination is a difficult area of public administration involving controversial issues. DIMA is obliged to administer the refugee decision-making system for boat people within a complex policy and legislative environment.

7.2 The main public administration dilemmas and controversial issues faced by DIMA may be summarised as:

- ? the conceptually difficult legal framework surrounding the definition of 'refugee';
- ? the need, under its international obligations in the Refugees Convention, to ensure that Australia does not return a refugee to a country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion;
- ? the substantial public interest boat people attract; and
- ? the need, at times, for rapid responses to developments, including legislation.

7.3 Boat people are only a small fraction of people in the refugee determination system. Of nearly 60 000 protection visa applications recorded on DIMA's protection visa computer system since 1989-90, fewer than 1000 were from boat people. The vast majority of applicants enter Australia lawfully on another visa and apply for a protection visa after arrival.

7.4 DIMA's conduct in relation to boat people decision-making processes is driven by the need to provide boat people with such treatment and assistance as is required by Australia's international obligations and domestic law: no more and no less.

7.5 The refugee determination system is important to DIMA because it is the means by which it discharges its responsibility to ensure that Australia's international obligations under the Refugees Convention are met. On a per

person basis, the refugee determination process can be very resource-intensive. DIMA has a further obligation to ensure that the refugee determination system correctly identifies every refugee at minimum cost consistent with government policy.

The refugee determination system defined

7.6 For the purposes of the audit, the ANAO defined the refugee determination system as the totality of the administrative and judicial processes through which a person may be found to be a refugee and issued with a protection visa. This 'system' consists of a primary determination process operated by DIMA and a series of further processes, most of which are appeals (the current refugee determination system is depicted at Figure 5). These appeals may involve administrative review of the merits of the decision or judicial review of the legality of the decision-making process. These processes are consistent with principles of administrative law governing most areas of Commonwealth administrative decision-making.

7.7 DIMA uses 'refugee determination' in a more limited sense to refer to primary determination only. The subsequent stages of the system come into effect only as the result of appeals from this primary determination. DIMA has put to the ANAO the view that in terms of 'refugee determination', DIMA is responsible for costs associated with primary determination only, as all of the appeal processes are external to it.

7.8 In this audit the ANAO has examined the primary determination process and all of the possible appeal processes.⁵⁷ The ANAO believes that only by taking this overall view, and by treating the processes together as a system, can an appropriate perspective on the management of boat people be obtained. DIMA may incur substantial detention and litigation costs where the appeal processes are lengthy or involve the courts.

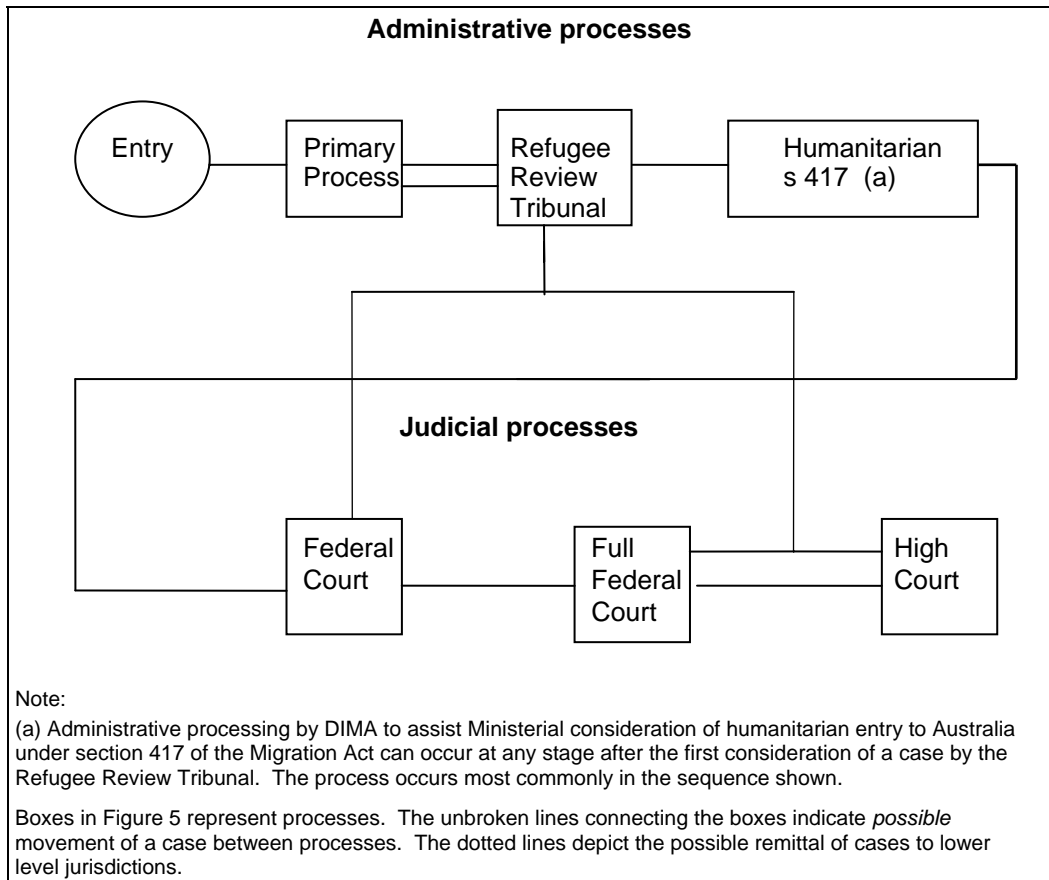
The refugee determination system

7.9 The current refugee determination system is depicted in Figure 5. The three administrative processes were established in 1990. The Refugee Review Tribunal (RRT) replaced an earlier administrative review body, the Refugee Status Review Committee, in 1993.

7.10 The stages of the system are described in the following sections.

⁵⁷ The agencies responsible for the appeals processes were not auditees for the purposes of this audit.

Figure 5
Current refugee determination system in Australia



Primary determination

7.11 The aim of the primary determination process is to ascertain whether Australia has protection obligations under the Refugees Convention to an applicant for a protection visa. The determination is made by officers of DIMA, acting as delegates of the Minister.

7.12 DIMA’s program objective for onshore refugee determination is to grant protection visas (permanent residence) to asylum seekers who engage

Australia's international protection obligations in accordance with the 1951 UN Convention and 1967 Protocol Relating to the Status of Refugees.⁵⁸

Application assistance

7.13 DIMA pays registered migration agents drawn from a panel of contractors to assist protection visa applicants in immigration detention.⁵⁹

7.14 Where DIMA assesses, under its entry screening process (see Chapter 6), that a boat person has made claims which *prima facie*, may engage Australia's protection obligations, assistance is provided for the lodgment of the application. Where a boat person is not assessed by DIMA as being a person who has made claims which *prima facie*, may engage Australia's protection obligations, but who nonetheless applies for a protection visa, assistance is provided only after the application has been lodged.

7.15 The assistance provided includes consultation with the applicant before the interview (see below), and to the applicant during the interview. If the application is refused, the migration agent can assist with the preparation and lodgment of an application for review by the RRT. The amount appropriated in 1996-97 for application assistance to boat people was \$826 000.

7.16 Application assistance helps protection visa applicants present the most complete case so that the case officer has available, as far as possible, all of the relevant information on which to base the decision.

7.17 DIMA does not help protection visa applicants seeking judicial review of RRT decisions.

The case officer

7.18 The case officer is the person whose task it is to determine whether an applicant for a protection visa is a refugee. In the primary determination process, case officers are employees of DIMA. Case officers for protection visa applications from boat people are selected from DIMA's Onshore Refugee case officers in Sydney and Melbourne.

⁵⁸ Immigration and Multicultural Affairs Portfolio Budget Statements, 1997-98, Budget Initiatives and Explanations of Appropriations, Budget Related Paper 1.9. This objective omits performance criteria which had been included in the objective for the corresponding program in DIMA's Annual Report for 1995-96, 'to protect refugees in Australia in accordance with the 1951 UN Convention and 1967 Protocol Relating to the Status of Refugees, through refugee determination processes which are fair, just, economical, informal and quick'.

⁵⁹ The panel includes: the Western Australian Legal Aid Commission, a private law firm, and until recently, a community-based refugee advisory service.

7.19 These case officers receive training and support through:

- ? a two-week training course on appointment;
- ? the *Refugee Law Guidelines* in DIMA's current Procedures Advice Manual (PAM 3), which contains a detailed account of refugee law and departmental procedures;
- ? other guidance such as *Refugee and Humanitarian Visa Applicants Guidelines on Gender for Decision Makers*;
- ? ongoing advice from the Refugee Law and Country Information Service Sections of DIMA in Canberra; and
- ? provision of ongoing formal training and on-the-job training through review of draft records of decision by senior case officers.

The interview

7.20 The key part of the primary process is an interview conducted by a DIMA case officer. The interview is held at the place of detention. The interview is taped in duplicate and a qualified interpreter is used. One copy of the tape is provided to the applicant at the conclusion of the interview. The interviews take as long as necessary for the applicant to present his or her case; typically, half a day.

7.21 After the interview, the protection visa applicant may review the tape with the migration agent and provide any further information which might assist the case.

7.22 With preparation for the interview and drafting the decision, case officers process about three interviews per week. After the decision, DIMA advises the applicant of the outcome and provides a copy of the decision to the applicant. A survey undertaken by DIMA for the Minister's 1996 Review of Immigration Decision-Making showed that decisions averaged eight pages in length.

7.23 The ANAO considers opportunities to improve the efficiency of the primary determination process are constrained by the need to:

- ? allow the protection visa applicant to tell his or her own story in his or her own time; and
- ? advise the applicant fully of the reasons for the rejection where, as is most commonly the case, the decision is to reject the application.

Country Information Service

7.24 DIMA maintains a Country Information Service (CIS) which contains information on conditions in those countries in which protection visa applicants

claim a fear of persecution. Information is collected from sources such as the United Nations High Commissioner for Refugees (UNHCR), the Department of Foreign Affairs and Trade, DIMA officers in overseas posts, books, newspaper and journal articles, and from similar country information services in other countries. This information is collated and made available to decision-makers to assist them in their assessment of the claims of protection visa applicants.

7.25 The CIS plays an important role in enabling a thorough assessment of protection visa claims to be made. The information in the CIS is most comprehensive for those countries and regions from which most protection visa applicants have come. Where there are protection visa applicants from new source countries or regions, the amount of information available will be less. DIMA nonetheless endeavours to ensure the decision-maker has sufficient information to assess the claims made by the applicant before the determination is made.

The decision

7.26 In reviewing the decision-making process used by case officers in deciding whether to grant protection visas, the ANAO has not sought to form an opinion on the quality of the decisions made in individual cases. The question to be decided by the case officer is whether the applicant for a protection visa is a person to whom Australia has protection obligations under the Refugees Convention.⁶⁰ A refugee is defined in the Refugees Convention as:

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

7.27 The decision is based on the merits of individual claims and on conditions in the country of origin at the time of the decision.

7.28 DIMA's approach to protection visa decision-making divides the Refugees Convention into five tests and requires the decision-maker to analyse the applicant's case against each test. An applicant's claims must satisfy each test for the grant of a protection visa to be considered. The tests are:

⁶⁰ Migration Act, section 36.

- ? does the applicant come within the ambit of the Refugees Convention, e.g., does an exclusion clause apply to the applicant?⁶¹
- ? what is the applicant's country of citizenship, or if the applicant is stateless, the country of former habitual residence?
- ? is the harm to or mistreatment feared by the applicant of sufficient gravity as to constitute persecution?
- ? is there a Convention ground? and
- ? is the fear of Convention-based persecution well founded?

7.29 The interpretation and application of the Convention definition of 'refugee' and of these tests have been the subject of debate in Australia and overseas. The complexities arise over:

- ? what constitutes 'a well-founded fear of being persecuted';
- ? the scope of the Convention grounds of race, religion, nationality, political opinion, and especially 'particular social group'; and
- ? other matters such as the nationality of the protection visa applicant.

7.30 A selection of writings relevant in Australia is listed at Appendix 4.

7.31 The High Court considered the definition of 'refugee' in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379. In this case, the High Court established a test for having a well-founded fear of persecution, namely that the applicant has a genuine fear of persecution and that that fear is founded on a 'real chance' of being persecuted, for a reason specified in the Refugees Convention, if the applicant is returned to his or her country of origin. The fear may be well-founded, notwithstanding the possibility that there is a less than 50 per cent chance of persecution occurring. The possibility of persecution cannot, however, be remote, far-fetched or insubstantial.

7.32 The environment for administrative decision-making in the refugee area is inherently difficult. Difficulties include:

- ? the complexity of the definition of 'refugee'; leading to
- ? the lack of court precedent in many important practical areas relating to the application of the definition of 'refugee,' thus providing an incentive to unsuccessful applicants to test in court the approach adopted by DIMA in these areas; and

⁶¹ The Refugees Convention contains provisions whereby people otherwise having the status of refugees are excluded from refugee status. Such people include those already receiving United Nations protection or assistance, people who are not considered to be in need of international protection (such as those for whom there is a safe third country, see Chapter 6), and people who are not considered to be deserving of international protection.

? frequent change to precedent as a consequence of the ongoing development of case law.

7.33 While these features are by no means unique to refugee decision-making, the ANAO view is that in this area they are particularly acute.

7.34 The environment in which these decisions are made was clarified by a recent decision of the High Court in which the Court set out the proper scope of judicial review of administrative decision-making. This decision has wide implications for administrative law in Australia.⁶²

7.35 The case involved an appeal by the Minister from a decision of the Full Federal Court. The Federal Court had found that although the reasons for decisions of delegates of the Minister on protection visas claimed to apply the correct 'real chance of persecution' test, this was in fact mere lip service to the approved forms, and a detailed textual analysis of the reasons revealed that the wrong tests had in fact been applied and that errors of law had occurred.

