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Abstract

This thesis argues that migration control operates as policing. It is a deceptively simple argument, yet it opens up analysis of migration control in a new and productive manner. Drawing together two separate bodies of literature, migration and policing, to consider the operation of migration control, is the primary contribution of the thesis. Policing is modelled in the thesis with a relationship of power as its central identity, developing Findlay and Zvekić's comparative contextual approach in *Alternative Policing Styles*.¹ It approaches policing as a dynamic relationship and process that is not tied to a particular institutional identity or a single normative function. Rather, policing is modelled as a practice of authoritative, discretionary decision-making. The thesis explores the relationship between migration control and policing as more than state police institutional involvement in migration control.

The argument that Australian migration control itself is discretionary is not new. However, the analytical lens of policing draws attention to areas of discretion that are often overlooked (and that lack accountability) - at the level of the individual encounter, bureaucratic decision making, as well as structured into law and policy. Further, the lens of policing enables a framework that challenges key conventional binaries in migration analysis between the citizen and non-citizen, legality and illegality, and between the national and global.

The particular analysis facilitated by exploring migration control in its operation as policing is the second key contribution of the thesis. The thesis examines four contexts of migration control within Australia, and compares the operation of control in these scenarios against the policing model: the role of employers in migration policing; immigration raids and location activities; the decision to release a migrant from detention; and the functioning of the character test. In this empirical examination, the thesis draws on in-depth interviews with illegal migrants in Australia as well as with professionals and community advocates working in the field, analysis of interview participants' Immigration Department files, and analysis of Australian migration law insofar as it guides and constrains (or fails to constrain) migration policing practices.

¹ Mark Findlay and Uglješa Zvekić, eds., *Alternative Policing Styles: cross-cultural perspectives* (Deventer The Netherlands; Boston: Kluwer Law and Taxation Publishers, 1993).

The broader purpose in taking migration policing seriously as a practice that is not completely captured by migration and citizenship law, is to investigate the relationship between migration policing and the nation-state. By considering whether the thesis findings on migration policing endure outside the national context, the thesis explores *how* migration policing operates beyond the nation, which is the third main contribution of the thesis. The thesis introduces a conceptual approach that links the mobile and transversal operation of migration policing and the constitution of a global citizenship which does not rely on supra-national global authority. It considers theoretical approaches to the operation of power through the management of global circulation, which ultimately emphasises the paradox of migration policing as both border policing, and inextricably tied to the constitution of a borderless global citizenship identity.

Joseph Boon-Kuo

Declarationgements

I hereby certify that this thesis is my own work and that any material written by another person has been duly acknowledged in the text. No part of this thesis has been accepted for the award of any degree at the University of Sydney or any other institution. The empirical work undertaken for this thesis (interviews and document analysis) was approved by the University of Sydney Human Ethics Committee.

The thesis was integral to its completion. I am also grateful for the generous and thoughtful attention of Associate Professor Fleur Johns and Louise Boon-Kuo Professor Pat O'Malley, my associate supervisors at different times during my study. Their rigorous questions were invaluable in improving the thesis, and their interest in the research was fortifying.

My most sincere thanks to all interview participants for contributing their time and insights to this research. The Refugee Action Collective, bordercollective and the Refugee Advice and Casework Service challenge the operation of border control in its various manifestations, and involvement in their activities influenced the questions I investigated in the thesis. The practical assistance of a University of Sydney scholarship was important, as was the postgraduate room provided by the Law Faculty. I am also grateful for the support of a writing residency at the Oñati International Institute for the Sociology of Law in Gipuzkoa, Spain, which was an invigorating and precious time for writing and reflection.

Vicki Sentas and Dave Trudinger have been a constant presence for me in this writing. Their persistence in asking hard questions, being at ease with discomfort, and in seeing the poetics of everyday life and the possibilities for change is an inspiration to me. I have also learned a lot from their research journeys and their political work. Thanks also to Richard Bailey, Gavin Sullivan, Nassim Arrage, Kata Japancic, Paul Simpson, Lucette Cysique, TexasQueen, Wayne Stamp and Melissa McAdam for many invigorating academic and political discussions over the years that have served as an antidote to the sometimes isolating task of seeing the world through a different perspective. My student colleagues (and ex students) at the Faculty of Law have shared the challenges and joys of writing and pursuing insights that often seem always at the horizon. Thanks also to Faculty members at the University of Sydney Arlie Loughnan, Kevin Walton and Professor Mary Crook for their encouragement.

I cherish the unflagging support of my extended family, with special thanks to my parents - Jacquelynne Boon and Graham Kuo, alongside Cecily Briggs and Chai Cheo-Hiang. They have supported me through their belief in me. Lastly, the enthusiasm and interest of my friend Meredith Williams has been inestimable in completing this thesis, and in contextualising my thesis within broader questions about migration, identity and

Acknowledgements

This thesis could not have been written without the support of a number of people. It has been a privilege and pleasure to study under my primary supervisor Professor Mark Findlay. Repeatedly throughout my candidature, Mark's comments about the direction of my argument proved prescient. I am indebted to our many discussions and Mark's engagement and interest in this research, his confidence in the thesis was integral to its completion. I am also grateful for the generous and thoughtful attention of Associate Professor Fleur Johns and Professor Pat O'Malley, my associate supervisors at different times during my study. Their rigorous questions were invaluable in improving the thesis, and their interest in the research was fortifying.

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ANZSCO	Australian and New Zealand Standard Classification of Occupations
ASAS	Asylum Seeker Assistance Scheme
ASCO	Australian Standard Classification of Occupations
ASIO	Australian Security Intelligence Organisation
AusAID	Australian Agency for International Development
Australian Constitution	Commonwealth of Australia Constitution Act 1900 (Imp) 63 & 64 Vict, c 12, s 9
BV	Bridging Visa
DIAC	Department of Immigration and Citizenship (2007- present)
DIEA	Department of Immigration and Ethnic Affairs (1976-1987, 1993-1996)
DILGEA	Department of Immigration, Local Government and Ethnic Affairs (1987-1993)
DIMA	Department of Immigration and Multicultural Affairs (1996-2001, 2005-2007)
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs (2001-2005)
ETA	Electronic Travel Authority
FC	Federal Court
FMC	Federal Magistrates Court
FOI	Freedom of Information
GSL	Global Solutions Limited
GSM	General Skilled Migration
HC	High Court
IAAS	Immigration Advice and Application Assistance Scheme
Immigration Department	Department of Immigration and Citizenship, Department of Immigration and Ethnic Affairs, Department of Immigration, Local

Abbreviations

AAT	Administrative Appeals Tribunal
AFP	Australian Federal Police
AHRC	Australian Human Rights Commission
ANZSCO	Australian and New Zealand Standard Classification of Occupations
ASAS	Asylum Seeker Assistance Scheme
ASCO	Australian Standard Classification of Occupations
ASIO	Australian Security Intelligence Organisation
AusAID	Australian Agency for International Development
Australian Constitution	<i>Commonwealth of Australia Constitution Act 1900 (Imp) 63 & 64 Vict, c 12, s 9</i>
BV	Bridging Visa
DIAC	Department of Immigration and Citizenship (2007- present)
DIEA	Department of Immigration and Ethnic Affairs (1976-1987, 1993-1996)
DILGEA	Department of Immigration, Local Government and Ethnic Affairs (1987-1993)
DIMA	Department of Immigration and Multicultural Affairs (1996-2001, 2005-2007)
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs (2001-2005)
ETA	Electronic Travel Authority
FC	Federal Court
FMC	Federal Magistrates Court
FOI	Freedom of Information
GSL	Global Solutions Limited
GSM	General Skilled Migration
HC	High Court
IAAS	Immigration Advice and Application Assistance Scheme
Immigration Department	Department of Immigration and Citizenship, Department of Immigration and Ethnic Affairs, Department of Immigration, Local

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	Government and Ethnic Affairs, Department of Immigration and Multicultural Affairs, Department of Immigration and Multicultural and Indigenous Affairs	
MARA	Migration Agents Regulation Authority	
MIA	Migration Institute Association	
Migration Act	Migration Act 1958 (Cth)	43
Migration Regulations	Migration Regulations 1994 (Cth)	
MODL	Migration Occupations in Demand List	44
MRT	Migration Review Tribunal	
MSI	Ministerial Series Instructions	45
NGO	Non-government organisation	
NZ	New Zealand	52-53
OPT	Occupied Palestinian Territories	
PAM 3	Procedures Advice Manual 3 (Immigration Department)	
PNG	Papua New Guinea	57
PPV	Permanent Protection Visa	
PSWPS	Pacific Seasonal Workers Pilot Scheme	
PV	Protection Visa	150
PVPM	Protection Visas Procedures Manual	
RACS	Refugee Advice and Casework Service	
RMA	Registered Migration Agent	221
RRT	Refugee Review Tribunal	
SIEV	Suspected Irregular Entry Vessel	
SOL	Skilled Occupation List	
THV	Temporary Humanitarian Visa	
TPV	Temporary Protection Visa	
UK	United Kingdom	
UN	United Nations	
UNHCR	United Nations High Commissioner for Refugees	
USA	United States of America	
VET	Vocational Education and Training	
VEVO	Visa Entitlement Verification Online	
VIDC	Villawood Immigration Detention Centre	

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Part I:
Setting the Scene:
Policing Concepts
and Australian
Migration Control

An Introduction: Migration control as policing

A Introduction

For many people in Australia, the term “border policing” summons association with dramatic standoffs in Australian waters between the Australian navy and unauthorised boats such as the 2001 Tampa incident,² or the treacherous and sometimes tragic journeys to Australia.³ The popular notion of border policing thus focuses on Australia’s geographic borders and the spectacular display of state power. Even accounts that acknowledge migration control’s broader operation within Australia, as well as at the geographical border, assume it sets national boundaries of the sovereign territorial state, the national identity, and the political citizen.

This thesis challenges this assumption on two levels. The primary argument is that Australian migration control operates as policing. This represents both a commitment to an analytical lens, and a comparative exercise between particular migration control contexts and policing as modelled in the thesis. The empirical study of four migration control contexts shows that the operation of migration policing is diverse and dynamic. These scenarios illuminate the fact that the authority of the nation-state in migration control is just one of the factors that structure the power relationships engaged in migration policing. Migration policing’s power to constitute new authority is a product of the asymmetric relationship of power it embodies, not fully described by the sovereign power to expel from the nation. This relationship of power draws in civil actors in making new laws who are not legal citizen members of the polity, harnesses solidarity action by supportive community members to engage control, and draws on force and the performance of authority to obtain “consent” where there is no formal legal

² David Marr and Marian Wilkinson, *Dark Victory* (Crows Nest, N.S.W.: Allen & Unwin, 2003).

³ See for example the sinking of the SIEV X which resulted in 353 deaths of asylum seekers travelling to Australia: Tony Kevin, *A Certain Maritime Incident: the sinking of SIEV X* (Carlton North, Victoria: Scribe Publications, 2004)., More recently the sinking of a boat travelling to Christmas Island in December 2010 resulted in up to 50 deaths: AAP, “The coronial inquest into asylum seeker deaths off Christmas Island has heard from local residents,” *The Australian*(11 July 2011), www.theaustralian.com.au/news/nation/the-coronial-inquest-into-asylum-seeker-deaths-off-christmas-island-has-heard-from-local-residents/story-e6frg6nf-1226092480690.

authority. The diverse impetus for the activation of migration policing, and the diverse factors that shape its discretionary exercise of power, challenge the characterisation of migration control as simply an affirmation and performance of the power of the nation-state.

Further, the thesis challenges the notion that migration control operates through boundary setting, whether territorial, identity based, or positive notions of citizenship. The diverse and dynamic operation of migration policing frustrates any delineation of boundary, no matter whether that boundary is conceptualised as disaggregated, multiple and shifting,⁴ or non territorially based and performed through bureaucratic and legal decision making.⁵ Instead I argue that migration policing is better conceived as a mobile relationship of power, that is, as a dynamic relation that is not contingent on borders, and indeed, the last chapter of the thesis explores the notion of migration policing's capacity to disaggregate power relationships beyond the Australian context through a concept of a global social citizenship. This approach does not focus on global citizenship as a positive essential identity, unified by a base level political participation. Rather, migration policing constitutes a key feature of global citizenship – freedom to move across the globe – by constraining or enabling migratory movement. By exploring the example of global citizenship as the product of migration policing beyond the nation, through relationships of policing, the thesis posits a truly fluid conceptualisation of globalised policing relationships. Global citizenship in this regard appears not as a product of supra national laws or institutions, nor even of positive global norms. On the one hand, the legitimacy of migration policing (and thus global citizenship) is itself a product of mutual inter-state recognition of the power of each nation-state to determine entry and exit into territory. On the other hand, the legitimacy of individual migration decisions is partly bestowed by non state dynamics such as labour markets and consumer education markets. The crucial factor in the legitimacy of migration controls is not that the state is the source of authority but that migration controls are perceived as authoritative. The constraints on movement as a feature of global citizenship are characterised thus by mobile circulating relationships of power, not by national borders.

⁴ Alison Kesby critiques international law's focus on the territorial border which she says may obscure the other ways that borders determine lives and outcomes. The meaning and function of borders shift for different groups, that is borders have multiple and shifting meanings and functions. Borders are also multiple in the manner they can overlap and coexist in the same national space. See Alison Kesby, "The Shifting and Multiple Border and International Law," *Oxford Journal of Legal Studies* 27, no. 1 (2007).

⁵ Connal Parsley talks about how the border is inaugurated into being through the initial interviews between Immigration Department officials and asylum seekers at the airport, determining whether there is a prima facie asylum claim from their account in interview. He refers to the border as a "performance" to highlight the way it must be continuously re-established. Connal Parsley, "Performing the Border: Australia's Judgment of "Unauthorised Arrivals" at the Airport," *The Australian Feminist Law Journal* 18(2003).

Part A of this chapter introduces the rationale for the thesis research, its focus, and its contribution to existing analyses of migration control and the limits of the thesis argument. Part B provides an overview of the thesis method and sources. Part C sketches the overall thesis argument and development.

In this thesis I use the term “illegal migrant” and “illegal migration”. In a sense this affirms the deviance that has been ascribed to “illegal” migrants because of their immigration legal status.⁶ Nevertheless I use it because my research examines the transition between legal and illegal immigration status in order to investigate what elements determine this transition. It researches how persons *become* illegal, both in the sense of immigration legal status and the social experience of the deviance attached to that term. I use the term “illegal” to keep the distinction between illegal and legal immigration status front and centre.

Rationale

My investigation is motivated by three considerations. First, the focus of public and scholarly attention overwhelmingly has been on the criminalisation of illegal migrants, their construction as deviants, and their spatial exclusion via immigration detention and border patrol. This attention has focused on refugees and asylum seekers, particularly through illegal boat entry, as the object of migration control. Yet these focal points provide only a limited and highly politicised picture of migration control and thus the conclusions that are drawn about the operation of power engaged by migration control are limited. My research seeks to suspend such assumptions and develop a portrait of the operation of discretionary power through migration control, both through its selection of data and in its modelling of control as policing. Second, despite the volume of literature on migration law and control, the voice of migrants experiencing migration control processes remains largely absent. In part I think this reflects the degree to which litigation, research, and even non-government organisations and social movements supporting illegal migrants, have framed their activities within the dominant and narrow legitimacy of refugee rights. The voices of non-refugee illegal migrants have not yet carved a space to be heard. Drawing on interviews with illegal migrants, I argue, opens up how the impacts of migration control should be conceived, and thus provides a starting point for a more fluid conceptualisation of migration control. My bigger hope is that the thesis sheds some light on how illegal migrants experience control processes outside detention. Listening to these voices brings to the fore the “troubling recognitions” that have operated to naturalise

⁶ By way of example, in seeking human research ethics approval for this thesis, the ethics committee expressed concerns about my safety as a researcher interviewing “illegal” migrants.

the operation of the border, voices that migration policing has in various ways diminished or excluded from social consideration.⁷ By listening to these voices to understand the effects of migration control, the thesis aspires to contribute to an alternative discourse on the control exercised in migration policing. Third, control of illegal migration engages more than simply the control of movement between nation-states. Existing literature acknowledges the effect of migration control in shaping economies, especially the informal economy. Yet by and large migration control is still conceived of as primarily within the national frame. By examining a non-institutional and non-structural approach to migration policing, the thesis aspires to explore whether and how migration policing might operate beyond the nation in the global sphere.

The thesis focus

Migration control within Australia

The focus of the empirical investigation is migration control in particular contexts within Australia, specifically contexts where non-citizen's immigration legal status changes. That is, contexts of detection and location of illegal migrants, changing definitions of immigration legal status through visa policy, release from immigration detention into the community, and visa cancellation. At the end of the thesis, the focus turns to exploration of these findings outside the national context, so as to explore theoretically the operation of migration policing through the example of its role in constituting global citizenship.

Migration control practices, not outcomes

The empirical exploration focuses on practices and instances of migration policing discretion. This is a major departure from accounts that centre their study of migration control by reference to a particular institutional or structural outcome of migration control. There are two that I mention so as to highlight the unique exploration in this thesis. The first approach concentrates on the status of illegal migrants as the diametric opposite of legal citizenship, and thus migration control as primarily engaging with national membership by excluding illegal migrants. The argument runs like this. Migration law has been argued to be more important in determining Australia citizenship than citizenship law, because permanent residence visas

⁷ Phil Scraton refers to "troubling recognitions" as those stories and information that have been "denied, neutralised or reconstructed": Phil Scraton, *Power, conflict and criminalisation* (London: Routledge, 2007), 14-15.

operate as the major barrier to citizenship.⁸ Further, the stated object of the *Migration Act* 1958 (Cth) ("the *Migration Act*") is to "regulate, in the national interest, the coming into, and presence in, Australia of non-citizens".⁹ The *Migration Act* and the *Migration Regulations* 1994 (Cth) ("the *Migration Regulations*") provide that visas are required for entry and stay in Australia, and set out the criteria for visa grants and the entitlements that accompany respective visas.¹⁰ That said, the whole purpose of the *Migration Act* has been argued to be regulating physical presence in Australian territory through control of entry and exit as a function of determining membership status.¹¹ In other words, illegal migrant status involves exclusion from the national polity constituted by citizenship.

The second, and connected, contrast to the thesis approach to which I want to draw attention are accounts that consider migration control primarily in terms of its boundary inscription.¹² That is, as physical exclusion through detention or interception at the border.¹³ Or as legal measures that "move the border offshore" and "harden" the external Australian border, through excision laws, the deployment of Australian document examiners at overseas airports and technological developments in biometric identification.¹⁴ These accounts focus largely on the exclusion function in migration control.

⁸ Catherine Dauvergne, "Confronting Chaos: Migration Law Responds to Images of Disorder," *Res Publica* 3(1999).

⁹ *Migration Act* 1958 (Cth) s 4(1)

¹⁰ *Migration Act* 1958 (Cth) s 4

¹¹ Kim Rubenstein, *Australian Citizenship Law in Context* (Pyrmont, NSW: Lawbook, 2002), 230 and 29-33.

¹² This is implicit in media and scholarly interest in controls primarily on illegal entry

¹³ Suvendrini Perera describes Australian immigration detention as "not Australia", conceptualising detention as a boundary inscribing practice: Suvendrini Perera, "What is a Camp...?", *Borderlands e-journal* 1, no. 1 (2002), www.borderlandsejournal.adelaide.edu.au/vol1no1_2002/perera_camp.html

¹⁴ See this agenda outlined in the *Protecting the Border and Managing the Border* short-lived series of statistical and operational reports on border control published by the Liberal Government covering the period from 1 July 1998 to 31 June 2005: Border Control Compliance Division (Department of Immigration and Multicultural Affairs), "Protecting the border: immigration compliance," (Belconnen, A.C.T.: Department of Immigration and Multicultural Affairs, 1999); Border Control and Compliance Division Strategic Assessment Unit, Department of Immigration and Multicultural and Indigenous Affairs, "Managing the Border: immigration compliance," (Belconnen, A.C.T.: Department of Immigration and Multicultural and Indigenous Affairs, 2004); Compliance Policy and Case Coordination Division Compliance Framework Branch, Department of Immigration and Multicultural and Indigenous Affairs, "Managing the Border: Immigration Compliance 2004-05 edition," (Belconnen, A.C.T.: Department of Immigration and Multicultural and Indigenous Affairs, 2005); Compliance and Analysis Branch Compliance Section, Border Control and Compliance Division, Department of Immigration and Multicultural and Indigenous Affairs, "Managing the Border: Immigration Compliance 2003-04 edition," (Belconnen, A.C.T.: Department of Immigration and Multicultural and Indigenous Affairs, 2005).

The character of Australian migration policing

The thesis models policing via its essential elements. The analytical commitment to policing enables focus on migration control as a process rather than an outcome and thus traces the diverse and dynamic ways through which migration control is transacted. The thesis argument that migration control operates as policing is evidenced through comparison between the policing model and four migration control contexts within Australia. The common features in the deployment of migration's policing function across these different contexts illustrate the character of Australian migration policing. These themes are set out in the section below headed "thesis contributions to existing analysis of migration control".

A borderless operation of migration policing outside the national context

The thesis findings about Australian migration policing found the final step of exploration of the potential for a borderless notion of migration policing. This is pursued by a theoretical investigation of migration policing's contribution to constituting global citizenship. The thesis finding that migration policing relies on authorities other than the nation-state is not enough to base the argument that the control agenda in migration policing would remain the same without the sponsorship of the nation-state. Yet the empirical findings compel further exploration as they suggest that migration policing is not simply about managing entry, exit and stay within bounded states, nor completely explained as transitions between immigration legal status and citizenship identities. Rather, it is about managing movement across the globe, a process that continues within the state and continues on departure from that state.

Conventionally, a binary between the national and the global setting has been established through the order that international relations bring to conceiving of the globe as a collection of bounded political communities.¹⁵ In this context, migratory movement is movement from one bounded community to the next and control occurs at the border. The last chapter of the thesis explores how migration policing's management of transitory movement challenges its characterisation as national border policing. We are "living in a world in motion",¹⁶ which makes transitory movement, and its control, of central importance. The number of migrants as a proportion of the total world population remains comparatively low, at 3.1%,¹⁷ yet this

¹⁵ Nevzat Soguk and Geoffrey Whitehall, "Wandering Grounds: Transversality, Identity, Territoriality, and Movement," *Millennium: Journal of International Studies* 28, no. 3 (1999).

¹⁶ Katja Franko Aas, "Analysing a World in Motion: global flows meet 'criminology of the other'," *Theoretical Criminology* 11 no. 2 (2007).

¹⁷ See United Nations Population Division, "International Migrant Stock: The 2008 Revision," United Nations, www.esa.un.org/migration/index.asp?panel=1. Note though these figures do not include

represents more people living outside their country of birth than at any other time in history.¹⁸ The number of people living outside their country of birth has doubled in the last 50 years and amounted to 214 million in 2010,¹⁹ which in an earlier estimation of just under 200 million would make the fifth most populous country following China, India, the United States and Indonesia.²⁰ Moreover increasing numbers of people are residing in places where they are *not* citizens, and where they do not desire to become citizens.²¹ That is, migration is increasingly temporary. Thus increasingly migration policing operates as control over movement which draws on the tools of immigration status and territory, rather than equating with control over immigration status and place.

Nonetheless, migration policing does operate as a process of inclusion and exclusion. Part of that inclusion and exclusion reflects visa criteria such as skills, family relationships and so on. However it also reflects notions of good and bad character,²² stereotypes about deviancy and criminality,²³ assessments that indicate adherence to control conditions,²⁴ Australian integration,²⁵ political negotiations with civil migration policing actors and many other factors.²⁶ These factors cannot be reduced to the construction of national borders. It is when migration policing is explored outside the nation-state that the thesis argument that migration policing cannot be conflated with border policing, becomes most clear. The last chapter of the thesis explores migration policing as it is formed through globalised policing relationships. It explores the foundations of migration policing as it traces migratory movements themselves, as it restructures power relations by managing their circulations across the globe, rather than control through national borders.

unauthorised migration numbers. In estimating international migrant stock, these figures equate international migrants with the foreign-born whenever possible.

¹⁸ María José Alcalá (United Nations Population Fund), "State of World Population 2006: A Passage to Hope, Women and International Migration," in *State of World Population* (New York: United Nations Population Fund, 2006), 6.

¹⁹ International Organization for Migration, "World Migration Report 2010: The Future of Migration Building Capacities for Change," (Geneva 2010), 115.

²⁰ Alcalá, "State of World Population 2006: A Passage to Hope, Women and International Migration," in *State of World Population: 6*.

²¹ Alison Brysk and Gershon Shafir, "People out of place: globalization, human rights, and the citizenship gap." (New York: Routledge, 2004).

²² chapter 6

²³ chapter 4

²⁴ chapter 5

²⁵ chapter 6

²⁶ chapter 3

Global citizenship and migration control

The thesis does not aspire to provide a cohesive overview of globalised governance.²⁷ But through tracing policing relationships within and without the national context, it puts forward a fluid conceptualisation of a form of global governance that is not dependent on a single national or supra national source of authority, whether an institution or a law.²⁸ It does, however, identify global governance by hegemonic norms or values.²⁹ An example of a borderless notion of migration policing is identified through its contribution to constituting global citizenship. Global citizenship is a tentative and highly contested concept. Migration policing treats global citizenship as a status, a feature of which enables individual autonomy over movement. Migration policing contributes to founding global citizenship by its negative determination of citizenship as constraint over legitimate movement. In this way, migration policing also mediates the benefits of inclusion and access to the global community that are integral to constituting global citizenship.

Citizenship in the supra-national context has no constitutional or legislative founding. Nor is it formed by a consistent inclusive dominant norm that enables a base level of political participation at a global level,³⁰ though some argue that international human rights is the first step to enable civil rights that would in time develop to encompass political and social rights.³¹ The constraint on legitimate movement is not a constraint that is the result of a global supra-national norm to restrict the movement of all persons who are blue eyed for example. Rather migration policing's capacity to constrain movement is contingent on the mutual recognition across the globe of nation-state power to determine entry and stay onto territory and thus legal and legitimate immigration status. Further, migration policing determines migrant legitimacy to move by assessing multiple factors (risk factors, skills in demand, credibility of intention to study, security risk factors, to name just a few) which are themselves shaped by

²⁷ By "governance" I refer to "...a relatively persistent set of often conflicting practices select and construct some social object that is acted on in such as ways as to control, restrain, limit and direct the activities of the selected object of governance." See Alan Hunt, *Governance of the Consuming Passions: A History of Sumptuary Law* (New York: St. Martin's Press, 1996), 3.

²⁸ Anne-Marie Slaughter, "Everyday Global Governance," *Daedalus* 132, no. 1 (2003).

²⁹ Ulrich Brand, "Order and Regulation: Global Governance as a Hegemonic Discourse of International Politics?," *Review of International Political Economy* 12, no. 1 (2005). Brand explains global governance as a hegemonic discourse of international politics that provides a guide for action. The five dimensions of discourse he flags are: globalisation, world problems and global challenges, RealPolitik, Utopia and democracy, and the general interest of world society.

³⁰ For some, the essence of global citizenship is participation in a global political arena. This might mean a crucial focus on the role of global governance in facilitating or obstructing the development of a global civil society: see Michael Muetzelfeldt and Gary Smith, "Civil Society and Global Governance: The Possibilities for Global Citizenship," *Citizenship Studies* 6, no. 1 (2002).

³¹ Brysk and Shafir, "People out of place: globalization, human rights, and the citizenship gap."

global economic circuits or dominant political motifs. Though the global features of economy and politics and the norms encouraged by these features are fluid and changing, migration policing's role in determining access to the global community through constraining individual autonomy over movement is constant.

The thesis contribution to existing analyses of migration control

The unique aspect of this thesis is its analytical commitment to exploring migration control as policing. This yields two major findings. First, migration control is shown not to operate as a straightforward assertion of national sovereignty, or as an operation of features of the nation-state such as legal citizenship. Existing literature posits that migration law has a changing relationship with legal institutionalisations such as citizenship law that found the nation state.³² Yet explanations of illegal migration control draw attention to its operation as primarily national, whether as a war like state response,³³ symbolic affirmation of national identity in globalising times, or as continuous affirmation of the normative status of national sovereignty in international relations.³⁴ Exploring the dimension of policing in Australian migration control reveals that migration policing is a relationship of power that cannot be reduced solely to determination of national membership nor control over territory.

The deployment of policing in the migration control contexts studied reveals policing themes that recur across these contexts and develops a portrait of migration policing. The first theme shows that the impetus for migration policing is diverse, as are the factors that determine it. The thesis explores these factors, ranging from the value of migrant labour to industries based in Australia, stereotypes of suspicion, deviance and risk that shape criminal justice policing, assessments of the credibility of information put forward by visa applicants and of the likelihood of continued contact with the Immigration Department, and more. In essence these factors reflect the capacity for the policing agent to enforce the control objectives shaped by the parties to the policing relationship, in particular legal, political and social contexts.

Although the specific factors are contingent depending on the particular context, the second feature of migration policing is its constitution of social rather than legal citizenship.³⁵ It is the

³² Two accounts are explored in detail in chapter 1, by scholars Saskia Sassen and Catherine Dauvergne.

³³ Michael Grewcock, *Border crimes: Australia's war on illicit migrants* (Sydney, N.S.W.: Institute of Criminology Press, 2009).

³⁴ Anthony Burke, "The Perverse Perseverance of Sovereignty," *borderlands e-journal* 1, no. 2 (2002), www.borderlands.net.au/vol1no2_2002/burke_perverse.html.

³⁵ Legal citizenship sets out the legal rights and responsibilities of citizenship, whereas social citizenship refers to the social conditions and relations that mediate and determine a uniform and equal experience of legal citizenship. Without full social citizenship, not all legal citizens experience equal

broad discretion available to migration policing that makes these diverse drivers of migration policing possible. Each empirical study analyses elements that create this broad discretion. Migration policing's discretion is a product of its legal structure of powers and accountability, the social context, and the fragmented operation of migration policing through both government and civil bodies, as well as individual community members. Not only do the factors driving migration policing diverge with manifestations of the nation state, the third feature of migration policing is its reliance on the endorsement of policing authority apart from that bestowed by migration law. The empirical study demonstrates how policing authority is generated through the threat or use of force, through symbolic assertions of authority, through economic relationships of power, as well as through norms that generate personal and social obligations. As such it is the perception of migration policing authority that is critical in controlling migratory movement, more than the particular source of such authority. In the national context, the administrative and constitutional legality of Australian migration law forms the fourth theme of migration policing. This particular legal setting provides weak accountability for migration policing, which further enhances its discretion. I argue this does not dispel the durability of the thesis analysis of Australian migration policing outside the national context. Rather it provides an avenue of connection to the global context as global citizenship, insofar as it exists, has no constitutional or legal founding, and is constructed in analogous fashion to social citizenship in the national arena. The identity of migrant illegality in the Australian context as constructed in relation to normative ideals of social citizenship is the final theme that emerges. This negative identity shaped by migration policing practices provides a further avenue of connection to the global context, which I will go on to explain.

The thesis does not argue that the policing themes that emerge characterise migration control to the exclusion of other factors. In the national context, migration controls do implement visa criteria, and thus contribute to constituting who is granted permanent residency and eventually citizenship. However, the discretion involved in migration decision making means that it is not enough to glean an understanding of migration control solely from the visas classes and criteria that grant permission to enter and stay in Australia as set out in the *Migration Act* and *Migration Regulations*. Further the thesis does not explore migration control contexts to argue that the particular analysis that characterises migration policing in

participation and enjoyment of citizenship status. For a good overview of the origins of the terms "social citizenship" and "social inclusion" see Luke Buckmaster and Matthew Thomas, "Social inclusion and social citizenship—towards a truly inclusive society," in *Research Paper no. 08 2009-10* (Canberra: Social Policy Section, Australian Parliamentary Library, 2009).

the control contexts examined represents migration control. It is the themes of migration policing discussed above that represent migration control, though the actual outcomes vary. The thesis argues migration control as policing has a role in broader frameworks of control and policing, not solely the framework of legal citizenship and nationhood. The themes of migration policing that emerge demonstrate the compatibility between migration policing in the national setting with its occurrence outside the nation. This provides a new method to conceptualise the global ambit of migration policing. Scholars such as Peter Andreas and Ethan Nadelman have pointed to growing international norms against slavery, and against sex trafficking, amongst others, as evidence of global policing.³⁶ Others point to global police institutions such as the United Nations police, or draw evidence of policing that operates solely in the global realm.³⁷ In contrast, the thesis approach to migration policing as a policing relationship, that is, not bounded by time and space, offers a fluid conceptualisation of globalised policing relationships. The compatibility between the national and global frame shows the integration between these forums evident in globalised policing relationships.

The limits of the thesis argument

The empirical part of the study concentrates on the time period from 1996 to 2010. It is outside the scope of the thesis to consider whether this period represents a change in migration policing themes, for example, if, during another time period, migration policing reinforced Australian national boundaries. The empirical study is limited to migration control contexts within Australia as the themes and issues addressed by migration policing are specific to the particular historical and political context in which they occur. A comparative study of other nations is outside the scope and aspirations of this thesis.³⁸ The last chapter explores, however, how features of Australian migration policing are not limited to the Australian

³⁶ Peter Andreas and Ethan Nadelmann, *Policing the globe: criminalization and crime control in international relations* (Oxford ; New York Oxford University Press, 2006), 17-58.

³⁷ Note that United Nations police operate as a unit within United Nations peacekeeping operations, not as a stand-alone global police force: United Nations Police, "United Nations Policing," United Nations, www.un.org/en/peacekeeping/sites/police/policing.shtml.

³⁸ For the United Kingdom see for example: Leanne Weber and Loraine Gelsthorpe, *Deciding to Detain: How Decisions to Detain Asylum Seekers are Made at Ports of Entry* (Cambridge: Institute of Criminology, University of Cambridge, 2000); Leanne Weber and Todd Landman, *Deciding to Detain: The Organisational Context for Decisions to Detain Asylum Seekers at UK Ports* (Colchester: Human Rights Centre, University of Essex, 2002); Leanne Weber, "Decisions to Detain Asylum Seekers: Routine, Duty or Individual Choice?," in *Exercising Discretion: Decision-Making in the Criminal Justice System and Beyond*, ed. L Gelsthorpe and N Padfield (Uffculme: Willan, 2003). For the United States see Andreas and Nadelmann, *Policing the globe: criminalization and crime control in international relations*. For Europe see Didier Bigo and Elspeth Guild, eds., *Controlling Frontiers: free movement into and within Europe* (Aldershot: Ashgate, 2005).

context, by examining their compatibility through the notion of globalised policing relationships managing circulation across the globe.

Each of the migration control contexts studied scrutinises individualised outcomes that are limited to the particular instance at hand. As mentioned above, the thesis does not argue that the particular outcomes in the instances discussed represent how future migration control decisions will be made. It is the recurrent themes of migration policing traced across the migration control contexts that can be generalised as characteristic of migration control.

The four control contexts sample civil involvement in migration control, as well as Immigration Department decision making, supportive community member sponsorship, and state police involvement in migration control. These focus on common contingent factors underlying the differing delivery of migration policing by diverse actors. The thesis was not however an in-depth study of a single institutional culture in these differing contexts. This was a theoretical decision early in the thesis research, arising from the model of policing applied, and also because the thesis takes as its starting point an investigation of the significance of illegal status in migration control, not controls exercised by a particular institution.

The examination of migration policing's reliance on authority beyond that of migration law does not argue that national authority is absent. Migration law bestows the legal power and justification for that authority. Rather, the argument is that migration policing involves more than national authority, and more than migration law that is being authorised. For example, the Australian trend towards employer sponsored visas in the skilled migration stream effectively draws in global economic circuits into migration decision making. However sponsorship requirements are set out in Australian migration law, and thus cannot be completely separated from law, though they involve more than law.

Although the empirical focus is the control of illegal migrants, some aspects of migration policing show its potential extension to migrants in general in Australia. The absence of citizenship in the Australian constitution ensures that Australian membership is not conclusively established through citizenship bestowed by legislation.³⁹ Legislative citizenship is not enough conclusively to discount an individual's alien status, which would therefore formally bring that person under the scope of the Migration Act and liability to migration

³⁹ Peter Prince, "Mate! Citizens, Aliens and 'Real Australians' - the High Court and the case of Amos Ame" in *Research Brief* (Canberra: Parliamentary Library, Law and Bills Digest Section, 2005).

control.⁴⁰ Migration policing's constraint of the potential for illegal migrants to overcome their illegal status through participation in the Australian polity foreshadows its control of migrants more generally. Outside the nation, the negative identity of the global social citizen is shown to be constituted in part by migration policing's constraint (or facilitation) of movement across the globe. In fact, the last chapter of the thesis as a whole specifically addresses the question of the limits of the thesis empirical study. It is devoted to precisely the question of the durability of the empirical findings about Australian migration policing outside the national context.

B An overview of method and sources

A model of policing as the first step in the thesis method

The goal in this qualitative research is to analyse the relationship between migration control and policing, focusing on migration control as it impacts on illegal migrants. This requires a method that first develops a definition of policing to make visible and cohere a set of practices as "policing" practices.⁴¹ Models have been understood as "concept or theory that offers the best way of understanding a social phenomenon" and that "explains and describes the essential aspects of a concept or theory based on structured assumptions."⁴² The policing model in this thesis is developed from both theoretical and sociological studies of policing. It proposes elements of policing that are essential to policing, but are not the only elements of policing. The model also represents an attempt to avoid assumptions about the framework that policing might draw on as a source of authority and legitimacy. In this way it was developed with the global environment of multiple and disaggregated sources of authority in mind. In essence, the model of policing I adopt conceives of policing as a relationship of power that through that relation gains the discretion and authority to police illegal migrants. The model does not reduce policing to isolated interactions between police and the policed. It acknowledges that every interaction takes place within existing legal, political and social dynamics.

⁴⁰Ibid. Further, chapter 1 and chapter 4 discuss incidences whereby citizens or lawful migrants were subject to migration policing, either through the Immigration Department's incorrect identification of immigration legal status, or incidentally through detection and apprehension practices that involved questioning of persons in a particular raid.

⁴¹The policing model is set out in chapter 3 of the thesis.

⁴²Allan Y. Jiao, "Matching Police-Community Expectations: A method of determining policing models," *Journal of Criminal Justice* 26, no. 4 (1998): 292.

My development of a policing model is the key technique adopted to develop the thesis. It is the hinge between theory and data in the thesis. It bridges theory and method. The model is used firstly as a point of comparison to consider whether migration control operates as policing and as a lens to illuminate migration practices that act as policing. Secondly it operates as a link to enable comparison across different contexts to further scrutinise the recurrence and consistency of migration control's operation as policing. Thirdly the elements of the model become the base for theoretical development of policing that at the end allows exploration of whether migration policing is necessarily tied to the national.

The model proposes policing as a relationship of power and authority within specific control contexts. The model is centred on the manner in which discretionary decision-making advances the control dimension of migration control, and in so doing transfers authority from the legal text, through discretion, into active relationships of power and subjugation. In these relationships, authority rests in obedience to policing rather than the detailed dominion of law.

The policing model, data collection and theory building

The model of policing in the thesis essentially involves a relationship of power, engaged in particular events and practices, between the policed illegal migrant and the policing agent. It is these two voices, in tension in the policing relationship, that provide the two data sets for the thesis. These are not fixed subject positions that gain an essential character simply from their identity as police or policed. Both the police and the policed are plural identities. For example, those empowered with migration control duties are from a range of organisations, both state based and private, as well as private individuals. Thus policing agents hold very different formal obligations, differing discretionary power and draw on different sources of authority to endorse their power. Those migrants who are policed also have multiple identities and their capacity to negotiate social citizenship is determined by their particular context.

The selection of contexts for data collection was shaped by features of the policing model, and examination of existing literature on migration control.⁴³ Study of the four migration control contexts progressively refined the conceptual character of migration policing. This method is

⁴³ Ibid., 45. See also Mark Findlay, *The Globalisation of Crime: Understanding Transnational Relationships in Context* (Cambridge, New York: Cambridge University Press, 1999), 1-19. Findlay uses what he refers to as "comparative contextual analysis" in an analogous way.

⁴⁴ Chapter 2 reviews adding Australian migration control literature through the frameworks of law, the management and statistical reporting of the use of migration control.

⁴⁵ For examination of existing literature on Australian migration control see chapter 1.

described by Glaser and Strauss as “theoretical sampling”.⁴⁴ “Theoretical sampling” involves a data collection process that is informed by the progressively developing theory, theory guides the next stage of data to be collected to further investigate the theory.⁴⁵ The character of Australian migration policing foreshadows that migration policing is not tied to the national location of the empirical study. The last chapter of the thesis considers the durability of this finding outside the national place and political epoch that limited the empirical study of migration control contexts. It explores the potential of migration policing to operate beyond the nation through its action on controlling the benefits of global citizenship, that is, in restricting migratory movement.

The policing model as the bridge for comparison of migration control across different contexts

The control contexts

Four key contexts of contemporary Australian migration control were selected – the involvement of employers in migration control, the detection and apprehension of irregular migrants, release from immigration detention, and visa cancellation for failure of the character test. These control contexts were selected after examination of existing literature on the operation of migration control.⁴⁶ The unique character of migration policing deployed in these contexts is highlighted by exploring the tension between migration law and control practices, as well as that between migration control and legal citizenship.

Each context engages a different relationship of policing, and study of each respective context concentrates on how one or two of the elements of the policing model are deployed. One control context reveals the role of employers in migration policing which draws in non-state based forms of authority and legitimacy. Another control context highlights how migration policing discretion is expanded by default by the administrative legality of migration law. The third shows that release from immigration detention is conditional on the establishment of a policing relationship, not on lawful immigration status. The last context demonstrates how

⁴⁴ Anthony Bottoms, “The relationship between theory and empirical observations in criminology,” in *Doing Research on Crime and Justice* ed. Roy D King and Emma Wincup (Oxford University Press, 2000), 43-44, 52-53.

⁴⁵ *Ibid.*, 45. See also Mark Findlay, *The Globalisation of Crime: Understanding Transitional Relationships in Context* (Cambridge ; New York: Cambridge University Press, 1999), 1-19. Findlay uses what he refers to as “comparative contextual analysis” in an analogous way.

⁴⁶ Chapter 1 reviews existing Australian migration control literature through the frameworks of law, the institution of the Immigration Department and statistical reporting of the use of migration control powers.

discretion is layered and integrated into migration law to enable policing of any migrant, regardless of visa status.

Comparison across different contexts

The comparative endeavour across control contexts is a challenge because each control context is discrete, generating knowledge and meanings particular to the context at hand. Further the model of policing proposed means policing cannot be generalised as a specific activity, objective, institution or law. It is always dynamic and context specific. Thus I draw on comparative contextual analysis to draw out the recurrent policing themes across the differing social, legal and political circumstances in the four migration control contexts studied.⁴⁷ Comparative contextual analysis deconstructs how processes in different scenarios are conceptualised by gaining an understanding of their social meanings.⁴⁸ My research method is based on the premise that illegal immigration status does not unify illegal migrant experience. To be an illegal migrant is the product of migration law and policing:

... in the more profound sense that the history of deliberate interventions that have revised and reformulated the law has entailed an active process of inclusion through "illegalization".⁴⁹

The contexts sample key social relationships that determine the extent to which an illegal migrant is able to "overcome" the restrictions of their illegal status. The contexts also sample the transition between legal and illegal status as it is effected by change in formal legal status, and as it is effected by transition in the social experience of the same immigration legal status, for example by apprehension as an illegal migrant. That is, they highlight the social meaning of illegal status. The contexts also draw out how policing authority is established by sampling policing relationships. These policing relationships include individual encounters between migration policing agents and illegal migrants, and political negotiations between civil and state policing agents. The way that policing generates and stabilises authority is explored through the social meaning of policing authority for both parties in the policing relationship, as well as the legal features that legitimate policing's discretionary authority.⁵⁰ Comparison of the social meanings of illegal status and policing authority across the varied scenarios enables the

⁴⁷ Findlay, *The Globalisation of Crime: Understanding Transitional Relationships in Context*: 1-19.

⁴⁸ Mark Findlay and Ralph Henham, "Integrating Theory and Method in the Comparative Contextual Analysis of Trial Process," in *Research Methods for Law*, ed. Mike McConville and Wing Hong Chui, *Research Methods for the Arts and Humanities* (Edinburgh: Edinburgh University Press, 2007).

⁴⁹ Nicholas P. De Genova, "Migrant 'Illegality' and Deportability in Everyday Life," *Annual Review of Anthropology* 31(2002): 439. See also Nicholas De Genova, "The Queer Politics of Migration: Reflections on 'Illegality' and Incurability," *Studies in Social Justice* 4, no. 2 (2010): 110.

⁵⁰ These indicators are discussed in further detail in the preface to Part II of the thesis.

recurrent features of migration policing to be teased out from their specific contexts. In this way the common themes of migration policing emerge.

The collection of data: two perspectives in the policing relationship

As mentioned earlier, the model of policing influences how data is collected, and the ethnographic approach to interpreting the voices of the police and the policed in migration control encounters. In every policing encounter there are two sides to the policing relationship, that of the policing agent and that of the policed. Hearing from both sides of the policing relationship, as they exist in constant tension to determine meaning, is crucial to explore how migration control operates as policing. Understanding the policing relationship as more than embodied encounters shapes the sources of data used to develop and present the perspective of each of the voices in the policing relationship.

The voice of illegal migrants in this research

The account of the policed illegal migrant is crucial to appreciate how policing effects control, the impact of migration control in controlling migrant movements, those elements that make policing authoritative, and how policing informs people about their place in Australia and so on. Direct accounts from migrants of the impact of migration control centre the actual practice of discretion and individual's interpretation of policing practice as indicative of its meaning and significance,⁵¹ rather than the aspiration or potential for policing discretion canvassed by law and policy.⁵²

The accounts of illegal migrants in the policing relationship are sourced from a mixture of semi-structured interviews conducted with participants, primary documentary evidence from participants' personal Immigration Department files, and their voices as they emerge from publically reported tribunal and judicial decisions. The centrality of illegal migrants' voices to the methodology of the thesis research is not solely demonstrated by the direct use of quotes from interviews. It is also presented through descriptions of migration procedure and the experiences of groups of illegal migrants. It has driven the research questions, as well as the

⁵¹ Note that the experience of policing is necessarily perceived through culturally and socially-economically determined perceptions of policing and migration control practices. The importance of culturally specific interpretations was illustrated in a study on the meanings of social support and support-seeking strategies of immigrants and refugees in Canada: Miriam Stewart et al., "Multicultural Meanings of Social Support among Immigrants and Refugees," *International Migration* 46, no. 3 (2008).

⁵² Michel Foucault, "Afterword: The Subject and Power," in *Michel Foucault: Beyond Structuralism and Hermeneutics With an Afterword by Michel Foucault*, ed. Hubert L Dreyfus and Paul Rabinow (Brighton: The Harvester Press, 1982). Foucault talks about how the study of power is really the study of the subject.

choice of particular migration control practices that form the thesis focus. In this way, illegal migrants participate as knowledgeable informants about migration control practices rather than as passive research objects.⁵³

Issues of access to the voices of illegal migrants arise for both the personal and publically available sources of data. Access to interview illegal migrants was difficult. Illegal migrants are inaccessible as a population precisely because they are illegal, and occupy marginal social standing.⁵⁴ The question of access also raises ethical issues that are discussed below. Although illegal migrants share an illegal status, this does not constitute an essential common identity or community in Australia. Instead illegal migrants are atomised and live in fear of detection. The interviews reflect selectivity as although participants were recruited so as to include a variety of experiences of migration control within Australia, participation in this research also reflects the relationships I had developed over time in migrant and refugee communities and with persons who work with or know persons living without visas.⁵⁵ Semi-structured interviews with persons who were illegal or had been illegal in the past focused on the following subject matter: life in Australia without a visa including practical issues such as work and shelter as well as social relationships, experience of apprehension as illegal, how an individual became illegal and if relevant became legal, and life in Australia on a bridging visa.⁵⁶

Similarly, the glimpses into illegal migrants' experience of migration control from publically reported cases are also selective and not easily accessible.⁵⁷ The perspective of illegal migrants is largely missing from the routine official records maintained by the Immigration Department⁵⁸ and from tribunal and judicial decisions. This absence, and conversely the selectivity of its presence, is in part a result of the legal structure of immigration decision-making. Firstly, the legality of migration control practices is rarely a relevant factor in visa

⁵³ Migration Act 1958 (Cth) s 474. Note that migrant accounts are present to some degree where

⁵³ Georgia Doná, "The *Microphysics* of Participation in Refugee Research," *Journal of Refugee Studies* 20, no. 2 (2007): 212.

⁵⁴ Franck Duvell, Anna Triandafyllidou, and Bastian Vollmer, "Ethical issues in irregular migration research, CLANDESTINO, European Union Citizens and Governance in a Knowledge-based Society.," in *CLANDESTINO Undocumented Migration: Counting the Uncountable, Data and Trends Across Europe* (Research DG, 2008).

⁵⁵ Staring discusses how both interview based and documentary based ethnographic research involve different forms of selectivity: Richard Staring, "Different methods to research irregular migration," in *The Ethics of Migration Research Methodology: dealing with vulnerable Immigrants*, ed. Ilse van Liempt and Veronika Bilger (Brighton, U.K: Sussex Academic Press, 2009), 83-97.

⁵⁶ See more detail with regards to the interview themes at Appendix B.

⁵⁷ The kind of selectivity is specific to the particular documentary material considered. For example, see Staring's discussion of the selective character of material before the court in his examination of judicial investigations to learn about the social organisation of human smuggling: Staring, "Different methods to research irregular migration."

⁵⁸ I refer to the Immigration Department annual reports, statistical reports, and website information.

determination decisions which form the bulk of migration tribunal and judicial review cases, and as a consequence, migrant experiences of control practices rarely feature in these decision records. Secondly, judicial review of migration control practices does not provide a basis for non-citizens to lawfully remain in Australia,⁵⁹ which acts as a disincentive for migrants to pursue judicial action. Thirdly, merits based judicial review is not available, thus limiting the inclusion of fact based accounts in court decisions.⁶⁰ Thus illegal migrant experience of migration policing is systematically and routinely silenced by their illegal status, which forces these voices out of legal, social and political forums, and makes it even more important that these voices be heard.⁶¹

Whether interview or documentary, the source of the voice of the illegal migrant used in the thesis is not held out to be empirically representative of illegal migrants' lives and experiences. The thesis does not aim to create a representative account of illegal migrant experience in Australia. The aim of the thesis rather is to explore and map some of those otherwise hidden experiences, not to homogenise the experiences of illegal migrants.⁶² This departs somewhat from a key trend in refugee studies which has sought from inception to develop a perspective which focuses on *commonalities* in refugee experience.⁶³ A representative approach to forced migration narratives which facilitates direct policy recommendations has been argued to be an important method to advance ethical research by providing benefit to the researched population.⁶⁴ However, this is not the only way to approach the ethics of research with illegal migrants as a vulnerable population, as will be discussed further below.

⁵⁹ Non-citizens are eligible for a bridging visa to remain in Australia to await determination of judicial review only for direct review of a valid substantive visa application.

⁶⁰ *Migration Act 1958* (Cth) s 474. Note that migrant accounts are present to some degree where statutory declarations are included in judicial decisions. However, the exclusion of merits based judicial review, which is restricted to matters of jurisdictional error, largely excludes migrant voices from immigration based judicial decisions.

⁶¹ David Brown argues that "In situations where 'normal' access to the forms of circulation of expression, to the ability to take part in acts of what I have elsewhere called, 'discursive citizenship' (Brown 2002: 323) in a democratic polity, are routinely restricted or prevented, it is more important than ever that these suppressed voices be heard.": David Brown, "Giving Voice: The Prisoner and Discursive Citizenship," in *The Critical Criminology Companion*, ed. Thalia Anthony and Chris Cunneen (Sydney: Hawkins Press, 2008), 229.

⁶² Paula Saukko utilised the metaphor of a patchwork quilt, with no centre, to stitch together the stories of five anorexic women, and through this rejected the idea of framing the characters as homogenous: Paula Saukko, "Between voice and discourse: quilting interviews on anorexia," *Qualitative Inquiry* 6(2000).

⁶³ Doná, "The *Microphysics* of Participation in Refugee Research."

⁶⁴ Karen Jacobsen and Loren B. Landau, "Researching refugees: some methodological and ethical considerations in social science and forced migration," in *New Issues In Refugee Research* (Geneva: UNHCR, 2003).

The more pertinent issue with regards to representation of the voices of illegal migrants is the extent to which the thesis presentation of the impact of living without a visa on people's lives in Australia, and the social meanings illegal migrants ascribe to illegal status and policing authority, is reliable. An important initial observation is that ethnographic research can never be objective.⁶⁵ By setting out the process by which the voice of illegal migrants is established in the thesis, and reflecting on my own presence in the research, I attempt to acknowledge and make the presence of myself as a researcher visible, rather than present that element as neutral. An important part of authorising the voice of the policed illegal migrant is the use of multiple sources to establish that voice, and in particular to place those voices in their social and legal context.⁶⁶ Interviews with illegal migrants alone are not sufficient to develop an understanding of the critical social, cultural and legal factors that form their perceptions of migration control practices, and inform their actions. The experiences relayed in interviews are affirmed through consideration of their consistency with official sources such as Immigration Department policy and procedure, as well as with the personal Immigration Department files of some interview participants.⁶⁷ Personal Immigration Department documentation enables confirmation of the timeframe events occurred, and analysis of the extent to which the individual's perception of an event (the identity of the policing agent, the basis for the policing intervention, the context in which powers were exercised) corresponds with that reported by the Immigration Department or other policing authority.

Secondary materials serve two purposes. They enable the accounts of interview participants to be confirmed, and they add to the picture that develops from the mosaic of illegal migrant voices. Drawing together accounts of migration control practices that are incidental in secondary commentary is itself a method of analysis that reframes these narratives from their original reporting in the context of immigration detention or refugee experiences amongst others, to make visible the varied experiences of migrant illegality.⁶⁸ The secondary sources relied upon in drawing out the voice of the policed subject are many and varied – from

⁶⁵ Andrea Fontana and James H Frey, "The Interview: From Neutral Stance to Political Involvement," in *The Sage Handbook of Qualitative Research*, ed. Norman K Denzin and Yvonna S Lincoln (Thousand Oaks: Sage Publications, 2005).

⁶⁶ David W. McCurdy, James P. Spradley, and Dianna J. Shandy, *The Cultural Experience: Ethnography in a Complex Society (2nd Edition)*, (Long Grove, Illinois: Waveland Press, 2005).

⁶⁷ See in particular Immigration Department's detailed procedure manual which includes template forms, template interview questions and template decision records: Policy Advice Manual 3, available via legal subscription services LexisNexis Australia or Legend.com.

⁶⁸ These secondary sources include for example Ombudsman reports, inquiries into particular cases (such as those into Cornelia Rau, Vivian Alvarez Solon, and Mohammad Haneef), reports by the Australian Human Rights Commission, and so on. These sources are referenced in each chapter.

Ombudsman reports, investigative journalist style reports, refugee written texts and letters included in books, submissions to government and so on.

In addition to interviews with illegal migrants, documentary evidence and secondary materials, peer and professional knowledge discerned from structured interviews with other migration agents and lawyers in the field and non-legal advocates, peer delivered seminars for professional development, and the seven years experience I have in the migration law field also affirm that the accounts of illegal migrants in this thesis are not atypical.⁶⁹ The multiple sources are used to triangulate or enhance the validity of the experiences of illegal migrants and the social meanings they attribute to illegality and marginal immigration legal status.⁷⁰ The experiences of illegal migrants reported in the thesis are held out as indicative rather than representative or complete, there being no such thing as the representative experience of illegal migration. Rather, they show the possibilities of migration's policing function.

The voice of the policing agent in this research

In contrast to those who are policed, the voice of the policing agent is abundantly prevalent in the social, public, legal and bureaucratic materials relied upon in my research. The goal in examination of the voice of the policing agent is to establish the extent of discretionary power of policing agents, the diversity of impetuses and objectives across policing agents, and to examine the importance of their support of migration law and control processes.

The identity of the policing agent drawn upon in the thesis reflects the fragmented operation of migration control as involving multiple institutions and individuals. The government entities include Immigration Department officers, the Immigration Minister, state police and the Australian Federal Police. The non-governmental entities include employers, education providers and community sponsors for detainees seeking release from immigration detention.⁷¹ The official discourse of law, policy, procedure, institutional reports, is utilised as the primary source for the voice of most of the policing agents considered in the thesis. One policing voice that was missing from the official discourse of policing was the voice of non-institutional community policing agents, specifically, community sponsors of detainees for

⁶⁹ The seminars I have attended have been delivered by migration agents and lawyers with generally twenty years experience in migration law. These seminars are certified for delivery for mandatory education requirements for ongoing registration as a migration agent. They include seminars on illegal migrants, visa cancellation, student visas, permanent residency, and the character requirement. Note also that I outline my experience in the migration law field below.

⁷⁰ Stewart et al., "Multicultural Meanings of Social Support among Immigrants and Refugees."; Doná, "The *Microphysics* of Participation in Refugee Research," 213.

⁷¹ The entities involved in migration policing are detailed further in chapter 1 at 42-46.

release from detention.⁷² These individuals were vital to interview as they are motivated by their support of the illegal migrants they police, and as such interviews focused on their experience of conflict between their support for migrants and the roles prescribed by legal undertakings and their relationship with the Immigration Department and other authorities.⁷³ Interviews of policing agents were otherwise unnecessary for the thesis goal of building a picture of the impact of policing practices on illegal migrants.

Multiple sources are used to develop the perspective of the policing agents, and triangulate to confirm the authority of its representation. These sources are specified in each chapter. These sources include law as well as policy, namely, the *Migration Act 1958* (Cth), the *Migration Regulations 1994* (Cth), the Immigration Department's *Procedures Advice Manual 3* (PAM 3) and Ministerial Series Instruction (for policy and procedures to be later incorporated into PAM 3). By drawing on law and policy as the "voice" of the policing agent I do not mean to suggest that policing practices are merely the enforcement and application of those laws. Although migration control is a highly bureaucratised form of control, it is also highly discretionary. Thus the perspective of the policing agent must focus on particular examples of the operation of migration control. Examples of migration control practices are drawn from the Immigration Department annual reports and website, Immigration Department decision records (obtained by Freedom of Information requests and provided by illegal migrant interview participants), Migration Review Tribunal, Refugee Review Tribunal and Administrative Appeal Tribunal decisions, Federal Magistrates Court, Federal Court and High Court decisions and transcripts and evidence given to Senate Legislative Committee inquiries. Examples are also sourced from *ad hoc* governmental inquiries such as those of the Ombudsman, the Human Rights Commission (formerly the Human Rights and Equal Opportunity Commission), and the annual reports of the Australian Federal Police and the Australian Security and Intelligence Organisation. Interviews with migration agents and lawyers working in migration law provide a supplementary source to qualitatively triangulate the voice of the policing agent, specifically as to ways that migration procedure has operated in addition to legislative text and policy and procedure.⁷⁴ The sources of the voice of the policing agent – derived from both primary and

⁷² There are other examples explored in the thesis that could also be seen as coming within this definition of community policing, namely, the involvement of employers in monitoring the immigration legal status of employees and education providers monitoring student visa compliance. However in both these examples the role and expectations of employers and education providers are set out in law, policy and official handbooks. It is only community involvement in assisting release from detention where there is a gap in the voice of these agents in the official discourse.

⁷³ See more detail with regards to the interview themes at Appendix B.

⁷⁴ See more detail with regards to the interview themes at Appendix B.

secondary documentary material as well as interviews - are analysed to consider the extent of discretion authorised by explicit powers, the structure of legal powers, and the presence (or absence) of accountability measures, as well as the factors that influence exercise of that discretion. In this way, the analysis of legal, secondary and interview material analysis is conducted in relation to each other, and teases out the relationship between discretionary powers and national laws.

Interviews conducted with research participants⁷⁵

Semi structured interviews with twelve persons who, in the past or at the time of interview, were "unlawful non-citizens", explored the experiences of life and immigration processes. These interviews covered experiences of living without a visa in Australia, being detected and apprehended, release from detention and so on. The experiences the interviews describe span a time period between 1996 and 2010, though some of the immigration processes described in these interviews are ongoing. That is, the interview participants largely described their experiences of migration control during the period in which John Howard was the Australian Prime Minister.

I interviewed six immigration lawyers and migration agents, based in Sydney and Melbourne, who represented migrants across Australia. These interview participants had between three to over thirty years experience in migration law in Australia, or their daily work entailed contact with illegal migrants.

I interviewed seven non-legal advocates based in Sydney and Melbourne who were involved in supporting illegal migrants, including sponsorship of detainees' release from detention and in community volunteer run support schemes. The majority of these advocates were involved in organisations which were informal in character. They provided support on an unpaid basis, and most were engaged in such activity as their main activity. Some non-legal advocates were community organisation workers who had contact with a specific population that included illegal migrants and had been involved in delivering training about their clientele to the Immigration Department.

⁷⁵ See the full list of interview participants at Appendix A, and details of the key themes explored in each set of interviews at Appendix B.

Ethics and ethnography: issues in relation to the participation and voice of illegal migrants

An ethical research method requires much more than simply following human research ethics guidelines, though such guidelines facilitate ethical research.⁷⁶ Such guidelines focus on the conduct of the research itself - matters such as informed consent, recruitment, and the risk of harm to research participants. Specific ethical issues arise in research with vulnerable persons such as illegal migrants due to the unequal power relationship between the researcher and research participant. The nature of the research subject itself involves individuals in violation of the law. In particular, illegal migrants often face language and cultural differences, vulnerability to detention and deportation, social isolation and poverty and health issues. These issues are analogous to those in the more discussed issues with regards to power relationships in refugee research,⁷⁷ though the issues that arise are specific to each research scenario.⁷⁸ In this research, the vulnerable position of illegal migrant participants prompted the following issues for ethical consideration.

The issue of coercion in recruitment and informed consent to participation The potential for coercion of interview participants who did not have permanent visas was increased through my association as a lawyer and volunteer at various times with a refugee community legal centre, as refusal of an interview might be interpreted by potential interview participants as impacting on their access to free legal services at the community legal centre. To avoid the potential for coercion, I did not directly request the participation of those who were illegal or had lived illegally. I advertised passively by circulating an advertisement about my research to persons working with people without visas in community legal, welfare and advocacy organisations in Sydney and Melbourne. I recruited interview participants on the basis of a variety of experiences with officers holding migration policing duties. Interview participants

⁷⁶ Richard Hugman, Eileen Pittaway, and Linda Bartolomei, "When 'Do No Harm' Is Not Enough: The Ethics of Research with Refugees and Other Vulnerable Groups," *British Journal of Social Work* 41(2011); Duvell, Triandafyllidou, and Vollmer, "Ethical issues in irregular migration research, CLANDESTINO, European Union Citizens and Governance in a Knowledge-based Society.."; Ruth M. Krulfeld and Jeffery L. MacDonald, eds., *Power, ethics, and human rights: anthropological studies of refugee research* (Lanham, MD: Rowman & Littlefield Publishers, 1998).

⁷⁷ Bogusia Temple and Rhetta Moran, "Introduction," in *Doing Research with Refugees: Issues and Guidelines*, ed. Bogusia Temple and Rhetta Moran (Bristol: The Policy Press, 2006), 1-20; Jacobsen and Landau, "Researching refugees: some methodological and ethical considerations in social science and forced migration."