7.36 The High Court rejected the proposition that detailed textual analysis can provide conclusive evidence that wrong tests have been applied. Rather, the reasons for the decision have to be considered in their entirety, from the perspective that they are provided to inform the applicant, and are not legal argument written by judges. The High Court also examined the primary decision in some detail and found no error with the reasoning.

7.37 The High Court has extended this approach in another recent decision.⁶³ A particular procedure which the Federal Court decision had suggested as necessary in order for the 'real chance of persecution' to be properly evaluated, was rejected by the High Court. This is consistent with the finding in the *Wu Shan Liang* decision that there are many approaches which a decision-maker might validly adopt.

7.38 The High Court also suggested in this decision that the use of the 'real chance' test as a substitute for the term 'well-founded fear' in the Refugees Convention invited error. It suggested further that decision makers would be on safer ground if they applied:

the language of the Convention while bearing in mind that a fear of persecution may be well-founded even though the evidence does not show that persecution is more likely than not to eventuate.

⁶² *Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Ors* (1996) 136 ALR 481

⁶³ *Minister for Immigration and Ethnic Affairs v Guo Rei Wong; Minister for Immigration and Ethnic Affairs v Pan Run Juan*, High Court, 13 June 1997, unreported.

7.39 DIMA may have to reconsider the way in which its decision-makers use the 'real chance' test following this decision.

7.40 Many decisions focus not on whether there is a real chance of persecution, but whether the potential persecution is for one or more of the reasons specified within the Refugees Convention.⁶⁴ An applicant may have a well-founded fear of persecution for a reason which is not a Convention reason.

7.41 The most difficult area in determining whether feared persecution is for one or more of the reasons specified in the Refugees Convention is the reason 'membership of a particular social group'. The RRT (the decisions of which are not precedential), has, through findings in a number of cases, identified the following social groups: women subject to dowry arrangements; homosexuals; people diagnosed as infected with Human Immunodeficiency Virus (HIV); people who have married contrary to caste rules; and disabled people. The High Court has decided that a family could be a particular social group. However, policies of a government which apply to the entire or a substantial proportion of the population do not create a 'social group' for the purposes of determining applications for protection visas.^{65,66}

7.42 Other matters such as the nationality of the protection visa applicant may also complicate the decision on whether an applicant for a protection visa satisfies the definition of a refugee in the Refugees Convention. Protection visa applicants, including boat people, sometimes pass through a number of countries and/or changing political circumstances. Situations arise where the nationality of the applicant is the key issue in determining applications for protection visas. The nationality of the applicant, may in turn, depend on interpretation of the laws of other countries, either current or at particular times in the past. For example, a key issue in determining the protection visa applications of boat people from East Timor is whether they have Portuguese as well as Indonesian nationality. In turn, this may depend on Portuguese law at the birth date of the applicant.

7.43 DIMA has adopted the following approach to handling the complexity of the decision on whether protection visa applicants are refugees:

⁶⁴ As indicated in the definition of 'refugee' in the Refugees Convention quoted earlier in this Chapter, the reasons are: race, religion, nationality, membership of a particular social group, or political opinion.

⁶⁵ *Su Wen Jian v Minister for Immigration and Ethnic Affairs and Refugee Review Tribunal* (unreported, Federal Court, 24 April 1996)

⁶⁶ *A and B v Minister for Immigration and Ethnic Affairs*, High Court, unreported 24 February 1997, FC 97/004

- ? the DIMA staff making primary determinations on protection visa applications are at a higher level within the Australian Public Service than DIMA staff taking other immigration decisions; and
- ? support for protection visa decision-makers through training, reference material such as DIMA's *Refugee Law Guidelines* and access to expertise in refugee law both within DIMA and, if necessary, the Attorney-General's Department.

7.44 The integrity of the primary determination for protection visa applications is supported by administrative arrangements which provide for the decision-maker to act as a delegate of the Minister when making the primary determination. DIMA cannot then lawfully direct the decision-maker as to how to decide particular cases.

Decision environment

7.45 Quite apart from the complexities of the decision referred to above, the environment in which the decision is taken is often one which attracts public attention in its own right.

7.46 Decision-makers are aware of the public attention their decisions will attract. Examples of public attention include:

- ? offers to provide 'safe houses' to protection visa applicants from East Timor who are found not to be refugees. Although the vast majority of East Timorese protection visa applicants are not boat people, the public profile of boat people is such that media interest in the outcome of the protection visa applications of the small number of boat people from East Timor is likely to be intense; and
- ? public figures sometimes comment on boat people issues in a way which could be seen as influencing, or attempting to influence, those taking decisions on protection visa applications.

7.47 Where such statements are made by political figures, DIMA formally instructs its decision-makers to ignore these statements and to decide each case on its merits within the established legal framework.

Outcomes

7.48 Conditions within a country have a major bearing on whether a protection visa applicant satisfies the definition of 'refugee' for the purposes of the Refugees Convention. Accordingly, changing conditions in source countries are a major factor leading to variation in outcomes of the processing of boat people. Variations in decision outcomes need to be understood in this context.

7.49 Chart 2 shows the ethnic background of unauthorised boat arrivals, by year. The vast majority of boat people to have come to Australia since 1989 have come from China, either as Chinese nationals or as Sino-Vietnamese.⁶⁷

7.50 Chart 2 reveals the changing composition of boat arrivals. The largest national group in 1989-90 and 1990-91 was Cambodian. Over the next two years all arrivals were Chinese nationals, but there were fewer than 200 arrivals per year. In 1993-94 Sino-Vietnamese arrived in significant numbers for the first time. 1994-95, in particular the period around Christmas, saw an unprecedented number of Sino-Vietnamese boat people. The number of Sino-Vietnamese dropped sharply in the following year, but they were replaced by a substantial number of Chinese nationals, possibly reflecting the continuing activities of boat organisers in the Beihai area of southern China.

7.51 For 1996-97, Chart 2 suggests that the number of people from China is diminishing, and that there may be the beginning of a trend to arrivals from other countries. The majority of these arrivals are from Middle Eastern countries.

7.52 The outcomes of the primary determination process are shown, by year of boat arrival, in Table 7.1. From this table it can be seen that in most years the approval rate in the primary determination process, the rate at which boat people have been granted protection visas, has been low. The incidence of grants in 1993-94 was unusually high, due largely to the acceptance as refugees of many of the people from three boats code-named *Pluto*, *Toto* and *Unicorn*.⁶⁸ As noted above, some ethnic groups have experienced circumstances which are more likely to engage Australia's protection obligations than others.

7.53 There is substantial Parliamentary and public interest in boat people issues. The ANAO suggests that greater community understanding of DIMA's position would assist DIMA to achieve its objective to protect the Australian community by promoting acceptance of and adherence to entry and stay requirements, including restrictions on access to work and other benefits, and enforcing such requirements including through detention and repatriation of unlawful non-citizens.

⁶⁷ The term 'Sino-Vietnamese' is used by DIMA and in this report to refer to ethnic Chinese from Vietnam who settled in China as refugees before coming to Australia. This meaning differs from the term's common use in Australia, which is to refer to any ethnic Chinese person from Vietnam.

⁶⁸ These boats all came from Beihai in Southern China. It is possible that the acceptance of the people on them as refugees acted as a stimulus for the increased number of arrivals around Christmas 1994.

Table 7.1**Refugee determination at primary level**

Year of arrival	Entering Refugee Determination System	Approved	Rejected	Pending	Approval Rate (b)
(a)	(number)	(number)	(number)	(number)	(%)
1989-90	242	5	237	-	2
1990-91	152	13	139	-	9
1991-92	68	-	68	-	0
1992-93	71	3	68	-	4
1993-94	199	83	116	-	42
1994-95	162	7	137	18 (c)	5
1995-96	56	10	46	-	18
Total	950	121	811	18	13

Source: DIMA

Notes: (a) The data in each row reflect the processing of boat people arriving in the specified year, irrespective of when the processing occurred. (b) Approval rate is the number of approvals divided by the number of decided applications, ie, total applications less those still pending. (c) The 18 cases shown pending for 1994-95 are the *Quail* group from East Timor. Processing of their cases has been delayed pending determination of their right to protection by Portugal.

Risk of incomplete information

7.54 Later in this chapter, the ANAO discusses the finding that boat people who apply for protection visas are more likely to be granted one at administrative review than primary determination. One possible explanation for this unusual circumstance is that the primary determination is made on incomplete information.

7.55 The ANAO has been advised by migration agents who have provided application assistance to boat people that some protection visa applicants may be unwilling to provide information which, if passed to the government of the country of origin, could place family members or friends at risk of persecution. There may therefore be reasons why in some cases applicants provide the minimum amount of information they think will lead to a protection visa being granted. This may be reinforced by the knowledge that, in Australia's multi-stage refugee determination system, they can provide further information later.

7.56 Sometimes applicants to the RRT admit that all of the information provided at the primary assessment stage was a fabrication. In such

circumstances, of course, it becomes part of the Tribunal's task to form a judgment as to the reliability of the information which is then presented to it.

7.57 DIMA has established a range of measures to encourage protection visa applicants to have confidence in the system and to encourage the provision of full information at the primary determination stage. These measures include:

- ? maintaining a clear distinction between the IRPC Centre Manager and the refugee determination system, which enables, among other things, the Centre Manager to provide authoritative information about the refugee determination system to boat people who apply for protection visas;
- ? application assistance provided by migration agents as mentioned earlier;
- ? review by the case officer of the protection visa determination process at the beginning of the officer's interview with the protection visa applicant; and
- ? access to representatives of the UNHCR, Red Cross and churches.

7.58 To the extent that more boat people can be persuaded to provide full information early in the process, there is an opportunity for savings in downstream processing costs. In the absence of reliable measures of the extent of this type of action by boat people protection visa applicants, it is not possible to estimate its size. The ANAO encourages DIMA to develop measures to assess the administrative consequences of boat people protection visa applicants providing additional information over time as they progress through the refugee determination system. Such measures could assist DIMA in its continuing attempts to improve communication with potential refugees.

Refugee Review Tribunal

7.59 Merits review of a decision to reject an application for a protection visa is available to applicants. The existence of this process is consistent with the principle of administrative law governing most areas of Commonwealth administrative decision-making as to the availability of merits review of the decision within the executive. The review is undertaken by an independent body outside DIMA but within the Immigration and Multicultural Affairs portfolio: the Refugee Review Tribunal (RRT). The RRT was not an auditee for the purposes of this audit.

7.60 The RRT is established and operates under Part 7 of the *Migration Act 1958*. In reaching its decisions on appeals which come before it, the RRT applies the same criteria as those of the primary determination: does the applicant engage Australia's protection obligations under the Refugees Convention? The Tribunal may affirm or vary a primary determination, remit a decision to DIMA for reconsideration or set the primary decision aside and

substitute a new decision. While the applicant may appeal to the RRT a primary determination not to grant a protection visa, DIMA may not appeal a primary determination to grant a protection visa.

7.61 Applicants in detention, including boat people, receive priority in processing by the RRT.

7.62 The Government has decided, in principle, to amalgamate the Refugee Review Tribunal, and a number of other administrative review tribunals into a single body, as part of its response to the report by the Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, (Report No. 39).

7.63 Table 7.2 shows that, allowing for those who escaped from custody during the appeal period, 98 per cent of boat people protection visa applicants who could have applied for review have done so.

7.64 The outcome of administrative review, by both the Refugee Status Review Committee⁶⁹ and the RRT, is shown in Table 7.3. In this table, the 'Approved' column indicates cases where the RRT has made a decision resulting in the grant of a protection visa. The 'Rejected' column indicates cases where the RRT has affirmed the primary determination and rejected the application for a protection visa.⁷⁰

Table 7.2

Boat people - appeals for administrative review of refugee determination (a)

Year of arrival	Applications for administrative review	Rejected at primary level, but not applying for administrative review	Total
1989-90	220	17(b)	237
1990-91	139	-	139
1991-92	68	-	68
1992-93	68	-	68
1993-94	116	-	116
1994-95	134	3	137
1995-96	46	-	46

⁶⁹ The Refugee Status Review Committee provided administrative review until 1 July 1993.

⁷⁰ Appeals decided by the RSRC were processed differently, but with the same possible outcomes.

Total	791	20	811
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Source: DIMA.

Notes: (a) Administrative review of refugee determinations before 1 July 1993 was undertaken by the Refugee Status Review Committee. After that date reviews were undertaken by the RRT. (b) Includes three people who escaped from custody without lodging applications for review.

Table 7.3

Boat people - refugee determination at administrative review

Year of Arrival	Approved	Rejected	Withdrawn	Other	Total
1989-90	12	200	8	-	220
1990-91	58	77	4	-	139
1991-92	31	37	-	-	68
1992-93	17	48	3	-	68
1993-94	47	66	2	1	116
1994-95	38	82	3	-	123
1995-96	-	46	-	-	46
Total	203	556	20	1	780

Source: DIMA.

Protection visa approval rates in the primary process and at the RRT

7.65 Table 7.1 shows that 950 boat arrivals between 1989 and 1996 entered the refugee determination system. Of these, 121 were granted refugee status or protection visas at the primary determination stage, whereas 203 were found to be refugees at administrative review (Table 7.3). Thus, more boat people applicants have been granted protection visas at administrative review than at the primary process. In percentage terms, 13 per cent of boat people applicants were granted protection visas at primary determination, whereas 26 per cent of review cases were granted protection visas.

7.66 The ANAO is not aware of another administrative decision-making system where the approval rate is higher at administrative review than at the primary level.

7.67 There is also a difference between the approval rates at the primary and review stages for onshore protection visa applicants in general. For example, from the inception of protection visas on 1 September 1994 to

31 December 1995, of 9066 determinations at the primary level, 1053 were granted protection visas, corresponding to an approval rate of 12 per cent. At the RRT, over the same period, of 5285 determinations, 722 were granted protection visas, corresponding to an approval rate of 14 per cent.