⁷⁸ Joan Sieber refers to an example of research where the common ethical challenges in refugee research did not emerge, one where four Afghan women conducted social action research to discover solutions for the problems to help their grandmothers find friends their own age: Joan E. Sieber, "Introduction: All Refugee Research Is Not the Same," *Journal of Empirical Research on Human Research Ethics* 4, no. 3 (2009).

included persons who were illegal at the time of interview, those who had experienced being apprehended while illegal, those who had reported themselves to the Immigration Department while illegal, those who had been in detention and released, and those who had lived in the community on a *Bridging Visa E*.⁷⁹ To address issues of informed consent, I discussed the nature of the research extensively with persons who work and socialise with persons living without visas, and also commenced interviews with a detailed description of anticipated discussion points, and a reminder of the power to withdraw at any time during or after the interview. Assurance of anonymity and confidentiality was critical to accessing the involving of participants living without visas, and was partly achieved through my pre-existing relationships of trust with particular community members and gatekeepers.⁸⁰ At the same time, these pre-existing relationships increased the sensitivity of issues of anonymity. I emphasised that withdrawal from participation (like participation itself) would remain confidential and specifically assured confidentiality with regards to any persons that the participant and I knew in common.⁸¹

The issue of anonymity Ensuring the participants who entered, live or lived in Australia without immigration authorisation would not suffer any disadvantage as a result of participation is especially important in research with illegal migrants. The Immigration Minister has the power to require information or documents which the Minister has reason to believe are relevant to ascertaining the identity or whereabouts of a person whom the Minister has reason to believe is an unlawful non-citizen.⁸² I required interview participants who were illegal at the time of interview to provide me with an alias, and I did not obtain residential addresses for any interview participants, so as to ensure I did not collect information that the Immigration Department could require of me. In addition, during the interviews, I utilised the alias the participant had selected as the name to be used in any publication of research.

Many of the interviews were conducted with the assistance of interpreters, and to facilitate trust, discussion of which interpreter would be appropriate was discussed prior to the

⁷⁹ A *Bridging Visa E* is the most restrictive form of bridging visa. It is typically issued on the grounds that a person is making arrangements to depart Australia, or is awaiting the Immigration Minister's decision on an intervention request. *Bridging Visa E* holders are routinely not given permission to work or study, and these visas are frequently issued for short periods of time, as short as a few days to usually not more than three months at the most. The *Bridging Visa E* is discussed in chapter 5 in the context of its grant permitting release from immigration detention.

⁸⁰ Valerie J. Smith, "Ethical and effective ethnographic research methods: A case study with Afghan refugees in California," *Journal of Empirical Research on Human Research Ethics* 4(2009).

⁸¹ Duvell, Triandafyllidou, and Vollmer, "Ethical issues in irregular migration research, CLANDESTINO, European Union Citizens and Governance in a Knowledge-based Society.," 10.

⁸² *Migration Act 1958* (Cth) s 18

interview, as well as assurance of the legal obligation of confidentiality of professional interpreters. In this regard, for those participants with refugee backgrounds, familiarity with the causes of conflict in their country of origin was important in finding an interpreter that facilitated the trust of the participant. Issues arising from the role of interpreters extend to the conduct of interviews themselves, such as checks to ensure translation is complete,⁸³ that the interpreter and participant understand each other, and the involvement of another person in the research process.⁸⁴

The issue of potential trauma from interviews The potential for psychological harm to research participants is an element that is explicitly included in human research ethics guidelines.⁸⁵

Risks to participants are ethically acceptable only if they are justified by the potential benefits of the research.⁸⁶ However it is important to note that participation in studies that engage with traumatic experiences does not of itself necessarily have a negative impact. Psychological research on the impact of trauma research participation upon survivors of physical violence or disaster indicates that the majority do not regret their participation nor experience unfavourable reactions to their participation, though some do.⁸⁷ Particular attention to informed consent is important for potentially traumatic research, as well as recognition that consent may be withdrawn at any time.⁸⁸ In this research, for many discussing their present or past illegality did involve a personal emotional cost, but, bar one potential participant, it was not so distressing that they wished not to participate. On one occasion an interview commenced but was then abandoned as it prompted great anxiety and we spent our time having tea and talking about other matters. The procedures I adopted to address ethical questions of potential disadvantage through participation meant that in many interviews I referred interview participants to welfare organisations, legal assistance, and multicultural or torture and trauma survivors' mental health services.⁸⁹

⁸³ Refugee Review Tribunal, "Refugee Review Tribunal Interpreters' Handbook," (Refugee Review Tribunal, February 2003).

⁸⁴ Temple and Edwards, "Limited exchanges: approaches to involving people who do not speak English in research and service development."

⁸⁵ See for example National Health and Medical Research Council (NHMRC)/Australian Research and Council (ARC)/Australian Vice-Chancellors' Committee (AVCC), "National Statement on Ethical Conduct in Human Research," (Canberra: NHMRC, 2007).

⁸⁶ Ibid.

⁸⁷ Elana Newman and Danny G. Kaloupek, "The risks and benefits of participating in trauma-focused research studies," *Journal of Traumatic Stress* 17(2004); Michael G. Griffin et al., "Participation in trauma research: is there evidence of harm?," *Journal of Traumatic Stress* 16, no. 3 (2003).

⁸⁸ Elana Newman and Elizabeth Risch, "Ethical issues in trauma-related research: A review," *Journal of Empirical Research on Human Research Ethics* 1, no. 3 (2006).

⁸⁹ I had referral sheets and explained the services available to interview participants if desired.

The issue of the benefit of research Broader ethical issues arise in relation to research with vulnerable communities, namely the debate between a “do no harm” approach to ethics and David Turton’s argument that research into other’s suffering can be justified *only* if that research explicitly aims to alleviate that suffering.⁹⁰ It is important however not to consider benefit to vulnerable populations within a limited framework of policy recommendations or reform. Reflecting on the research interviews undertaken in this research highlights an observation made by Susan Bibler Coutin that fieldwork is never merely nor even primarily research.⁹¹ Thus the issue of “benefit” must be understood within the broader context of research that can be just as much a legal, political and social practice. The process of undertaking this research has involved, in effect, an incidental advocacy. Introducing the research to those in community legal centres, lawyers and migration agents, refugee advocates, union employees, and broader community organisations has implicitly challenged common boundaries that determine the identity of those worthy of support and research. Simply framing this research on experiences of illegality rather than identity based legitimacy has opened up (or contributed to) debate within different community sectors as to whether their activities should include consideration of or extension to the illegal migrant population, though there remains no formal community organisation exclusively focused on this group.⁹²

It is important not to negate illegal migrant participants’ own political agency, nor reduce their identity to persons that are vulnerable. Immigration politics (and participants’ immigration legal status) played a role in motivating participant involvement in this research, and thus the framework through which the benefit of the research should be understood. Two interview participants explicitly identified their involvement in various activities as political, as they had been involved in activities to address conditions in immigration detention while they were inside. A number of others saw their participation in research as an opportunity to correct mistaken beliefs, to promote their own opinions, and to share their experiences, as an opportunity for potential future migration law and control reform in Australia.

Ethics and research in a social context Research is never only “research”. It is undertaken in the context of people’s lives and their legal journeys towards visa grants or other legal claims,

⁹⁰ David Turton, "Migrants and Refugees," in *In Search of Cool Ground: War, Flight, and Homecoming in Northeast Africa*, ed. Tim Allen (Trenton: Africa World Press, 1996), 96.

⁹¹ Coutin, "Reconceptualising Research: Ethnographic Fieldwork and Immigration Politics in Southern California."

⁹² Note there is some informal political support and advocacy for illegal migrants by collectives such as the Border Collective (Cross Border Collective, "Cross Border Collective" www.crossbordersydney.org), and the Refugee Action Coalition within their broader campaigns, (Refugee Action Coalition, "Refugee Action Coalition," www.refugeeaction.org.au)

and within a broader context of immigration politics within Australia.⁹³ Participants' immigration legal status affected research in ways that reflected immigration politics at the time. In seeking ethics approval for my research, the university ethics committee expressed concern about my safety as a student researcher, prompted by concerns that such research was with "illegal migrants". The ethics committee suggested that as "another level of protection" my email address be removed from all public documents such as the participant information statements, advertisements and consent forms and so on.

Research can have both political and legal consequences for both the researcher and research participant.⁹⁴ In some instances, interview participants contacted me at a later date seeking assistance in obtaining free legal assistance for matters that arose in our discussions which they decided to pursue. In one instance, this led to an interview participant pursuing compensation for his unlawful detention. Another participant supplemented his request to the Immigration Minister for intervention with information that I had shown interest in during our discussions. Although I was careful not to provide migration advice, it was clear that some interview participants found participation in the interview helped them orient their understanding of their legal status and Australian migration law.

An ethical approach to research with vulnerable people means being aware that the cessation or maintenance of contact with participants at the conclusion of field-work influences whether participants feel they are treated merely as sources of data.⁹⁵ In this research, participants had differing needs and expectations for contact following their participation in the research. A couple of participants have kept in contact, even years after the interviews were conducted, and let me know what they were doing as well as ask about the completion of this research. One interview participant, having lived for ten years illegally, now has a permanent visa and is sponsoring the migration of his elderly parents, and has commenced an undergraduate university course. Others, I continue to see at refugee and migrant forums, and I receive occasional calls from a number of the research participants for advice and referrals. One participant was disappointed that our discussions did not lead to ongoing socialising and

⁹³ Susan Bibler Coutin argues that the increasing polarisation on immigration issues and identity politics at the time she undertook ethnographic fieldwork, in Southern California in the mid 1990s, was important in the interviews and fieldwork she conducted: Susan Bibler Coutin, "Reconceptualising Research: Ethnographic Fieldwork and Immigration Politics in Southern California," in *Practicing ethnography in law: new dialogues, enduring methods*, ed. June Starr and Mark Goodale (New York: Palgrave Macmillan, 2002).

⁹⁴ Carolyn Nordstrom and Antonius C.G.M. Robben, eds., *Fieldwork under fire: contemporary studies of violence and survival*, Berkeley (University of California Press: 1995).

⁹⁵ Hugman, Pittaway, and Bartolomei, "When 'Do No Harm' Is Not Enough: The Ethics of Research with Refugees and Other Vulnerable Groups," 1278.

friendship. These different expectations reflect the intimacy generated in sharing stories of difficult experiences, participants' differing motivations for participation, and underscores that participation occurs in a social context which contributes to participants' sense of belonging in Australia. Indeed, one of the themes that connects migration control across the different control contexts examined was the way that the social citizenship of illegal migrants (and migrants more generally) was endorsed by everyday social encounters, not just through interaction with government or public bodies. Participation in my thesis research in effect contributed to illegal migrants' experiencing the social inclusion and exclusion that the thesis research studied, and in this way shows how research processes can never be separated from the social processes they study.

Insider/outsider dynamics: I also gained some insight into whether individuals perceived qualities of their own identities as those that made them more "Australian", or less, by how they positioned my own identity in the research. That is, whether interview participants saw me as an "insider" or "outsider".⁹⁶ Of course, as an Australian citizen, and a lawyer, I am always an "outsider" to illegal migrant experience. Yet I was asked by most of the participants about my own ethnic background and sometimes about my immigration history. Interview participants treated me variously as "Australian", but also as someone "on-side" politically or as someone with potentially common experiences as a non-Anglo Australian. I shared with a couple of the interview participants my own experience of being searched on the street by police as a suspected illegal immigrant.

Ethical issues in relation to the research participation of legal and non-legal advocate participants

My involvement in various legal and community settings facilitated the interview participation of lawyers, welfare advocates and those who had sponsored detainees' release from detention. While undertaking this research, I worked in various capacities as a refugee lawyer and migration agent at a community legal centre in Sydney. At various times I was a full time staff member, casual detention centre lawyer and a volunteer at the centre's evening advice service.⁹⁷ I spoke at various conferences, not solely about my academic work, but also delivering peer based migration legal education. I was also involved in supporting migrant and

⁹⁶ Bruce A. Collet, "Confronting the insider-outsider polemic in conducting research with diasporic communities: towards a community-based approach," *Refuge* 25, no. 1 (2008).

⁹⁷ My migration law work was specialised in refugee and humanitarian law, as well as character based visa refusals or cancellations. It involved working with clients living in the community, and those in both city based and remote immigration detention centres. Clients were from a wide range of nationalities, and also included unaccompanied children seeking asylum in Australia.

refugee action through facilitating contact between various persons and bodies. Legal advocates participated as named interviewees. However the majority of the non legal advocates and community sponsors chose to maintain anonymity as research interview participants because of their ongoing advocacy work in the migration field.

C A thesis overview

The seven chapters of the thesis are structured as three parts to explore the framework in which migration control operates as policing. Part 1 introduces the contexts and key concepts used in the thesis. Part II empirically examines migration as policing in four Australian migration control contexts. Part 3 explores the potential for conceptualising migration policing beyond the bounded national framework.

Chapter 1 introduces the contemporary context of Australian migration control. The specific political, legal and social context of Australian migration control is crucial in setting out the contexts in which policing is deployed. These contexts are important because the thesis models policing as a relationship of power, that through that relationship, gains the discretionary power and authority to police illegal migrants. That is control is not policing because it is undertaken by a particular "police" institution, nor because a body holds particular "police" powers. Control is identified as policing by its operation as a relationship of power where as a result of the overall legal, political and social dynamics, the policing agent is able to authoritatively exert discretionary power over the policed individual. This chapter orients the reader to the legal and social position evident from existing literature of the respective parties in migration control - the illegal migrant and those with migration control responsibilities. These studies demonstrate that the frameworks of migration law, the institution of the Immigration Department, and insight from statistical analyses, are not sufficient to understand the diverse and dynamic operation of migration control. The final orientation provided in this first chapter focuses on specific elements that signal the potential for migration policing's authority to operate beyond the nation. It examines the changing role of legal citizenship in determining national membership, ethical authority in migration law, and the legitimacy provided by global hegemonic norms. The exploration in this chapter informed my selection of control contexts for empirical analysis as sites wherein any recurrence of policing themes across these contexts would be particularly meaningful.

Chapter 2 follows on from this by introducing the model of policing which serves two functions in the thesis. It defines policing in order to structure its comparison with migration control. It

also provides an analytical lens to examine migration control contexts and present a new picture of migration control. The policing model draws on sociological and theoretical approaches to policing. It develops policing as a dynamic relationship of power that, through that relationship, gains the discretion and authority to police. The model distinguishes itself from institutional approaches to defining police, from approaches that define policing by its function, and from those that view policing as constituted by legal powers and structures. It is also distinct from approaches that define police as holding legitimacy to use force solely within the domestic arena. In contrast, the legitimacy of policing as a form of governance is explained as arising from its management of a diverse set of issues emerging from urban environments, or in other words, from people living in proximity to one another. The model of policing developed in this chapter forms the basis for the inductive reasoning underlying the thesis and explores contexts of migration control to examine the factors that make migration control into policing. The chapter also introduces some analytical tools used to highlight the unique insight the lens of policing brings to understanding migration control. I flag how the spatial approach inherent in legal scale limits understanding of migration control to citizenship and affirmation of the nation state.

From examining how existing literature frames migration control and my analytical approach to policing, Part II of the thesis turns to an empirical examination of Australian migration control contexts between 1996 to 2010. The thesis compares four migration control contexts in Australia with elements of the policing model, and argues that control in these contexts operate as policing. Examination of these control contexts is needed because the policing is modelled on relations of power that take their meaning and character from the particular legal, political and social dynamics of a particular context. The recurrence of themes across these control contexts reveals the specific manifestation and character of *migration* policing, as distinct from other deployments of the policing relationship. Migration policing constrains and enables the social citizenship of migrants. It shows that the social meaning of migrant illegality is always constructed in relation to notions of normative inclusion. Migration policing relies on endorsement of its authority by more than features of the nation-state such as migration and citizenship law. Further, the particular legality of migration law in its administrative and constitutional law setting enhances the discretionary power of migration policing. The control context chapters unfold along the process of becoming illegal itself, starting with the exercise of discretion as it is exercised in apprehension of irregular migrants, to detention and release from detention, and ending with visa cancellation.

Chapter 3 explores employers' and educational institutions' direct role in migration policing and visa policy. It argues their role in the policing relationship is evident from the stock government places on securing their perception of the legitimacy of migration controls. Chapter 3 explores this through two examples. The first example describes migration policy changes that make employers' critical to managing Australia's future skilled labour needs. It then shows how employers' contestation of the criminalisation of illegal work led to visa policy reform for seasonal workers in the rural harvest sector. The second example traces how one part of Australia's international education sector, vocational training institutions, were constructed as sources of deviance. I argue this was an attempt to stabilise the authority of migration control to determine the function of educational institutions. Tracing the deployment of the policing model in this context draws out two recurrent and binding migration policing themes. First, employers' duty to police adherence to laws against illegal work highlights their role in constraining the social citizenship of illegal migrants. Second, the growing importance of employers' and educational institutions' control over who obtains permanent residency diminishes the role of the state in determining visa status, and also shows the significance of global economic circuits in endorsing migration control authority.

Chapter 4 investigates the control context of immigration raids. It is in these individual encounters that the reach of the migration policing model element of discretion appears most forcefully. Migration policing discretion to apprehend illegal migrants can be activated by diverse activities, to operate anywhere, and over anyone. The dynamic and diverse operation of discretion in raids is in part an outcome of the multi-institutional enactment of migration policing powers. This illustrates the theme that migration policing determines the social citizenship of illegal migrants in both public and private spaces. Drawing on illegal migrants' experiences of raids, the chapter shows how discretion ultimately relies on force to endorse its authority, a theme that recurs in different ways across the contexts. The chapter goes on to argue that the weak limits imposed by the administrative legality of migration law expand policing discretion by default. Overall, the raids context shows the extent to which migration control is a practice of policing rather than law. Law provides the formal authority for officers, but operates more as justification than determination of the exercise of power.

The control of movement from immigration detention to the community is chapter 5's control context. It argues that release from immigration detention is primarily contingent upon the constitution of a policing relationship, not on immigration legal status. The chapter draws on interviews with both parties to the relationship established between supportive community

members' and released detainees. It further develops the identity of migrant illegality in the policing relationship as better described as an "anti-identity" in that it has no essential character, except insofar as it is constructed in relation to normative ideals and constraints on social citizenship. Indeed, even full legal citizenship in Australia might be characterised as a relational anti-identity as the absence of the constitutional founding of citizenship enhances the powerful agency of migration policing. Other release decisions reflect assessments of the comparative risk individuals pose within and outside detention. That is, apparently "local" issues inform control over the movements of migrants, although these factors are not relevant legal considerations for release. I argue the legitimacy of these release decisions is derived from the character of these factors as managing issues that arise from interpersonal proximity, that is, the urban quality of the policing model. Thus issues that might appear as solely pertinent to, for example, order within detention or the attitudes of the local community, operate to mediate global issues of proximity which further illustrate migration control as policing.

The final control context, chapter 6, addresses the good character test in migration control. The chapters leading up to this have studied several influential scenarios where discretionary power determined control and thus showed migration control as policing. This is intensified in the context of the character test. The character test involves the confluence of discretionary power engaged in legislated power, individualised discretionary power and concealed control consequences. The outcome of policing discretion exercised in the character test differs from the prior control contexts, as through grounds for visa refusal and cancellation, the character test can determine substantive immigration legal status for every non-citizen. This chapter traces how the character test integrates discretion for visa cancellation for every non-citizen, layers discretion at every stage of the character refusal or cancellation process, and provides limited review options which further facilitate its deployment in matters outside of strict concerns about character. Character testing is shown to operate as a mechanism to endorse inclusion into the citizen community, to confirm the exclusive privileges of that community, and to "outlaw" those who not only may be of bad character but who have not been able to successfully neutralise the negative exercise of policing discretion. This chapter draws out the character testing's policing characteristic in its deployment as determinative of social inclusion. The character test's function to include and exclude connects the control over migratory movement in the nation-state context and beyond through the notion of "global citizenship" which the final chapter of the thesis develops.

The limited relevance of national limits to the authority of migration policing that emerged from the empirical study prompts chapter 7's exploration of a borderless notion of migration policing outside the nation. It builds on the policing model to conceptualise migration policing outside the nation as globalised policing relationships that move with migrants across the globe, restructuring power relations as they move. This is explored through trends in migration policing that found the potential for globalised migration policing, such as the shift from identification to identity management, and critically through migration policing as a factor that shapes global citizenship.

Conclusion

This chapter has introduced the thesis argument and flagged its contribution to existing literature as well as signalled the limits of that argument. The thesis argues that changing the focus from "policing migration" to "migration policing" is far more than just word play. It departs from an institutional approach to evaluating the policing function in migration control. It argues instead that migration control itself operates as policing. Rather than a separation between policing and migration, "migration policing" emphasises the immanence of policing in migration, and the active way in which migration is policed even as it is constituted. The new vision of migration policing as globalised policing relationships challenges the naturalised connection between migration control and the nation. The chapter provided a roadmap to the chapter progression of the thesis argument. It has also overviewed the method utilised in the thesis in investigating the relationship between migration control and policing, and explained how the policing model shaped the collection of data and the sources used. The next chapter is an important step in the thesis method. It reviews existing studies of Australian migration law and control institutions, and identifies features these studies foreshadow as critical in how migration control is transacted. Based on this analysis, the next chapter proposes particular control contexts for empirical study that will best reveal the changing and constant features of migration policing in its diverse settings.

The thesis approach to policing as a relationship of power means that legal, political and social dynamics are crucial in establishing that relationship. Policing agents gain the discretionary power and authority to control illegal migrants as an outcome of embedded political, legal and social relations. These contexts represent both the site wherein policing takes place, and also

¹⁰ Aas, "Analysing a World in Motion: global flows meet 'criminology of the other'." See also for example Zygmunt Bauman, "Social Issues of Law and Order," *British Journal of Criminology* 40(2000): 271.

¹¹ Stuart Hall, "New Cultures for Old," in *A Place in the World? Places, Cultures and Globalization*, ed. Dorota S. Massey and Pat M. Jess (Milton Keynes: The Open University Press, 1995).

Migration Policing in Australia: Contemporary Contexts

Introduction

The chapter is structured in three parts. First it introduces the legal position of illegal migrants. We are living in a "world in motion",⁹⁸ where "individuals' routes rather than roots have become a defining feature of social life, identity making and cultural belonging".⁹⁹ This thesis argues that the features that control people's movements across the globe are more than by migration and citizenship laws. The power to control movement is determined by the specific political, legal and social context of migration control. This chapter sets out to orient the reader to the contemporary Australian position of the respective parties in migration control – the illegal migrant and those with migration control responsibilities. It also reviews existing studies of migration control to suggest which features of migration control might be important in determining its operation. It is quickly apparent that the discretionary operation of migration control cannot be grasped solely through migration law, nor through study of the Immigration Department as the primary migration institution. The findings of this chapter informed the thesis selection of particular control contexts for empirical study that form Part Two of this thesis. I selected the particular contexts to best draw out the features anticipated to determine the relationship of control in its diverse settings, which together shape the essential character of migration policing. Thus, this chapter is a crucial step in the thesis method to select those control contexts that will be compared with the thesis policing model.

The thesis approach to policing as a relationship of power means that legal, political and social dynamics are crucial in establishing that relationship. Policing agents gain the discretionary power and authority to control illegal migrants as an outcome of embedded political, legal and social relations. These contexts represent both the site wherein policing takes place, and also

⁹⁸ Aas, "Analysing a World in Motion: global flows meet 'criminology of the other'." See also for example Zygmunt Bauman, "Social Issues of Law and Order," *British Journal of Criminology* 40(2000): 221.

⁹⁹ Stuart Hall, "New Cultures for Old.," in *A Place in the World? Places, Cultures and Globalization*, ed. Doreen B. Massey and Pat M. Jess (Milton Keynes: The Open University Press, 1995).

construct the asymmetry of power between police and policed. Study of particular control contexts is crucial as a theoretical device to establish comparative elements between policing and migration control at three levels in the thesis. Migration control contexts provide accounts of control for comparison with the policing model. Control contexts provide a site for analysis of policing deployment and the themes that emerge from those contexts. Lastly, the migration policing themes that emerge from contextual study are compared across the differing contexts. By distinguishing between recurrent themes across contexts, and those that are specific to the particular context studied, the distinctive and binding character of migration policing emerges.

The chapter is structured in three parts. First it introduces the legal position of illegal migrants, as well as the social demographics of illegal migrants, to provide an overview of their powerlessness in Australian law and society. It then goes on to introduce the legal powers of migration officers, and the findings from existing literature of the exercise of those powers by officers of the Immigration Department. These studies demonstrate that the frameworks of migration law, the institution of the Immigration Department, and insight from statistical analyses, are not sufficient to understand the diverse and dynamic operation of migration control.

The chapter then moves from considering the control context within Australia, to the connection between the nation state and control over migratory movement. The power to refuse entry and to expel aliens is a sovereign right, connected historically to the development of nation-states, and affirmed by Australian jurisprudence.¹⁰⁰ On this basis migration control which determines migrant entry and stay is conventionally understood as an affirmation of the power of the nation-state. Yet this part of the chapter explores arguments that citizenship and migration law show signs of separation from the historical notion of nation. These changes are interpreted to signify the changing importance of membership in defining nation states,¹⁰¹ and tentative signs that Australian migration law derives authority outside the national community.¹⁰² This sets the scene for study of migration control as a form of law-in-action that has capacity to rely on the social legitimacy of its actions as well as explicit legal authority. The

¹⁰⁰ The conventional assumption that the right to expel or exclude is a sovereign right is captured in the first case examining the legality of mandatory immigration detention laws: *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* [1992] HCA 64; (1992) 176 CLR 1

¹⁰¹ Saskia Sassen, "The Repositioning of Citizenship: emergent subjects and spaces for politics," in *Empire's New Clothes: Reading Hardt and Negri*, ed. Paul A. Passavant and Jodi Dean (New York; London: Routledge, 2004).

¹⁰² Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law*, Law in Context (New York: Cambridge University Press, 2008).

chapter ends by explaining how the broader context of migration control in Australia has informed the selection of control contexts for empirical study in Part II of the thesis.

A The illegal migrant in Australian law and society

The powerlessness of illegal migrants in Australia is a product of its legal, social and political contexts. An “unlawful non citizen” is the legislative term for a person in the Australian migration zone who does not hold a visa.¹⁰³ This category was implemented with migration reforms in 1992, and commenced in 1994,¹⁰⁴ which introduced the requirement for all non-citizens in Australia to hold a visa (the “universal visa requirement”). This change removed the legislative distinction between persons who entered without a visa and those who became unlawful after their lawful entry to Australia. A large part of the powerlessness of illegal migrants however, arises from powers bestowed on migration officers over those known or reasonably suspected to be illegal migrants. This will be discussed in the next part of the chapter.

The process of becoming illegal

A non-citizen who enters Australia without a visa becomes illegal. It is most commonly asylum seekers who enter by boat – either on organised boats leaving countries they have transited through (such as Indonesia or Malaysia), or rarely, as stowaways or crew departing ships. Non-citizens may become illegal after arrival by air having entered the plane with false documents which are detected at immigration clearance upon arrival, or by arrival without documents. A non-citizen may also become illegal after entry to Australia if their initial entry visa expires and they do not obtain a further visa. The Immigration Department terms this “overstaying”.¹⁰⁵ Alternatively, a non-citizen may become illegal if their visa is cancelled, for example due to breach of visa conditions (such as work restrictions, study requirements, or so on).¹⁰⁶ A visa may also be cancelled on character grounds arising from a period of imprisonment, general conduct or security grounds.¹⁰⁷

¹⁰³ *Migration Act 1958* (Cth) s 13 defines a lawful non-citizen, and s14 defines an unlawful non-citizen. Note s13(2) provides there is an exception for those persons permitted within the Australian migration zone without a visa if they are permitted in connection with the performance of traditional activities consistent with the Torres Strait Treaty. Note also that “unlawful non-citizens” are referred to as illegal migrants in the thesis.

¹⁰⁴ Human Rights and Equal Opportunity Commission, *Those who’ve come across the seas: detention of unauthorised arrivals* (Sydney: Human Rights and Equal Opportunity Commission, 1998), 16.

¹⁰⁵ This is discussed in chapter 4.

¹⁰⁶ This is discussed in chapter 3.

¹⁰⁷ This discussed in chapter 6.

The significance of illegal status in shaping the social experience of being illegal, and controlling movement, is teased out in the control contexts in Part II of the thesis. The differing contexts show the extent to which civil and governmental actors can socially include or exclude migrants. For example, chapter 6 shows that government may permit illegal migrants to reside in the community, provided that illegal migrants are controlled and disempowered. Some scholars argue that the powerlessness of illegal migrants is an outcome of the criminalisation of illegal migrants, or migration control, without the safeguards offered in criminal law.¹⁰⁸ However, I argue migration law does not disempower illegal migrants through adopting features familiar from criminal law such as detention. It disempowers illegal migrants because of the contexts that make migration policing possible. That is, the political unpopularity of illegal migrants discounts the legitimacy of illegal migrants' movement and their claims to remain in Australia.¹⁰⁹ Further, the discretionary power available to migration officers increases the powerlessness of illegal migrants. Moreover, the particular legality of migration law in its administrative and constitutional law setting diminishes the claims migrants generally have in making migration control accountable.

Who are illegal migrants; where are they; and what do they do?

At any one time there are just under 50,000 persons living without visas in Australia.¹¹⁰ This population is unified only in terms of their illegal status, as there is no essential commonality of identity except that almost all entered Australia on a visa.¹¹¹ Statistical reporting on the

¹⁰⁸ See for example: Stephen H. Legomsky, "The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms," *Washington and Lee Law Review* 64, no. 2 (2007).

¹⁰⁹ See the following sources for discussion of the political unpopularity of illegal migrants, and the concomitant popularity of measures to control illegal migration: Scott Poynting, "Bin Laden in the suburbs: attacks on Arab and Muslim Australians before and after 11 September," *Current Issues in Criminal Justice* 14, no. 1 (2002); Peter Manning, "Dog Whistle Politics and Journalism: Reporting Arabic and Muslim people in Sydney newspapers," (Sydney: Australian Centre for Independent Journalism, University of Technology, Sydney 2004); Marr and Wilkinson, *Dark Victory*.

¹¹⁰ Auditor-General, "Onshore Compliance: Visa Overstayers and Non-Citizens Working Illegally Department of Immigration and Multicultural and Indigenous Affairs," in *Audit Report* (Australian National Audit Office, 2004). In 2008-09, the Immigration Department confirmed that the overstay population has remained stable at under 50,000 persons since 2005: Department of Immigration and Citizenship, "Annual Report 2008-09," (Belconnen, A.C.T.2009), 114.

¹¹¹ Non-citizens entering by boat without a visa are intercepted and detained, as are those entering via the airport without a visa, and thus almost entirely do not form part of the illegal population living in the community. Very few of these entrants are permitted to be released from immigration detention because those non-citizens who arrived by unauthorised boat or without documents by plane, are eligible for release on a bridging visa *only* if they are awaiting determination of their refugee protection visa application and are either under 18 years or over 75 years of age, or have health needs that cannot be met in detention: *Migration Regulations* 1994 (Cth), Schedule 2, Subclass 051 Bridging (Protection Visa Applicant). This is discussed further in Part B of this chapter, and the release of some individuals from immigration detention without a bridging visa is considered in chapter 5.

demographics of this population is minimal and the reported particulars do not remain consistent over time. What is known is that the number of persons living without a visa in Australia far exceeds the number of entrants without a visa. Even at the time of the highest number of illegal entrants in the financial year 1999-2000, the combined number of illegal entrants by boat and air was less than one tenth of the estimated number of illegal migrants in the community.¹¹² The population dominating detention varies. At 30 June 2010, almost 95% were illegal maritime arrivals,¹¹³ and of all 8749 of those detained in 2009-10, 81% were illegal entrants.¹¹⁴ Thus, the majority of illegal migrants in Australia at any one time live without a visa in the community, not in detention. This makes the thesis' exploration of the social and legal inclusion and exclusion of illegal migrants in the community statistically just as significant as control of illegal entry.

The demographics of the illegal population in Australia outside detention

The political significance of illegal migration in Australia seems disproportionate to the small percentage of migrants who breach their visa conditions. Overall not many non-citizens stay in Australia after their visa expires. Less than 1% of all temporary visa holders entering between 2007-08 and 2009-2010 stayed past their visa expiry.¹¹⁵ More than 99% of temporary and permanent visa holders complied with their visa conditions.¹¹⁶ Before becoming illegal, about 82% of illegal migrants in the community held visitor visas,¹¹⁷ the next largest proportion held

¹¹² This assertion is based on a comparison between the estimated numbers of overstayers (which has remained approximately 50,000 since 1996) and the approximate number of illegal entrants to Australia. Note that the Immigration Department refers to non-citizens who have remained in Australia beyond the period of their visa as "overstayers". In 1999-2000 the combined number of illegal entrants by boat and air amounted to 5870, see Australian Bureau of Statistics, "Australian Social Trends 2001 (4102.0)," (Canberra: Australian Bureau of Statistics, 2001). The next largest number of illegal entrants was in 2009-10 when 5609 illegal entrants arrived by boat, see Janet Phillips and Harriet Spinks, "Boat arrivals in Australia since 1976" in *Background Note* (Canberra: Parliamentary Library, 2010). The number of illegal entrants by air is not consistently reported. In 2009-10 although we know that 1573 persons were refused immigration clearance at the airport, the number of persons who entered Australia without a visa or with false travel documents is unknown, see Department of Immigration and Citizenship, "Annual Report 2009-10," (Belconnen, A.C.T.2010), 2.)

¹¹³ See Figure 23: People in immigration detention by arrival type at 30 June 2010 at ———, "Annual Report 2009-10," 178.

¹¹⁴ Ibid.

¹¹⁵ See Table 61: Visa compliance and status resolution—key performance indicators at 158 of *ibid.*

¹¹⁶ Ibid., 2.

¹¹⁷ These figures are a snapshot as at 30 June 2009. Please note this breakdown is not routinely reported in Immigration Department annual reports, but was provided in response to questions posed via the Federal Parliament's Senate Estimates Committee, see Senate Legal and Constitutional References Committee Immigration and Citizenship Portfolio, "Supplementary Budget Estimates Hearing: 20 October 2009, Answer to Question Taken on Notice, Question no. 51, Program 4.1: Visa Compliance and Status Resolution," Supplementary Budget Estimates (Canberra: Commonwealth of Australia, 2009).

student visas.¹¹⁸ Most of those without a visa and not yet apprehended are citizens of the United Kingdom, the United States of America and the People's Republic of China.¹¹⁹ However, these countries do not represent the greatest number of persons staying after their visa expiry as a proportion of the total number of entrants from these countries.

Almost half of the illegal population in the community were between 31 to 50 years of age.¹²⁰ Of these, 62% were male.¹²¹ The largest proportion (19%) of illegal migrants remain illegally in Australia for under a year.¹²² Of those who have been illegal for more than one year, a quarter have remained in Australia for over 15 years, and almost 60% resided illegally for over five years.¹²³ Thus, if we take the total illegal migrant population at the consistent estimate of 50,000, this means that 40,500 remain illegally in Australia for more than one year. Of that 40,500, about 10,125 remain for over 15 years and 23,085 for more than five years.¹²⁴

Illegal work

Not all migrants who hold visas are permitted to work. Visitor visa holders (which include tourists) make up the bulk of the temporary entrants to Australia, and show that 3.4 million entrants in 2009-10, cannot lawfully work.¹²⁵ The Immigration Department estimates that half of the illegal population in the community work without permission.¹²⁶ However the number of migrants working in breach of visa conditions is unknown.¹²⁷ Australian census surveys do

¹¹⁸ These figures are a snapshot as at 30 June 2009. Please note this breakdown is not routinely reported in Immigration Department annual reports, but was provided in response to questions posed via the Federal Parliament's Senate Estimates Committee, see *ibid.*

¹¹⁹ Note that the most recent data available for this information is at 30 June 1999 published in Border Control and Compliance Division Compliance Strategy Section, Department of Immigration and Multicultural Affairs, "Review of Illegal Workers in Australia: Improving immigration compliance in the workplace," (Canberra: Department of Immigration and Multicultural Affairs, Commonwealth of Australia, 1999), 19.

¹²⁰ Senate Legal and Constitutional References Committee Immigration and Citizenship Portfolio, "Supplementary Budget Estimates Hearing: 20 October 2009, Answer to Question Taken on Notice, Question no. 51, Program 4.1: Visa Compliance and Status Resolution."

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ Department of Immigration and Citizenship, "Visitors," www.immi.gov.au/e_visa/visitors.htm. Visitor visas - such as tourist visas, Electronic Travel Authority visas, or eVisitor visas - when issued for tourism purposes do not permit the visa holder to work. The number of visitor entrants is available at —, "Annual Report 2009-10," 444.

¹²⁶ See annual reports. And also see Auditor-General, "ANAO Onshore Compliance Audit (2004)," 27, 38-41 for an overview on the methodology of developing an estimate. See also at 49: "DIMIA advised that around 50 per cent of overstayers are working illegally in Australia."

¹²⁷ *Ibid.*, 28. Note also the audit findings at 37: "A comparison of the number of people DIMIA has found to be in breach of their visa conditions with the average number of temporary entrants in Australia provides no direct indication of how effective DIMIA is in locating non-citizens in breach of their visa

not collect data on workforce participation by migrants without immigration authorisation.¹²⁸

So, at any one time it is fair to say at a minimum that about 25,000 persons are working without immigration permission in Australia, plus an uncertain number of persons who are working in breach of their visa conditions.

The significance of the number of illegal migrant workers has some bearing on the relative powerlessness of illegal migrants in Australia. The Australian context is different, for example, from the United States context in this regard. The essential role that illegal migrant labour plays in the United States economy contributes to a more empowered political voice for illegal migrants. This is evident for example in the movement in support of illegal immigrants' rights in the United States that saw up to 5 million illegal immigrants demonstrating across the United States in 2006.¹²⁹

This brief legal and social introduction to illegal migrants in Australia forms just one part of the broader context that enables the policing of illegal migrants in Australia. The empowered legal and institutional role of migration officers, which I now turn to, forms a second crucial plank to the Australian migration control context.

B Introducing Australian onshore migration policing

This second part of the chapter introduces Australian onshore migration policing. The position of those who exercise migration control powers is explored through the frameworks of law, institutional studies, and statistical reporting. The limits of these frameworks in determining control relationships are revealed through this analysis, which emphasises the powerful discretion available to migration officers. Thus this provides a basis for proposing control contexts that will support identification of themes that do not rely on the limited and discrete frameworks of law, institutions and statistics.

conditions. This is because no comparison is made between the number of non-citizens in breach of their visa conditions located by DIMIA, relative to the total number of non-citizens likely to be in breach of their visa conditions in Australia."

¹²⁸ This was determined by examining the collection of data and statistical reporting at the Australian Bureau of Statistics website. See Australian Bureau of Statistics, "Census Data," Australian Bureau of Statistics.

¹²⁹ De Genova, "The Queer Politics of Migration: Reflections on 'Illegality' and Incurability."

The legal framework of migration control powers

"Officers", defined by the *Migration Act*, have specific powers over persons who are (or are reasonably suspected to be) in Australia without a visa.¹³⁰ In some circumstances these powers also apply over persons who would be illegal if they were in Australia or who are about to become illegal by visa cancellation. In the thesis, persons with *Migration Act* powers or duties are referred to as "migration officers" or "policing agents". Migration officers have the power to detain,¹³¹ remove¹³² and deport¹³³ illegal migrants. They are empowered to search persons and premises in particular circumstances.¹³⁴ Migration officers have the power to require evidence of immigration status,¹³⁵ and information about illegal migrants.¹³⁶ Migration officers can use such force as reasonably necessary to detain a person,¹³⁷ and to search a detainee.¹³⁸

These powers are "police-like". This has been observed for example by Weber and Bowling who make the "police-like" nature of migration powers an important part of the definition of migration policing.¹³⁹ Yet these powers are not policing powers because they are analogous to those from criminal justice policing. In terms of the model applied in this thesis, it is more importantly because the discretion in these powers gives the policing agent the power to determine when and how policing is conducted, and what it is directed towards, that mark these powers as policing. That is, it is because these powers give rise to a relationship of power that they are defined as migration policing powers. The openness of legal text suggests that migration control cannot be grasped solely from legal text. Thus study of control contexts must enable study of the exercise of discretion.

¹³⁰ Migration "officers" are defined at *Migration Act* 1958 (Cth) s 5. "Unlawful non-citizens" are defined at *Migration Act* 1958 (Cth) s 14. Officers are also provided these powers over other classes of persons such as deportees or detainees.

¹³¹ *Migration Act* 1958 (Cth) ss 198 and 199

¹³² *Migration Act* 1958 (Cth) s 189

¹³³ Note that deportation is the term used in Australian law specifically for removal from Australia for criminal or security reasons pursuant to the *Migration Act* 1958 (Cth) ss 200 or 201.

¹³⁴ *Migration Act* 1958 (Cth) ss 251, 252, 268CA, 268CI. The use of search warrants is discussed in chapter 4.

¹³⁵ *Migration Act* 1958 (Cth) s 188. This is discussed in chapter 4.

¹³⁶ *Migration Act* 1958 (Cth) s 18 and 21

¹³⁷ *Migration Act* 1958 (Cth) s 5. This power is included when setting out the interpretation of "detain". The use of force in apprehension of illegal migrants is discussed in chapter 4.

¹³⁸ *Migration Act* 1958 (Cth) s 252

¹³⁹ Leanne Weber and Benjamin Bowling, "Policing Migration: A Framework for Investigating the Regulation of Global Mobility," *Policing and Society* 14, no. 3 (2004).

Officers with migration law duties and powers

The powers discussed thus far – detention, identification, search, reasonable force – empower “officers” under the Migration Act, not solely officers of the Immigration Department. The involvement of multiple agencies and individuals in migration control, which I now introduce, signals that control contexts must not solely study practices of the Immigration Department.

Figure A: Officers with powers under the Migration Act 1958 (Cth) (“migration officers”)¹⁴⁰

Officers of the Immigration Department Officers of the <i>Customs Act 1901</i> Protective service officers of the <i>Australian Federal Police Act 1979</i> Members of the police force of a State or an internal or external Territory	Members of the Australian Federal Police Individuals or members of a class of persons authorized by the Minister for Immigration to be officers under the Migration Act.
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The *Migration Act* empowers officers of specific government departments as officers with migration control powers.¹⁴¹ Thus, any powers that can be exercised by officers under the *Migration Act* can be exercised by these listed officers (see *Figure A*). This diversifies the activities that might act as impetus for the exercise of migration policing powers.¹⁴² Migration powers may be exercised alongside everyday policing tasks. For example, the location of illegal migrants by police can take place amongst general state police tasks such as traffic regulation, the payment of tickets on public transport, street based questioning and so on.

However, other migration policing tasks arise from the direct mandate of non Immigration Department officers under their primary duties, and do not depend on government employees being defined as officers under the *Migration Act*. The Immigration Department engages in joint operations and projects with other agencies. For example, both the Australian Federal Police (AFP) and the Immigration Department are involved in the Transnational Sexual Exploitation and Trafficking Team (TSETT). The Immigration Department refers directly to the AFP when there is alleged sexual trafficking.

Further government organisations listed in *Figure A* and *Figure B* play a role in migration control by providing information to the Immigration Department. For example, prisons notify

¹⁴⁰ Officers of the organisations listed in the table are also defined as “officers” under the *Migration Act 1958 (Cth)* s 5.

¹⁴¹ *Migration Act 1958 (Cth)* s 5. There is a residual discretion for the Minister of Immigration to exclude certain officers (from the Immigration Department, Customs and the Australian Federal Police) from being “officers” under the *Migration Act*.

¹⁴² The expansion of discretion effected by the multi institutional operation of migration control is discussed in chapter 4.

the Immigration Department at the completion of a non-citizen's imprisonment. The Australian Security Intelligence Organisation (ASIO) notifies the Immigration Department whether non-citizens meet security requirements. A range of governmental agencies, for example the Australian Tax Office and the government social welfare agency Centrelink, share information on non-citizens. This further expands the diversity of activities that potentially bring a non-citizen to notice, and the subsequent identification and apprehension of illegal migrants.

Figure B: Government organisations which provide information to the Immigration Department about non-citizens

State Police	State Prisons
Australian Federal Police	Department of Public Prosecutions
Australian Security Intelligence Organisation	Attorney-General's Office
Department of Foreign Affairs and Trade and its Minister	Centrelink
	Australian Tax Office

Civil involvement in migration policing

Civil organisations and individuals play roles of varying formality in migration policing. Education institutions that deliver education to overseas students have positive legislative duties to monitor and report on student visa compliance.¹⁴³ Employers risk sanctions if they employ migrants without immigration work rights.¹⁴⁴ Detention service providers have contractual obligations in detention centre management.¹⁴⁵ The Immigration Department facilitates community reporting of illegal migrants via the "Immigration Dob-In Line".¹⁴⁶ The range of entities underscores that the diverse operation of migration control requires specific contextual studies to enable comparison with the policing model.

¹⁴³ This is discussed in chapter 3.

¹⁴⁴ This is discussed in chapter 3.

¹⁴⁵ The contractual arrangements between the Immigration Department and private corporations have been reviewed, see: Joint Standing Committee on Migration, "Detention Centre Contracts: Review of Audit Report No. 1, 2005-2006, *Management of the Detention Centre Contracts - Part B*," (Canberra The Parliament of the Commonwealth of Australia 2005). The Auditor-General, "Management of the Detention Centre Contracts—Part A Department of Immigration and Multicultural and Indigenous Affairs," in *Performance Audit* (Canberra: Australian National Audit Office, 2004).

¹⁴⁶ This is a dedicated telephone and fax line that receives community information about persons they believe to be illegal, or believe to be non-citizens in breach of visa conditions. See Amanda Vanstone (Minister for Immigration and Multicultural and Indigenous Affairs), "Immigration Dob-In Line Launched," in *Media Release* (Canberra: Commonwealth of Australia, 2004).

Figure C: Civil institutions and individuals with migration control duties

Employers and industry bodies Airlines and Ships Education providers Education training registration bodies Visa sponsors Community members (through the Immigration Dob-In Line)	Corporations outsourced to provide detention services (these have included Australasian Corrections Management (ACL)/GSL/GS4 and other corporations)
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Ministerial discretion as part of migration policing

In comparison to other portfolios, the Immigration Minister has a powerful role in determining migration control. The heightened discretionary power of the Immigration Minister is evident at the formal law making power. Thousands of Australian islands were excised by Ministerial decree, preventing persons entering Australia from these places from making valid visa applications.¹⁴⁷ Moreover, the entire offshore processing of asylum applications is authorized by the Minister’s discretionary power to permit illegal offshore entrants to lodge a valid visa application.¹⁴⁸ The Immigration Minister also holds discretionary power over individual visa matters. The Immigration Minister has various personal, non compellable and non delegable discretionary powers that are not subject to review. These include the personal power to grant or refuse visas after refusal by migration review tribunals,¹⁴⁹ cancel visas without the requirement to abide by procedural fairness,¹⁵⁰ substitute decisions of the administrative review tribunal in character cases,¹⁵¹ and release detainees into community detention.¹⁵² The Immigration Minister’s discretionary power goes beyond mere accommodation for unforeseen cases that do not fit the text of the rules, but fit the intention of the rules. The Minister’s discretionary power determines the extent to which certainty in decision making exists in migration law, and thus determines the context in which migration control takes place.

¹⁴⁷ Moira Coombs, "Excising Australia: Are we really shrinking?," in *Research Note: Information, analysis and advice for the Parliament*, ed. Information and Research Service Law and Bills Digest Section (Canberra: Parliamentary Library 2005); ———, "Excisions from the Migration Zone-Policy and Practice" in *Research Note*, ed. Law and Bills Digest Group: Information and Research Services (Canberra: Parliamentary Library, 2004).

¹⁴⁸ *Migration Act 1958 (Cth) s 46A* This was considered by the High Court in *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia [2010] HCA 41*

¹⁴⁹ *Migration Act 1958 (Cth) s 351* empowers the Immigration Minister to intervene and grant a visa after an adverse Migration Review Tribunal decision and s417 similarly empowers the Immigration Minister with regards to the Refugee Review Tribunal.

¹⁵⁰ *Migration Act 1958 (Cth) s 501(5)*

¹⁵¹ *Migration Act 1958 (Cth) s 501A*

¹⁵² *Migration Act 1958 (Cth)* See Division 7 Subdivision 2 on Residence Determinations. The sections regulating the Minister’s power to order community detention (termed “residence determinations” under the Act) are set out at ss 197AA – 197AG.

The range of actors holding powerful discretion to determine migration control establishes that the selection of control contexts must enable study of a range of these actors. Studies into the institutional framework and statistical reporting of migration control focus specifically on the institution of the Immigration Department. Immigration Department activities cannot be representative of all migration control activities, because of the range of bodies involved. However, these studies provide unique insight into migration control, and also provide a basis from which to identify preliminary matters that shape migration control.

The institutional framework of migration control

Prior to 2005, public discourse on illegal migration as well as government and non-government reports on migration control focused primarily on the operation of external border controls and immigration detention issues rather than onshore migration policing.¹⁵³ The instances of border control were often high profile and spectacular. For example the 2001 standoff at sea between the Australian military and the Norwegian freighter ship MV Tampa, that was carrying 438 rescued asylum seekers.¹⁵⁴ That event led to the introduction of the "Pacific Solution" that involved Australian interception of unauthorised boats and redirection to Nauru or Papua New Guinea for the processing of refugee claims.¹⁵⁵ It could be argued that the discretionary use of power in this instance was a product of the political electoral climate prior to the 2001 Australian federal elections. However, subsequent studies of migration control within Australia, specifically focusing on Immigration Department activities, confirm the importance of discretion in routine migration control.

In 2005, two reports focused attention to the actions of the Immigration Department within Australia and outside the detention setting. Former Australian Federal Police Commissioner

¹⁵³ Human Rights and Equal Opportunity Commission, *Those who've come across the seas: detention of unauthorised arrivals*; Commonwealth Ombudsman, "Report of an Own Motion Investigation into Immigration Detainees held in State Correctional Facilities: Report under section 35A of the Ombudsman Act 1976," (Canberra 2001); Human Rights and Equal Opportunity Commission, "A Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner 2001," (Sydney: Human Rights and Equal Opportunity Commission 2001); P. J. (Auditor-General) Barrett, "Performance Audit Management of the Detention Centre Contracts—Part A, Department of Immigration and Multicultural and Indigenous Affairs," in *Audit Report* (Canberra: Australian National Audit Office, 2004); Human Rights and Equal Opportunity Commission, *A Last Resort? The National Inquiry into Children in Immigration Detention* (Human Rights and Equal Opportunity Commission, 2004); The Auditor-General P. J. Barrett, "Management Framework for Preventing Unlawful Entry into Australian Territory Department of Immigration and Multicultural and Indigenous Affairs," in *Audit Report: Performance Audit* (Canberra: Australian National Audit Office, 2002).

¹⁵⁴ Marr and Wilkinson, *Dark Victory*. Written by investigative journalists, this book conveys the sense of spectacle of the standoff and maintains a careful record of the events while reading as a political thriller.

¹⁵⁵ Grewcock, *Border crimes: Australia's war on illicit migrants*.

Mick Palmer ("the Palmer Inquiry") exposed the ten month wrongful detention of Australian permanent resident Cornelia Rau.¹⁵⁶ Former Chief Commissioner of Victoria Police, Neil Comrie, reported on the wrongful removal of Australian citizen Vivian Alvarez Solon, as well as failure to rectify that mistake for two years despite repeated "discovery" of the mistake within the Immigration Department ("the Comrie Inquiry").¹⁵⁷ These two reports led to a series of Ombudsman investigations into systemic and individual issues arising from 247 cases of unlawful detention referred by the Immigration Department to the Ombudsman, Immigration Department reform, and a subsequent 2008 evaluation of the reforms implemented after these reports.¹⁵⁸ Some commented cynically that the explosive impact of these reports arose from the shock that mistakes in migration policing practices could impact on Australian citizens and permanent residents. Nonetheless, these inquiries and others provide insight into how migration policing powers are used within Australia.

Migration policing deviance from the law: the incorrect implementation of the power to detain

The power to detain illegal migrants, or those reasonably suspected of being illegal, is a routine power that all officers under the *Migration Act* hold.¹⁵⁹ Once detained, officers are required to remove detainees from Australia "as soon as reasonably practicable".¹⁶⁰ The Immigration Department's mistakes in the Rau and Solon cases hinged on their initial and then continued detention, that is, on processes prior to and following their detention. Officers who

¹⁵⁶ Mick Palmer, "Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau," (Canberra: Commonwealth of Australia, 2005).

¹⁵⁷ John McMillan, "Inquiry into the Circumstances of the Vivian Alvarez Matter: Report under the *Ombudsman Act 1976* by the Commonwealth Ombudsman, Prof. John McMillan, of an inquiry undertaken by Mr Neil Comrie AO APM," (Canberra Commonwealth and Immigration Ombudsman, 2005).

¹⁵⁸ ———, "Department of Immigration and Citizenship Report into Referred Immigration Cases: Detention Process Issues," (Canberra: Commonwealth and Immigration Ombudsman, 2007); ———, "Department of Immigration and Citizenship Report into Referred Immigration Cases: Data Problems," (Canberra: Commonwealth and Immigration Ombudsman, 2007); ———, "Department of Immigration and Citizenship Report into Referred Immigration Cases: Notification Issues Including cases affected by the Federal Court Decision in Srey," (Canberra: Commonwealth and Immigration Ombudsman, 2007); ———, "Department of Immigration and Citizenship Report into Referred Immigration Cases: Other Legal Issues," (Canberra: Commonwealth and Immigration Ombudsman, 2007); Elizabeth Proust, "Evaluation of the Palmer and Comrie Reform Agenda – including Related Ombudsman Reports," (Canberra 2008); Australian Department of Immigration and Citizenship, "Media release: Proust report on immigration reform progress" (2008).

¹⁵⁹ *Migration Act 1958* (Cth) s 189

¹⁶⁰ *Migration Act 1958* (Cth) s 198. Note that s 189 should also be read with the whole of Division 7 and 8 of the *Migration Act* which sets out the provisions on the detention and removal of unlawful non-citizens respectively.

use detention powers and who were interviewed as part of the Rau Inquiry were found to have little understanding of how to apply "reasonable suspicion" in factual scenarios.¹⁶¹

Officers with direct responsibility for detaining people suspected of being unlawful non-citizens and for conducting identity and immigration status inquiries often lack even basic investigative and management skills.¹⁶²

The inquiries found both field officers and executive management of the Immigration Department failed to appreciate "the distinction between the discretionary nature of the exercise of 'reasonable suspicion' and the mandatory nature of the detention that must follow the forming of a 'reasonable suspicion'."¹⁶³ On review, the suspicion that led to Solon's detention did not amount to reasonable suspicion.¹⁶⁴ There was a proper basis for reasonable suspicion on the evidence available at the time of Rau's detention; however the Immigration Department failed to re-evaluate that basis in her subsequent detention which led to her wrongful detention for nine months.¹⁶⁵ The Ombudsman's review of wrongful detention confirmed this mistaken understanding of legal responsibilities was not isolated.¹⁶⁶ It found that in many of the 247 cases it reviewed, officers "did not have an adequate basis on which to form a reasonable suspicion that the person being detained was an unlawful non-citizen."¹⁶⁷

The inquiries found that officers and executive management of the Immigration Department believed s 189 of the *Migration Act* imposed a mandatory duty to detain, and that when a person is detained that detention is absolute, thus not requiring further inquiry.¹⁶⁸ The Immigration Department saw the correct process as to detain first and then obtain evidence to support that detention, rather than to obtain evidence to support a reasonable suspicion of unlawful status. Further, investigation into the basis for detention was treated as "a matter of

¹⁶¹ Palmer, "Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau," 24. See also the McMillan, "The Comrie Inquiry," 69.

¹⁶² Palmer, "Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau," x, paragraph 15.

¹⁶³ *Ibid.*, 25. See also McMillan, "The Comrie Inquiry," 69., Note also Palmer, "Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau," 21. Palmer states: "Because of the word 'must', the section [i.e. s189 MA] has been viewed as a mandatory provision in its entirety. What has not been fully appreciated is that s. 189(1) operates in a mandatory way only *after* an officer has formed the requisite 'reasonable suspicion' that a person 'is' an unlawful non-citizen."

¹⁶⁴ McMillan, "The Comrie Inquiry," 68.

¹⁶⁵ Palmer, "Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau," 26-27.

¹⁶⁶ McMillan, "Report into Referred Immigration Cases: Detention Process Issues," 3.

¹⁶⁷ A summary of recurring deficiencies in the majority of cases reviewed by the Ombudsman is set out at *ibid.*

¹⁶⁸ Palmer, "Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau," 21., McMillan, "The Comrie Inquiry," 69.

process" without urgency.¹⁶⁹ This approach diminished the significance of the loss of liberty as "a consequence of both the operation of the Act and the detainee's own doing and circumstances brought about by the detainee's own actions."¹⁷⁰ For Mick Palmer, one statement of the Immigration Department – namely that the case of Cornelia Rau represented less than 0.001 per cent of the removals and cases dealt with each year - exemplified the culture and mindset that brought about the failures in Rau's case.¹⁷¹ The Immigration Department is just one of the bodies empowered with the duty to detain by the Migration Act. The question of whether the discretion that enabled the mistakes made in the Rau and Solon cases was particular to the Immigration Department engages the question of whether it arose from the institutional culture of the Immigration Department, or whether it arose from law. The preliminary findings from existing studies inform the choice of contextual focus for the thesis study between institutions or law.

Mistakes in exercising discretion: a problem of culture or legality?

The Inquiries' found the mistaken understandings in the Rau and Solon cases did not arise from an absence of policy or procedure. The problems arose from a cultural environment in which the detention of suspected unlawful non-citizens was foremost, and shaped the way such instructions and procedures were interpreted and applied.¹⁷² Palmer said that pressure on the Immigration Department's detention and compliance areas led to "...a culture that is overly self-protective and defensive."¹⁷³ The Inquiries found the Immigration Department did not have effective management oversight, nor clear triggers for executive intervention.¹⁷⁴

¹⁶⁹ Palmer, "Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau," 25. See also Palmer at 171 "In summary, the Inquiry formed the view that DMIA management approach to the complexities of implementing immigration detention policy is 'process rich' and outcomes poor', with the predominant, and often sole, emphasis being on the achievement of quantitative yardsticks rather than qualitative measures."

¹⁷⁰ McMillan, "The Comrie Inquiry," 69.

¹⁷¹ Palmer, "Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau," 160.

¹⁷² Ibid., 169., McMillan, "The Comrie Inquiry," 69. Note that the Proust evaluation of post Palmer/Comrie reform commenced her report by sharing comments made to her by external observers of the Immigration Department before the release of these reports. These comments emphasised the difference between the culture of the Immigration Department from the rest of the public sector. (see Proust, "Evaluation of the Palmer and Comrie Reform Agenda – including Related Ombudsman Reports," 7.) These observers Proust explains were persons with a strong interest in immigration and detention issues, and either at arm's length from the Immigration Department or closer through involvement in Immigration Department related groups such as the Immigration Detention Advisory Group]]. They confirmed the findings of the Rau and Solon Inquiries of a "closed culture", a "culture of fear", a "damaged department" where decisions were made largely without oversight and the Compliance function was separate from the rest of the department.

¹⁷³ Palmer, "Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau," 172-73.

¹⁷⁴ Ibid., 169.

Management attitude did not question policy based instructions and processes, and did not value training staff in the operating context and the purposes of instructions.¹⁷⁵ The Palmer and Comrie Inquiries provided detailed recommendations on changes within the Immigration Department ranging from training to information systems, identity issues, records management and more. However the most scathing criticism by the Palmer report was directed at the culture of the Immigration Department, which it saw as the ultimate culprit in the failure to effectively exercise detention powers with integrity:¹⁷⁶

...the DIMIA [Immigration Department] management approach to the complexities of implementing immigration detention policy is 'process rich' and 'outcomes poor', with the predominant, and often sole, emphasis being on the achievement of quantitative yardsticks rather than qualitative measures... Many of these practices have been in operation for a long time and seem to have given rise to an immigration detention culture that, in the opinion of the Inquiry, constrains thinking, flexibility and initiative and concentrates on functions, process and quantitative measurement to the detriment of the achievement of policy outcomes.¹⁷⁷

The wrongful discharge of duties by police, like the incorrect approach to the *Migration Act* 1958 (Cth) s 189 mandatory detention powers, is often referred to as "police deviance". Laying the blame on non legal motivations such as institutional culture, as the Palmer and Comrie reports do, invites the critique made by Doreen McBarnet and others in the 1980s with regard to police deviance in arrest and conviction procedures. McBarnet argued that a cultural or individual deviance perspective can treat the notion of legality as unproblematic, as though fairness and efficiency would result if police practice reflected the law.¹⁷⁸ In her study of the law and procedures governing arrest and criminal procedure, McBarnet found rather that the gap between police behaviour and practice is institutionalised in law itself.¹⁷⁹ She argued that due process rhetoric sets up a false dichotomy between crime control and due process. As a

¹⁷⁵ Ibid. Following these reports the Immigration Department accepted there was inadequate support for officers in the period under review until till 2005, including limited training, poor systems to support compliance activity and decision making, limited internal supervision, quality assistance and oversight, see McMillan, "Report into Referred Immigration Cases: Detention Process Issues," 3.

¹⁷⁶ Palmer, "Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau." See in particular chapter 7 "Culture, Structure and Operations", 160-182. Note as well that the Comrie Report agreed with the assessment of DIMIA culture by Palmer.

¹⁷⁷ Ibid., 171.

¹⁷⁸ Doreen J. McBarnet, "The Police and the State: Arrest, Legality and the Law," in *Power and the State*, ed. Gary Littlejohn, et al. (London: Croom Helm, 1978); Doreen J. McBarnet, *Conviction: law, the state and the construction of justice* (London: Macmillan, 1981).

¹⁷⁹ McBarnet, "The Police and the State: Arrest, Legality and the Law."; McBarnet, *Conviction: law, the state and the construction of justice*.

result, the law on criminal procedure in her study “does not so much set a standard of legality from which the police deviate as provide a licence to ignore it.”¹⁸⁰

McBarnet’s point that legal text, procedures and instructions themselves encourage activity at odds with rule of law rhetoric resonates strongly with recent interest in how legal procedures, specifically jurisdiction, make differences in how powers should be exercised seem natural and legal.¹⁸¹ The common understanding of the significance of migration practices arguably is shaped by the legality of migration law. Thus, separating the jurisdictions of immigration and criminal justice also distinguishes between the safeguards appropriate for each area of law. Palmer recounts the attitudes of senior executives who explained that immigration detention was administrative and not punitive, and thereby contextualised detention as part of administrative process:

Comment was made to the Inquiry on a number of occasions that the operation of s. 189(1) was not reviewable since it was mandatory in nature and immigration detention was administrative, not criminal.¹⁸²

Adopting McBarnet’s perspective reframes the Inquiries’ finding that management treated investigation into the reasonable basis for detention as simply a matter of process rather than a serious issue of loss of liberty. It suggests that the administrative legality of migration law informs the exercise of discretion over mandatory detention, rather than solely institutional culture.

The influence of the administrative setting of migration law in shaping the discretionary power of migration policing agents is confirmed by the accountability mechanisms available to contest the exercise of discretion. Non-citizens, especially illegal migrants, face disincentives to challenging the exercise of migration policing powers. The Immigration Department is likely to be the main (or at least one of the) respondents to the action, but is also the decision maker in any visa application in process. Further, although non-citizens have standing to initiate a claim against the Commonwealth Government, for example for breach of duty of care, commencing such an action does not give rise to legal rights to remain in Australia while awaiting the outcome of the trial. The cost of initiating that complaint, together with the

¹⁸⁰ McBarnet, “The Police and the State: Arrest, Legality and the Law,” 213.

¹⁸¹ Mariana Valverde, “Jurisdiction and Scale: Legal ‘Technicalities’ As Resources for Theory,” *Social and Legal Studies* 18, no. 2 (2009): 141.

¹⁸² Palmer, “Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau,” 25. “Comment was made to the Inquiry on a number of occasions that the operation of s. 189(1) was not reviewable since it was mandatory in nature and immigration detention was administrative, not criminal.”

prospect that vindication for recognition of harm will not necessarily equate with permission to stay in Australia, can act as disincentives for non-citizens to commence court action. In this way the administrative setting of migration law has the capacity to enhance policing discretion.

Risk management: rhetoric or reality?