7.68 DIMA's view is that the period 1989 to 1996 encompasses a wide range of source countries, circumstances within those source countries, and changes to the refugee determination system. Accordingly, comparisons over time and across source countries are unlikely to be helpful.

7.69 DIMA has no capacity to direct the RRT should it perceive the approaches of the two agencies to protection visa determination to be different. DIMA's chief method of achieving consistency is to appeal to the Federal Court on fundamental questions going to the interpretation of the Refugees Convention. However, there is delay in achieving outcomes by this method (possibly more than two years in cases which go to the High Court).

7.70 The ANAO has not sought in this audit to examine the reasons for the differences in outcomes at the primary and administrative review stages. However, the differences are marked, and this is in the context of the ANAO's estimates that the cost of an RRT determination is about double that of the primary process (see Chapter 8). A better understanding of the causes of the difference between outcomes in the primary and administrative review stages could form the basis of discussion between the two agencies which could enhance the administration of the refugee determination system as a whole.

7.71 The Minister for Immigration and Multicultural Affairs has taken action to encourage greater consistency on refugee determination between the primary level decision maker within DIMA and the RRT.

Recommendation No.11

7.72 DIMA should investigate the causes of lower approval rates in the primary process as compared to the administrative review stage of the refugee determination system.

DIMA response

7.73 Agreed with qualifications. Decisions set aside by the RRT and the courts are evaluated by DIMA to identify any issues of country information and interpretation needing further consideration. The administrative review stage is, however, independent of DIMA and decisions at that stage have no precedent impact on the Department. DIMA's obligation is to ensure that

applications determined by its officers receive objective consideration on a case by case basis, whether they be approvals or rejections. The wording of the recommendation as it stands implies without supporting justification that the approval rates at the primary level should be higher than they are.

Humanitarian consideration

7.74 All applicants for protection visas who are unsuccessful at the administrative review stage are considered by DIMA for entry to Australia on humanitarian grounds. For those who do not appeal to the Federal Court, such consideration occurs before action is taken to remove them from Australia. For those who appeal, a decision to provide entry on humanitarian grounds means the Government can withdraw from the court case, thereby saving the costs which would be incurred if the case proceeded.⁷¹ Where DIMA wishes to have a matter clarified in the courts, it may recommend proceeding with a case even though entry on humanitarian grounds is likely.

7.75 Humanitarian consideration is provided for under section 417 of the Migration Act whereby the Minister may substitute for a decision of the Refugee Review Tribunal a decision which is more favourable to the applicant, including decisions which the Tribunal was not empowered to make. Such decisions are required to be taken by the Minister personally because the Minister's powers under section 417 of the Migration Act are non-delegable and non-compellable. The applicants are ineligible for consideration until the administrative component of the refugee determination system has been exhausted.

7.76 On return from the RRT, all cases are considered by DIMA against guidelines which have been approved by the Minister, which are publicly available and which are not exhaustive. Cases which come within the ambit of the guidelines are referred to the Minister. In accordance with the Federal Court decision in the Ozmanian case,⁷² the Minister personally views every request for the exercise of his public interest powers under section 417 of the Migration Act.

7.77 In addition, all requests from applicants or made on behalf of applicants are referred to a team of case officers who are familiar with the Minister's guidelines for the consideration of the exercise of his non-compellable powers under the Act. The team collates all relevant information

⁷¹ The procedure described in the paragraph reflects current Departmental practice. DIMA previously did not consider entry on humanitarian grounds until after judicial proceedings relating to refugee status had been exhausted. The savings identified in the paragraph were thus not then captured.

⁷² *Minister for Immigration and Ethnic Affairs v Ozmanian* (1996) 141 ALR 322.

from the applicants' case documents and any new information which may be contained in the requests. This information is then put before the Minister.

7.78 The Minister may decide:

- ? not to consider to intervene in a particular case;
- ? to consider a case but not intervene; or
- ? to consider and intervene in a particular case.

7.79 The Minister is required to advise Parliament when he exercises his powers to intervene and substitute a decision of the RRT, but not identify the person in any way.

7.80 The grant of entry to Australia to boat people on humanitarian grounds is shown in Table 7.4. This table shows that a number of people have been considered twice for entry on humanitarian grounds as the total number of cases considered (564) exceeds the number unsuccessful at the administrative review stage (556).⁷³ Applicants for refugee status were sometimes considered twice for entry to Australia on humanitarian grounds, where:

- ? their first application was unsuccessful;
- ? they did not satisfy the Minister's criteria for entry on humanitarian grounds; and
- ? before removal, they applied a second time for refugee status, and were again unsuccessful.

Table 7.4

Boat people - humanitarian consideration

Year of arrival	Satisfies	Does not satisfy	Pending	Total
1989-90	16	189	-	205
1990-91	6	76	-	82
1991-92	-	60	-	60
1992-93	-	56	-	56
1993-94	9	66	-	75
1994-95	3	83	-	86

⁷³ Table 7.3.

1995-96	-	-	-	-
Total	34	530	-	564

Source: DIMA

Judicial review

7.81 Both the Minister and the boat person protection visa applicant may seek judicial review of a decision of the RRT. Grounds for review are specified in Part 8 of the Migration Act. The Act also specifies that certain claims are not grounds for review:

- ? breach of natural justice; and
- ? the decision was so unreasonable that no reasonable person could have made it.⁷⁴

7.82 The effect is to place the onus on the applicant for a protection visa to prove that those deciding the application have acted other than in accordance with the procedures set out in the Migration Act.

7.83 The courts are unable to determine that a boat person should receive a protection visa. They can merely find that an administrative decision was taken other than according to the law, and order that it be redetermined in a lawful manner.⁷⁵

7.84 The Minister for Immigration and Multicultural Affairs announced on 26 March 1997 that the Government would introduce legislation into the Parliament to amend the *Migration Act* to limit judicial review of immigration decisions to whether the decision maker made a decision that was within his or her jurisdiction and power to make.⁷⁶

7.85 As with all litigants in the Federal Court, appeals by either the Minister or the boat person protection visa applicant are available to the Full Federal Court and from there to the High Court.

⁷⁴ DIMA has advised that the decision of the Full Federal Court on 10 July 1997 in *Moges Eshetu* may enliven the grounds of natural justice or unreasonableness in applications for judicial review of both Immigration Review Tribunal and RRT decisions. Special leave has been sought to appeal this judgment to the High Court.

⁷⁵ Courts may declare that a boat person protection visa applicant is in their view a refugee. While such an expression of opinion may be of persuasive force, it is of no direct assistance to the boat person. The Migration Act requires that it must be the Minister or his or her delegate who is satisfied that the applicant for a protection visa satisfies the definition of 'refugee' in the Refugees Convention.

⁷⁶ Media Release MPS 32/97 by the Hon. Philip Ruddock MP, Minister for Immigration and Multicultural Affairs.

7.86 DIMA does not provide funding for protection visa applicants to seek judicial review of RRT determinations.⁷⁷ DIMA incurs litigation costs in defending actions brought by boat person protection visa applicants, and on the infrequent occasions on which it launches its own appeals.

7.87 Appendix 3 provides overall data on the experience of boat people in court. Of the 432 boat people who have been involved in completed litigation, 36 have been granted refugee status as a result of that litigation. Where reconsideration has been ordered by a court, the reconsideration has in all cases determined thus far resulted in the applicant being granted refugee status.

7.88 Table A3.2 in Appendix 3 indicates that the number of cases lodged by boat people in the Federal Court fell from 42 in 1993-94 and 53 in 1994-95 to 14 in 1995-96. It is not possible to determine from the data the degree to which this reduction is due to the reduction in the number of boat people entering the refugee determination system.

7.89 The current provisions of the Migration Act relating to judicial review have remedied two inconsistencies which had arisen in the earlier part of the audit period:

- ? simultaneous appeals to the RRT and the Federal Court for review of a primary assessment (now prevented by section 475(2)(d)); and
- ? where the Minister appeals against a decision of the RRT, the Tribunal is not a party to the court case against the Minister (now prevented by section 480).

7.90 Table 7.5 shows the litigation status of boat people, by year of arrival. The table reflects *all* litigation, including that which relates to detention issues as well as to the decision process. DIMA's information systems did not enable the ANAO to determine the percentage of unsuccessful boat person protection visa applicants who appeal to the Federal Court. However, Table 7.5 shows that the number of boat people who have engaged in litigation (543) is similar to the number rejected at the RRT (556 - see Table 7.3), suggesting that a significant proportion of boat people whose protection visa applications have been rejected by the RRT have lodged appeals to the courts. This is a key parameter in the cost model developed by the ANAO to estimate the overall cost per boat person, and which is reported in Chapter 8.⁷⁸

⁷⁷ Costs, may, however, be awarded against DIMA.

⁷⁸ A few of these cases arose as a result of DIMA appealing to the courts against a decision of the RSRC or the RRT.

Use of the judicial system in boat people cases

7.91 As part of the consultancy service provided by the Attorney-General's Legal Practice, the ANAO obtained an overview of the experience of boat people in court.

7.92 The consultant examined 62 cases involving boat people which had been finalised. These cases represented all of the cases which had been entered into any of a number of legal databases to which the consultant had access. Of these cases, 53 were commenced by boat people⁷⁹ and nine by DIMA. Of the nine case commenced by DIMA, three were in the High Court⁸⁰, three in the Federal Court, two in the Full Federal Court and one in a State Supreme Court.

7.93 Appendix 3 provides information about the outcomes of those decisions. Table A3.5 indicates that DIMA is successful in about 90 per cent of boat people cases in the Federal Court. In the Federal Court of Appeal and the High Court, DIMA's success rate is much lower, around 50 per cent. This probably reflects the fact that only cases which could go either way reach these higher courts.

7.94 The ANAO's consultant has advised that in qualitative terms it can be seen that DIMA has been both discerning and successful in its choice of matters to review or appeal. This has been especially so when account is taken of the series of Federal Court decisions adverse to DIMA that have now been identified, by the High Court, as having been decided on the wrong principles.

7.95 It should also be noted that the motivations to appeal differ significantly between the applicant for refugee status and DIMA.

Table 7.5

Boat people and litigation status (a)

Year of Arrival	Pending	Finalised	Withdrew	Within appeal period	Total
1989-90	-	94	13	-	107

⁷⁹ Thirteen of these 53 were commenced in the Refugee Review Tribunal, to which DIMA cannot appeal.

⁸⁰ *Wu Shan Liang, Tang and Re A & B.*

1990-91	2	45	10	-	57
1991-92	38	2	-	-	40
1992-93	19	2	1	-	22
1993-94	5	16	6	-	27
1994-95	41	243	-	-	284
1995-96	-	-	-	6	6
Total	105	402	30	6	543

Source: DIMA

Note: (a) Not all litigation follows an unsuccessful refugee application. For example, the people on the *Albatross* (arrived 1994-95) sought the right to lodge protection visa applications and the people on the *Quail* (arrived 1994-95) sought release from detention. The boat people aboard the *Isabella* (arrived 1991-92) had both refugee-related and other matters heard.

7.96 In the consultant's view, for the applicant, a successful application for review or appeal is a means of staying, temporarily at least, in Australia. The absence of a significant opportunity cost for the applicant in deciding to appeal also serves to prolong the period applicants remain in Australia – albeit in detention.

7.97 For DIMA, appeal or review is a means of testing the limits of application of a particular interpretation of the law, or seeking to ensure that a line of new authority for refugee determination that is inconsistent with government policy does not succeed.

Other issues

Repeat applications

7.98 Under the legislation as it stood to 1 September 1994, applicants for refugee status could lodge repeat applications. Repeat applications were, and are, allowed as a matter of principle because an event may occur between the date of decision and the removal of the applicant which creates a well-founded fear of persecution for a Convention reason.⁸¹ DIMA was obliged to consider such applications.

7.99 Some 87 boat people arriving between 1989-90 and 1994-95 lodged repeat applications. Of these, ten were granted refugee status at the repeated primary assessment and a further eight were successful at the administrative

⁸¹ People who leave their country of origin as normal citizens, but who have a well-founded fear of persecution if returned because of events subsequent to their departure, are known as refugees *sur place*.

review stage. The approval rate for repeat applicants was very similar to that for first applicants at the primary level but was lower at the administrative review level.

7.100 The ability to make a repeat application could also be a mechanism to extend the period of time spent in Australia. Sections 48A and 48B of the Migration Act, which came into effect on 1 September 1994, operate to deter repeat applications which seek merely to buy time, without closing off the possibility of a further application for a protection visa where there has been a change in circumstances in the applicant's country.⁸² Section 50 provides that if a non-citizen has applied for a protection visa, and that an application has been finally determined, then in considering any further application for a protection visa, the Minister (or his or her delegate) is not required to reconsider any information considered in the earlier application, and may assume as correct any decision taken because of that information.

7.101 The effect of the legislation is to enable DIMA to deal expeditiously with repeat applications for protection visas where there is no significant change in the circumstances of the applicant.

Protection visa queue management

7.102 The ANAO has been advised that there have been occasions when officers become aware that a protection visa applicant might succeed on humanitarian grounds even though the case for recognition as a refugee is not strong. There may be limited savings in developing a system whereby humanitarian entry can be considered in parallel with the refugee determination system, rather than at the end. Such a system would require a change in legislation.

Administrative decision processes

7.103 The ANAO notes that there are many decision processes relating to the refugee determination system, as outlined in the preceding sections. Table 7.6 sets out the average number of administrative processes relating to refugee determination passed through by boat people, by year of arrival.