A key reform implemented after the Palmer and Comrie Inquiries was a more serious approach to managing the risk of wrongfully detaining and removing persons.¹⁸³ Efforts to identify Anna (the alias of Cornelia Rau) failed because of a lack of coordination, no coherent methodology in location, and because "nobody was in charge".¹⁸⁴ Part of subsequent risk management reform involved the introduction of detention principles (see *Figure D* below) that institute a risk assessment approach in deciding who should be detained. The Labor Government under Prime Minister Kevin Rudd announced new detention principles in July 2008, and introduced them into legislation the following year, but at the time of writing they still have not been enacted.¹⁸⁵ However the Immigration Department explains it has implemented the second detention value which explains which illegal migrants should be subject to mandatory detention.

Figure D: Key immigration detention values¹⁸⁶

The government's seven key immigration detention values are:

1. Mandatory detention is an essential component of strong border control.
2. To support the integrity of Australia's immigration program, three groups will be subject to mandatory detention:
 - all unauthorised arrivals, for management of health, identity and security risks to the community
 - unlawful non-citizens who present unacceptable risks to the community, and
 - unlawful non-citizens who have repeatedly refused to comply with their visa conditions.

¹⁸³ Ibid.: The *Palmer Report* highlighted various systemic failures in the Immigration Department as well as in the accountability structure for detention centre services. See for example pp 176-182 for discussion of the Immigration Department's contact with detention service providers GSL. The detention contract involved exception based reporting to the Immigration Department, rather than a risk management approach. In practice, this reporting style encouraged GSL to report problems to the Immigration Department after the problem emerged rather than prior to practice being implemented.

¹⁸⁴ Ibid., xiii, paragraph 31.

¹⁸⁵ See Minister for Immigration and Citizenship Senator Chris Evans, "Media release: Detention values to be enshrined in law," (25 June 2009), www.minister.immi.gov.au/media/media-releases/2009/ce09058.htm. See also The *Migration Amendment (Immigration Detention Reform)* Bill 2009.

¹⁸⁶ Department of Immigration and Citizenship, "Annual Report 2009-10," 172.

3. Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre.
4. Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, would be subject to regular review.
5. Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.
6. People in detention will be treated fairly and reasonably within the law.
7. Conditions of detention will ensure the inherent dignity of the human person.

This is not a significant change from prior to the introduction of these values. The strongest change represented in the *Key Immigration Detention Values* concerns the detention of children. After a damning report on the impact of detention on children and high profile litigation for the mental health impact, the Howard government legislated that children were only to be detained as a last resort.¹⁸⁷ The Rudd detention values set out the principle that where possible children and their families will not be detained in immigration detention centres. However, at the time of writing there were over 1000 children held in immigration detention.¹⁸⁸ Many of these children arrived in Australia by boat, unaccompanied by an adult family member, and were held initially at Christmas Island and then transferred elsewhere.¹⁸⁹ The introduction of key detention values does not change the importance of discretion over the power to detain. Existing studies of migration control, namely of Immigration Department practices, confirm that the importance of discretion in migration control goes beyond high profile politicised incidents. Discretion is engaged in routine migration control activities. Further, control contexts should enable study of the administrative legality of migration law to highlight the particular ways in which that setting enhances discretion.

¹⁸⁷ Human Rights and Equal Opportunity Commission, *A Last Resort? The National Inquiry into Children in Immigration Detention*. The principle that minors are to be detained only as a measure of last resort is set out at *Migration Act 1958 (Cth)* s 4AA.

¹⁸⁸ As at 6 June 2011, 1041 children were held in detention: Kate Gauthier et al., "No Place for Children: Immigration detention on Christmas Island," (ChilOut - Children Out of Immigration Detention, 2011), 8. Detention statistics are updated regularly at the Immigration Department website. However, the Immigration Department classifies "detention" as specific immigration detention centres, whereas I also include residential immigration facilities that do not permit autonomy to move in and out of the facility: Department of Immigration and Citizenship, "Managing Australia's Borders: Detention Statistics," Department of Immigration and Citizenship, www.immi.gov.au/managing-australias-borders/detention/facilities/statistics.

¹⁸⁹ Gauthier et al., "No Place for Children: Immigration detention on Christmas Island," 8.

Patterns in migration policing discretion

A number of features of onshore migration policing can be discerned from existing literature, government reports and statistics. Despite their limited focus on the activities of the Immigration Department, review of these sources potentially enables insight into patterns in migration policing discretion. However, review of the following sources shows that no strong pattern in the target population can be discerned. Migration policing field activities to locate illegal migrants rely only indirectly on profiling the demographic details and histories of illegal migrants. It does show that the Immigration Department relies primarily on intelligence gained through relationships with organisations and individuals to locate and apprehend illegal migrants. Thus, the thesis study of control contexts should focus on such relationships.

Patterns in the target population for onshore policing activities

The Immigration Department argues that its two main target populations for onshore compliance activities are non-citizens who have remained in Australia beyond the period of their visa ("overstayers"), and non-citizens in breach of their visa conditions (such as working without permission).¹⁹⁰ The Immigration Department states that other non-citizens who do not have a visa in Australia, and those who have entered Australia without authorisation are insignificant in number, and thus not a target for onshore policing.¹⁹¹ In any case those who have entered Australia without a visa are almost all in immigration detention.¹⁹² The Immigration Department prepares an annual estimate of the number of non-citizens present in Australia who remained after their visa expired. Based on that figure, about one-fifth of the illegal migrants living in the community are located each year.¹⁹³

¹⁹⁰ Auditor-General, "ANAO Onshore Compliance Audit (2004)," 31.

¹⁹¹ Ibid.

¹⁹² Those few who entered Australian without a visa but are not in detention include those who have managed to either get through immigration clearance at the airport with false documents, or stowaways who entered Australia without going through immigration clearance. They also include those who fit the narrow criteria for release from detention for those who entered without immigration authorisation. These migrants are eligible for release on a bridging visa *only* if they are awaiting determination of their refugee protection visa application and are either under 18 years or over 75 years of age, or have health needs that cannot be met in detention: *Migration Regulations* 1994 (Cth), Schedule 2, Subclass 051 Bridging (Protection Visa Applicant). Unauthorised boat arrivals are almost all detected and intercepted prior to arrival on land, and immediately detained.

¹⁹³ This relies on data from reports published by the Immigration Department covering the period 1 July 1996 to 30 June 2011. These include the annual reports from July 1996 to June 2010, and the *Protecting the Border* series of reports (later called *Managing the Border* reports) that collectively cover the period July 1998-June 2005. For some reports, the figure was back reported with updated figures in the annual report of the following year. In these cases the later corrected figure was used. Data from the *Review of Illegal Workers* was also used.

The Compliance section of the Immigration Department is responsible for checking adherence with visa conditions by proactive visits to workplaces. It also conducts education activities for employers and others about their migration law responsibilities, such as the requirement not to employ non-citizens without immigration authorisation to work.¹⁹⁴ The Compliance section of the Immigration Department views the prioritisation of specific industries and labour markets as a control strategy.¹⁹⁵ Yet this is inconsistently implemented nationally.¹⁹⁶ In 2004, the Immigration Department's NSW Office stood out in this respect as it prioritised compliance activities on the risk profiles of industries and labour markets.¹⁹⁷ The Immigration Department justifies this focus on compliance on the basis of its estimate that about half of all illegal migrants in Australia work.¹⁹⁸

Overall Immigration Department operations within Australia did not undertake systematic risk analysis of their client database to plan operations to locate illegal migrants.¹⁹⁹ The Immigration Department did not analyse ICSE data so as to profile individuals (with regard for example to their biographical details such as age, gender, country of citizenship) who are likely to breach their visa conditions, or those who might be most likely to self report.²⁰⁰ There is no indication that this has changed.²⁰¹ In any case, performance assessment in terms of clear-up rates for the location of illegal migrants or those in breach of visa conditions would be hampered, as the Immigration Department did not have an estimate of the number of non citizens working without permission.²⁰²

In contrast to the attention to the risks involved in unlawful detention, the conduct of Immigration Department initiatives to locate illegal migrants do not rely on risk assessment to determine organisational priorities in location operations.²⁰³ Risk assessment does have some

¹⁹⁴ See for example Department of Immigration and Citizenship, "Annual Report 2009-10," 153, 62-63.

¹⁹⁵ This is evident from the Immigration Departments internal 2003 document 'Risk Assessment and Treatment Plan worksheet'. This document is not publicly accessible but was obtained and referenced by the Australian National Audit Office. See Auditor-General, "ANAO Onshore Compliance Audit (2004)," 48.

¹⁹⁶ Ibid., citing DIMIA (2003) 'Risk Assessment and Treatment Plan worksheet'.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid., 49.

¹⁹⁹ Ibid., 43. Note that the client database is the Integrated Client Services Environment 'ICSE'. See also Palmer, "Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau," 167.

²⁰⁰ Auditor-General, "ANAO Onshore Compliance Audit (2004)," 43-44. In addition, although the technology has the capacity some further data would require collection in order for example to profile those whom are most likely to self refer to the Department, ANAO explains this would require for example collection of data on how the non-citizen became aware of the self referral process (see ANAO at 44).

²⁰¹ From perusal of subsequent annual reports to June 2010.

²⁰² Auditor-General, "ANAO Onshore Compliance Audit (2004)," 44.

²⁰³ Ibid.

bearing on how migration policing operates onshore because it is used extensively in determining whether a visa to enter Australia should be granted at all.²⁰⁴ In this way it shapes the distribution of who is eventually affected by onshore activities. The Immigration Department describes this as a “compliance continuum”. In contrast to onshore policing activities, pre entry visa decision making involves assessment of the risk of future breach of visa conditions.²⁰⁵ This risk assessment draws on evidence including the visa applicants past adherence to visa conditions in Australia.²⁰⁶ Thus, based on existing reports, the Immigration Department’s target population for control of illegal migrants in Australia appears only in very broad terms, being illegal migrant workers and those who have remained in Australia after their visa expired.

Patterns of targeting: a focus on how, rather than targets

Although the persons targeted by the Immigration Department remain broadly sketched, existing literature on Immigration activities illustrates a clearer trend in how control of illegal migrants is achieved. The Immigration Department predominantly relies on information from individuals and organisations, making its relationships with these entities of prime importance in migration control.

The most important relationship in terms of productivity in locating illegal migrants is that between the Immigration Department and illegal migrants themselves. Since 2002-03 most illegal migrants were located because they reported themselves to the Immigration Department.

Migration search warrants empower activities that are crucial to locating illegal migrants. Search warrants enable an officer to enter and search any premise, vehicle or vessel provided that an officer holds “a reasonable cause to believe” that an illegal migrant, or person who holds (or did hold) a temporary visa with work conditions would be found.²⁰⁷ Thus, although the Immigration Department does develop knowledge of workers of

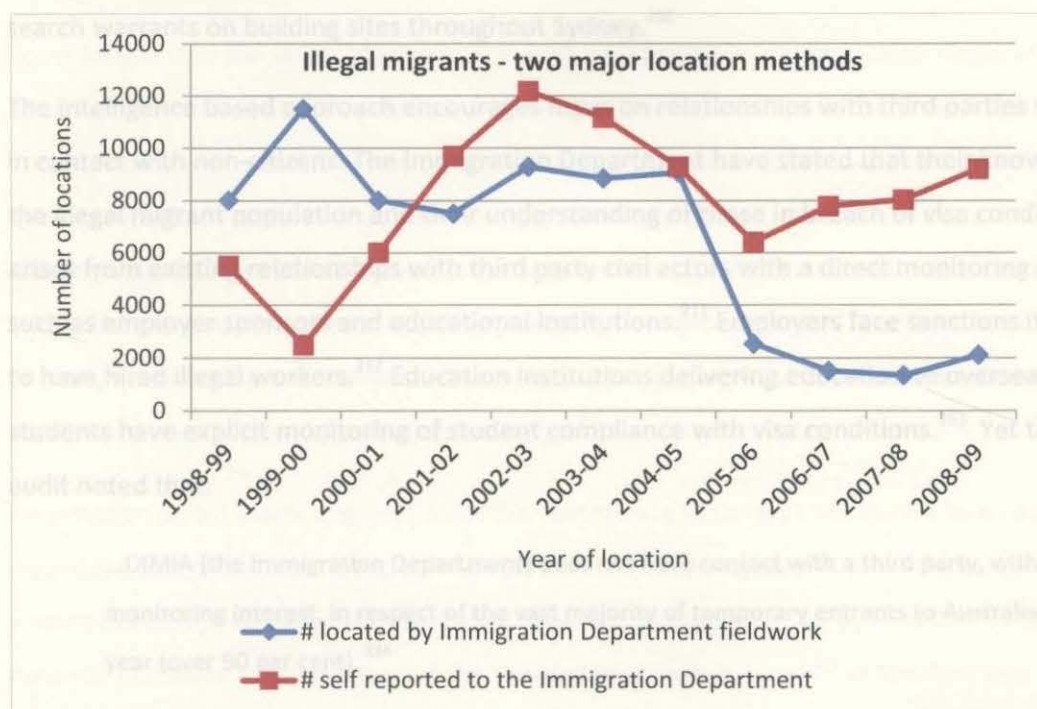
²⁰⁴ The data used to create this graph is from reports published by the Immigration Department. These reports cover the period from 2002-03 to June 2010, and the *Protecting the Border* series of reports from 2007-08 to 2009-10.

²⁰⁴ Ibid., 42. Note that the way in which the compliance continuum operates in the pre entry and visa decision making contexts is picked up as it related to the character test in Chapter 5. See also *ibid.*, 145., for a diagram of the “DIMIA Compliance Continuum”.

²⁰⁵ Historically this occurred through the “Risk Factor List”. It is now defunct, but when operational it profiled the risk of overstay in accordance with demographic details including age range, gender and country of nationality. The “Safeguards System” is in use today. It is a risk management system that identifies visa applicant who meet pre-determined characteristics, and then prompts particular checks and further queries. See John (Commonwealth Ombudsman) McMillan, “Department of Immigration and Citizenship: The Safeguards System,” ed. Commonwealth and Immigration Ombudsman (Canberra: Commonwealth Ombudsman, 2008).

²⁰⁶ Ibid. under the provision (s 251(4)), for up to three months (s 252(5)).

Figure E: The comparative numbers of illegal migrants located by self referral and by Immigration Department fieldwork²⁰⁷



The second most important relationship is that between the Immigration Department and those in direct contact with illegal migrants, including both individuals and organisations. In part, this results from the legal framework governing migration location activities. The legal framework has informed an Immigration Department approach that centres on “intelligence or observed behaviour”, sourced primarily through dob-ins, data matching, and liaison with civil society groups.²⁰⁸ Migration search warrants empower activities that are crucial to locating illegal migrants. Search warrants enable an officer to enter and search any premise, vehicle or vessel provided that an officer holds “a reasonable cause to believe” that an illegal migrant, or person who holds (or did hold) a temporary visa with work conditions would be found.²⁰⁹ Thus, although the Immigration Department does develop knowledge of workers of

²⁰⁷ The data used to create this graph is from reports published by the Immigration Department. These include the annual reports from July 1996 to June 2010, and the *Protecting the Border* series of reports (later called *Managing the Border* reports) that collectively cover the period July 1998-June 2005. For some reports, the figure was back reported with updated figures in the annual report of the following year. In these cases the later corrected figure was used.

²⁰⁸ Auditor-General, “ANAO Onshore Compliance Audit (2004),” 47.

²⁰⁹ *Migration Act 1958* (Cth) s 251(6)(a)-(b). Note that these search warrants also extend to enable entry and search where the officer has reasonable cause to believe that a document, book or paper relating to the entry or proposed entry into Australia of a person whom would not be authorised to enter or would become an unlawful non-citizen, be found on the premises, or passport or identity document or travel ticket from Australia of a person without immigration authorisation to remain in Australia (s 251(6)(c)-(d)). Note also these it is the Secretary of Immigration whom has the power to issue search warrants under this provision (s 251(4)), for up to three months (s 252(5)).

particular nationalities working without immigration permission in, for example, the building trades, it explains that this does not necessarily provide a lawful basis to conduct random search warrants on building sites throughout Sydney.²¹⁰

The intelligence based approach encourages focus on relationships with third parties who are in contact with non-citizens. The Immigration Department have stated that their knowledge of the illegal migrant population and their understanding of those in breach of visa conditions arises from existing relationships with third party civil actors with a direct monitoring interest, such as employer sponsors and educational institutions.²¹¹ Employers face sanctions if found to have hired illegal workers.²¹² Education institutions delivering education to overseas students have explicit monitoring of student compliance with visa conditions.²¹³ Yet the 2004 audit noted that:

...DIMIA [the Immigration Department] does not have contact with a third party, with a direct monitoring interest, in respect of the vast majority of temporary entrants to Australia each year (over 90 per cent).²¹⁴

Even prior to these formal legislative duties or incentives, the Immigration Department explained that information from the community and peak industry bodies was a key source in planning Compliance field visits.²¹⁵ Communicative relationships ranged in formality. For example, by June 2001, contact between the Construction Forestry Mining and Energy Union NSW Secretary Andrew Ferguson and the Immigration Department had reached a point

²¹⁰ *Ibid.*, para 11. See also Department of Immigration and Multicultural and Indigenous Affairs, "Royal Commission into the Building and Construction Industry

²¹⁰ Auditor-General, "ANAO Onshore Compliance Audit (2004)," 46. Note that ANAO considers that despite the limits of profiling as a legal basis for search warrants, that DIMIA should undertake target group profiling to provide information on a group within its target population so as to inform effective compliance strategies.

²¹¹ *Ibid.*, 44.

²¹² *Migration Act 1958* (Cth) ss 245AB, 245AC. This is discussed in chapter 3. See also The Senate Legal and Constitutional Legislation Committee, "Migration Amendment (Employer Sanctions) Bill 2006," (Canberra: The Senate Legal and Constitutional Legislation Committee, 2006); Department of Immigration and Citizenship, "Do your employees have a valid visa to work in Australia?," (Canberra: Commonwealth of Australia, 2007).

²¹³ This is discussed in chapter 3. See the following *Education Services for Overseas Students Act 2000* (Cth); Australian Education International, "National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007 (the National Code 2007)," ed. Australian Government (Canberra 2007).

²¹⁴ Auditor-General, "ANAO Onshore Compliance Audit (2004)," 45.

²¹⁵ Richard Steven Konarski (Department of Immigration and Multicultural and Indigenous Affairs), "Statutory Declaration," (Melbourne: Royal Commission into the Building and Construction Industry, 2002). "A large proportion of these field activities are undertaken as a result of "dob-in" information received from a range of sources, including employers, the community, educational institutions, peak industry bodies and other governmental agencies including the police,"

whereby the Immigration Department provided a regular contact in the Employer Awareness Unit which included out of business hours contact for information on illegal workers.²¹⁶

Some insight into the utility of information with civil bodies in locating illegal migrants can be discerned from evidence provided by the Immigration Department to the 2002 Royal Commission into the Building and Construction Industry. From 2000 to about September 2002, the Construction Forestry Mining and Energy Union and other bodies in the construction industry reported about 1620 persons as illegal workers.²¹⁷ This resulted in identification of about 120 persons identified as working without permission, that is, 7% of those reported.²¹⁸ The majority of the persons reported were later found to be Australian citizens, permanent residents or visa holders with work permission.²¹⁹

Information about illegal migrants from the community in general has always been an important source for the Immigration Department.²²⁰ Seeking community information became a more deliberate strategy from February 2004 with Immigration Minister at the time Senator Amanda Vanstone's introduction of the "Immigration Dob-in Line".²²¹ In the first year of operations, community reports to the line were on average 570 calls per week,²²² then in the years following reports to the line ranged between about 32,000 and 47,000.²²³ Commenting on the reliability of "dob-ins" is hampered as the Immigration Department reported these details for only two time periods. In February to July 2004, upon the introduction of the Dob-In Line, 2179 illegal migrants were located as a result of community information.²²⁴ In 2004-05,

²¹⁶ Ibid., para 11. See also Department of Immigration and Multicultural and Indigenous Affairs, "Royal Commission into the Building and Construction Industry Discussion Paper Eleven - Working Arrangements - Their Effects on Workers' Entitlements and Public Revenue," ed. Department of Immigration and Multicultural and Indigenous Affairs (Melbourne: Royal Commission into the Building and Construction Industry, 2002); Richard Steven Konarski (Department of Immigration and Multicultural and Indigenous Affairs), "Statutory Declaration."

²¹⁷ ———, "Statutory Declaration," para 12.

²¹⁸ Ibid., para 14.

²¹⁹ Ibid., para 13.

²²⁰ Vanstone, "Immigration Dob-In Line Launched."

²²¹ Ibid.

²²² That is, from February 2004 to the end of the financial year on 20 June 2004. Department of Immigration and Multicultural and Indigenous Affairs, "Annual Report 2003-04," (Canberra: Department of Immigration and Multicultural and Indigenous Affairs, 2004), 87. Note that it notes that about 23% of these calls were referred to compliance areas for investigation.

²²³ Note however that the number of calls were not reported for every year of operation: Compliance Framework Branch, "Managing the Border: Immigration Compliance 2004-05 edition," 52; Department of Immigration and Multicultural Affairs, "Annual Report 2005-06," (Canberra: Commonwealth of Australia, 2006), 159; Department of Immigration and Citizenship, "Annual Report 2006-07," (Belconnen, A.C.T.2007), 119.

²²⁴ Ibid.

²²⁴ Compliance Framework Branch, "Managing the Border: Immigration Compliance 2004-05 edition," 52.

3186 locations were made.²²⁵ These figures indicate that about one to two percent of dob-ins resulted in successful location. In later years, the Immigration Department reported instead on the number of allegations identified from community information. In 2008-09, 11,300 allegations were identified,²²⁶ and in 2009-10, dob-ins or fraud related information amounted to 13,800.²²⁷ The apparent substantial reduction in the number of dob-ins is not explained by the Immigration Department, though the change in reporting information might be relevant. The patterns in the exercise of discretion evident from existing studies and reports of the Immigration Department are not strongly formed by who is targeted. The pattern is instead in *how* discretion is informed, that is, through relationships with organisations with a direct monitoring role as well as with individuals in contact with illegal migrants. The importance of these relationships suggests that the legitimacy of migration control in the eyes of these individuals and organisations is important to the capacity to locate and apprehend illegal migrants. Moreover, relationships with civil actors are an important feature to include in a study of control contexts, to discern how that legitimacy is established. This adds to the other features identified as crucial for inclusion in the study of control contexts: policing agents not limited to the Immigration Department, scenarios where there is a high degree of discretion and instances that enable study of the administrative legality of migration law. Existing literature has positioned migration control within the frameworks of law, the institution of the Immigration Department, and statistical insight. Review of those frameworks however suggested that the features just described more crucially shape the exercise of discretion, being the central element that means migration control cannot be understood solely through legal text.

The first two parts of this chapter have introduced migration control in its Australian national setting. Migration control is however control over movement. In the national setting this control entails movement into or out of detention, and also entry and departure from Australia. But it also always entails control over movement to and from nations, that is, migration control is always in a global context. The third and last part of the chapter moves from the national setting to the global.

²²⁵ Ibid.

²²⁶ Department of Immigration and Citizenship, "Annual Report 2008-09," 124. Note this figure was made more specific in the annual report the following year ———, "Annual Report 2009-10," 161.

²²⁷ ———, "Annual Report 2009-10," 161.

C The connection between migration control and the nation state

I now turn to consider the connection between the nation state and control over migratory movement outside Australia as suggested by existing scholarly literature. I explore this connection to foreshadow the end of the thesis which investigates the potential for Australian migration policing to operate beyond the nation. I start first by introducing the relationship between illegal migration and the state, to set the scene for analytical approaches that suggest how the operation of migration control beyond the nation might be traced.

Some scholars have argued that illegal migration challenges the sovereignty of nation-states, and conversely that migration control affirms and bolsters such sovereignty. This has been explained on various grounds. The most public and virulent is that of political discourse. Australian governmental political discourse, on both sides of politics, treats illegal migration as a challenge to national sovereignty. The discursive link between entry into Australia by boat without immigration authorisation and war, framing migration control as in defence of the realm, has been extensively documented.²²⁸ The language of "war", "invasion of our shores", was developed in the context of other issues including the Gulf Wars and the consequent influx of asylum seekers from Afghanistan and Iraq, as well as the localised issue of the sexual assault of an "Australian" girl by a group of "Middle Eastern" men.²²⁹ The confluence of these issues intensified the sense in which migration became an issue of "war". This was invoked not just in the sense that a northern sea approach prompts the historical national imagery of invasion from the north, but also by linking such entry with "ethnic divisions" turning Australian streets into a "war zone".²³⁰

It is not solely public and political discourse that constructs illegal migration and illegal migrants as a threat to national sovereignty. Michael Grewcock's *Border Crimes: Australia's war on illicit migrants* argues that the exclusionary effect of Australia's border control amounts to a war against illegal migrants.²³¹ Australia's border control strategies, alongside other Western nations, exclude and contain refugee movements, criminalising and alienating illegal migrants. In doing so, border control creates the conditions that shape refugee journeys

²²⁸ Poynting, "Bin Laden in the suburbs: attacks on Arab and Muslim Australians before and after 11 September." Poynting explores the "moral panic" over entry of asylum seekers in 1999-2001.

²²⁹ Ibid; Manning, "Dog Whistle Politics and Journalism: Reporting Arabic and Muslim people in Sydney newspapers."; Marr and Wilkinson, *Dark Victory*.

²³⁰ Poynting, "Bin Laden in the suburbs: attacks on Arab and Muslim Australians before and after 11 September." See also Manning, "Dog Whistle Politics and Journalism: Reporting Arabic and Muslim people in Sydney newspapers."

²³¹ Grewcock, *Border crimes: Australia's war on illicit migrants*.

and what Grewcock argues to be a deviant use of force amounting to state criminality through force, deterrence and interception, that, like war, are rationalised by defence of national sovereignty.²³² The threat to national sovereignty posed by illegal migration forms part of the energised political context of migration control debates.

Effects which might be broadly categorized as the effects of globalisation provide a second set of grounds that undermine national sovereignty. These effects include the development and the increasing normative importance of international conventions on human rights; the effect on national identity of increasing cultural commonality (sometimes observed as a global cultural dominance), as well as the circulation intrinsic to a global and regional economy.²³³ Although these elements of globalisation have very different impacts and effects, they all contribute to perceptions of diminishing national power in globalisation, which have invested migration control with a sense of being the “last bastion of sovereignty”.²³⁴

National sovereignty is generally understood as exclusive authority over territory, and as such coterminous with the nation-state. In a more general sense the term “sovereignty” has been used to describe different practices of power.²³⁵ For the purposes of this thesis, sovereignty is relevant only insofar as the nation-state operates as the institutionalisation of sovereign power, and is treated as equivalent to the nation-state. Yet what constitutes the “nation” that is sovereign is difficult as not all state practices are sovereign in this manner, and if the argument that migration control diminishes sovereignty is right, then the nation cannot be defined by sovereignty itself. In Peter Fitzpatrick’s words “we find it difficult to challenge allegiance to the sovereign state and membership permitted entry to the nation.” Both elements spoke of the power of the nation-state from an inter-state perspective.

²³² Note Grewcock defines state crime as derived from ‘the organised and deviant use of force diffused through the alienation, criminalisation and abuse of unauthorised migrants’. See *ibid.*, 36.

²³³ Virginie Guiraudon and Gallya Lahav, “A Reappraisal of the State Sovereignty Debate: The Case of Migration Control,” *Comparative Political Studies* 33, no. 2 (2000).

²³⁴ Dauvergne argues this is how migration law is being treated, but doesn’t necessarily argue that migration law is indeed a “last bastion” of sovereignty. See Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law*: 2.

²³⁵ It has been described as dominion over oneself. It also describes the relationship of dominion and subjection between a sovereign and subject wherein the sovereign has the right to kill and operates through binary prohibitions. A biopolitical sovereignty has been characterized by its relation to the population at large and exercise of power on the basis to “let live or make die” maximizing the continuance and productivity of the population at large. See Michel Foucault, *Security, Territory, Population: lectures at the Collège de France, 1977-78*, ed. Michel Senellart, General editors: François Ewald and Alessandro Fontana, and English series editor: Arnold I. Davidson, trans. Graham Burchell (Houndmills, Basingstoke, Hampshire; New York: Palgrave Macmillan, 2007); ———, *Society Must Be Defended: Lectures at the Collège de France 1975-1976*, ed. Mauro Bertani, et al., trans. David Macey (London: Penguin Books, 2004). Sovereignty has also been defined as the power to decide the exception. See Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. G. Schwab (2005).

nation because we cannot say what it is so as to identify it explicitly and thence confront it."²³⁶ In the thesis, the nation-state is treated as exclusive authority over territory. The nation-state is established in part through historically specific foundations, which, for the purposes of this thesis, involve governmental authority over territory, legal citizenship and alien status. This is explicated further towards the end of this chapter.

Migration law and control – as a bordering process over the presence of persons on territory, and status – is quintessentially sovereign. It affirms government's exclusive authority over territory as well as defining the relationship of rights and responsibilities between the individual and government. John Torpey's text *The Invention of the Passport* argues that the 19th century development of migration controls, such as documentary controls, were crucial in forming the very "stateness" of nation-states. In the United Kingdom, Germany and France at this time, private bodies such as employers and religious bodies historically held power over people's movement. The monopoly over legitimate movement by people in countries then shifted from those bodies, and came to solely rest in the nation state.²³⁷ From these beginnings, migration control came to have two main constitutive roles in the nation state. First, migration control was crucial in delimiting the geo-political boundaries of the nation state as coterminous with power. Stations were set up at these borders, to check permission for entry and exit, evidenced by different forms of documentary authorities and identification.²³⁸ Second, migration control was significant in distinguishing between members of the nation-state and outsiders. At inception, membership was conditional upon exclusive allegiance to the sovereign state and membership permitted entry to the nation.²³⁹ Both elements spoke of the power of the nation-state from an inter-state perspective.

Tracing "beyond nation" in migration control

A common approach to conceptualising governance beyond the nation is to point to the creation of something new in the international arena – international law, conventions and international institutions and so on. In this frame, the challenge that globalisation poses to the nation state is said to be the way that international law, and so on, usurps national authority. Implicit in this approach is a separation between the national and the international, which in

²³⁶ Peter Fitzpatrick, "'We know what it is when you do not ask us': the unchallengeable nation," *Law Text Culture* 8(2004): 263. Fitzpatrick goes on to argue at 263 that it is difficult to define nation "from within the uniform plane of modernity since nation occupies a sacral dimension of being which the modern cannot integrate."

²³⁷ John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State*, ed. Chris Arup, et al., Cambridge Studies in Law and Society (Cambridge: Cambridge University Press, 2000).

²³⁸ *Ibid.*

²³⁹ *Ibid.*

legal geography scholarship on scale is distinguished as different scales of governance. Yet Hirst and Thompson draw attention to how international law, conventions and institutions all rely on nation-states for both their authority (as signatories to conventions and so on) and their resources to enable international capacity to act.²⁴⁰ Establishing the development of power beyond the nation-state thus involves something more than the phenomenon of international law and institutions. This thesis proceeds on the basis that the national and the international are deeply imbricated. The national remains the realm where "formalisation and institutionalisation have all reached their highest forms of development."²⁴¹ This makes study of the national context productive for understanding the operation of power beyond the nation, and construction of changing notions of nation. It is also pertinent to remember that governance is not a zero sum game. An increase in global power does not necessarily imply a reduction in national law, rather governance may be multiple and layered.²⁴²

Three analytical approaches suggest avenues of tension between migration or citizenship law and their operation as an affirmation of nation. Both Sassen and Dauvergne locate evidence of change in the law itself, that is, in legislative or judicial text. Sassen considers changes in the legal meaning of citizenship and nationality which make them less central to the meaning of nation. Dauvergne argues that Australian migration law shows tentative signs of drawing an ethical authority from the global rather than national community.²⁴³ A third approach harnesses the notion of policing as a new imperial mode of authority. It provides a theoretical notion of policing which has the capacity to operate beyond the nation and draws its legitimacy from hegemonic global norms.²⁴⁴

²⁴⁰ Paul Hirst and Grahame Thompson (1999) *Globalization in Question: the international economy and the possibilities of governance*, 2nd ed, Cambridge, UK: Polity Press; Malden, MA: Blackwell Publishers. See also Katja Franko Aas (2007) *Globalization and Crime*, Sage Publications: London for a concise summary of the post national literature. See Saskia Sassen (2006) *Territory, Authority, Rights: from medieval to global assemblages*, Princeton, N.J.: Princeton University Press 286-290, for an elaboration of the subject of citizenship and particularly on a growing scholarship based not on the nation state (in a narrow political sense, or broader sociological or psychological sense of the terms). This literature focuses especially on experiences of identity that shift outside the reference frame of the nation state.