7.104 Table 7.6 shows that DIMA has reduced the number of refugee-related administrative processes through which boat people pass from an average of thirty for every ten 1989-90 arrivals to an average of three for every ten 1995-96 arrivals. This reduction has occurred because fewer boat people now enter the refugee determination system. As indicated in Chapter 6, this

⁸² Ministerial intervention to allow a further application for a protection visa is required.

reduction in the number of boat people entering the refugee determination system has meant savings estimated by the ANAO at \$62 million over a number of years. Also as explained in Chapter 6, the reduction in the number of people entering the refugee determination system has been due to a number of factors, not all of which have been within DIMA's control.

Table 7.6

Boat people - refugee decision processes - administrative

Year of arrival	1989-90	1990-91	1991-92	1992-93	1993-94	1994-95	1995-96	1989-96
Average number of administrative processes per boat person	3.0	2.3	3.3	1.1	2.0	0.4	0.3	1.0

Source: DIMA.

Time taken for administrative and judicial decisions

7.105 The time taken for each stage of the refugee decision-making process is shown in Table 7.7. The table shows the mean time (in calendar days) to complete each step of the refugee determination process, for each year of arrival. The figures in the 'Cumulative' columns indicate the time which would be taken *if* an application proceeded through all of the preceding stages. Such an assumption would hold quite well for the upper rows of the table, where the vast majority of processing follows the same linear path. The assumption becomes less valid in the middle and lower rows of the table, as the number of possible paths through the refugee determination system increases.

7.106 An alternative interpretation of Table 7.7 is to compare the 'days in detention' figure at the bottom of the Table with the most similar row. Thus for 1989-90, the mean number of days in detention is 1201. The closest cumulative total in the same column is 1301, corresponding to the Federal Court. While there may be other interpretations, the implication of this

interpretation is that the average boat arrival in 1989-90 proceeded as far as the Federal Court with their application for refugee status.

7.107 Two observations can be made from Table 7.7. The first is that it has often taken the refugee determination system, including court processes, many years to reach a final decision.

7.108 The second observation is that the times for Departmental processes have been falling. The primary decision process has fallen substantially from a mean of 477 days for 1989-90 arrivals. The administrative review step has also fallen substantially from 304 days for 1989-90 arrivals. The major reduction in time at the administrative review stage clearly coincides with the establishment of the RRT.

Breach of ICCPR

7.109 The United Nations Human Rights Committee (UNHRC) adopted the view in April 1997 that Australia was in breach of its obligations under the International Covenant on Civil and Political Rights (ICCPR) in respect of the detention of a boat person. The UNHRC is not a court but a committee of experts which expresses views to which governments are asked to respond. The UNHRC is established under Part IV of the ICCPR and, among other things, receives and considers complaints lodged against countries which have signed the ICCPR's First Optional Protocol, such as Australia.

7.110 The boat person who complained to the ICCPR arrived in Australia on 28 November 1989 and lodged the complaint more than three years later, on 20 June 1993. The complainant was released from custody on 21 January 1994 when his wife was granted refugee status. The UNHRC concluded that Australia had detained the boat person arbitrarily, and had denied him access to judicial review of the legality of his detention.

7.111 The UNHRC considered the detention of the boat person, pending determination of his refugee status, to be legitimate. It concluded, however, that the period of time during which the boat person was detained whilst his status was being determined to have been unjustifiably long, so that the detention was considered by the UNHRC to be arbitrary. An Interdepartmental Committee, which includes DIMA, has been established to consider the implications of the UNHRC findings.⁸³

⁸³ The Minister for Immigration and Multicultural Affairs and the Attorney-General announced jointly the Australian response to the views of the UNHRC on 17 December 1997.

7.112 The ANAO notes that the mean time in detention for the seventeen 1992-93 arrivals still in detention in June 1996 is shown in Table 7.7 as 1366 days, thus exceeding the time the complainant was in detention at the time the complaint was lodged. Although the mean time in detention, an indicator of the mean time for a decision, is falling, there remained at that time perhaps 200 boat people where the finalisation of the decision on refugee status or protection visas was taking several years. As at 31 May 1997, the number of boat people in detention for more than 2½ years had been reduced to 102. As at September 1997, the oldest unresolved cases were two boat people who arrived in 1991. The principal cause of delay in these cases is the court system.⁸⁴ The ANAO believes there could be benefits in DIMA exploring further with the judiciary, the Attorney-General's Department and the Department of Finance whether it is possible to reduce the time taken between lodgment and decision in cases where there are substantial external costs to the Commonwealth, such as detention costs for boat people.

7.113 There were up until July 1997 some boat people in the refugee determination system whose period in detention exceeded that of the complainant. Moreover, the moves described above to limit judicial review will reduce the number of cases which enter the court system, but will not reduce the likelihood of extended periods in detention for those who seek judicial review.

7.114 There were 50 boat people cases active as at 30 June 1996.⁸⁵ This number had fallen to 17 by February 1997.

⁸⁴ This is not intended as a criticism of the courts. It merely reflects a relationship between the resourcing and procedures of the courts on the one hand, and its case load on the other.

⁸⁵ DIMA

Table 7.7 Mean time to complete refugee determination and related processes

Calendar days	1989-90		1990-91		1991-92		1992-93		1993-94		1994-95		1995-96		Overall	
	Time	Cum *	Time	Cum *	Time	Cum *	Time	Cum*	Time	Cum*	Time	Cum*	Time	Cum*	Time	Cum *
Lodge application	166	166	179	179	53	53	14	14	17	17	46	46	20	20	92	92
Primary application	477	643	184	363	16	69	25	39	46	63	40	86	18	38	182	274
Apply for administrative review	36	679	34	397	11	80	13	52	8	71	8	94	n.a.	38	22	296
Review	304	983	249	646	312	392	214	266	102	173	59	153	n.a.	38	213	509
Lodge court appeal (a)	28	1011	28	674	28	420	28	294	28	201	28	181	28	66	28	537
Federal Court (b)	290	1301	290	964	290	710	290	584	290	491	290	471	290	356	290	827
Full Federal Court (b)	178	1479	178	1142	178	888	178	762	178	669	178	649	178	534	178	1005
High Court (b)	178	1657	178	1320	178	1066	178	940	178	847	178	827	178	712	178	1183
Reconsideration	307	1964	n.a.	1320	n.a.	1066	n.a.	940	n.a.	847	n.a.	827	n.a.	712	307	1490
Repeat application	121	2085	27	1347	63	1129	67	1007	266	1113	243	1070	n.a.	712	108	1598
Repeat review	105	2190	151	1498	197	1326	131	1138	113	1226	118	1188	n.a.	712	146	1744
Humanitarian	20	2210	27	1525	32	1358	13	1151	12	1238	9	1197	n.a.	712	22	1766
Days in detention(c)																
- those released		1201		701		446		120		224		255		16		369
- still in detention		n.a.		n.a.		n.a.		1366		758		546		104		530

Source: Department of Immigration and Multicultural Affairs

Legend: * Cumulative n.a. not applicable as there are no boat people in the specified category

Notes: (a) Data for the delay in appeals to the court is based on the time permitted in the Migration Act. (b) Mean time to complete court processes has been estimated using all available data and applied across all time periods. (c) Days in detention' refers to all boat people, not just those who entered the refugee determination process.

Conclusion

7.115 In relation to the refugee determination system as it applies to boat people, the ANAO's major conclusions are:

- ? boat people protection visa applicants have been less likely to be found to be refugees at the primary decision than at administrative review of that decision. This feature does not appear to be common in Commonwealth administrative decision-making systems. The Minister for Immigration and Multicultural Affairs has taken action to encourage greater consistency on refugee determination between the primary level decision makers within DIMA and the RRT; and
- ? boat people have been held in detention for periods of several years as a result of the refugee determination system. The time taken for both the primary decision and administrative review stages of the system has been reduced over the period since 1989, but cases which enter the judicial system can still take several years. The Minister has announced that the Government intends to introduce legislation into the Parliament to amend the Migration Act to reduce the number of appeals to the courts by protection visa applicants, which would include boat people.

8. Costs

In this chapter the ANAO examines the financial arrangements under which boat people operations are funded, and costs associated with the management of boat people.

Introduction

8.1 One of the objectives of the audit was to examine and report on the economy of the management of boat people.

8.2 A first step in forming a view on the economy of any function is to identify its full cost. The full cost of the management of boat people has not been calculated by DIMA and is difficult to estimate for the following reasons:

- ? expenditure on the management of boat people involves Commonwealth, State and local governments;
- ? Commonwealth expenditure is spread across many agencies;
- ? within DIMA, where most of the Commonwealth expenditure is incurred, expenditure on the management of boat people is distributed across programs and functions and is generally on a cash basis;
- ? in many cases within Commonwealth agencies, expenditure on boat people within a program or function is not separately identified. Examples include:
 - Coastwatch; and
 - Department of Defence patrol boats providing a response for the Coastwatch marine surveillance operations;
- ? in some cases, for example, costs associated with litigation in relation to boat people, costs are identified but have not been reported separately.

8.3 Further difficulties in forming a view of the economy of the management of boat people include:

- ? the highly specialised nature of many of the operations within the function makes it difficult to establish external benchmarks for them;
- ? the highly unpredictable nature of the requirement for operations and activities; and
- ? allocation of costs of a shared function to the management of boat people by proportionate use of that function may be inappropriate. Some of the capability of the function (and hence purchase and operating costs) may have been justified largely on the basis of the need to manage boat people.

8.4 Notwithstanding these difficulties, the ANAO developed estimates of the cost to the Commonwealth of the management of boat people. Expenditure on the management of boat people by all Commonwealth agencies was conservatively estimated by the ANAO to be \$40 - 50m in 1995-96, of which at least \$33m was incurred by DIMA. In view of the relatively small number of boat people who have arrived in Australia - the average number of arrivals in northwest Australia (including Christmas Island) was 325 people per year from 1989 to 1997 - it can be concluded that the management of boat people is a resource intensive element of public administration where economy is constrained by public policy and legislative parameters.

8.5 More rigorous attempts by DIMA to identify the full costs of managing boat people on an annual basis, and the further development of departmental models of the cost per boat person, including adoption of accrual accounting concepts, would provide better information to assist in minimising costs.

Risk of variation

8.6 The unpredictable nature of the requirement for operations and activities relating to the management of boat people has implications for the funding of the function. These implications are explored in this section.

8.7 Agencies with responsibilities for the management of boat people would ordinarily be exposed to significant risk due to the variability in the numbers of boats and boat people arriving. Conventional appropriation arrangements could lead to agencies being significantly under- or over- resourced depending on whether the actual level of activity was more or less than budgeted.

8.8 The principal mechanism by which DIMA controls this risk is by being funded for activities relating to boat people primarily through Boat Resource Agreements developed with the Department of Finance (DoF). The previous agreement expired on 30 June 1996 and an interim agreement was negotiated for 1996-97 and again for 1997-98. DIMA and DoF will conclude a longer-term agreement when a major new contract for the provision of DIMA's immigration detention function has been let. The previous agreement and the interim agreements are based largely on set amounts of funding per unit of activity. Through this agreement, departmental operations relating to boat people are funded for set amounts by the numbers of:

- ? boat people arriving;
- ? detainee days in detention; and
- ? removals from Australia.

8.9 DIMA also has let substantial contracts for the provision of services related to boat people. Overwhelmingly in terms of dollar value, these contracts and obligations have also been expressed in terms of costs per unit of activity. There is thus a substantial match in variability between the funding sources for and the cost obligations of DIMA in relation to the management of boat people. These funding and cost structures are appropriate to highly uncertain levels of activity and are thus a means of controlling financial risk to DIMA. The risk of variability is largely borne by the Commonwealth as a whole.

8.10 Funding by unit of activity may mean that the agency in the best position to identify operational savings, DIMA, does not benefit directly from their implementation. DIMA has advised that its expenditure on boat people exceeds its funding under the Boat Resource Agreements. DIMA is thus obliged to supplement its funding under the agreement with funding from its Running Costs appropriation. In this circumstance, DIMA benefits from the implementation of operational savings in its management of boat people in terms of a reduced call by the function on its Running Costs appropriation.

8.11 Another way of aligning the ability to identify savings with benefit from their implementation is to provide a mixture of block and unit of activity funding. The interim Boat Resource Agreement negotiated between DIMA and DoF for 1996-97 had this characteristic in relation to detainee days in detention. The agreement provided funds for guarding of \$4.5 million plus \$30 per detainee day.

8.12 DIMA has reduced budget costs associated with the Boat Resource Agreement very substantially in 1996-97 as compared to 1995-96, reflecting both reductions in the expected number of boat people and time taken to process those that arrive.

8.13 The risk of variation borne by Coastwatch is not financial as this service is funded on a block funding basis. The risk is instead one of reduced service to other Coastwatch clients, because tactical flights for sighting and identification of suspect illegal entrant vessels (SIEVs) may not cover the areas of most surveillance interest to those other clients. Similarly, the greater the number of ADF patrol boat days devoted to SIEVs, the fewer are available for other clients. The roles of Coastwatch and the ADF were described in Chapters 2 and 3.

Costs

8.14 The ANAO adopted two approaches to its examination of costs. The first was to identify as fully as possible actual expenditure on boat people in one year (1995-96). The second approach was to estimate the expected cost per person of the management of boat people.