²⁴¹ Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton: Princeton University Press, 2006), 1.

²⁴² ———, "The Repositioning of Citizenship: emergent subjects and spaces for politics," 175-98.

²⁴³ Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law*.

²⁴⁴ Michael Hardt and Antonio Negri, *Empire* (Cambridge, Massachusetts; London, England: Harvard University Press, 2000).

The changing significance of citizenship and nationality in shaping nation

Saskia Sassen's *Territory, Authority, Rights: from medieval to global assemblages* argues that changing articulations of the national are affecting complex institutionalisations founding the nation, such as citizenship and nationality.²⁴⁵ Sassen argues that the capabilities of territory, authority and rights are constructed through law and law related practices as foundational to nation. The repositioning of such capabilities operate as a fundamental reorientation which reconstructs (or "denationalizes") the nation. She proposes globalising and denationalising dynamics work to:

...destabilise existing meanings and systems/frameworks e.g. crucial frameworks through which modern societies, economies and politics (under the rule of law) have operated – the social contract of liberal states, social democracy as we have come to understand it, modern citizenship, and the formal mechanisms that render some claims legitimate and others illegitimate in liberal democracies.²⁴⁶

Sassen argues that a global trend starting in the 1990s permitting dual nationality indicates a shift in the relationship between the foundation of the nation-state, and nationality and citizenship. Nations' increasing acceptance of dual nationality suggests that formal legal citizenship may be less important as an assertion of the nation state than otherwise considered. Both nationality and citizenship identify the legal status of the individual in terms of state membership. Citizenship frames this within the national dimension. Nationality frames that status in the context of an inter-state system.²⁴⁷ Nationality in medieval Europe meant an insoluble and exclusive allegiance of the individual to the sovereign.²⁴⁸ Yet today nationality enables a changeable allegiance.

Illegal migrants have no formal allegiance to their host nation. However, Sassen's study of immigration in the United States demonstrates illegal migrants' social integration (in other words social citizenship) can act as grounds for their "effective nationality".²⁴⁹ Sassen details the potential for legal residence in the United States where documented long term residence, "good conduct", and evidence that deportation would be an extreme hardship works to support this legalisation of status.²⁵⁰ In Australia, the extent to which an illegal migrant might develop an "effective nationality" is much more marginal. There is no specific visa category for

²⁴⁵ Sassen, "The Repositioning of Citizenship: emergent subjects and spaces for politics," 180.

²⁴⁶ ———, *Territory, Authority, Rights: From Medieval to Global Assemblages*: 3.

²⁴⁷ *Ibid.*, 281.

²⁴⁸ *Ibid.*, 282.

²⁴⁹ ———, "The Repositioning of Citizenship: emergent subjects and spaces for politics."

²⁵⁰ *Ibid.*

illegal migrant applicants. However should a person be refused a visa, elements of social integration – including a parental relationship with an Australian citizen child, marriage to an Australian citizen or permanent resident, as well as other social ties - become relevant as humanitarian reasons the Immigration Minister may take into account so as to intervene and grant residence.²⁵¹ Further, social ties may be taken into account in the decision as to whether to waive failure of the migration character test which ordinarily results in visa refusal or visa cancellation.²⁵² Regardless of the extent to which social integration is (or is not) recognised in progressing immigration legal status, Sassen's focus reminds that non nation-state actors contribute to the social integration or social citizenship of illegal and legal migrants. That is, control over migratory movement is not solely at the hands of the nation state.

Legal citizenship signifies full membership of a nation, and a key value is the right to re-entry into the country. Thus, migration control should not prevent the entry of Australian citizens, nor require their departure from Australia. Yet in Australia, Kim Rubenstein warns that citizenship law reform in 2002 has resulted in the increasing vulnerability of dual citizens. Dual citizens might constitutionally be understood as aliens despite their legal citizenship,²⁵³ and thus potentially able to be refused entry to Australia or removed. For example, the 2005 High Court decision of *Ame* found that Australian citizenship does not necessarily confer full membership of the Australian community.²⁵⁴ Amos Ame was an Australian citizen by birth, having been born in Papua when it was an Australian territory. However the High Court decided that people born in Papua were never full Australian citizens, and that in any case citizenship was divested when Papua and New Guinea became independent in 1975. As such, Mr. Ame was found to be a constitutional alien and thus subject to migration laws prohibiting stay in Australia without a visa.²⁵⁵

Legal citizenship in Australia thus does not of itself exempt one from the exercise of migration control powers. The Australian Constitution empowers the legislature to make laws with regard to aliens as well as immigration and naturalization. Australian case law suggests that it is alien and non alien status that are on opposite ends of a continuum, not alien and citizenship status.²⁵⁶ The lack of constitutional founding of citizenship means that citizenship is

²⁵¹ See ss417 and 351 of the *Migration Act 1958* (Cth).

²⁵² This is discussed further in chapter 6 of this thesis.

²⁵³ Simon Bronitt and Kim Rubenstein, eds., *Citizenship in a Post-national World: Australia and Europe Compared*, Law and Policy Paper 29 (Leichhardt, NSW: The Federation Press, 2008).

²⁵⁴ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* [2005] HCA 36.

²⁵⁵ Prince, "Mate! Citizens, Aliens and 'Real Australians' - the High Court and the case of Amos Ame".

²⁵⁶ *Ibid*; ———, "We are Australian - The Constitution and Deportation of Australian-born Children" in *Research Paper* (Canberra: Law and Bills Digest Group, Parliamentary Library, 2003); ———, "Deporting

no guarantee of exemption from the powers of the executive over aliens. By default then, the absence of citizenship from the Australian Constitution enhances potential discretion in migration control.

The three examples of the legal meaning of citizenship and nationality discussed above reveal the difficulties in equating legal citizenship law with full membership, and changing relationships with the meanings of nation. Changes in citizenship law make nationality a less exclusive concept, and thus indicate the changing role of membership in defining the nation-state within an inter-state framework. They also show that it is not only bare citizenship or immigration legal status that prevents or compels migratory movement. It highlights that non-state actors have a role in enhancing the social citizenship of illegal migrants that may affect the ability of migration control authorities to locate and remove them. Further, in Australia, legal citizenship does not of itself connect to national membership such that citizenship prevents expulsion from the nation. These analyses imply there are two relevant features that may trace the potential for migration control to operate beyond nation, when examining contexts within Australia; first, the activities of non state actors that socially include illegal migrants, and second, the influence of the absence of citizenship from the Australian Constitution in empowering discretion in migration control.

Embedding the ethics of a global community of law in national law-making

Contesting the equation of citizenship with national membership does not however imply that migrant illegality no longer has significance. As Catherine Dauvergne reminds throughout her book *Making People Illegal*, migration law provides no cure for illegality, bar the limited exceptions in refugee and humanitarian law. Dauvergne's text tells the story of how migration law has ceased to be a mere tool of the state that can be "deployed to either facilitate global forces or shore up states against them."²⁵⁷ She tells of how, in the to and fro between the legislature, executive and judiciary across the site of migration law, migration law is developing a more law like character in marginal and unexpected ways.²⁵⁸ She argues this change in migration law is a tentative sign that migration law is drawing ethical authority from

British Settlers," (Canberra: Australian Parliamentary Library, 2004); *ibid*; Michael Klapdor, Moira Coombs, and Catherine Bohm, "Australian citizenship: a chronology of major developments in policy and law," in *Background Note* (Canberra: Social Policy and Law and Bills Digest Sections, Parliament of Australia Parliamentary Library, 2009); Rubenstein, *Australian Citizenship Law in Context*; ———, "Meanings of membership: Mary Gaudron's contributions to Australian citizenship," *Public Law Review* 15, no. 4 (2004); ———, "Citizenship and the Centenary: inclusion and exclusion in 20th century Australia," *Melbourne University Law Review* 24, no. 3 (2000).

²⁵⁷ Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law*: 3.

²⁵⁸ *Ibid.*, 7.

the global rather than national community. In this way, migration law shows signs it has become uncoupled from nation. ²⁵⁹ The broader theorizing Dauvergne is interested in connects law and sovereignty, as well as law and Dauvergne draws on Peter Fitzpatrick's argument that the basis of the authority of international law is not the bare power of nation-states, but the recognition of an existent ethic of community of law. ²⁵⁹ Utilising Fitzpatrick's analysis enables Dauvergne's approach to distinguish between ethics in law that emerges from a global community, and nationally specific legal decision making. Fitzpatrick's approach can be summarised as follows. The underlying legitimacy of international law over the nations arises from the development of a global meta-ethics constituted by a community of law. The power of international law to challenge, for example, the United States' actions in violating international law, shows that international law is more than an assertion of the bare power of nation-states. ²⁶⁰ It is in fact international law's dependence on the power of nation states that makes each state mutually dependent on the other. That mutual dependence discloses how the power of nation states constitutively relies on international law. Fitzpatrick explains this by his theorizing of the relationship between the social norm and law, as well as that between law, ethics and legitimacy. He explains that the extensive norm cannot be contained by law. Law can make the norm explicit and enforceable, but its enforceability also relies on the power of the norm itself, which is instrumental in maintaining an open quality to law. In short, law depends on power for its content, and ruling power relies on law effecting sociological normativity. ²⁶¹ He argues an ethics can be found from the open quality of law and the juridical. The ethics does not amount to definite principles and standards, but rather a meta-ethics as a manner of being, that Fitzpatrick refers to as an "ethics of the existent". ²⁶² This ethics involves equality, freedom and impartiality before the law. ²⁶³ Because laws have effect only in a community which would "make sense" of them, such an ethics would operate in this community. ²⁶⁴ The openness of law, he explains, is invitation "to an inclusive being-in-common, to a regardful community that is a 'community of law'". ²⁶⁵

²⁵⁹ Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law*. See in particular 93-118, 59-90.

²⁶⁰ Cited by *Ibid.*, 40, referencing Fitzpatrick, "Gods Would Be Needed..." *American Empire and the Rule of (International) Law*, 431.

²⁶¹ *Ibid.*, 183.

²⁵⁹ *Ibid.*, chapter 3 (29-49) and chapter 9 (169-90). See also Peter Fitzpatrick, "Gods Would Be Needed..." *American Empire and the Rule of (International) Law*, *Leiden Journal of International Law* 16, no. 3 (2003).

²⁶⁰ ———, "Gods Would Be Needed..." *American Empire and the Rule of (International) Law*.

²⁶¹ *Ibid.*, 444.

²⁶² *Ibid.*

²⁶³ *Ibid.*, 444-45.

²⁶⁴ *Ibid.*, 445.

²⁶⁵ *Ibid.*

It is this existent ethic of a community of law, that is beyond nation, that Dauvergne argues manifests through what she sees as a turn to the rule of law in migration jurisprudence.²⁶⁶ The broader theorizing Dauvergne is interested in connects law and sovereignty, as well as law and nation, as interdependent and mutually constitutive. In the character of these elements as “constituent complicities”, the ethical authority of law is an important indicator of its work in constituting nation and sovereignty.²⁶⁷ Thus judicial decisions that rely upon the rule of law – rather than for example national constitutions or other national or international legal texts – demonstrate judicial recognition of an ethics beyond the nation-state.²⁶⁸ In jurisprudential terms, the ethics to which the international community of law subscribes can be equated to a “thick” or substantive sense of the rule of law. A “thick” rule of law contains protection of fundamental individual rights, and sometimes criteria of justice and democracy. In contrast, a “thin” or procedural sense of the rule of law is generally held to require that law be prospective, publicly declared and certain. It applies to all, that is, holds the principle of equality before the law.²⁶⁹

The rule of law previously had little purchase in migration law. Signs of change in those nations which are part of Dauvergne’s study (Australia, New Zealand, the United Kingdom and Canada) are marginal and by no means consistent. Dauvergne points to relevant signs of its emergence in two streams of migration law – where security intersects with migration law, and in refugee matters.²⁷⁰ In Australian jurisprudence this is more evident in refugee matters than security. Precisely how the analysis that the rule of law is deployed to ground legal legitimacy differs across the national bodies of case law that form part of her study. To illustrate Dauvergne’s point, the turn represented in the 2003 Australian case of *Plaintiff S157* is worth mentioning.

²⁷¹ Legislative attempts to curtail refugee cases reaching the courts from the late 1980s were

²⁶⁶ Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law*: See in particular 93-118, 69-90.

²⁶⁷ Cited by *ibid.*, 40. referencing Fitzpatrick, “‘Gods Would Be Needed...’ American Empire and the Rule of (International) Law,” 431.

²⁶⁸ Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law*: 183.

²⁶⁹ See Brian Z. Tamanaha, “The Rule of Law for Everyone?,” *St. John’s Legal Studies Research Paper 07-0082*(2007); Brian Tamanaha, *On the Rule of Law: history, politics, theory* (Cambridge; New York: Cambridge University Press, 2004), 104. Tamanaha cites Joseph Raz, 1979, “The Rule of Law and its Virtue” in *The Authority of Law* Clarendon Press: Oxford, 211. Note that a “thin” or procedural sense of the rule of law allows law to be used in an instrumental sense, that is as a means to an ends: Brian Z. Tamanaha, *Law as a means to an end: threat to the rule of law* (Cambridge; New York: Cambridge University Press, 2006), 133-55, 215-26.

²⁷⁰ Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law*.

²⁷¹ *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2.

met with a degree of judicial deference.²⁷² *Plaintiff S157* went against this trend. This case considered the legality of the *Migration Act's* privative clause which purported to exclude review of merits based migration tribunal decisions. It was possible to restrict interpretation of the privative clause by reference to the constitutional guarantee in section 75(v) of the Australian Constitution that sets out the High Court's original jurisdiction to provide remedies against the government. Yet the joint judgment situated s75(v) as a reinforcement of the rule of law,²⁷³ and Chief Justice Gleeson in a separate judgment emphasised that what was at issue was "...a basic element of the rule of law."²⁷⁴ Dauvergne interprets the High Court choice of rationale – that is, the rule of law rather than the Australian Constitution - as indicative of the separation of law from nation. It was that "judicial recognition of a space for marginal migrants within the law is embedded within the nature of law itself."²⁷⁵

Migration policing: beyond nation

Although considered within a very different project, Hardt and Negri's approach to policing resonates somewhat with the constitution of an ethical community beyond the nation.²⁷⁶ For Hardt and Negri, the basis for police intervention was said to be universal values, or those values dominant globally. If we were to take policing as law-in-action, the norm represented by "universal values" which authorizes such intervention, then like Fitzpatrick's analysis, these values reflect its legal legitimacy rather than the bare power of nation.

Hardt and Negri conceptualise policing as a new form of right in the name of the exceptionality of the intervention and part of the new global imperial sovereignty they call Empire.²⁷⁷ For Hardt and Negri two characteristics of police are necessary prerequisites in defining and constituting a new global form of sovereignty they call Empire.²⁷⁸ The police must have the "capacity to define, every time in an exceptional way, the demands of intervention".²⁷⁹ Further, the particular plasticity of police is critical to enable diverse functions in plural and fluid contexts. Subscribing as they do to the Schmittian definition of sovereignty as the power to decide the exception, this power marks out "the right of the police" as

²⁷² See for example *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* [1992] HCA 64; (1992) 176 CLR 1; *Abebe v The Commonwealth; Re Minister for Immigration and Multicultural Affairs* [1999] HCA 14.; *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21.

²⁷³ *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2. See in particular the joint judgment was of Justices Gaudron, McHugh, Gummow, Kirby and Hayne at para. 103.

²⁷⁴ *Ibid.* para. 5.

²⁷⁵ ———, *Making People Illegal: What Globalization Means for Migration and Law*: 182.

²⁷⁶ Hardt and Negri, *Empire*: 3-21, 37-39, 189.

²⁷⁷ *Ibid.*, 16-17.

²⁷⁸ *Ibid.*, 26.

²⁷⁹ *Ibid.*, 16-17.

sovereign in character.²⁸⁰ The example of police given in *Empire* is that of internationally sanctioned military intervention, which Hardt and Negri argue operates today not as war between sovereign nations but as civil war within the global framework. This fits with their evaluation of contemporary global governance that there is no more outside, everything is inside, and governance is immanent.²⁸¹ However their articulation of contemporary society as the Deleuzian “society of control” supports a broader reading of police, not limited to military intervention nor to formal international sanction. The text does not elaborate on precisely what is meant by the notion of “police” beyond its plasticity, its involvement in maintaining social equilibrium or order, and its dependency on the global legitimacy of the policing activity.

The model of policing developed in this thesis is very different to the one proposed by Hardt and Negri. Their concern is fundamentally to define a new imperial sovereignty which is an immanent, disaggregated sovereignty rather than one that is transcendent and supra-national. Presumably it is the immanent character of *Empire* that attracts their interest in the term “police”, because of the historical association of police with internal governance. The value of their approach to police is that it articulates a mobile governance, which is said to remain cohesive across plural regulatory environments, and further, the authority of police as sourced not only by formal legal approval, but by the social legitimacy of their action.

Both Sassen and Dauvergne examine legal text as a basis for theorising changes that signify tentative separation between citizenship or migration law and the operation of national power. These approaches inform the thesis approach to consider aspects of migration policing in the control contexts studied that might operate beyond nation. The thesis draws on Dauvergne’s approach by considering whether the *authority* for migration policing, ethical or otherwise, is derived from sources other than the nation state. It makes use of Sassen’s argument that the tension between legal citizenship or nationality and membership signifies a change in the significance of exclusive membership in determining nation. It considers the degree that immigration legal status shapes membership. But like Hardt and Negri’s conceptualisation of an international police, the thesis considers the legitimacy afforded to police, rather than limiting its examination to formal legal text. That is, I draw on policing as

²⁸⁰ Ibid., 17.

²⁸¹ Note as well, Dean sees Hardt and Negri’s definition of police action as restricted to “internationally sanctioned police action” which he takes to mean military action. Mitchell Dean, “Military Intervention as ‘Police’ Action?,” in *The New Police Science: the police power in domestic and international governance*, ed. Markus D. Dubber and Mariana Valverde (Stanford California Stanford University Press, 2006).

“law-in-action”. “Law-in-action” refers to those policies and policies practices that are legally authorized in the sense that they are not actively sanctioned, that is, they are legitimate.

Conclusion

The first two parts of this chapter introduced the position of the illegal migrant in Australia as well as those with migration control powers. It examined these positions through the frameworks of law, institutional studies, and statistical reporting. Through this exploration the limits of these frameworks in determining control relationships became apparent. These findings informed my selection of control contexts for empirical analysis as sites wherein any recurrence of policing themes across these contexts would be particularly meaningful. Thus, control contexts were selected that entailed a high degree of discretion and thus asymmetry of power. Individual embodied encounters between policing agents and those already illegal were selected, to highlight themes in discretion revealed in the detection and apprehension of illegal migrants.²⁸² Character testing, resulting in visa refusal or cancellation, was selected to highlight themes in discretion that are embedded in visa determination.²⁸³ Release from immigration detention was selected as a context where the contrast between the universal visa requirement and the practice of release from detention without a visa sharply teases out social factors in control themes.²⁸⁴ The selection of contexts was also intended to cover the involvement of differing policing agents. This was planned to avoid focus on institutional culture as a defining theme in migration policing, and increase focus on those contingent factors that determine control regardless of who is exercising power. Adopting the context of employers’ role, across both visa policy and the prevention of illegal work, further sought to remedy the potential for the Immigration Department’s central role in migration control from pinning the character of migration control too closely to a single institution.²⁸⁵ Moreover, relationships with civil actors are an important feature to include in a study of control contexts, to discern how the legitimacy of migration control is established.²⁸⁶

The third and last part of the chapter examined literature considering how changes in migration and citizenship law affect their role in determining nation. This review confirmed the importance of practices of migration control as sites where the purchase of the nation on authority and membership might be changing. The thesis investigates whether and how

²⁸² chapter 4

²⁸³ chapter 6

²⁸⁴ chapter 5

²⁸⁵ chapter 3

²⁸⁶ chapters 3, 4, 5 and 6

migration control operates as policing, that is, not wholly determined by law. As this chapter's exploration has shown, the legality of migration law, in its administrative and constitutional setting, plays a role in shaping policing discretion. As such, instances that enable study of the administrative legality of migration law were selected for study.²⁸⁷

This initial examination of migration policing practices within Australia show that migration policing is not simply law enforcement. As often observed in policing literature, police are not legal automatons. In the next chapter I explain the thesis approach to policing. It emphasizes discretion as the recurrent and perpetual theme. Delving further than legal analysis appreciates the dynamic character of relationships of power in migration policing. The model developed in the next chapter is then used in Part II of the thesis as a basis to compare the operation of migration control. As an analytical lens the policing model makes policing visible as law-in-action, enabling a new dynamic vision of migration control as policing to emerge. Following on from Part II, the thesis turns to pick up the tension explored in this chapter between citizenship and migration law and their roles as affirmation of the nation state. It goes on to examine whether, like migration law, migration policing is more than an assertion of national sovereignty, by exploring the concept of migration policing as constitutive of global citizenship.

This chapter introduces the model of policing adopted for the thesis. Part B of the chapter sets out the anchors to the policing model that enable comparison with migration control, and thus evidence my argument that migration control is migration policing. The last part of the chapter, Part C, outlines the analytical tools utilised in the thesis to highlight what elements of control become visible through the lens of policing that are obscured in accounts of migration control that emphasise the spatiality of migration control. I model policing, not migration, as

²⁸⁷ This is recognised in public law literature which has often commented on the increasing power of the Executive arm of government in migration control. It is also recognised in criminological literature examining migration.

²⁸⁸ Dauvergne, "Controlling Chaos: Migration Law Responds to Images of Disorder," 32. Dauvergne makes this comment to describe the malleability of the migration laws given that the bulk of the Migration Regulations, not in the Migration Act. She argues this law to respond directly to the needs of the state.

Policing: Model and Analytical Lens

A Introduction

Migration control in Australia is indisputably recognised as a highly discretionary area of government.²⁸⁸ The last chapter introduced features of illegal migration control within Australia that demonstrate the importance of discretionary power. Discretion is involved at every level of migration control. Discretion characterises law making, evident through the Immigration Minister's power to make migration regulations. This is captured in Dauvergne's comments that the *Migration Regulations* are "politics poured and made legal".²⁸⁹ Discretion is engaged in Immigration Department decisions to strategically target some places or persons for proactive operations to locate illegal migrants. Discretion is engaged in every decision to grant or refuse a visa. Policing offers a rich and diverse resource for conceptualising migration control because, in comparison to law, its main focus, whether preventive or reactive, is *discretion*.

This chapter introduces the model of policing adopted for the thesis. Part B of the chapter sets out the anchors to the policing model that enable comparison with migration control, and thus evidence my argument that migration control is migration *policing*. The last part of the chapter, Part C, outlines the analytical tools utilised in the thesis to highlight what elements of control become visible through the lens of policing that are obscured in accounts of migration control that emphasise the spatiality of migration control. I model policing, not migration, as

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²⁸⁹ Dauvergne, "Confronting Chaos: Migration Law Responds to Images of Disorder," 32. Dauvergne makes this comment to describe the malleability of the migration laws given that the bulk of the detailed provisions appear in the *Migration Regulations*, not in the *Migration Act*. She argues this enables migration law to respond directly to the needs of the state.

the basis for comparison in this thesis even though I could just as easily do the opposite.²⁹⁰ I model policing because the thesis argues that it is migration control that is the focal point for analysis. Further, the resource of policing literature avoids the pitfalls of migration literature which remains bound up in analysis of borders. Ultimately, exploring contexts of migration control that operate as policing enables the potential operation and significance of migration control as an authoritatively legal operation of power outside the nation-state to become visible. In this way it enables an analysis of migration control that does not assume that migration control is necessarily an operation of power that is tied to the nation-state.

Policing and control

Policing offers a portrait of control which emphasises its continuous operation, aspects of which are most apparent when placed in the context of other forms or expressions of control. As an activity of government, policing engages directly in society with both law-abiding and law-breaching individuals. As an activity of authority it develops its authority through multiple means. It presents as law enforcement or at least lawful exercise of power. Its authority is underscored by the symbolic institutional legitimacy of the bodies that undertake that policing. Its authority is established through its social legitimacy as well as the mechanisms that give it legal legitimacy. Control is not necessarily coercive in the conventional sense, as force is not essential to control, or hijacking a person's autonomy or consent, nor are nefarious motives. Control is about management; it is a process as well as a negotiated outcome. It can be preventive or responsive to particular events or for particular events. Control is an essential justification for policing, and often an impetus, but it is not completely equivalent to policing. Control can exist without policing, but policing rarely occurs without control.

The policing model serves two functions in the thesis. It models policing to provide a point of comparison for studies of onshore migration control in Part II of the thesis. Study of these migration control contexts allows a progressive refinement of the specific ways that policing is deployed in the context of migration control. Comparison of the themes that recur across the contexts enables the specific character of migration policing to emerge from this study. The policing model also serves as an analytical lens to be trained on particular contexts of migration control in Australia. As an analytical lens, the model focuses on discretionary

²⁹⁰ For example, a model of migration could be developed with the anchor points of movement, with that movement being of knowledge, labour and bodies. Modelling migration to establish a basis for comparison with policing might be anticipated to develop an analysis of policing that emphasises its global and transnational dimensions.

decision making and practices, the outcome of the relationship of power between the police and the policed, rather than the fixed structures of law and institutions. The device of relationships is culturally located and tested in the Australian context in Part II of the thesis. Yet the central feature of the policing model is the relationship of power engaged in policing. Thus the policing model is not bound to a particular national structure of law, nor is it bound to any particular context of control. The picture that develops from study of the control contexts in this way provides an account of migration policing or migration law in action, as a basis then for determining whether migration policing, like migration law, demonstrates a separation from the nation-state. If this is the case, it would be expected that the authority for migration policing becomes detached from the nation, that it becomes mobile. The constitution of policing authority which is potentially relevant is that generated by participants in migration policing (police, civil actors with policing responsibilities and visa sponsors) and migrants themselves.

The chapter starts by introducing how migration policing has been defined by others. It then explains the thesis policing model. Part of the challenge in modelling policing is conceptualizing how policing – as a practice that is other than law, and never fully described by law, but connected to law – coheres. The approach I explain in this chapter defines policing in terms of *how* policing operates, and its relation to law and society, rather than its function or object or institutional identity. The model sets out four interdependent anchors – a relationship of power, discretion, authority and the legitimacy resting on policing's urban quality. The coherence of policing practices is evident through these policing anchors, though the specific scenarios, interests, outcomes and effects and policing agents change. The chapter then introduces some concepts utilised in the control context studies that highlight the unique insights that the lens of policing brings to understanding migration control.

Policing as law in action has the capacity to reach and affect individuals in many different social spheres. Policing lies at the interface between law and society. Its constitutive role means that it creates authoritative practices that are law in action. Whereas migration *law* mediates the legal citizenship of migrants, migration *policing* mediates their social citizenship and their autonomy over their movement. In examining the policing anchors, I expand, where relevant, on potential issues in policing's operation beyond the nation. This is not to limit the model, but to flag the issues for the model in contexts beyond the nation, paying particular attention to the roles policing plays in society in terms of building perceptions of legitimacy for policing practices.

B **Blue lines: starting points for a concept of migration policing**

Migration control is a concept that intuitively lends itself to be aligned as policing – through commonalities in rhetoric, terminology, institutions, and in analogous legal powers. The term “policing” is used in relation to migration in both scholarly and popular accounts.²⁹¹ Analogous terms to policing are used in official discourse.²⁹² Yet like the common usage of the word “policing” it is largely left to speak for itself. Keeping a general or implied sense of migration policing inhibits analysis of implications that can be drawn from saying that migration control operates as policing. Precisely what control practices are encompassed in this term?

Literature referencing migration policing tends to define migration policing in a limited way. The term “police” in most accounts simply reflects the purpose of the academic investigation in that instance, rather than an attempt to conceptualise migration policing more generally.²⁹³ Thus, the idea of migration policing implicit in these accounts focuses on powers and activities familiar from criminal justice policing; the concept of control in general;²⁹⁴ police institutional involvement in migration control activities²⁹⁵ and police focus on migrants.²⁹⁶ The choice of

²⁹¹ Examples of the term “policing” in media accounts can be seen in the following articles, selected to show this term is used across a long time period and by different news sources: ABC News Online, “Protocols were followed in immigration raids: Ruddock,” *ABC News Online*, 20 February 2003., AAP, “Outcry over school ‘raids’ to detain children,” *Sydney Morning Herald*, 16 March 2005 2005., ———, “Immigration raid leads to 20 deportations” *The Australian* 2010. This chapter goes on to discuss scholarly use of the term “policing” with regards to migration control.

²⁹² The discursive correlation is made through official publications of the Australian Department of Immigration’s terminology of “border control” and “border security”. See in particular a series of four statistical reports on border control, titled “Protecting the border” and “Managing the border” covering the period 1 July 1999 to 31 June 2005. See Border Control Compliance Division (Department of Immigration and Multicultural Affairs), “Protecting the border: immigration compliance.”; Strategic Assessment Unit, “Managing the Border (2004).”; Compliance Section, “Managing the Border: Immigration Compliance 2003-04 edition.”; Compliance Framework Branch, “Managing the Border: Immigration Compliance 2004-05 edition.”

²⁹³ Policing historian Mark Finnane’s series of fascinating articles study the inter-institutional relationship between policing, immigration and security agencies. For Finnane, it is control of the alien that unifies the policing role, no matter where its institutional location is, although his study specifically focuses on the practices of institutions. See Mark Finnane, “Controlling the ‘alien’ in mid-twentieth century Australia: the origins and fate of a policing role,” *Policing and Society* 19, no. 4 (2009); ———, “National Security and Immigration in Australia’s Twentieth Century History,” *Australian Policy and History* (2010).

²⁹⁴ Gordon’s study of policing immigration in the United Kingdom is similar in that it does not distinguish between “policing” in terms of institutional origin. It coheres policing migration in one brief line as including all those internal controls – any aspect of law or administration – related to immigration status. See Paul Gordon, *Policing Immigration: Britain’s Internal Controls* (London; Sydney: Pluto Press, 1985).

²⁹⁵ Sharon Pickering, “The Production of Sovereignty and the Rise of Transversal Policing: People-smuggling and Federal Policing,” *Australian and New Zealand Journal of Criminology* 37, no. 3 (2004): 362. For another example of migration policing as the involvement of recognized policing institutions in

subject for these studies, however, is broadly interested in the ways in which policing acts upon migration, that is, in “policing migration” and draws attention to the significance and meaning of institutional police involvement in migration control. By treating policing as a relationship of power not an institution, my thesis turns the conceptual approach from “policing migration” to “migration policing”. The turnabout in my thesis argument to the phrase “migration policing” is not just word play. “Migration policing” emphasizes the connection between migration control and policing, the immanence of policing in migration, and the active way in which migration is policed even as it is constituted. It makes the regulation of migratory movement central to the definition, not the institutional involvement of bodies popularly recognised as police in migration control. “Migration policing” is the process whereby relationships of power manifest as control over migratory movement, that is, the movement of persons in places where they are not citizens or members. This implies that migration policing only operates over those who are moving or have moved outside their country of citizenship. Yet as the empirical exploration in Part II explores, migration policing is bound more by the social legitimacy of its control relationships than the identity of the policed individual in that control relationship.

Leanne Weber and Benjamin Bowling present the only account that explicitly defines “migration policing”. They utilise the term “migration policing” as an umbrella for both police institutional involvement in the enforcement of immigration law, “police-like” activities and powers of immigration authorities (such as the power to search, use force, require identification and so on),²⁹⁷ and the control of immigrant communities. In explaining the nature of migration policing as necessarily transnational, they argue for a research agenda that focuses on the multiple “sites of enforcement” of migration control situated across the globe. They develop a framework that schematises these sites grouped across more general categories of generalized surveillance, in country enforcement, border checks, pre-entry controls and global apartheid. In doing so, their approach acknowledges the multiple

their institutional form, see: Jonathan Klaaren and Jaya Ramji, “Inside Illegality: Migration Policing in South Africa after Apartheid,” *Africa Today* 48, no. 3 (2001).

²⁹⁶ Finnane, “Controlling the ‘alien’ in mid-twentieth century Australia: the origins and fate of a policing role.”; ———, “National Security and Immigration in Australia’s Twentieth Century History.”

²⁹⁷ Weber and Bowling, “Policing Migration: A Framework for Investigating the Regulation of Global Mobility,” 195. Leanne Weber and Benjamin Bowling work from the premise that “migration policing” exists, and from this argue a framework to investigate the regulation of global mobility. In earlier work, Weber (with others) conducted empirical research into the discretionary decision to detain asylum seekers at UK ports, linking this structural provision of discretion with that generally afforded to policing. Weber and Landman, *Deciding to Detain: The Organisational Context for Decisions to Detain Asylum Seekers at UK Ports.*, Weber and Gelsthorpe, *Deciding to Detain: How Decisions to Detain Asylum Seekers are Made at Ports of Entry.*

institutions (both public and private) and individuals involved in migration policing, which accords with my approach. However the schema prefigures a number of outcomes of migration policing, including border enforcement, which I argue prevents the potential for policing practices to constitute forms of authority that do not accord with border enforcement, which departs from my approach. I am influenced in building a policing model by theories of policing that emphasise that policing is not solely a reproduction of dominant social order but may also produce new orders, new norms and new forms of authority.²⁹⁸ At the end of their article, Weber and Bowling identify the need for study of the factors that "shape the exercise of discretion by the various actors involved at the coalface of migration policing."²⁹⁹ This is where my research picks up. The first step is proposing a model of policing that employs the "means" of policing as anchors for the model, avoiding a normative approach that would inevitably find the outcomes of migration control reflect the model's boundaries.³⁰⁰

An overview of the thesis policing model and its influences

The thesis approach to policing highlights four "means" in anchoring the model. Firstly, policing is modelled in essence as a "relationship of power", developing Mark Findlay and Uglješa Zvekić's comparative contextual approach in *Alternative Policing Styles*.³⁰¹ It is an asymmetrical power relationship that is critical for police to gain power over the policed, at whatever level of generality or particularity in social relations that asymmetry is achieved. Secondly, it always involves the element of discretion. Discretion makes the policing agent powerful. Thirdly, the authority of policing frames and enables the asymmetry in the power relationship at the individual level, and makes policing practices legitimate at a systemic

²⁹⁸ See for example Mark Neocleous, *The Fabrication of Social Order: A Critical Theory of Police Power* (London: Sterling, VA: Pluto Press, 2000); ———, "Theoretical Foundations of the "New Police Science", in *The New Police Science: The Police Power in Domestic and International Governance*, ed. Markus D. Dubber and Mariana Valverde, *Critical Perspectives on Crime and Law* (Stanford: Stanford University Press, 2006); Michael Brogden, *The Police: Autonomy and Consent* (London: Academic Press, 1982).

²⁹⁹ Weber and Bowling, "Policing Migration: A Framework for Investigating the Regulation of Global Mobility," 208. Further, note that Weber's more recent research on onshore migration policing networks in Australia remains unpublished. Leanne Weber, "Policing Migration in Australia: An analysis of onshore migration policing networks," (personal communication). It intends to broaden examination of institutional involvement in policing migration. Interviews with state police about their role as "officers" with *Migration Act 1958* (Cth) duties are intended to determine the structure, dynamics and normative implications of onshore policing networks aimed at locating persons living without visas. It may include other institutions in delivering migration control services, but the conceptual touchstone remains either institutional or legislative duties.

³⁰⁰ Carl B Klockars, *The Idea of the Police* (Newbury Park, California; London; Greater Kailash I, New Delhi: Sage Publications, 1985).

³⁰¹ Findlay and Zvekić, *Alternative Policing Styles: cross-cultural perspectives* 5-14, 15-39.

level.³⁰² The fourth anchor picks up on the thread that underscores the legitimacy of the other three elements: the proximity, or what I refer to here as the urban quality of policing. It is this urban quality that is integral in promoting the legitimacy of policing. The concept of the urban quality of policing captures the legitimacy bestowed by the multifaceted meaning of proximity. That is, the legitimacy that matters between people or places proximate in space, emergencies (as the response proximate in time), or on issues pertaining to shared values (as proximity in terms of social relations). Further the quality of the issues policing manages are those that arise from living in proximity with others, which in Europe and the United Kingdom (and by extension Australia) reflect as well the historical development of police alongside urbanisation.³⁰³

The model of policing developed does not define policing by its institutional formation, nor as an exclusive state practice,³⁰⁴ nor does it define policing by a single function such as law enforcement.³⁰⁵ Each element of the policing model thus encompasses policing practices that are undertaken by private bodies, by community and individuals, as well as by the Immigration Department. In the introductory chapter of the thesis I explained that analysing migration control as policing seeks to suspend preconceived assumptions of the function or institutionalisation of migration control, which are, after all, contingent on the particular legal

³⁰² Authority in this sense is not dependent on a meta-authority such as the state, or a particular legislative power. Policing can and does reflect meta-authority in the national context, and the empirical examination of control contexts are located within the nation. But as Part II of the thesis explores, even within the nation, endorsed by the meta-authority of migration law, policing exhibits authority founded in wider agendas for control. Chapter 7 will explore the supra-national level where policing breaks free of the sponsorship of state authority, yet still exhibits a control agenda compatible with its manifestation in state contexts.

³⁰³ Although it may not be immediately apparent that the development of police in Australia is tied to processes of urbanisation, there are two characteristics of the historical development of police that support this. First, the police that were eventually produced in Australia reflected the police in Britain as they had been conceived in the pre-modern to modern transition (Mark Finnane, ed. *Policing in Australia: historical perspectives* (Kensington, N.S.W: New South Wales University Press, 1987), 11. Secondly, in a more general sense the process of colonisation was at the time imagined as a process of creating a city both in the physical sense and the governmental sense. Although the reference here is to the writing at the time of colonisation of the United States, the sentiment resonates with what we know of Australian colonisation: Christopher Tomlins, "Framing the Fragments. Police: Genealogies. Discourses, Locales, Principles," in *The New Police Science: The Police Power in Domestic and International Governance*, ed. Markus D. Dubber and Mariana Valverde, *Critical Perspectives on Crime and Law* (Stanford: Stanford University Press, 2006), 279-80.

³⁰⁴ The question as to whether private police are "police" is no longer controversial, and extensive literature on private policing demonstrates this, see Trevor Jones and Tim Newburn, *Private Security and Public Policing*, ed. David Downes and Paul Rock, Clarendon Studies in Criminology (Oxford: Clarendon Press, 1998).

³⁰⁵ It is disaggregated and non institutional, see for example Robert Reiner, *The Politics of the Police*, 2nd ed. (Hertfordshire: Harvester Wheatsheaf, 1992)., and Pat O'Malley, "Policing, Politics and Postmodernity," in *Policing: Key Readings*, ed. Tim Newburn (Uffculme: Willan Publishing, 2005).

and political system, cultural norms, concerns of the day, and so on.³⁰⁶ This explains why I do not define policing by reference to particular legal structures, powers, institutions or functions, which run the danger of being a product of time and place or preconception. Further, the model has been developed to draw out the features of policing that are directed towards the constitution of new authority, or more precisely the constitution of perceptions of authority. Policing is a practice, and I use the term "policing" deliberately to emphasise its character as a verb rather than a noun.³⁰⁷

In developing this approach to policing I have been influenced by a number of scholarly movements in policing. The explosion of critical criminology in the 1970s and 1980s has been a point of inspiration. Observational and socio-legal studies of policing have influenced recognition that policing always occurs in a social context, highlighting the different ways in which policing authority (and the exercise of discretion) is dependent on social conditions from the most generalised social power relations to the most micro individual encounters. There is a diversity of approaches to the content of these social power relations, whether these be defined as a function of class, gender or patriarchy, race, social hierarchy, or democratic majority. The strategies employed to do this are equally diverse – from managing information about risks and dangers,³⁰⁸ developing terrains of knowledge with restricted access or where police are the experts,³⁰⁹ or incorporating community members and civil actors into policing activities.³¹⁰ However they all take a critical view of "police fetishism", the ideological view that police are required to prevent social order devolving to chaos.³¹¹ They also all recognise the value of norms. Attitudes to authority, institutional legitimacy, recognition of a common "enemy", the appropriate target of police, or notions of a particularly urgent threat all show important ways that norms create and reinforce policing authority.³¹² I do not draw on observational studies of constabulary policing to suggest that these studies define the *only* ways in which policing takes place. However, socio-legal studies

³⁰⁶ Nancy Fraser, "Foucault on Modern Power: Empirical Insights and Normative Confusions," in *Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory* (Cambridge: Polity Press, 1989), 19. Robert Reiner, *The Politics of the Police*, 3rd ed. (Oxford: Oxford University Press, 1999).

³⁰⁷ When I use the word "police" in the thesis I mostly use it in its verb form "to police".

³⁰⁸ Richard V Ericson and Kevin D Haggerty, *Policing the Risk Society* (Oxford: Oxford University Press, 1997).

³⁰⁹ Richard Ericson, "The division of expert knowledge in policing and security," *The British Journal of Sociology* 45, no. 2 (1994).

³¹⁰ Nigel G. Fielding, "Theorizing Community Policing," *British Journal of Criminology* 42(2002); Jack L. Kuykendall, "Styles of Community Policing," *Criminology* 12, no. 2 (1974).

³¹¹ Reiner, *The Politics of the Police*: 1.

³¹² Stuart Hall, Charles Critcher, and Tony Jefferson, *Policing the Crisis: Mugging, The State and Law and Order* (London Macmillan, 1978)., Brogden, *The Police: Autonomy and Consent*.

draw out elements of social interaction that policing, or any governmental activity, relies upon specifically to generate and endorse authority. The context of these observational encounters, however, limits the extent to which they illuminate policing outside the mode of authority at issue in the context they study.

Policing and law have a complex and dynamic relationship. The field of policing research has moved on from the time when policing was perceived as mere law enforcement.³¹³ Police work has been shown to be primarily about service provision and order maintenance, generally achieved other than through law enforcement.³¹⁴ Law is a resource for policing,³¹⁵ but policing also constitutes law.³¹⁶ In a sociological sense this can be understood as policing's "gate-keeping" role.³¹⁷ Critical legal approaches draw attention to how law as a "technology" legitimates policing power. This might be through the naturalising of policing activities through operation of legal techniques or through legal rhetoric,³¹⁸ or through legal technologies that "responsibilize" persons are drawn into policing in subtle ways seamless with liberal social practices.³¹⁹ Policing and law cannot be separated so insights from both these fields are

³¹³ Empirical research has extensively demonstrated that law enforcement does not describe the primary task of what police actually do: Richard Ericson, *Reproducing Order: A Study of Police Patrolwork* (Toronto: University of Toronto Press, 1982). In a different approach, in 2004 and 2006 workshops resulting in books under the banner the "new police science", invited critical scholars working across a range of disciplines to use the 18th century European models of "polizeiwissenschaft" (that is, the science of the police) as a springboard to consider this earlier, broader notion of police which engaged with much more than criminal law enforcement, in terms of its insights into contemporary fields of governance beyond the police institution. Two edited collections were published from these workshops: Markus D. Dubber and Mariana Valverde, eds., *The New Police Science: the police power in domestic and international governance*, Critical Perspectives on Crime and Law (Stanford, California: Stanford University Press, 2006); Markus Dirk Dubber and Mariana Valverde, *Police and the Liberal State* (Stanford, California: Stanford Law Books, 2008).

³¹⁴ David Dixon, *Law in Policing: Legal Regulation and Police Practices* (New York; Oxford: Oxford University Press; Clarendon Press, 1997), 11. (citing Reiner, *The Politics of the Police*: 139-46.); See also Ericson, *Reproducing Order: A Study of Police Patrolwork*: 3-11, 206. Ericson states at 206 that "the bulk of the patrol officer's time was spent doing nothing other than consuming the petrochemical energy required to run an automobile and the psychic energy required to deal with the boredom of it all".

³¹⁵ Charles Edwards, *Changing Policing Theories for 21st Century Societies* (Sydney: Federation Press, 2005), 6-24.

³¹⁶ McBarnet, *Conviction: law, the state and the construction of justice*. More generally see Alan Hunt, *Explorations in Law and Society: towards a constitutive theory of law* (New York: Routledge, 1993).

³¹⁷ Albert J. Reiss, *The police and the public* (New Haven: Yale University Press, 1971).

³¹⁸ Valverde, "Jurisdiction and Scale: Legal 'Technicalities' As Resources for Theory." McBarnet's approach will be discussed in examining the disjuncture between legal rhetoric and practice.

³¹⁹ Pat O'Malley, "Risk and Responsibility," in *Foucault and Political Reason: Liberalism, Neo-Liberalism, and Rationalities of Government*, ed. Andrew Barry, Thomas Osborne, and Nikolas Rose (London: UCL Press, 1996). See also Mariana Valverde's discussion of the liquor license system and making bar workers responsible for assessing intoxication: Mariana Valverde, *Law's Dream of a Common Knowledge*, ed. Austin Sarat, *The Cultural Lives of Law* (Princeton; Oxford: Princeton University Press, 2003), 141-66.

needed to consider how policing practices are created in terms of what is authorised, where and when, and by whom.

The first anchor of policing: a relationship of power

The thesis policing model places a relationship of power as its central identity. It develops Findlay and Zvekić's approach that drew on diverse accounts of policing across the world to propose common features. These authors conceive of policing as a power relationship, a process that is operationalised through the interaction between power, authority, force and interest or politics.³²⁰ In their approach, these elements are interdependent, context specific, structural adaptations of power relations, whose form and practice is contingent upon interaction between specific interests, needs and power arrangements. Conceiving of policing in this way can be seen as an abstracted form of common definitions of policing which centre the police as a state institution, or as mandate to deliver law and order, or as specific powers, or a specific legitimacy, being a monopoly on the use of violence.³²¹ Defining policing as a relationship of power between the police and policed reflects the underlying dynamic in these approaches, but retains the flexibility as to form and function that is necessary to recognise the fragmentation and diffusion of the police function in contemporary societies.³²²

Critically the relationship of power in policing is not static. It is characterised by tension and contestation. This approach emphasises that there are two voices, two agents, in the policing relationship. Each is constituted by the broader contexts in which they are situated, and each with differing objectives, interests, resources and accountabilities.³²³ The "of power" aspect of the "relationship of power" element emphasises the way in which policing identifies a weak party and a powerful party in the relationship, that is the policed subject from the policing agent. In approaches to police that see police as a particular institution, these roles are clear. However, moving to a definition of policing that includes non-state and non-institutional

³²⁰ Findlay and Zvekić, *Alternative Policing Styles: cross-cultural perspectives* See in particular page 5-14, 15-39.

³²¹ Mike Brogden, Tony Jefferson, and Sandra Walklate, *Introducing Policework* (London: Unwin Hyman, 1988), 1. These authors offer the following definition: "The police is an occupation defined by its *specific mandate* (given in the oath which all must take), its *specific powers* and its *specific form of accountability*. The mandate entails upholding 'law and order'" (at 1). Or Mawby, who draws on the Weberian approach to monopoly, defining police as "an agency that can be distinguished in terms of its *legitimacy*, its *structure* and its *function* (Mawby 1990)." He explains his reference to legitimacy as implying police are empowered with some degree of monopoly by those in power to authorise this "whether this is an elite within the society, an occupying power or the community as a whole." See Robert Mawby, "Models of policing," in *Handbook of policing*, ed. Tim Newburn (Devon: Willan Publishing, 2003), 15.

³²² Reiner, *The Politics of the Police*: 1.

³²³ This has informed my approach to data collection, which relies on a mix of interviews with informants, legal sources including legislation, case law, as well as policy and procedure.

activities as policing clarifies the essential element embedded in institutional definitions of policing, that is, an asymmetry of power between those that police and those that are policed. An immediate parallel can be drawn between policing as an asymmetric relationship of power and that of migration control. Migration control can be seen as a series of relationships that disaggregate the weak against the powerful. These relationships of power cannot be captured as simple and singular translations of law into power, such as citizen/non-citizen, though that dynamic is present at times. Multiple relationships of power may operate at the same time as: Immigration Department/migrant, detention centre management/detainee, employer/employee, education institution/student, visa-sponsor/visa holder and more. Some relations of power are determined by the coercive power formally provided by law, and physical force such as detention and deportation. These manifestations of migration control have been the main subject of scholarly study by criminologists.³²⁴ However, the thesis also investigates relationships that demonstrate a more ambiguous mix of coercion and consent, such as sponsorship arrangements that are voluntarily entered into so as to demonstrate reasons for release from detention.³²⁵

The relative power of the each party in the policing relationship also depends on the particular context in which the policing agent asserts control. The basic framework of the context of such a relationship can be conceived as decision making. The outcome of these relationships is also decisions. However, the decision outcome of policing is less important than the process of policing.

The second anchor of policing: discretion

Policing is intrinsically characterised by discretion. Discretion is "a policeman's daily task".³²⁶ Discretion in the context of executive or administrative power is essentially the permission to make a decision, the process of a continuum of decisions. It is the "room for decisional manoeuvre",³²⁷ the freedom to "make a choice among possible courses of action or inaction",³²⁸ or the "boundaries of permission".³²⁹ It enables what some refer to as the "sovereign" role of policing in that it involves deciding on the exception and thus the rule.³³⁰

³²⁴ Leanne Weber, "The Detention of Asylum Seekers: 20 Reasons Why Criminologists Should Care," *Current Issues in Criminal Justice* Volume 14 Number 1(2002).

³²⁵ See chapter 4 of this thesis.

³²⁶ Leslie George Scarman, *The Scarman Report: The Brixton Disorders 10-12 April 1981 Report of an Inquiry* (Harmondsworth: Penguin, 1982), para 4.58.

³²⁷ Jeffrey Jowell, "The Legal Control of Administrative Discretion," *Public Law* (1973): 179.

³²⁸ Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge Louisiana State University Press, 1969), 4.

Discretion is necessary in that rules cannot account for every circumstance, but it is controversial in policing because it brings the potential for discrimination. The history of migration control in Australia has been characterised by discretion exercised in a discriminatory manner, but without explicit discrimination in legal text. Migration officers were empowered to require any migrant to pass a dictation test in any European language so as to authorise entry or further stay in Australia.³³¹ The individual discretion allowed the systemic implementation of the White Australia Policy, discriminating against "non-white" and particularly Asian migration to Australia.³³² By tracing the exercise of discretion in migration policing, the thesis interprets what constitute policing practices at a systemic level. The diverse ways that discretion operates has informed the thesis method of tracing discretionary practices by comparative contextual analysis. Studying themes that emerge in particular contexts and their recurrence across different contexts enables attention to how discretion is exercised.

Discussion of various ways that types of discretion can be checked, limited, structured and so on has formed an ongoing preoccupation in policing literature.³³³ This reflects an underlying view in such literature that if police practice was brought in line with law then justice and efficiency would result, which is not the premise of this thesis.³³⁴ In any case, the limits of the line between law and discretion cannot be strictly drawn. Alternatively, the unwritten rules and norms of policing culture, as touched on in the last chapter, are put forward as determining policing discretion. Police culture is conceptualised as patterned understandings

³²⁹ Mark Findlay, "The Ambiguity of Accountability: deaths in custody, and the regulation of police power," *Current Issues in Criminal Justice* 6, no. 2 (1994).

³³⁰ Hardt and Negri's approach to the sovereign role of police that emerges from their power to decide the exception was discussed in the chapter 1 at 70-72. The sovereign role of policing will be discussed further in chapter 7. See also Giorgio Agamben, "The Sovereign Police," in *The Politics of Everyday Fear*, ed. Brian Massumi (Minneapolis: University of Minnesota Press, 1993).

³³¹ See for example James Jupp, *From White Australia to Woomera: the story of Australian immigration*, 2nd ed. (Cambridge: Cambridge University Press, 2007).

³³² The dictation test was applied in a discriminatory manner to restrict in particular Asian migration to Australia. The impetus in retaining a legislative scheme that did not explicitly discriminate was to maintain the fiction of equal membership in the colonies of the British Empire. Discrimination was not restricted to racial grounds; it was also used to prevent entry on a political basis, gendered notions of undesirability and so on. See for example Kel Robertson, Jessie Hohmann, and Iain Stewart, "Dictating to One of 'Us': the Migration of Mrs Freer" *Macquarie Law Journal* 12(2005). Finnane, "National Security and Immigration in Australia's Twentieth Century History."

³³³ See for example: Davis, *Discretionary Justice: A Preliminary Inquiry.*, David John Smith, Jeremy Gray, and Policy Studies Institute, *Police and people in London: the PSI report* (Aldershot, Hants, England ; Brookfield, Vt., U.S.A.: Gower, 1985); Dixon, *Law in Policing: Legal Regulation and Police Practices*. For a good review of the arguments in policing literature as to whether police discretion is best contained by changing police culture or police rules see *ibid.*, 1-48.

³³⁴ See Doreen McBarnet's critique of this view in McBarnet, "The Police and the State: Arrest, Legality and the Law."; McBarnet, *Conviction: law, the state and the construction of justice.*

that reflect the organisation of policing and its pressures.³³⁵ Policing culture is said to be shaped by populist understandings of its role as good guys who catch bad guys. It has been described in terms of the working personalities of police with attributes such as overt masculinity and racism.³³⁶ Policing "culture" is neither absolute nor universal. However there are some commonalities in observational studies that reflect the particular challenges of the police mandate as it operates in liberal democratic late capitalist societies.³³⁷ Suspiciousness, a sense of mission and solidarity within the police department and isolation from outsiders are persistent features of policing culture.³³⁸ It is beyond the scope of this thesis however to consider whether a discernible culture can be discerned within bodies and institutions involved in migration control.³³⁹ The thesis prioritised examining common features between different contexts of migration control that were exercised by different institutions and individuals.

Inquiries into Immigration Department practices were discussed in chapter 1. Some of those department characteristics reflect those commonly attributed to conventional police organisations. However, some of the organisations with migration control duties are primarily organised around non-migration related roles, such as employers or educational institutions. It cannot be assumed that there is any consistency of "culture" between organisations involved in migration control. The broad range of institutions and individuals involved in migration control places investigating discretion, as it might be shaped by culture across these diverse bodies, beyond the scope of this thesis.

One finding from observational study findings indicates that the extent of policing discretion increases as one goes down the institutional hierarchy, and that controlling discretion is not necessarily achieved through controlling police policy, or processes of "professionalising" police.³⁴⁰ That is, low ranking officers who engage at an everyday level with the public hold the

³³⁵ Reiner, *The Politics of the Police*: 114-21.

³³⁶ Tim Prenzler and Rick Sarre, "Policing," in *Key issues in criminal justice*, ed. R Sarre and J Tomaino (Unley, South Australia: Australian Humanities Press, 2004).

³³⁷ Reiner, *The Politics of the Police*: 109.

³³⁸ *Ibid.*, 114, 15-21.

³³⁹ The broad range of institutions and individuals involved in migration control means that studying any "culture" in migration control means investigating that culture across these diverse bodies. Inquiry into Immigration Department practices were discussed in chapter 1 at 46-53. Some of those characteristics reflect those commonly attributed to conventional police organisations. However, some of the organisations with migration control duties are primarily organised around non-migration related roles, such as employers or educational institutions.

³⁴⁰ Andrew Goldsmith, "Policing and law enforcement," in *Crime and justice: a guide to criminology*, ed. Mark Israel and Kathleen Daly (Sydney: Law Book Company, 2006). Daniel James, "Police-Black

most power to exercise discretion because these interactions hold the most opportunity to set the terms of engagement and have the least accountability.

Policing's discretion is the key to its law making function. Gatekeeper approaches to the role of policing in the legal system highlight how, whether and on what grounds police intervening to arrest contributes to the meanings of offences that are judicially considered once they progress to court. That is, discretion involves decision making with consequences for meanings of law. Mark Neocleous characterises this as the "quasi judicial" character of police. He argues that today police discretion over the decision to arrest or not enforce the law, the selection of charge, and the decision to proceed to prosecution, were originally the province of the judiciary, presumably in recognition of their law making function.³⁴¹ He adds that specifically police powers such as stop and search powers also take on a quasi judicial function, given that they are based on a reversal of the assumption of innocent until proven guilty.³⁴²

Policing's law making function is less socially visible than the law making of judicial and legislative bodies whose function it mirrors. This obscures the significance and extent of the law making engaged in policing decisions. Moreover, legal text itself has been shown to support the legality of most uses of police discretion, even those activities sometimes regarded as "deviant".³⁴³ In her critical legal analysis of the legality of arrest (introduced in the last chapter), Doreen McBarnet examined the way that law (legislation, case law, policy) institutionalised the legality of police departure from "due process", that is, the rule of law principles such as procedural fairness. In her study the principles and standards that the rule of law propounds are treated as functional to the demands of crime control, such that policing practices are not interpreted as inconsistent with the rule of law. Thus due process operates as the rhetoric but not the substance of law.³⁴⁴ The discretion embedded in policing decisions and practices thus creates law in its everyday practice in defining offences and exercising powers, and is supported in this constitutive role by legal text itself.

In analysing the constraints of policing discretion, I draw on Findlay's concept of "boundaries of permission" which suggests an analytical frame to explore (and measure) the discretionary

³⁴¹ Findlay, "The Ambiguity of Accountability: deaths in custody, and the regulation of police power,"

³⁴² *Ibid.*, 234.

³⁴³ *Ibid.*

Relations: the Professional Solution," in *The British Police*, ed. Simon Holdaway and M. R. Chatterton (London: E. Arnold, 1979).

³⁴¹ Neocleous, *The Fabrication of Social Order: A Critical Theory of Police Power*: 105.

³⁴² *Ibid.*

³⁴³ McBarnet, "The Police and the State: Arrest, Legality and the Law.,"; McBarnet, *Conviction: law, the state and the construction of justice*.

³⁴⁴ McBarnet, "The Police and the State: Arrest, Legality and the Law," 200.

dominion of police power as competing factors that are not completely articulated by law.³⁴⁵ It views discretion as the outcome of contextual interaction between the opportunity (for that policing activity or practice) and control. Opportunity is shaped by the aspirations for policing, and the structures and processes which work to regulate them.³⁴⁶ Control is shaped by the structures of police accountability, as a brake on police authority.³⁴⁷ In migration control, the boundaries of permission are shaped by the explicit legal powers provided to policing agents, the control objectives in a particular outcome, and the accountability of migration law in its administrative and constitutional setting.

The third anchor of policing: authority

The third element of the policing model is authority. The exercise of discretion further opens the space and purchase of policing authority, while policing authority quietens and limits the contestation of policing discretion. Discretion is the product of authority in the policing relationship; it is able to proceed because of its authoritative character. However, while discretion is *essential* in defining policing, it is the authority or legitimacy of policing that *distinguishes* it from other forms of power relationships.

Policing scholar Klockars defines authority as the “unquestioning recognition by those who are asked to obey; neither coercion nor persuasion is needed”³⁴⁸. In this approach, authority is the strongest social and stable form of control in which the legitimacy of the command is recognised, such that it forecloses consideration of alternatives, typified by a driver’s halt at a red traffic signal. In conceiving of authority however the model does not perceive this as absolute, as authority is not quarantined from elements of compulsion and negotiation, coercion and consent. Rather authority speaks with a powerful legitimacy, reflecting social norms, that skews the power dynamic in favour of one side. Policing acts with authority and is read as authoritative.

The thesis model of policing positions authority, not force, as *essential* in policing.³⁴⁹ In this way it differs from one of the most well-known definitions of police that distinguish police by

³⁴⁵ Findlay, "The Ambiguity of Accountability: deaths in custody, and the regulation of police power."

³⁴⁶ Ibid., 234.

³⁴⁷ Ibid.

³⁴⁸ Klockars draws on Hannah Arendt’s comments that authority is “unquestioning recognition by those who are asked to obey; neither coercion nor persuasion is needed”. Hannah Arendt, "On Violence," in *Crises of the Republic: lying in politics, civil disobedience on violence, thoughts on politics, and revolution*, ed. Hannah Arendt (Harmondsworth, England Penguin, 1973), 116. cited by Klockars, *The Idea of the Police*: 45.

³⁴⁹ ———, *The Idea of the Police.*, Egon Bittner, *The Functions of Police in Modern Society* (Chevy Chase MD: National Institute of Mental Health, 1970)., Brogden, *The Police: Autonomy and Consent*.

what was said to be their monopoly on the legitimate use of coercive force.³⁵⁰ Carl Klockars argues that it is force which gives the unique flexibility of police authority, which enables police intervention in situations which may not be illegal, and where intervention does not necessarily rely on arrest and the law.³⁵¹ Similarly, Egon Bittner distinguishes police as "nothing else than a mechanism for the distribution of situationally justified force in society."³⁵² These definitions were developed at a time when legitimate force was seen as institutionally split between the military, whose jurisdiction was outward looking in defence of territory from state enemies, and the police, whose jurisdiction was civil order within the nation. Today, the jurisdictional limitation to policing as within the nation can no longer be sustained.³⁵³ It is also difficult to sustain police as *monopolising* legitimate force as these definitions do. Other entities in civil society such as parents are also able to utilise coercive force.

Waddington argues that while it is the potential to use force which unifies the diverse subjects of policing (as highlighted by Bittner), it is authority which best describes what shapes what police do, as distinct from what police have the potential to do.³⁵⁴ It is arguable on a theoretical level that the entire legal order and policing is founded on force, and thus present as the backdrop to policing.³⁵⁵ Yet force is not explicitly relied on in every policing event and encounter. The role of police as risk communicators, highlighted by Ericson and Haggerty, emphasises policing's primary role as providing information, for example on traffic accidents to insurance companies.³⁵⁶ This does not explicitly involve force, but it involves providing information that is regarded as decisive and authoritative. Similarly, policing routines of

³⁵⁰ Egon Bittner, "The Capacity to Use Force as the Core of the Police Function," in *The Police and Society: Touchstone readings*, ed. V. E Kappeler (Prospect Heights, Illinois: Waveland Press Inc., 1995), 129.

³⁵¹ Klockars, *The Idea of the Police*.

³⁵² Bittner, "The Capacity to Use Force as the Core of the Police Function," 129.

³⁵³ See for example - Andreas and Nadelmann, *Policing the globe: criminalization and crime control in international relations.*, James W. E. Sheptycki, "Transnational policing and the makings of a postmodern state," *British Journal of Criminology* 35, no. 4 (1995)., Mick Palmer, "A borderless world: the politics and realities of policing in the new millennium," *Platypus*, no. 65 (1999)..

³⁵⁴ P. A. J Waddington, *Policing Citizens* (London, Philadelphia: UCL Press, 1999). Waddington uses the example of the police role in tasks such as informing relatives of a person who has died. This is explained by the authority police hold in this circumstance, not the use of force.

³⁵⁵ Benjamin introduces the concept of "law founding violence" which represents the constitution of a new legal order. Law founding violence is necessarily outside the prior existing legal order, as it sets out a new state constitution sponsoring a new legal order. In contrast, "law preserving violence" is the force that always underlies law. Force guarantees law's enforcement, through for example police and prisons. It ensures that which is said to be law is enforced, and thus ensures its continued existence. Walter Benjamin, "Critique of Violence (1920-1)," in *One Way Street and Other Writings* (London: New Left Books, 1979).

³⁵⁶ Ericson and Haggerty, *Policing the Risk Society*.

patrolling and swamping operations in "no go" areas have been shown to be ineffective in detecting crime, but are effective as a symbolic affirmation of authority.³⁵⁷ The common feature in all policing is not force, but authority.

The mode of decision making engaged in a particular control context shapes what policing draws on to endorse its authority, and how it creates and broadcasts perceptions of policing authority. I outline three motifs in how policing creates and circulates perceptions of its authority. First, the use of force; second, by enhancing the legitimacy of the policing bodies themselves, as well as emphasising the deviancy of those targeted by policing. Third, through legal mechanisms that tag authority onto one or more parties to a relationship that was formed for reasons other than solely policing.