DIMA expenditure on boat people in one year

8.15 On 25 March 1997, in response to a Question on Notice in the House of Representatives, the Minister for Immigration and Multicultural Affairs advised the following identifiable costs in relation to unauthorised boat arrivals:

- ? 1992-93 - Reception, detention and repatriation, excluding property operating costs - \$8.608 million;
- ? 1993-94 - Reception, detention and repatriation, excluding property operating costs - \$6.384 million;
- ? 1994-95 - Reception, detention and repatriation, including property operating costs - \$15.485 million;
- ? 1995-96 - Reception, detention and repatriation, including property operating costs - \$29.776 million. [In the 1996-97 Immigration and Multicultural Affairs Portfolio Budget Statement the Boats Sub-Program reported expenditure on boat people in 1995-96 of \$30.786 million. This figure includes \$1.011 million in non-SES DIMA staff salaries for boat people which was not included in the Minister's response]; and
- ? 1996-97 (to 31 December 1996) - Reception, detention and repatriation, including property operating costs - \$6.910 million.⁸⁶

8.16 The Minister's statement also indicated that costs for unauthorised boat arrivals were not separated from other Departmental costs until 1992-93. The ANAO notes that cost data on a basis which appears to be similar to that provided for 1992-93 in the Minister's answer was included at paragraph 2.92 of the report by the Joint Standing Committee on Migration, *Asylum, Border Control and Detention*, in respect of the years 1989-90 to 1992-93. Costs identified in that report included:

- ? 1989-90 (from November 1989 only) - \$0.61 million;
- ? 1990-91 - \$5.55 million;
- ? 1991-92 - \$7.44 million (including the purchase of the Port Hedland Immigration Reception and Processing Centre; and

⁸⁶ The Immigration and Multicultural Affairs Portfolio Budget Statements for 1997-98 estimate the equivalent costs for the full year to 30 June 1997 as \$25.667m (p 118).

? 1992-93 - \$8 million.

8.17 The cost data in the Committee's report were based on submissions by DIMA.

8.18 In the view of the ANAO, DIMA could improve Parliament's understanding of the management of boat people by devoting greater attention to identifying the full costs of the function. The Minister's answer to the Question on Notice indicates that property operating costs have been included in estimates of the cost of managing boat people since 1994-95. The reported costs do not include the significant refugee determination costs where boat people have applied for refugee status or lodged protection visa applications. (These costs are discussed later in the chapter.)

The Boats Sub-program

8.19 DIMA addressed the identification of the full costs of boat people by creating, on 1 July 1996, a sub-program within its budgeting and financial reporting structure to separately identify boat arrival costs. The Immigration and Multicultural Affairs Portfolio Budget Statements and Portfolio Additional Estimates Statements now include financial and other information specifically about boat people. In addition, DIMA has established reporting systems over a period of time to provide information on boat arrivals operations and expenditure.

8.20 However, potentially significant costs incurred by DIMA in the management of boat people are not included in these reports. Such costs include the costs of DIMA staff supporting the management of boat people in other than a full-time capacity. In the ANAO's view it is important to incorporate the costs of such staff as their costs have been incorporated into the detail of the Boat Resource Agreement. The distribution of responsibility for the management of boat people within DIMA means that it is likely that the majority of DIMA effort on the management of boat people is undertaken by staff who do not work on the management of boat people on a full-time basis.

8.21 Also not included in the Boats Sub-Program are some costs associated with the refugee determination system, including litigation costs. The expected cost of a boat person entering the refugee determination system is \$42 000, as discussed later in this chapter. Boat people cases have in the recent past represented up to ten per cent of DIMA's litigation case load. Moreover, boat people cases have been more likely to be appealed to the Full Federal Court and the High Court than other cases involving DIMA. Boat people cases may therefore have represented in excess of ten per cent of DIMA's litigation costs. The ANAO acknowledges a difficulty for DIMA in reporting litigation costs in that it sometimes takes years, for reasons beyond DIMA's control, to determine

its costs following the resolution of a case. Such instances should, however, be able to be accommodated within an accrual accounting framework. The issue is one of having useful management information, of which costs are one part.

8.22 As mentioned in Chapter 7, the Minister for Immigration and Multicultural Affairs has announced that the Government intends to amend the Migration Act to limit the incidence of judicial review of refugee and immigration decisions, which includes refugee decisions concerning boat people. In the view of the ANAO, DIMA should report on litigation costs of boat people and perhaps on other categories of litigants so that the intended reduction in costs can be identified and measured.

Capital expenditure relating to boat people

8.23 In principle, capital expenditure on boat people includes an allocation of the ADF patrol boats and a share of the establishment cost of the long-term lease of marine surveillance aircraft for Coastwatch. The audit has confined itself to capital expenditure within the Immigration and Multicultural Affairs portfolio. Such expenditure is associated primarily with the IRPC at Port Hedland and a temporary IRPC which operated from April to December 1995 at Curtin RAAF Base near Derby, Western Australia.

Table 8.1

Past and planned capital expenditure on Port Hedland Immigration Reception and Processing Centre

Year	Item	\$million
1991-92	Purchase	1.000
	Recommissioning	0.300
1995-96	Refurbishment to ensure conformity with applicable	2.491
1996-97	building codes and occupational health and safety	1.231
1997-98	standards and to increase the ability of IRPC	5.613
1998-99	structures to withstand cyclone damage.	4.322
1999-2000		0.103
Total		15.060

Source: 1991-92 data - Department of Immigration and Multicultural Affairs. Other data - Immigration and Multicultural Affairs Portfolio Budget Statements 1996-97, Budget Related Paper No. 1.9, pp 133-4.

8.24 Centres for the detention of unauthorised boat arrivals are specialised and remotely located. This has resulted in past and planned expenditure on the Port Hedland IRPC as shown in Table 8.1. The planned expenditure of

\$5.613m in 1997-98 was brought forward in the Immigration and Multicultural Affairs Additional Estimates Statements in 1996-97 to provide a more timely response to DIMA's duty of care obligations, to achieve savings through the use of economies of scale, and to limit the government's vulnerability to price increases as a result of the unpredictable nature of the labour market in Port Hedland.

8.25 DIMA's capital expenditure at Port Hedland contains items other than those relating to the IRPC identified in Table 8.1. \$500 000 was spent in 1995-96 on the purchase of accommodation for DIMA staff at Port Hedland.

8.26 The cost of setting up, operating and closing down the temporary IRPC at the Curtin RAAF Base near Derby was \$4.904m.⁸⁷ The centre operated from 20 April to 7 December 1995 and provided 16 545 detainee days. The average cost at this centre was thus almost \$300 per detainee day. This amount was well over the cost per detainee day at Port Hedland, which is approximately \$120. Alternatives to this expenditure which provided detention of boat people consistent with government policy were limited.

8.27 One way to avoid expenditure on temporary IRPCs is to establish a permanent IRPC with capacity above expected requirements so that there is some capacity to cope with unexpected surges of boat people.⁸⁸ The Port Hedland IRPC has a capacity of 700 detainees, but the 1996-97 Budget was framed on an expected requirement of approximately 250 detainees.

8.28 Finally, another method of increasing the effective capacity of Port Hedland IRPC is to reduce the time spent in the Centre by unauthorised boat arrivals who do not lodge protection visa applications. The average detention days for boat people in detention was reduced from 606 in 1994-95 to 67 in 1995-96. This represents a nine-fold increase in processing capacity at the IRPC, provided the decrease in detention time can be maintained in the event of increased numbers of boat arrivals.

Estimate of DIMA costs in managing boat people in 1995-96

8.29 The ANAO's estimate of DIMA's costs in managing boat people in 1995-96 are shown in Table 8.2. The total expenditure is at least \$33m. This amount does not include an estimate of the cost of DIMA staff working in support of the management of boat people on other than a full-time basis. The ANAO had no reliable basis for estimating this cost

⁸⁷ DIMA Annual Report 1995-96, p43.

⁸⁸ Or other unlawful non-citizens.

Table 8.2**ANAO estimate of DIMA costs in managing boat people - 1995-96**

Cost item	\$million
DIMA - Sub-Program 8.3 Boats	
This Sub-Program covers DIMA's costs relating to reception, immigration processing, detention and removal. 'Immigration processing' includes the costs of activities reported on in the Chapter 'Entry to the refugee determination system'. Detention costs include payments to the Australian Protective Service and capital works associated with decommissioning the Immigration Reception and Processing Centre at Curtin RAAF base near Derby, and with upgrading the Port Hedland IRPC. Also included are costs of refugee determination which are specific to boat people.	30.786
Onshore refugee determination	
12 primary cases - DIMA determination costs @ \$2556	0.031
Application assistance	0.290
Litigation	
Estimate based on DIMA data on the cost of boat cases.	2.036
Estimated total DIMA expenditure on boat people - 1995-96 (a)	33.143

Source: Appendix 5 of this report.

Note: (a) As discussed in the text, the total excludes an estimate of the cost of DIMA staff support for the management of boat people, other than staff working full-time on the function. Onshore refugee determination costs for boat people in 1995-96 were unusually low. Other costs, for example, those relating to the temporary IRPC at the Curtin RAAF base near Derby, were high.

8.30 It should also be noted that some of the cost components in 1995-96 differed somewhat from those in the past and the likely future, such as:

- ? expenditure in relation to the temporary IRPC at Curtin RAAF Base caused higher than normal expenditure in relation to detention costs; and
- ? refugee determination costs in 1995-96 were lower than they are likely to be in the future.

Recommendation No.12

8.31 In view of the relatively significant proportion of DIMA funds involved and because of the sensitivity of the relevant policies, DIMA should review the adequacy and organisation of its resources allocated to the management of boat people to ensure that improvements in efficiency and effectiveness continue, and to identify areas which require change.

DIMA response

8.32 Agreed. DIMA has constantly monitored the management arrangements for boat people. On 3 November 1997, there was a departmental restructure which was accompanied by changes to the program structure thereby further improving the overall management of boat people. In order to reflect government priorities, there is a closer integration in managing boat people as part of the broader control of unauthorised arrivals.

Commonwealth expenditure on boat people

8.33 As discussed earlier, DIMA is only one of several agencies involved in the management of boat people. The ANAO estimates the Commonwealth's expenditure on boat people in 1995-96 at more than \$40 million (see below). The breakdown of this estimate by portfolio is shown in Table 8.3. In preparing its estimates the ANAO has included direct costs incurred by DIMA, and indirect or overhead costs incurred by DIMA, the Australian Customs Service and the Australian Defence Force, both of which provide services at no cost to DIMA - and the Federal and High Courts.

Table 8.3

Estimated Commonwealth expenditure on boat people in 1995-96

Agency	\$million
Immigration and Multicultural Affairs	33.1
Refugee Review Tribunal	0.3
Australian Customs Service	3.1
Australian Defence Force	6.5
Judicial costs (Federal and High Court)	1.0
Total	44.0

Source: Appendix 5 of this report.

8.34 The overwhelming feature that emerges from a consideration of the management of boat people is that the numbers involved are small, a total of approximately 2500 people over the period 1989 to 1996, while the costs, which the ANAO has identified more comprehensively than previously, are substantial. Boat arrivals represent 0.01 per cent of all arrivals in Australia, but total Commonwealth expenditure on them represented close to 10 per cent of DIMA's budget in 1995-96.⁸⁹ The corresponding figure in 1996-97 was close to

⁸⁹ DIMA's budget for 1996-97 was \$466m (1996-97 Budget Related Paper 1.9, p10).

8 per cent of DIMA's budget, while DIMA's own expenditure on the management of boat people was approximately 6 per cent of its budget. The management of boat people is thus a very resource intensive element of public administration.

8.35 These costs reflect the application of legislation and policy developed by successive governments to manage boat arrivals in the following areas:

- ? border and immigration control;
- ? mandatory detention of unlawful non-citizens, including boat people;
- ? detention standards which in most cases have been consistent with Australia's obligations under the International Covenant of Civil and Political Rights;⁹⁰
- ? a strong preference for the detention of boat people in north-west Australia;
- ? access to a refugee determination system which is consistent with Australia's obligations under the Refugees Convention and as specified in legislation; and
- ? prompt removal from Australia if the boat person does not apply for a protection visa or an application has been finally determined to be unsuccessful.

8.36 The economy of this expenditure is thus constrained by public policy and legislative parameters.

8.37 The ANAO is of the view that DIMA, as the agency with prime carriage for the management of boat people, could assist Parliamentary consideration of boat people issues by including in its performance reporting, information on services received by DIMA at no cost. This would provide as much information as possible on the full cost to government of the management of boat people.

8.38 Matters relating to reporting are taken up further in Chapter 9.

8.39 There were 589 unauthorised boat arrivals in 1995-96. Commonwealth expenditure on boat people in that year was at least \$40million (Table 8.3). The average cost per boat arrival, although easily calculated, is not helpful in managing the costs of boat people, as much of this expenditure relates to unauthorised boat arrivals from earlier years.

8.40 More useful measures of the costs of managing boat people can be developed based on accrual accounting concepts. One such measure is the

⁹⁰As mentioned in Chapter 7, the United Nations Human Rights Committee found recently that the length of detention of one boat person was in breach of Australia's obligations under the International Covenant of Civil and Political Rights.

expected cost of a new boat arrival. The difference between the cost per person and the cost over one year is that costs associated with an individual may extend over more than one year. Where characteristics of the processing system change, it becomes easier to estimate the financial effects of the change through a cost model which calculates the expected cost per new arrival.

Expected cost per boat person

8.41 The ANAO has developed a cost model in order to provide an estimate of costs per boat person expressed as a contingent liability and to demonstrate the utility of models of this kind. The model seeks to capture only the main features of the boat people processing system.

8.42 As part of the model the ANAO sought to determine the costs of the refugee determination system as it currently operates for boat people. DIMA has undertaken some cost analysis of the refugee determination system. This analysis identifies the cost of the primary decision and the merits review decision by the Refugee Review Tribunal (RRT). The ANAO believes that more comprehensive analyses, incorporating costs such as:

- ? detention costs while decisions are being made; and
- ? litigation costs incurred by DIMA and the judicial system should the case go to court

would improve advice to DIMA management on the costs of the refugee determination system. The cost model developed by the ANAO incorporates these costs in addition to the features described above.

8.43 The main features of the model are:

- ? the holistic approach, in particular to the refugee determination system;
- ? its probabilistic character, e.g., it allows for different decisions on whether a boat person does or does not lodge an application for a protection visa; and
- ? the emphasis placed on links between components of the system. This is especially important in systems with many processes and exit points, such as the refugee determination system.

8.44 The model enumerates the most common 'paths' through the refugee determination system, where a 'path' refers to the processes and decisions that occur between the entry of a boat person to the refugee determination system and exit from it in the sense that the protection visa application is finally determined. 'Processes' are elements of the refugee determination system such as primary determination, administrative review, consideration for humanitarian entry, and consideration of an appeal by the Federal Court.

Decisions are made both within the processes, ie, whether or not to grant a protection visa, or in the case of a court, whether or not the decision-making process which is the subject of the appeal was lawful, and by the boat people, who decide whether or not to appeal following the decisions to reject an application for a protection visa where the decisions are appealable.

8.45 Using historical data, the likelihood of each path through the refugee determination system is calculated, together with its cost. The probabilities and costs of each path are multiplied together, and the resulting costs (the expected cost of a single path) are totalled over all possible paths in the model to produce an estimate of the cost per person of the refugee determination system.

Inconsistent information systems

8.46 One difficulty in developing the model related to the structure of DIMA's management information systems. DIMA maintains data on boat people in a number of special purpose data bases. These involve:

- ? boat people data (by individual boat person);
- ? protection visa applications (by application); and
- ? litigation in which DIMA is involved (by case).

8.47 The data bases were developed to suit specific operational requirements. Inadequate integration between these systems does not permit efficient monitoring of some significant aspects of the Department's role. An example, mentioned earlier in this chapter, of an important data item which is not easily obtainable from these systems is the proportion of boat people protection visa applicants who are rejected at the RRT and who appeal to the Federal Court. This item is important both as a cost driver and to monitor the effectiveness of the Government's moves to reduce the incidence of judicial review of immigration decisions.

Recommendation No.13

8.48 DIMA should develop its databases to facilitate extraction of information which is important to the management of boat people.

DIMA response

8.49 Agreed. A review of the Central Office Detention Register was undertaken in 1997 and an upgrade of the Register is expected to be

completed soon. The new immigration detention service provider intends to introduce a new case management computer system at Immigration Detention Centres. This system will have the capacity to record and report on a wide range of information concerning the status and welfare of detainees at the centre. It is anticipated that the introduction of this system will contribute significantly to improved reporting arrangements and provide the department with the capacity to obtain information on a wide range of issues pertaining to the management of detainees.

8.50 The expected cost per boat person that emerged from the model falls naturally into two components:

- ? the expected cost for boat people who arrive and depart within a few weeks without entering the refugee determination system - this situation now applies to the clear majority of boat people; and
- ? the expected cost of determining whether a boat person is a refugee, should he or she enter the refugee determination system.

8.51 The expected cost per unauthorised boat arrival arriving in 1996-97 and not entering the refugee determination system is estimated by the ANAO at more than \$11 000 per person. The details are shown in Tables 8.4. and 8.5.

Table 8.4

Estimated cost of unauthorised boat arrival not entering refugee determination system

Cost item per person	\$
Reception	2 336
Detention, per day (a)	\$121.71
Multiply by average number of days in detention for person not entering refugee determination system	17
Removal	6 657
Total	11 062

Source: 1996-97 Interim Boat Resource Agreement between DIMA and the Department of Finance, and Table 8.5.

Note: (a) see Table 8.5.

Table 8.5**Estimated IRPC detention cost per person per day**

Cost item	\$
Base guarding cost \$4.5m over 88 848 detainee days (a)	50.65
Additional cost, per detainee day	30.00
Food and services	25.53
Repairs and maintenance \$1m (b) over 88 848 detention days	11.26
Depreciation expense \$3.8m (c) over, say, 10 years, per detainee day	4.27
Detention cost per day *	121.71

Notes: (a) This figure is used in the Interim Boat Resource Agreement as a basis for 1996-97 Budget estimates. It corresponds to an average of approximately 243 people in detention over the course of the year. (b) Estimate based on ANAO analysis of DIMA past and expected costs from 1992-93 to 2000-01. (c) Capital expenditure to 1995-96, see Table 8.1. When the refurbishment program is completed at Port Hedland IRPC, depreciation expense will rise to \$16.88 per detainee day.

Costs of the refugee determination system

8.52 The ANAO's estimate of the expected cost per boat person of each process in the refugee determination system is shown in Table 8.6. The second column of figures shows the cumulative or total cost of the refugee determination process up to each stage. Thus if the refugee determination process for one applicant stops at the RRT, the model's estimated cost of the refugee determination system for that person is \$29 000. The lowest expected cost of the refugee determination system occurs for a process which concludes at the primary stage, at a cost of \$9000. The highest expected cost occurs for a person whose case goes through all the processes in the refugee determination system up to and including the High Court. For such a case, the expected cost is \$270 000 per person. The overall average cost (\$40 000), is much closer to the lowest cost (\$9000) than to the highest cost (\$270 000), reflecting the fact that relatively few boat person protection visa applications reach the more expensive stages of the refugee determination system.

8.53 Although these costs seem high, they represent a substantial reduction in processing costs over earlier years. The processing times were then much longer, and the detention costs would have been correspondingly larger. The overall average cost for the 1989 arrivals would have been in the vicinity of, in

1996 dollars, \$150 000 per person. DIMA has thus been successful in reducing substantially the expected processing cost over a number of years.

Table 8.6

Expected cost of each stage of the refugee determination system for boat people

Process	Expected cost per person (\$) (a)	Cumulative expected cost per person (\$)
Primary decision	9 000	9000
Administrative review	20 000	29 000
Humanitarian consideration	1 000	30 000
Federal Court	70 000	100 000
Full Federal Court	90 000	190 000
High Court	80 000	270 000
Overall average cost	40 000	

Note: (a) These costs include decision costs, litigation costs and judicial costs borne outside the Immigration and Multicultural Affairs Portfolio, together with detention costs while decisions are being made and during appeal periods.

Overall cost per boat person

8.54 The overall cost of boat people can be estimated using the information in the two previous sections. The ANAO has assumed, based on experience for 1995-96 arrivals, that 90 per cent of boat people do not apply for a protection visa and incur DIMA costs of approximately \$11 000 per person as set out in Table 8.4. For the 10 per cent that enter the refugee determination system,⁹¹ the average costs will be:

- ? reception costs of approximately \$2000 as shown in Table 8.4;
- ? refugee determination costs of \$38 000 or approximately \$40 000 as shown in Table 8.6; and
- ? detention and removal costs if the application for a protection visa is unsuccessful, (\$5000 expected cost).

⁹¹ These percentages are based on 1995-96 experience where 61 of 589 1995-96 arrivals entered the refugee determination system.

8.55 When these figures are added, the average cost of a boat person who enters the refugee determination system, allowing for reception and the possibility of removal, is estimated by the ANAO to be of the order of \$50 000.

8.56 If the 90 per cent of boat people not entering the refugee determination system incur an average cost of \$11 000, and the ten per cent of boat people who enter the refugee determination system incur an average cost of \$50 000, then the overall average cost is \$15 000 per boat person.

8.57 The maximum cost possible for a boat person under the model would be a person who proceeds through each stage of the refugee determination system and is then removed. The cost of each such person would be \$11 000 plus the sum of the components in Table 8.6, \$270 000, giving an overall cost of some \$280 000. According to the model such a person would have spent approximately 800 days, or over two years, in detention before being removed from Australia.

8.58 As mentioned earlier in this chapter, these costs reflect the application of an extensive range of Government policies and legislation.

8.59 The financial effect of changes to the processing of boat people can be assessed using this model. For example, the average cost per arrival is very sensitive to the proportion of boat people entering the refugee determination system. If all boat people enter the refugee determination system, as occurred in many years before 1994-95, the average cost per boat person would be \$50 000.⁹²

Recommendation No.14

8.60 To improve its planning of policy and delivery options, DIMA should:

- ? estimate, as far as is practicable, the full costs of its expenditure on the management of boat people on both cash and accrual bases; and
- ? for predictive purposes, develop cost models based on accrual accounting concepts.

⁹² The actual average cost of boat arrivals in earlier years would have been substantially larger as they spent considerably longer periods in detention awaiting decisions than has been assumed here based on current decision times.

DIMA response

8.61 Agreed with qualifications. The Department is moving to substantially improve cost attribution mechanisms for boat related expenditure. Further developments will need to be addressed in the context of the broader Commonwealth move to accrual accounting practices and the opportunities available to DIMA to further develop its resource management systems.

8.62 The ANAO notes that DIMA, together with the Department of Finance, recently supported a Senior Executive Fellowship Award for the study of international experience in the fiscal oversight of uninvited refugee arrivals.

Conclusion

8.63 In relation to the cost of the management of boat people, the ANAO concludes:

- ? expenditure on the management of boat people by all Commonwealth agencies was conservatively estimated by the ANAO to be \$40 - 50m in 1995-96, of which at least \$33m was incurred by DIMA. The average number of unauthorised boat arrivals in north-west Australia, including Christmas Island, from 1989 to 1997 was approximately 325 people per year. Thus, the management of boat people is a resource intensive element of public administration whose economy is constrained by public policy and legislative parameters;
- ? DIMA has taken a valuable step towards identifying the full cost of the management of boat people by creating a Boats Sub-program within its budgeting and financial reporting structures. DIMA could take this process further;
- ? DIMA should attempt to report the cost of services received at no charge from Coastwatch, the Department of Defence, and other agencies involved in the management of boat people;
- ? cost models which identify the full cost per person can provide valuable insight into issues associated with the management of boat people. There is a risk that the full benefits of this approach will not be realised if DIMA does not extend the analyses it has undertaken to date; and
- ? there are opportunities to improve management information on boat people through greater integration between relevant Departmental databases.

According to ANAO estimates:

- ? DIMA's average cost of receiving, detaining and removing promptly from Australia a boat person who does not enter Australia's refugee determination system is \$11 000 per person;
- ? DIMA has made substantial improvements to the efficiency of the refugee determination system. This can be seen, for instance, in how for 1989 arrivals, the average cost to government of a refugee determination was \$150 000. In comparison, for 1995-96 arrivals the average cost to government of a boat person who enters the refugee determination system is \$40 000 per person, with the range being from \$9 000 to \$270 000; and
- ? the overall average cost per boat person arrival is \$15 000, reflecting the fact that only about ten per cent of boat people enter the refugee determination system currently.

9. Conclusion: boat people and risk management

In this chapter the ANAO draws together the principal issues within the risk management framework for the audit.

Introduction

9.1 Risk management in the private and public sectors has been common for many years. As mentioned earlier, in acknowledgment of this, the Management Advisory Board - Management Improvement Advisory Committee (MAB-MIAC), has promoted a risk management approach to the design and delivery of programs which implement government objectives.

9.2 The period covered by this audit commenced in 1989. Even though the risk management guidelines were released long after that year, the ANAO decided to apply them in this audit for three reasons:

- ? the ANAO expected to find elements of a risk management approach as a result of the application of conventional management principles;
- ? the guidelines' utility in analysing the large number of issues and stages in the management of boat people - an especially complex area of public policy; and
- ? because boat people are managed through application of parts of programs, notwithstanding that the agency with primary responsibility for the management of boat people, DIMA, initiated a Boats Sub-program in 1996. Accordingly, program-based analyses of government activity, while useful, cannot describe accurately the totality of government activity in this area.

Reporting

9.3 In its 1995-96 Annual Report DIMA provided information on boat people under three of its then Sub-Programs. In addition, DIMA has a series of 'Facts Sheets,' each of which dealt with immigration issues of public interest. Facts Sheets are revised regularly. Three Facts Sheets deal with boat people issues. Further information on boat people is provided in response to Questions on Notice in the Parliament, and in Parliamentary processes relating to the passage of legislation affecting boat people.

9.4 The ANAO suggests that while this reporting satisfies many aspects of accountability, also reporting the following could help DIMA to achieve its broader objectives:

- ? information on boat people in the refugee determination system and in litigation could be included in DIMA's reporting of those systems. While the proportion of boat people in these systems is small, they form a category which is important, costly and quite distinct from other groups. For example, while boat people represent a small fraction of immigration court cases, they contribute a very significant proportion of immigration cases which have gone to the High Court;⁹³
- ? information on funding and expenditure under the Boat Resource Agreement between DIMA and the Department of Finance; and
- ? increased 'cohort-based' reporting (see below).

9.5 DIMA has advised, and the ANAO agrees, that the processing of boat people and associated costs depend critically on the personal circumstances of the boat person. In this report the ANAO adopted year of arrival as the characteristic which defined a cohort. Differences in outcome by year of arrival are clearly evident. It may be that other ways of defining a cohort, such as ethnicity or source country of boat people, would provide even clearer explanations of variations in boat people processing and costs.

9.6 The ANAO notes also that the performance forecasts in the Portfolio Budget Statements lack quantitative targets. While this may be appropriate in areas where DIMA does not have full control of the processes leading to performance outcomes, there may be scope for nominating other targets, perhaps cohort-based, in which DIMA would have sufficient control so that their setting would be appropriate. Examples of quantitative targets within DIMA's control could include the time and cost to process unauthorised boat arrivals who do not enter the refugee determination system to the point where they become subject to removal from Australia; and the time and cost of primary determination for those boat people who enter the refugee determination system.

Summary of major findings with respect to risk management

9.7 Application of a risk management perspective led to the following major findings.

⁹³ See Appendix 3, Table A3.5.

Establish context

9.8 DIMA had established the strategic and organisational context for its activities in the management of boat people. Notwithstanding, there are opportunities for enhancing Parliament's understanding of the context through additional reporting.

Risk identification

9.9 DIMA had identified the risks to the success of the Government's objectives in the management of boat people.

9.10 The principal risks for DIMA include:

- ? non-compliance with the Migration Act, the Refugees Convention, the International Covenant on Civil and Political Rights or other relevant international obligations, for example:
 - undetected arrival of boats;
 - non-refugees being granted protection visas;
 - return of refugees to their places of persecution;
- ? incorrect information about Australia's attitudes to unauthorised boat arrivals being distributed among source countries and within the Australian community;
- ? large increases in unauthorised boat arrivals resulting from the preceding point or from any of a number of potential trouble spots in Australia's region;
- ? different objectives between the Federal Government agencies which share responsibilities for implementation of government policy;
- ? damage to Australia's international reputation;
- ? unnecessary expense to government and taxpayers; and
- ? community misunderstanding of government objectives.

9.11 APS and Coastwatch had identified the major risks to their roles in the implementation of government policy.

9.12 Information provided to stakeholders on boat people involvement has been insufficient to allow assessment of the degree to which government policy objectives have been met. Assessment would be enhanced by data on numbers of people entering and not entering the refugee determination system, and data on the passage through the system of those entering it.

9.13 Greater efforts in the area of community awareness could lead to greater understanding by the general public of the ways in which DIMA implements government policies. Such awareness raising would include

clearer explanations of why some boat people are not considered for refugee status. Better informed stakeholders may be more discriminating about the assistance they seek to provide to boat people, thereby reducing some of the complexity of the management of boat people and some administrative costs. Cost reductions would occur through reduced numbers of unauthorised attempts to enter Australia and consequent reduced costs associated with the appeals process.

9.14 This information will also allow the identification of risks which are not readily apparent to individual agencies, because of role ambiguity or uncertainty between agencies. The dispersal of government responsibilities across agencies increases the need for a whole of government approach to the analysis of risks associated with management of boat people.

Risk analysis

9.15 DIMA, APS and Coastwatch had analysed the operational risks to the success of the Government's objectives in the management of boat people. This analysis was primarily tactical in nature and forward-looking. The ANAO suggests that analyses of historical operational data could provide strategic insights and lead to improvements in program delivery, cost savings, and improved accountability.

9.16 DIMA has advised that it considers analyses of historical data to be of some, albeit limited, value. Over time, the citizenship of the unauthorised arrivals and the source country of the boats have changed significantly. However, for every unauthorised arrival, the boat task force undertakes investigation into the organisation of their travel to Australia. This information is then assessed against previous similar boat arrivals for patterns and trends. Operational experience is also a major source of input when formulating new approaches to boat arrivals.

Risk assessment and ranking

9.17 Risk assessment is that part of the risk management process where agencies decide whether a risk which has been analysed is worth the effort of controlling. Those risks which are assessed as worth controlling are then ranked to provide a guide to the agency in the allocation of funds available for the control of risk.

9.18 The ANAO has observed that, consistent with the risk management model propounded by MAB-MIAC, all agencies engage in an iterative process whereby risks which are likely to be assessed as not worth controlling are not analysed formally.

9.19 Accordingly, this step in the risk management process happens very quickly and is not formally recorded by the agencies audited.

9.20 The ANAO notes that risk assessment and ranking can become a significant issue where more than one agency is involved and the assessments and rankings of the agencies differ. There is a possibility that some risks may have a significance on a whole of government basis which is not seen by agencies focussing on their specific areas of responsibility. The analysis of boat detections could fall into this category.

Risk control

9.21 A feature of the management of boat people is that responsibility for the implementation of government policy is shared between agencies. Possibly the single most important risk control measure is the development of a shared and detailed understanding of their respective roles and responsibilities. In the view of the ANAO, there are ambiguities in the relationship between DIMA and both Coastwatch and APS which could be, or in the case of the APS, could have been, addressed through MOUs with performance agreements. In neither case was there a performance agreement in place.

9.22 DIMA had taken effective action to control the risks to the success of the Government objective's in the management of boat people. Some of these risks are more amenable to departmental action than others. Departmental action involved both legislative and administrative initiatives. Some of that action may be effective only in the short-to-medium term, while the considerable savings from some of those measures may not be able to be sustained because their achievement depends upon the circumstances and actions of future boat arrivals.

9.23 The Minister for Immigration and Multicultural Affairs has taken action to encourage greater consistency on refugee applications between the primary level decision makers within DIMA and the RRT.

9.24 Prompt action was always necessary to ensure consistency between clearly relevant international agreements, such as the Comprehensive Plan of Action, and the Migration Act.

9.25 DIMA had not adequately defined its requirements and expectations to its Coastwatch and APS service providers. A firm base for cost control will not exist until these are adequately defined.

9.26 The economy of the management of boat people is constrained by public policy and legislative parameters.

9.27 DIMA does not maintain information on the total costs to government of the management of boat people. The ANAO has estimated that those costs were approximately \$40-50m in 1995-96, the equivalent of 10 per cent of DIMA's running costs appropriation in that year. The costs to DIMA were approximately 7 per cent of its annual appropriation, as some agencies bear their own costs. In 1996-97 these percentages fell to 8 and 6 per cent respectively. Boat persons represent about 0.01 per cent of the total number of persons who arrive in Australia annually. Management of boat persons is thus in the order of one thousand times more resource intensive than the reception of ordinary arrivals. In such an environment, there are clear risks to the economy and efficiency of operations. The fact that DIMA had no explicit responsibility for monitoring whole of government costs of the management of boat people means that one of the pre-conditions for the control of these risks is missing.

9.28 There was uncertainty about the application of the Migration Act to arrivals on Ashmore Reef, north-west of Australia. The Government has moved to control this risk through legislation which was passed by Parliament in June 1997.

Continuous monitoring and review

9.29 DIMA provided to Parliament a relatively small amount of information about its role with boat people. Relevant information would be data on numbers of persons entering and not entering the refugee determination system, and data on their passage through the latter.

9.30 DIMA's IT systems did not permit efficient monitoring of some significant aspects of DIMA's role.

9.31 ANAO has included recommendations to address difficulties in the various agencies' roles.

9.32 The ANAO acknowledges that the management of boat people take place in an environment where it is very difficult to identify all of the significant risks, let alone analyse, assess, rank and control them. The challenge for DIMA in the future is to further develop its administrative systems for the management of boat people in a way which remains consistent with government and departmental objectives; yet retains sufficient flexibility to respond appropriately to new risks as they emerge.

Canberra ACT
17 February 1998

P. J. Barrett
Auditor-General

Part Three

Appendices

Appendix 1

Court cases cited in the report

A and B v Minister for Immigration and Ethnic Affairs, unreported, High Court, 24 February 1997, FC 97/004

C, L, J and Z v Minister for Immigration and Ethnic Affairs, unreported, Federal Court, 30 March 1995.

Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379

Chu Kheng Lim and Ors v Minister for Immigration, Local Government and Ethnic Affairs and Anor (1992) 176 CLR 1

Guo Wei Rong v Minister for Immigration and Ethnic Affairs; Pan Run Juan v Minister for Immigration and Ethnic Affairs (1996) 135 ALR 421

Human Rights and Equal Opportunity Commission and Anor v Secretary of the Department of Immigration and Multicultural Affairs (1996) 137 ALR 207

Koon Wing Lau v Calwell and Anor (1949) 80 CLR 533

Lek v Minister for Immigration, Local Government and Ethnic Affairs (No 2) (1993) 45 FCR 418

Long Guan Chun, Li Liu Ying, and Long Guan Juan v Minister for Immigration and Ethnic Affairs and Anor, unreported, Full Federal Court, 17 April 1996

Minister for Immigration and Ethnic Affairs v Ozmanian (1996) 141 ALR 322

Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Ors (1996) 136 ALR 481

Minister for Immigration and Ethnic Affairs and Anor v Tang Jia Xin (1994) 125 ALR 203

Su Wen Jian v Minister for Immigration and Ethnic Affairs and Refugee Review Tribunal, unreported, Federal Court, 24 April 1996

Tang Jia Xin v Minister for Immigration and Ethnic Affairs and Commonwealth, unreported, Federal Court, 11 April 1996.

Wu Yu Fang v Minister for Immigration and Ethnic Affairs (1996) 135 ALR 583

Appendix 2

Legislation relevant to boat people

Migration Legislation Amendment Act 1989;

Migration Amendment Act 1991 ();*

Migration Amendment Act 1992 ();*

Migration Amendment Act (No 2) 1992;

Migration Reform Act 1992;

Migration Amendment Act (No 4) 1992 ();*

Migration Laws Amendment Act 1993;

Migration Legislation Amendment Act (No 4) 1994 ();*

Migration Legislation Amendment Act (No 2) 1995 ();*

Migration Legislation Amendment Act (No 5) 1995 (); and*

Migration Legislation Amendment Act (No 6) 1995 ().*

* Deals largely or exclusively with boat people.

Appendix 3

Boat people and the court system

In this Appendix the ANAO provides overall data on boat people and the court system. Boat people can enter the court system for a variety of reasons: in connection with criminal charges arising from detention, as litigants in connection with their detention or removal from Australia, or in connection with a decision on their refugee status or protection visa.

Table A3.1 shows the number of times boat people have been involved in court cases. In this Table, cases which proceed from the Federal Court to the Full Bench of the Federal Court to the High Court are counted as separate cases. Moreover, where the same boat person has more than one case running, for example over detention *and* on decision, each case is counted separately. In order to set the level of boat person court activity against that of other onshore refugee status/protection visa applicants, corresponding figures for the latter category also are shown. Figures for all cases involving DIMA are also shown. In terms of numbers of applicants, boat people represent about one-third of DIMA's total litigation case load, other onshore refugees a little less, and all other matters account for the remaining 40 per cent. As there are millions of applications to enter Australia each year, the focus on refugee matters in the litigation case load is very strong. The further focus on boat people is even more pronounced. It should be remembered that there are about one hundred times as many onshore refugee status/protection visa applicants as there are boat people applicants.

Another feature of Table A3.1 is that the emphasis on boat people in the litigation case load strengthens as one proceeds up the court system. Boat people represent about 25 per cent of applicants at the Federal Court, about 85 per cent of applicants at the Full Federal Court and 90 per cent of applicants at the High Court.

Part of the reason for the disproportionately large number of boat people applicants is the tendency for people from an individual boat to be processed by DIMA as a group. This practice is sometimes continued by the boat people themselves in court proceedings. For example, the *Albatross* boat had a single case which went through the three levels of the court system. That one case provided 124 applicants at each level.

Table A3.2 repeats Table A3.1 for court cases rather than applicants. Although the emphasis on boat people is still out of proportion to their numbers, the effect is much less pronounced than in Table A3.1. In terms of

resource consumption, cases is probably a better indicator of costs than numbers of applicants. Comparison of Tables A3.1 and A3.2 suggests that the majority of non-boat cases have only one or occasionally two applicants. It is also noteworthy that to 21 May 1996, nine applications for High Court cases were lodged. As shown below, only one of these had finished by 21 May 1996.

Table A3.1**Refugee status/protection visas - Court applicants (a)**

Number	Year of lodgement			Total
	1993-94	1994-95	1995-96	
Federal Court				
- Boat people	45	363	16	424
- Other onshore	134	180	390	704
- Other matters	228	210	161	599
Federal Court sub-total	407	753	567	1727
Full Federal Court				
- Boat people	56	33	125	214
- Other onshore	8	3	5	16
- Other matters	16	7	11	34
Full Federal Court sub-total	80	43	141	264
High Court				
- Boat people	1	-	143	144
- Other onshore	-	3	5	8
- Other matters	3	2	4	9
High Court sub-total	4	5	152	161
Other (b)				
- Boat people	-	-	-	-
- Other onshore	-	2	8	10
- Other matters	114	128	134	376
Other sub-total	114	130	142	386
All courts				
- Boat people	102	396	284	782
- Other onshore	142	188	408	738
- Other matters	361	347	310	1018
All courts total	605	931	1002	2538

Source: DIMA.

Notes: Data for this table were obtained from DIMA rather than from the judicial bodies themselves.

(b) Includes Administrative Appeals Tribunal.

Table A3.2**Refugee status/protection visas - court cases**

Number	Year of lodgement			Total
	1993-94	1994-95	1995-96	
Federal Court				
- Boat people	42	53	14	109
- Other onshore	134	180	323	637
- Other matters	195	142	161	498
Federal Court sub-total	371	375	498	1244
Full Federal Court				
- Boat people	10	8	7	25
- Other onshore	8	3	5	16
- Other matters	13	6	10	29
Full Federal Court sub-total	31	17	22	70
High Court				
- Boat people	1	-	9	10
- Other onshore	-	3	5	8
- Other matters	3	1	4	8
High Court sub-total	4	4	18	26
Other (a)				
- Boat people	-	-	-	-
- Other onshore	-	2	8	10
- Other matters	113	117	134	364
Other Court sub-total	113	119	142	374
All courts				
- Boat people	53	61	30	144
- Other onshore	142	188	341	671
- Other matters	324	266	309	899
All courts total	519	515	680	1714

Source: DIMA.

Note: (a) Includes Administrative Appeals Tribunal.

Who initiates litigation?

Table A3.3 lists the initiator of litigation. The table is derived from the DIMA's Litigation database and lists cases commenced after 1 July 1993 and completed at 21 May 1996.

Table A3.3

Boat people - initiator of litigation

Cases	DIMA	Boat person	Total
Federal Court	3	71	74
Full Federal Court	2	21	23
High Court	1	1	2
Total	6	93	99

Source: DIMA.

Table A3.3 indicates that the vast majority of cases are initiated by the boat people. DIMA has initiated cases relatively infrequently.

Table A3.4 shows the mean time in calendar days from the date of lodgment of the case to the date of the decision. This table refers only to concluded cases. In the case of the High Court one of the two cases involved application for leave to appeal to the High Court only, so the mean shown may be less than that which would be obtained from a more representative set of cases.

Table A3.4

Boat people - litigation time

Court	Mean days from lodgment to decision
Federal Court	290
Federal Court of Appeal	178
High Court	178
Other	n.a.
Total	261

Source: DIMA.

n.a. not available

Table A3.5 provides an indication of the outcomes of the litigation involving boat people. Table A3.5 shows that DIMA wins about three-quarters of the cases in which it is involved. Some of the cases shown as initiated by DIMA and resulting in a loss have been found in a subsequent High Court case to have been wrongly decided.

Table A3.5

Boat people - litigation outcomes

Cases	Federal Court		Full Federal Court		High Court		Total	
	Initiated by		Initiated by		Initiated by		Initiated by	
	Boat people	DIMA	Boat people	DIMA	Boat people	DIMA	Boat people	DIMA
Withdrawal by applicant	13	-	4	-	-	-	17	-
Department win	51	-	5	1	1	-	57	1
Sub-total	64	-	9	1	1	-	74	1
Withdrawal by Department	-	2	-	-	-	-	-	2
Withdrawal by Department – reconsideration	5	-	-	-	-	-	5	-
Department loss - decision substituted	2	1	2	-	-	-	4	1
Department loss - reconsideration	-	-	10	1	-	1	10	2
Sub-total	7	3	12	1	-	1	19	5
Total	71	3	21	2	1	1	93	6

Source: DIMA.

Appendix 4

Literature on refugee law

Butterworths, *Migration Law*,

DIMA, *Procedures Advice Manual 3*, Refugee Law Guidelines, incorporated in Schedule 2, Visa Class 866

Hathaway J, *The Law of Refugee Status*, Butterworths, 1991

Joint Standing Committee on Migration, *Asylum, Border Control and Detention*, AGPS, Canberra, February 1994.

Joint Standing Committee on Migration Regulations, *Australia's Refugee and Humanitarian System: achieving a balance between refuge and control*, AGPS, Canberra, August 1992.

Matthews, Penelope, *Sovereignty and the right to seek asylum: the case of Cambodian asylum-seekers in Australia*, Australian Year Book of International Law, No.15, 1994, pp35-101.

Parliamentary Research Service, *Boat People from China and China's one child policy*, Research Papers (Social Policy Group) No.25 1994-95

Refugee Advice and Casework Service, *Refugee Manual: a guide for advisers*, December 1992.

Sinclair, Charles E, *Who would want to be a refugee? A comparative analysis of Australian and Canadian refugee policy and law*, PhD thesis, (unpublished), University of New England, September 1995

Taylor, Savitri, *Federal Law Review*, Christmas 1994.

Appendix 5

Cost of the management of boat people - 1995-96

	\$million
DIMA - Sub-Program 8.3 Boats	30.786
<p>This Sub-Program covers the Department's costs relating to reception, immigration processing, detention and removal. 'Immigration processing' includes the costs of activities reported on in the chapter 'Entry to the refugee determination system.'</p> <p>Detention costs include payments to the Australian Protective Service and capital works associated with decommissioning the Immigration Reception and Processing Centre at Curtin RAAF base near Derby, and with upgrading the Port Hedland IRPC. Also included are costs of refugee determination which are specific to boat people.</p>	
Onshore refugee determination	
12 primary cases @ \$2556	0.031
Application assistance	0.290
Litigation	2.036
<p>This estimate is based on DIMA data on the cost of boat cases.</p>	
DIMA sub-total	33.143
Refugee Review Tribunal	
50 cases determined @ \$5500 per case	0.275
Australian Customs Service	
Coastwatch	3.05
<p> ANAO's estimate of 10% of Coastwatch costs for 1995-96</p>	
ACS Marine Fleet	0.06
<p> ANAO's estimate of 10% of marine fleet costs</p>	
Australian Customs Service sub-total	3.11

Department of Defence

Patrol boats	6.461
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ANAO's estimate of 10% of patrol boat costs.

Judicial costs	0.964
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ANAO's estimate of Federal and High Court costs of boat people cases.

TOTAL	43.953
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The estimated total excludes a number of costs which are attributable to boat people but which there is no basis for providing an estimate. Such costs include Parliamentary and Public Service activity associated with the passage of boat people-specific legislation, staff costs associated with AQIS and DHFS activities on reception, and a wide range of Commonwealth and State public sector organisations which carry their own costs in relation to boat people.

Appendix 6

Public sector agencies involved with boat people

Commonwealth

Department of Immigration and Multicultural Affairs

Refugee Review Tribunal

Australian Customs Service

- ? Coastwatch
- ? Border control
- ? Intelligence

Attorney-General's portfolio

- ? Australian Protective Service (APS costs are paid by DIMA)
- ? Attorney-General's Department
 - Office of the Australian Government Solicitor (costs paid by DIMA)
 - Office of International Law
- ? Director of Public Prosecutions

Department of Defence

- ? Royal Australian Navy patrol boats
- ? Royal Australian Air Force - lease of a section of Curtin Air Force Base, Derby WA, for use as an alternative IRPC.

Australian Quarantine and Inspection Service

Department of Transport

Department of Foreign Affairs and Trade

Department of Health and Family Services

Department of Finance and Administration

Northern Territory

Darwin Correctional Centre

Royal Darwin Hospital

Western Australia

Western Australian Department of Health

- ? Pilbara Public Health Unit
- ? Port Hedland Hospital

Western Australian Police

Pilbara Intelligence Committee

Appendix 7

Immigration detention and the law

Unlawful detention

In two areas since 1989, difficulties with the administrative framework have resulted in the detention of boat people being found to be unlawful. The difficulties with the framework are described below.

The destruction of boats

The vessels on which the first boat people came were in poor condition and maintaining them in an Australian port seemed to serve little purpose. Some boats were burned and others were sunk.

This action had major unintended consequences for the lawfulness of the detention of the people on those boats. The people on the first boats in the early 1990s were detained under the then Section 88 of the Migration Act, which had been intended to deny entry to Australia to stowaways on ships which berthed in Australian ports. Once the relevant vessel no longer existed, the temporary period pending departure in which a person could be detained under Section 88 came to an end.⁹⁴ Thus the detention of the boat people following the destruction of their boats had been unlawful.

Further doubt on the Department's administration of the detention provisions of the *Migration Act* was cast by a later decision which held that once it became apparent that the vessel on which the boat people had arrived would not depart Australia, detention was no longer authorised by Section 88.⁹⁵

The 273 day rule

Following the prolonged detention of boat arrivals in the early 1990s, Parliament passed what is now Section 182 of the *Migration Act*. The Section applies to boat people who arrived in Australia before 1 September 1994. It provides that boat people must not be kept in 'application immigration detention' for more than 273 days, or about nine months. 'Application immigration detention' refers to detention which occurs while the Department is considering an entry application,⁹⁶ but excludes certain periods of time outside

⁹⁴ *Chu Kheng Lim and Ors v Minister for Immigration, Local Government and Ethnic Affairs and Anor* (1992) 176 CLR 1; (1992) 110 ALR 97.

⁹⁵ *Lek v Minister for Immigration, Local Government and Ethnic Affairs (No 2)* (1993) 45 FCR 418.

⁹⁶ An entry application was invariably for refugee status.

the control of the Department, for example if the Department is waiting for the detainee to provide information in relation to the application. Another period excluded from the time spent in application immigration detention is time when the Department is waiting for information relating to the application to be given by a person who was not under the control of the Department.

In keeping records of progress towards the 273 day limit for each boat person, the Department did not count as time spent in application immigration detention periods in which the Department sought information about the application from some other person or agency. The High Court found that such periods were within the control of DIMA, and should be counted as time spent in application immigration detention.⁹⁷ The practical difficulty for the Department of administering these provisions in accordance with the law may be seen from the fact that in making its judgment, the High Court noted that the construction it had given to the relevant section of the *Migration Act* was not the same as that given by the Full Federal Court.

One result of the High Court's judgment was that certain boat people may have been detained for longer than the period allowed by law. In a subsequent case, the Federal Court, applying the High Court's interpretation, and after examining all periods of custody, found that detention had continued after the period allowed by law.

Quite apart from the finding of unlawful detention, considerable processing would have been necessary by the Department:

- ? to keep track of progress towards the 273 day limit for each boat person; and
- ? when the High Court determined that the Department's understanding of the law had been incorrect, reprocessing to redetermine the days in application immigration detention for each boat person affected by the decision.

Release from immigration detention by a court

Section 54R of the *Migration Act* provided:⁹⁸

*A court is not to order the release from custody of a designated person.*⁹⁹

The High Court found in the *Lim* case in 1992 (mentioned above) that this section contravened the judicial power of the courts under the Constitution and

⁹⁷ *Minister for Immigration and Ethnic Affairs and Anor v Tang Jia Xin* (1994) 125 ALR 203.

⁹⁸ The numbering of the *Migration Act* was altered by the *Migration Reform Act 1992*, with effect from 1 September 1994.

⁹⁹ 'Designated persons' were boat people who were illegal entrants. The term ceased to apply to arrivals after 1 September 1994. However, boat people who arrived before that date and were designated, continue to have that status under the current Act.

held it to be invalid. This section remains in the *Migration Act* as section 183 and applies to boat people who arrived before 1 September 1994.¹⁰⁰ In the ANAO's view, the presence in the Migration Act of a section, which has been found by the High Court to be unconstitutional, misinforms all who, reading it without any indication of its status, would believe it to be valid.

The day before the *Lim* decision was delivered by the High Court,¹⁰¹ the *Migration Reform Act 1992* received the Royal Assent. The Act inserted subsection 196(3) into the *Migration Act*, which applies to boat people arriving on or after 1 September 1994, as follows:

... subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa.

The ANAO's legal consultant has advised that no attempt appears to have been made to repeal either section 183 or section 196 to bring the statute book into line with the law as declared by the High Court. The consultant has also advised that, although it has never been challenged, sub-section 196(3) probably has the same constitutional flaw as section 183.

Compensation for unlawful detention

The *Lim*, *Lek* and *Tang* decisions mentioned above meant that boat people had been detained unlawfully. There was therefore a possibility they might commence an action for damages against the Commonwealth for unlawful detention. In response to the *Lim* decision in 1992, the Parliament passed a law restricting compensation for any detention which was found to be unlawful to one dollar per day.¹⁰² In a judgment unrelated to boat people in 1994, the High Court held that legislation which purported to prevent a person pursuing a common law action for damages against the Commonwealth or one of its agencies was invalid as it amounted to an acquisition of property without just compensation.

The Parliament, through the *Migration Legislation Amendment Act (No.6) 1995*, repealed the 'one dollar a day' provisions of the *Migration Act*. Some of the boat people who had been detained unlawfully brought an action for damages against the Commonwealth. This action was settled out of court towards the end of 1996 on terms which have not been disclosed.

¹⁰⁰ With the exception that "custody" has been replaced with "immigration detention." The Attorney-General's Legal Practice Group has advised the ANAO that the substitution, which was part of a general change in terminology in the *Migration Reform Act 1992*, is unlikely to have any effect on the High Court's finding.

¹⁰¹ 8 December 1992.

¹⁰² *Migration Amendment Act (No. 4) 1992*.

Appendix 8

Court criticism of a boat person removal

On occasion, removal action has led to adverse comment about DIMA by the courts. The following case from 1994 provides an example.

Mr X arrived in Australia on a SIEV in 1990.¹⁰³ His application for refugee status was unsuccessful and he appealed to the courts. By 1994 the case had reached the Full Bench of the Federal Court.

The Court appointed a 'tutor' to represent the interests of Mr X following evidence establishing his incapacity.

After the commencement of the court case, but before its conclusion, Mr X accepted an offer from the Government to return to Cambodia for one year and then be permitted to return to Australia permanently under the Special Assistance Category of the humanitarian component of the immigration program. DIMA sought and obtained medical advice that Mr X was capable of making this decision.

DIMA then arranged for the removal of Mr X to Cambodia without advising either the Court or the tutor.

The Court proceeded to finalise the case and handed down its decision: the primary decision-maker had made an error of law by misinterpreting the term 'well founded fear of being persecuted'.¹⁰⁴ Had Mr X still been in Australia, his case would have been remitted to the Refugee Review Tribunal for reconsideration according to the correct interpretation.

The Court commented:

it is to be regretted that the Departmental officers did not recognise that the tutor, who had a responsibility in respect of the appeal to both X and to the Court, should have been informed of the change in X's mental state and his wish to return to Cambodia. This should have happened promptly so that the tutor could have made his own assessment of the situation as it affected him as tutor and so that he could, if thought appropriate, have sought directions from the Court.

DIMA has advised the ANAO that it provided an affidavit to the Full Federal Court on the circumstances surrounding Mr X's departure in which the

¹⁰³ The ANAO has substituted 'Mr X' for the applicant's real name.

¹⁰⁴ *Taing Kay Chew, Lek Kim Sroun and Lim Hour v Minister for Immigration and Ethnic Affairs (unreported, Full Federal Court, 22 December 1994)*

Department advised of steps taken to ensure this did not occur again. DIMA has also advised that the above example is dated and was an exceptional case which has no bearing on the general relationship between DIMA and the courts on removal matters. DIMA considers the use of this particular case to illustrate the relationship as being most misleading.

The ANAO agrees that this case is exceptional in that it involved a combination of refugee determination and removal matters: a combination which does not normally arise by virtue of Australia's adherence to the Refugees Convention. More generally, in refugee determination matters and others, there have been a number of cases in recent years where the courts have been critical of DIMA's procedures and approach. Other examples of where courts have criticised Departmental procedures are the *Vagabond* case and the Mok Gek Bouy case.

Appendix 9

Performance audits in the Immigration and Multicultural Affairs portfolio

Set out below are the titles of the reports of the main performance audits by the ANAO in the Immigration and Multicultural Affairs portfolio tabled in the Parliament in recent years.

Audit Report No.35 1993-94
The Compliance Function

Audit Report No.44 1993-94
Electronic Capture of Passenger Card Data

Audit Report No.1 1996-97
Passenger Movement Charge

Audit Report No.7 1997-98
Immigration Compliance Function