Endorsement of authority by force

Force may not be essential to defining policing, however it frequently plays a role in establishing authority. Explicit threat of violence or actual violence is not present in every policing interaction; however, it is residually present to endorse authority. This is most explicit in individual encounters when actual physical violence or the potential for police to use force means that individuals comply with police direction. The blurred lines between force and consent are also most evident in the individual encounter. Individual consent to policing such as consent to search may be formally provided, which in law transforms the encounter in legal terms from that between a state official and private citizen to that between two private citizens.³⁵⁸ However, the subjective conditions of the encounter may challenge the "informed" element necessary for consent to be voluntarily given. Police may have given the impression that co-operation is legally required.³⁵⁹ Formal consent can belie its substance in the context of power imbalance, different cultural and linguistic communication particularly regarding the negative voice, and the impact of deference to authority which may affect some responses to police.³⁶⁰ When explicit force is used, its use is important not solely to ensure compliance, but

³⁵⁷ Waddington, *Policing Citizens*.

³⁵⁸ Dixon, *Law in Policing: Legal Regulation and Police Practices*: 90. See also David Dixon, Clive Coleman, and Keith Bottomley, "Consent and the Legal Regulation of Policing," *Journal of Law and Society* 17, no. 3 (1990).

³⁵⁹ The quality of consent is shaped by subjective belief that consent is required. Police phrasing has been shown to influence the perception of choice in being able to refuse searches: Dorothy K. Kagehiro, "Perceived Voluntariness of Consent to Warrantless Police Searches," *Journal of Applied Social Psychology* 18, no. 1 (2006).

³⁶⁰ Douglas discusses this with regards to the issues affecting apparent consent, or what she refers to as "gratuitous concurrence" by indigenous Australians in their encounters with police. See Heather Douglas, "The Cultural Specificity of Evidence: the current scope and relevance of the Anunga guidelines," *University of New South Wales Law Journal* 21(1998).

also in its role in producing and circulating *perceptions* of policing authority. The perceptions important to policing may be both the immediate audience for policing, as well as broader society. Policing authority depends on its recognition. The notion that force has a role in establishing the social legitimacy of policing is addressed through two main arguments. First, the liberal notion of the social contract implies that consent to policing is established through citizenship and presence within the nation, as part of the system of being ruled by law. Secondly, policing practices are explained as enacting the dominant social values, either because policing enforces the law (which reflects majority values in liberal democracies), because policing practices and decisions reflect social norms, or the vested interests of the majority (or dominant group in society).³⁶¹ The link between authority and societal norms makes what is legitimate action for policing a moving target that changes with the social and political conditions.

Managing perceptions of policing activities and its targets

The thesis interest is specifically in those strategies that generate authority for policing as perceived by those involved in policing and by those affected by policing, that is, those involved in the policing relationship. The parties to policing are not the only persons relevant as the “audience” or target for the constitution of authority in policing or in migration control. Michael Brogden’s 1982 study *The Police: Autonomy and Consent*, amongst others, argues policing practices actively generate society-wide attitudes to policing to reinforce recognition of policing. In fact, this society-wide target is evident, he argues, from practices that can only be explained by their function in unifying social attitudes. Police targeting of the “chaff” of society and street crime makes little functional sense unless considered in terms of how, as a “common enemy”, police targeting creates the impression that it meets the needs of the whole society.³⁶² Policing practices thus function to obscure the differential service policing provides to different sectors of society. To unify social attitudes, policing selection of a “common enemy” must cut across social divisions such as class, institutional imperatives embedded in police mission and accountability regimes, and popular perceptions of

³⁶¹ Edwards, *Changing Policing Theories for 21st Century Societies*: 6- 24, chapter titled “The Triangle of Tension”.

³⁶² Brogden argues that the specific attributes of the lower strata in society make them “a convenient bridge for the interests of the dominant and subordinate classes, and a conjunction between the structural pressures on the police institution and the intra-organizational constraints”: See Brogden, *The Police: Autonomy and Consent*: 230, see further at 33.

acceptable policing.³⁶³ In migration control, the criminalisation of illegal migrants as the deviant other that is the "common enemy" emphasises the difference between citizens and non-citizens, and thus the commonalities between citizens. Within a globalising world, where culture and shared values are difficult to confine within a shared unique national identity, this is said by some to be constantly challenged. In this context, constructing a "common enemy" may be a simpler task than a common national identity to ground policing legitimacy.³⁶⁴

In a similar method, Brogden critiques the function of community policing. Community policing, while widely defined, generally encompasses tasks that bring police into contact with the community, such as police bicycle patrol, community/police consultations, and joint schemes such as neighbourhood watch in Australia.³⁶⁵ Brogden traces the factors that demonstrate community policing strategies are tangential to the crime problematic that shapes the work of policing. Brogden argues community policing tasks function not for crime control but rather to demonstrate police work as service to the community:

Community policing represents the zenith of police intervention in civil society, through the medium of the legal relation..... No longer simply concerned with negotiating truces with the social classes, community involvement schemes, in particular, are intended as large-scale extension of the consent problematic. They reinforce the institution's autonomy at the same time that they legitimize civil intervention...³⁶⁶

In the context of the continuing retreat of the welfare state, migration policing might similarly be seen as a demonstration of protection that citizenship offers. The message it sends is that citizenship may not offer much in terms of civil rights nor welfare rights, but it protects citizens from those practices that make non-citizens and illegal migrants vulnerable.³⁶⁷

³⁶³ Ibid.

³⁶⁴ See for example: Ghassan Hage, *Against Paranoid Nationalism: searching for hope in a shrinking society* (Annandale NSW; London: Pluto Press, 2003). ———, *White Nation: Fantasies of White Supremacy in a Multicultural Society* (Sydney: Pluto Press, 1998).

³⁶⁵ See these diverse approaches to community policing: Marie Segrave and Jerry Ratcliffe, "Community Policing: A descriptive overview" (Canberra: Australian Institute of Criminology, Australian Government, 2004); Les Johnston, "From 'Pluralisation' to 'the Police Extended Family': Discourses on the Governance of Community Policing in Britain," *International Journal of the Sociology of Law* 31, no. 3 (2003); Danielle Campbell and Roberta Julian, "Final Report Australian Research Council Linkage Project, A Conversation on Trust: Community Policing and Refugee Settlement in Regional Australia," (Churchill Ave, Sandy Bay: Tasmanian Institute of Law Enforcement Studies, 2009).

³⁶⁶ Brogden, *The Police: Autonomy and Consent*: 217.

³⁶⁷ For an explanation of the diminishing rights of Australian citizens in comparison to permanent residents see for example Rubenstein, *Australian Citizenship Law in Context* See also Louise Boon-Kuo, "The challenge to restrain the power to detain: the impact of immigration detention decisions on control orders and the making of the Alien Citizen," in *Postgraduate Law Students Conference* (University of Sydney: University of Sydney, 2007).

Both these approaches to generating authority focus on the legitimacy of policing as perceived by the public at large. The thesis policing model itself does not limit consideration of the development and recognition of policing authority to the parties to the policing relationship. It acknowledges that recognition of policing is important across society. However, the analytical exercise in Part II of the thesis concentrates on those in society who have a vested interest in the outcome or process of migration policing, whether that interest is personal, political, or arises from their occupation or business interests. Studying those most likely to dissent to broader social attitudes to migration policing, or support them more wholeheartedly, focuses on the development of perceptions of policing legitimacy in contexts where it is actively contested or sought.³⁶⁸

Law is often said to be a resource for policing, one resource of many in a toolkit in handling issues that threaten order,³⁶⁹ emphasised in the way the bulk of police work does not involve arrest.³⁷⁰ Yet law is also a resource for policing in stabilising consent to policing authority by changing the law itself, via legislation and policy. Legal changes thus can spotlight whose voices in a political community are dominant and set the agenda for policing, or whose dissent to policing and law is seen as especially important to manage.

Embedding attitudes to policing authority in liberal social relations

Liberal ideology frames the extent to which any law or policing is coercive as a question of the balance that is struck between individual rights and freedoms and societal interests. Critical legal studies turns the focus from sociological approaches that trace the organisation of policing within a political and social frame to how certain forms of legal authority (including policing) frame the action of individuals as almost entirely within their autonomy.

Governmental interests are obscured in these circumstances, as legal authority is attached to relationships or activities that were formed for reasons other than solely policing and other than for government reasons. It embeds that policing and law as established by consent. This has much the same effect as establishing a "common enemy" or "community policing" in that it creates the impression that the practice of policing is in the interests of that individual,

³⁶⁸ Chapter 3 examines how employers' and education institutions' perceptions of the legitimacy of migration authority are constructed and circulated. Chapter 5 explores how the familial and political interests of community members supportive of illegal migrant detainees, are aligned with Immigration Department interests. It thus shows how supportive attitudes to migration control authority are fostered in community members who might otherwise contest that authority.

³⁶⁹ Australian Bureau of Statistics, "Perspectives on Migrants 2009 (3416.0)," (Canberra 2009), 31.

³⁷⁰ Reiner, *The Politics of the Police*: 139-46.; Dixon, *Law in Policing: Legal Regulation and Police Practices*: 11. Ericson, *Reproducing Order: A Study of Police Patrolwork*: 3-11, 206.

except in the case of assigning particular duties to persons or individuals. It involves them in carrying out policing activities but makes it seem largely at their own behest and in their own interests rather than for the nation-state.

In much the same way, Mariana Valverde's study of the United Kingdom's hotel alcohol licence as "police science British style" highlights how the integration of law in liberal governance develops social consensus, or in her words, common knowledge.³⁷¹ The hotel licence imposes a duty on bar tenders and the licensee to cease serving alcohol to a person who is intoxicated. If the responsible service of alcohol guidelines are breached, the licence may be cancelled. The licence thus requires the bar tender to "know" when a person has become intoxicated. The courts, Valverde explains, treat knowledge of intoxication as "common" knowledge that goes without saying, not requiring expert evidence. Yet individuals reach drunkenness after imbibing differing amounts of alcohol, depending on their size, tolerance, genetics and so on. It is not something that is automatically evident, and whether an individual was intoxicated may depend on the person who is making that assessment. Valverde's interest is in how "common" knowledge is constructed and circulated through legal technologies that are less direct than criminal offence provisions. The licence strikes a perfect balance for neo-liberal governance that seeks to avoid too much governing, too closely. It "responsibilizes" civil actors.³⁷² Through making civil actors responsible it involves them as actors in policing, but without the concomitant capital that employed police and judges enjoy as a result of that responsibility. She explains:

... the knowledge relied on when relying on civil society – the knowledge of a correct system of police – may not always emanate from civil society itself. It may rather be imposed by the logic of police, through the trope of common knowledge.³⁷³

³⁷¹ Valverde, *Law's Dream of a Common Knowledge*: See in particular chapter 6 "Police Science, British Style: Pub Licensing and Knowledges of Urban Disorder" 141-66, and chapter 7 "'Common Knowledge Must Enter the Equation Somewhere': Knowledge as Responsibility" 67-92.

³⁷² O'Malley, "Risk and Responsibility." Note also Levi and Valverde comment that the case of Canadian liquor licensing and drunk driving laws illustrate that neoliberal techniques of responsabilization may not be unique to neo liberal societies, but "may also be a feature of preliberal, preconsumer, and prescientific modes of governance that devolve parts of the enforcement of the state's police powers either to nonstate personnel or to the citizens at large." See Ron Levi and Mariana Valverde, "Knowledge on Tap: Police Science and Common Knowledge in the Legal Regulation of Drunkenness" *Law & Social Inquiry* 26, no. 4 (2001): 842-43.

³⁷³ ———, "Knowledge on Tap: Police Science and Common Knowledge in the Legal Regulation of Drunkenness" 843.

The visa as a relationship of authority between sponsor and non-citizen

In migration control, the same kind of control as I discussed above in Valverde's argument about the licence can be observed in two relationships of power generated through the visa as a legal technology. Visa sponsorship invests the need for the visa sponsor to ensure the non-citizen complies with visa conditions. It embeds a control impetus while presenting sponsorship arrangement as an act of freedom, one where the visa sponsor is able to enhance the chance for the non-citizen's visa grant. In the most general sense, visas as a legal "technology" that come about through visa application are themselves this perfect liberal form of governance "responsibilising" non-citizens. The form of a visa itself sends a strong message that there is no right to movement. It sets up an immediate frame for the relationship between government and non-citizens which positions the non-citizen as having responsibility for their movement, as well as their decision to accept the terms of entry and stay into national territory. The visa form also naturalises the governmental decision maker as having absolute power to permit or refuse the visa. In this dynamic, movement is presented as a privilege not a right, and closure of boundaries around community one that is justifiably determined by those already within the nation.

Developing policing authority through liberal legal technologies is especially important in the contemporary context of social fragmentation and plural moral orders. Its significance is further emphasised when considering perceptions of policing authority beyond bounded political communities, where there is not necessarily a correspondence between the exercise of power and authority, and the accountability of that authority to a political community of which the policed subject is a member. In a bounded political community members at least formally contribute to the determination of legislative law making through democratic processes, regardless of the limitations of the base level of participation through voting in government elections. Outside the bounded political community, the operation of law and policing as force, or as a product of politicised relations between nations or hegemonic norms, becomes more explicit.

The fourth policing anchor: the urban quality of policing

The last element of the policing model is its urban quality. In a sense, this is another aspect that promotes perceptions of the authority and legitimacy of policing. It adds to the discussions of force, strategies that emphasise policing practices as acting for the whole population, and embedding authority in liberal social arrangements. The model however draws upon this as the fourth anchor for policing as the urban quality draws in an essential

element of the legitimacy of policing as a particular kind of governance. The urban quality of policing draws together different key elements that promote the legitimacy of policing, through the notion of proximity, that is, a physical or social nearness, or emergencies where action and response must be close in time.³⁷⁴ However in developing the urban anchor of the policing model, I focus specifically on the legitimacy policing establishes from its operation over issues arising from the impact of persons living close to one another, physically and socially. Historically, policing's urban association arose from the development of policing in conjunction with processes of urbanisation. But examination of the literature interested in policing scholarship in the United Kingdom and Europe, at the time of the emergence of modern policing, shows how even at this time, policing was more than a local government over a bounded space. In approaching policing as an "urban" rather than a "local" activity, this early policing scholarship foreshadows the contemporary globalisation of urbanisation. With globalisation's collapses of time and space,³⁷⁵ urban activities need not be physically close to one another, in order to establish their proximity. My approach to the urban quality of policing is influenced by Mariana Valverde's discussions of the limits of spatial analysis in conceptualising policing.³⁷⁶

The urban quality of policing

It is not that police regulations did not exist in medieval cities. Yet with the social changes of urbanisation and early capitalism, by the 1700s police had developed a unified meaning and a central role in state power.³⁷⁷ Policing scholars writing in the 1700s, as well as texts setting out the duties of police at that time, have grounded arguments that policing has an urban quality. Drawing on an early 1700s French compendium of police ordinances, Foucault argued the 13 domains of police concern listed in the text - ranging from regulation of religion and morals, health and subsistence, public peace, servants and labourers, theatre and games and more -

³⁷⁴ The establishment of policing legitimacy in addressing urgent situations is described by Egon Bittner's statement that police exist to respond to the situation where "Something-ought-not-to-be-happening-about-which-something-ought-to-be-done-NOW!" Egon Bittner, "Florence Nightingale in Pursuit of Willie Sutton: A Theory of Police," in *The Potential for Reform of Criminal Justice*, ed. H Jacob (Beverly Hills, California: Sage, 1974). Bittner is referring to the authority police have in micro encounters, but it can also be applied to broader "emergency" situations. Neocleous for example argues that the institution of emergency powers is not unique to the post 11 September 2001 world, nor are emergency powers exceptional. Instead they are central to the rule of law: Mark Neocleous, "The Problem with Normality: Taking Exception to "Permanent Emergency", " *Alternatives* 31(2006): 208.

³⁷⁵ David Harvey, *The Condition of Postmodernity: an enquiry into the origins of cultural change* (Oxford England; Cambridge, Mass., USA: Blackwell, 1990).

³⁷⁶ Valverde, "Jurisdiction and Scale: Legal 'Technicalities' As Resources for Theory."

³⁷⁷ Dubber and Valverde, *Police and the Liberal State*: 20, 24-27.

all shared an urban quality.³⁷⁸ These domains are “urban” because the term “urban” refers to issues that exist only in the context of the town, because there is a town, or are especially significant in towns.³⁷⁹ For example roads and squares exist in towns more than other spaces, and the means for preventing scarcity and the presence of beggars are especially significant in towns.³⁸⁰ The domains listed in Delamare’s text are also problems of the market (closely related to problems of the town) in that they concern when things can and must be put on sale, prices, the regulation of craft based industries, or more generally the circulation of goods.³⁸¹ Thus, overall, these are problems of the coexistence of people and the circulation of goods, or as Foucault puts it, about the circulation of men and goods in relation to each other.³⁸² From this, Foucault argued to “police” is “to urbanize”.³⁸³

Other scholars examining early texts on policing, such as English magistrate and writer on police, frequently heralded as the key to the development of the British New Police in 1829, Patrick Colquhoun, have drawn similar conclusions about the work of police as qualitatively urban.³⁸⁴ The tasks Colquhoun proposed and attributed to “police science” at this time were varied and detailed. The attention to minute details, which might be determined only in a particular locality, prompts the contemporary association of these tasks with that of local government. These tasks ranged from the issue of weights and measures as well as matters of hygiene and garbage collection. In Colquhoun’s proposal for police, what he envisaged is captured in the opening of his *Treatise on the Police*:

Police in this country may be considered as a new Science; the properties of which are consistent not in the Judicial Powers which lead to Punishment, and which belong to Magistrates alone; but in the PREVENTION AND DETECTION OF CRIMES, and in those other

C The difference that policing makes: the insight the policing model offers into control relationships

³⁷⁸ Foucault, *Security, Territory, Population: lectures at the Collège de France, 1977-78*: 335. The thirteen domains of police concern were classed under the more general headings grouping these domains as “goodness of life”, “preservation of life”, “convenience of life” and the “pleasures of life”, and a “considerable part of the public good (334).

³⁷⁹ *ibid.* Note Foucault here refers to urban “objects”, but by referring to “urban” I mean the quality of the issues that arise rather than necessarily the object or target of governance.

³⁸⁰ *ibid.*

³⁸¹ *ibid.* Taken from the opening of the later editions of Patrick Colquhoun’s *Treatise on the Police*, cited in

³⁸² *ibid.* *Social Police and the Mechanisms of Prevention - Patrick Colquhoun and the Condition of*

³⁸³ *ibid.*, 337. Note although Delamare’s text was published in French, it was fundamental in both France and Germany (311-332, 333-361).

³⁸⁴ See for example essays in Dubber and Valverde, *The New Police Science: the police power in domestic and international governance*; Mark Neocleous, “Social Police and the Mechanisms of Prevention - Patrick Colquhoun and the Condition of Poverty,” *British Journal of Criminology* 40(2000).

Functions which relate to INTERNAL REGULATIONS for the well ordering and comfort of Civil Society. (1806c)³⁸⁵ (*Colquhoun's emphasis*)

Accordingly, he envisaged a branch of the police dealing with municipal regulations as well as a "criminal police".³⁸⁶

The urban quality of policing has diverse manifestations. It may appear as concern with matters of public order or order within a particular context. Yet the urban quality of policing does not mean that policing is directed towards urban objects or functions, as it is not a normative definition. The particular policing decisions made might appear as legitimate only over a certain defined area. However, the urban quality in the policing model does not limit policing power to a defined localised space. That is, the boundaries of the urban do not remain consistent. The urban locality is one where persons come together in a living space. It is defined by the concentration of inhabitants, not by its boundaries. Urban issues requiring policing potentially encompass all those issues that arise from close living.

The lack of constant defined boundaries for urban locales is illustrated by Sassen's conceptual development of "global cities".³⁸⁷ Her approach to global cities as nodes on a global circuit better recognises the way in which localised practices are both constituted by and constitute global circuits. It demonstrates how urban issues cannot be confined to a particular geographical space. Sassen identifies the global city as a concentrated centre for global economic flows and migratory circuits, which produces its own transnational pushes and pulls for labour and capital. It is a social and economic confluence of flows more than a particular spatial locality. This approach to global cities better conceptualises how policing relationships of control are generated, as well as what they generate.

C The difference that policing makes: the insight the policing model offers into control relationships

The unique insights that the lens of policing brings to understanding migration control are highlighted by contrast with the conceptual underpinnings that frame and limit many contemporary approaches to migration control. The contrast between legal citizenship and

³⁸⁵ Extract from the opening of the later editions of Patrick Colquhoun's *Treatise on the Police*, cited in ———, "Social Police and the Mechanisms of Prevention - Patrick Colquhoun and the Condition of Poverty," 712.

³⁸⁶ *Ibid.*

³⁸⁷ Sassen approaches the urban as more than a local space: Saskia Sassen, "Global Cities and Survival Circuits," in *Global Woman: Nannies, Maids, and Sex workers in the New Economy*, ed. Barbara Ehrenreich and Arlie Russell Hochschild (New York: Henry Holt and Company, 2002).

policing highlights a tension between the concept of legal scale and policing on a number of levels. It focuses on the tension between migration policing and the national scale, national scale and citizenship, and that between sources of authority and perceptions of authority. In these ways it becomes evident that control relationships may not require national authority to effect control.

Legal geography has offered scale as a method to distinguish between plural legal orders, that is, between laws that may operate on the same social objects, each aspiring to monopolise control.³⁸⁸ In the same way that scale is a cartographic tool that translates geographic three dimensional realities into the two dimensions of paper, legal scale is offered as a tool that explains how law imagines social reality. In Boaventura de Sousa Santos's words, scale (and other cartographic tools of projection and symbols) show how law might be conceived as an organised and orderly (mis)reading of social reality.³⁸⁹ Law is only ever one reading of social reality, it cannot fully represent social reality nor does it intend to. Each law reflects the reasons particular laws were enacted, and produces a limited view of the reality it seeks to represent. This is why Santos refers to law as a (mis)reading of reality.

Santos uses "scale" as a typology for differentiating between how laws envisage regulation, the normative codes they reference, and where and why they apply. Thus local law is large scale in that through its lens social reality is captured in minute detail. It contextualises behaviour, attitudes and features in their immediate surroundings.³⁹⁰ It regulates by representing objects and activities and where they should be and what they should do. In contrast, the small scale legality of international law is low on detail, and it operates through generalisations. It regulates by orienting, for example, by providing universal standards by which to judge position, and direct aspirations.

Migration policing and the national legal scale

Legal scale is utilised in the thesis to highlight the alternative vision of control that the analytical approach of policing modelled here makes visible. The legal powers of migration control are primarily set out in the *Migration Act*. The object of the *Migration Act* is to "regulate, in the national interest, the coming into, and presence in, Australia of non-

³⁸⁸ Boaventura de Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law," *Journal of Law and Society* 14, no. 3 (1987): 281.

³⁸⁹ ———, *Toward a New Common Sense: law, science and politics in the paradigmatic transition* (New York: Routledge, 1995).

³⁹⁰ *Ibid.*, 465.

citizens".³⁹¹ The *Migration Act* is the only source of right for non-citizens to enter Australia.³⁹² It provides that entry and stay requires a visa, and that those whose presence is not permitted will be removed.³⁹³ The *Migration Act* thus presents its object as national in scale. It is national in that it controls entry and departure to the national territory. Further, the visa system operates by setting the length of non-citizens stay and the activities they are permitted to undertake while in Australia, such as work and study and application for further visas. In this way, visas can be interpreted as mediating participation in the Australian polity. For permanent residents, this extends to some political participation traditionally associated with citizenship, such voting rights in some State local jurisdictions.³⁹⁴ The bulk of the barriers to legal citizenship exist in obtaining permanent residency, and are thus determined by migration law and control.³⁹⁵ For these reasons, migration law has been argued to be the primary legislation that defines legal citizenship in Australia.³⁹⁶

The national scale and citizenship

However, the control relationships that become visible via the policing model cannot be reduced to the national, local, or the global scale. In fact, these control relationships cannot be defined as contingent on a bounded geographical space. These control relationships demonstrate that migration control straddles the local, national, and global legal scales simultaneously. The control effected by migration policing operates at the intersection of these multiple scales. This has been recognised in some literature on migration control that examines localised city or state based governmental activities as creating a localised citizenship.³⁹⁷ A number of scholars in the United States of America draw on the theoretical resources of legal geography, such as scale, to analyse the phenomenon of governmental activities that include migrants despite their illegal status. These scholars interpret governmental inclusionary activities as their recognition of a valid claim by illegal immigrants to reside and to participate in society. The extent of these inclusionary practices has prompted jurisdiction. Thus the urban quality of the policing model moves both inclusionary and exclusionary practices, implicit in the term social citizenship, to the forefront.

³⁹¹ *Migration Act* 1958 (Cth) s 4(1)

³⁹² *Migration Act* 1958 (Cth) s 4

³⁹³ *Migration Act* 1958 (Cth) s 4

³⁹⁴ Rubenstein, *Australian Citizenship Law in Context* 213.

³⁹⁵ Dauvergne, "Confronting Chaos: Migration Law Responds to Images of Disorder."

³⁹⁶ *Ibid.*

³⁹⁷ Monica W Varsanyi, "Immigration Policing Through the Backdoor: City Ordinances, the "Right to the City," and the Exclusion of Undocumented Day Labourers," *Urban Geography* 29, no. 1 (2008); Jennifer Ridgely, "Cities of Refuge: Immigration Enforcement, Police, and the Insurgent Genealogies of Citizenship in U.S. Sanctuary Cities," *Urban Geography* 29, no. 1 (2008).

Jennifer Ridgely's argument that some cities in the United States today operate as "cities of refuge" for illegal immigrants.³⁹⁸ The US scholars' focus on government practices in control relationships that work to include illegal migrants.³⁹⁹ Arguments that national citizenship is being "rescaled", or is "multi scalar", have been put forward to account for the generation of citizenship at a local level. Varsanyi has also referred to these inclusionary practices as "citizenship-as-inhabitation" not inheritance".⁴⁰⁰ She argues:

In effect, local communities are collapsing the processes of immigration and naturalization into "local neoliberal membership moments," which enable the presence and residence of undocumented migrants within their communities without giving them firm and permanent purchase in the United States.⁴⁰¹

Varsanyi's analysis refers to such practices as in effect developing foreign policy, and migration and membership policy. Yet I argue that the conceptual tool of legal scale Varsanyi (and others) draw upon limits how this analysis is developed, by shaping the typology of scale by the space it governs. Varsanyi makes it clear that she is not arguing that immigration and citizenship policy is being created at the local scale and not at the federal level. She acknowledges that citizenship policy is within the jurisdiction of the federal government, but argues that local governments are forming partial and varied forms of "local migration and membership policy".⁴⁰² This analysis is further limited by the focus on *inclusionary* activities as activities in terms of their significance for *legal* citizenship. Framing the significance of inclusionary practices in terms of legal citizenship obscures the importance of social citizenship in controlling the movements of illegal migrants. The urban quality of the policing model does not conceive of urban matters as those that take place in a bounded localised space. It captures practices that manage the close coexistence of persons, regardless of the formal jurisdiction. Thus the urban quality of the policing model moves both inclusionary and exclusionary practices, implicit in the term social citizenship, to the forefront.

³⁹⁸ ———, "Cities of Refuge: Immigration Enforcement, Police, and the Insurgent Genealogies of Citizenship in U.S. Sanctuary Cities."

³⁹⁹ Ibid; Monica W. Varsanyi, "Rescaling the 'Alien', Rescaling Personhood: Neoliberalism, Immigration, and the State," *Annals of the Association of American Geographers* 98, no. 4 (2008); Monica W. Varsanyi, "Interrogating 'Urban Citizenship' vis-à-vis Undocumented Migration," *Citizenship Studies* 10, no. 2 (2006).

⁴⁰⁰ ———, "Interrogating 'Urban Citizenship' vis-à-vis Undocumented Migration," 239-40.

⁴⁰¹ ———, "Rising Tensions Between National and Local Immigration and Citizenship Policy: Matriculas Consulares, Local Membership and Documenting the Undocumented," in *Working Paper 140* (San Diego: The Center for Comparative Immigration Studies (University of California), 2006), 21.

⁴⁰² Ibid.

Legal citizenship sets out the legal rights and responsibilities of citizenship, whereas social citizenship refers to the social conditions and relations that mediate and determine a uniform and equal experience of legal citizenship. Without full social citizenship, not all legal citizens experience equal participation and enjoyment of citizenship status.⁴⁰³ Social citizenship does not necessarily correlate with the national scale. It is determined by all those social factors that affect social participation in work, education, personal and family relationships, religious practice, cultural practices, political participation and so on. As such, social citizenship is constructed by multiple normative frameworks, many of which have little engagement with national boundaries. Social citizenship is constructed by all these factors, and is not contained within a single legal authority such as the *Migration Act*. Migration policing is one of these factors. It constrains the ability of illegal migrants to overcome their illegal status and participate in the social and political life of the community. Whereas focusing on such practices as they pertain to legal citizenship primarily highlights inclusionary practices, focusing on social citizenship emphasises both inclusionary and exclusionary practices in terms of how they affect an individual's self determination and autonomy.

Valverde argues that the urban quality of policing is not captured by legal scale. Instead, she argues that the power effects of the urban are better understood by adding the legal practices of jurisdiction to the resources of scale.⁴⁰⁴ Valverde argues that the role jurisdiction plays in legal governance draws in the dimensions other than the spatial boundaries of legal scale in sorting out who is empowered to do what.⁴⁰⁵ Jurisdiction draws in the relevance of who is empowered, where that power may be exercised, what is empowered to be done, and how that power should be exercised.⁴⁰⁶

Thus, jurisdiction sorts the where, the who, the what, and the how of governance through a kind of chain reaction, whereby if one question (where, who) is decided, then the answers to the other questions seem to follow automatically...⁴⁰⁷

The resource of jurisdiction thus has value outside its doctrinal purpose, in conceptualising the domains of power in plural legal orders.

⁴⁰³ For an overview of the terms "social citizenship" and "social inclusion" see Buckmaster and Thomas, "Social inclusion and social citizenship—towards a truly inclusive society."

⁴⁰⁴ Valverde, "Jurisdiction and Scale: Legal 'Technicalities' As Resources for Theory."

⁴⁰⁵ Arguably Santos's approach to legal scale goes beyond spatial differentiation as it establishes qualitative differences between the legal scales through explaining the regulation patterns, actions and thresholds associated with each scale. But in teasing out his notion of symbolic legal cartography are the local, national and international.

⁴⁰⁶ Valverde, "Jurisdiction and Scale: Legal 'Technicalities' As Resources for Theory," 144. [and 141]

⁴⁰⁷ Ibid.

For the purposes of this thesis, however, which focuses on policing in terms of how it effects control, the resources of jurisdiction have particular but limited value. Valverde argues the unfolding "chain reaction" of jurisdiction makes the simultaneous operation of very different rationalities of legal governance appear natural, provided these powers are exercised by a particular authority and in a particular place.⁴⁰⁸ This describes how migration policing is given legal legitimacy through its administrative and constitutional setting.⁴⁰⁹ However, although jurisdiction does bring in more than the spatial element that concepts of legal scale rely upon, it still focuses on delineating power through its boundaries. In contrast, the policing model does not identify policing by the boundaries over which it governs, whether these are spatial, temporal, rationales or functions. Policing as modelled here shows how control is effected through relationships of power. Studying relationships of power enable the urban quality of policing to become visible, without tying the urban to a particular space. For instance, the proximity between Australian employers and foreign potential employees is evident through visas, through the relationship generated through visa sponsorship arrangements.

Perceptions of authority and sources of authority

The final contrast between legal citizenship and policing that I draw out here focuses on the tension between sources of authority and perceptions of authority. The typology of legal scale, as it has been used to consider migration control, equates the spatial jurisdiction of the source of authority as equivalent to its scale of operation.⁴¹⁰ Yet in migration control it is the perceptions of authority that are more important in determining how control is effected. Control over migratory movement is always global in operation. This is not because the source of authority for migration law is international. Documentary controls were integral in developing the very state-ness of nation-states, and, as argued by John Torpey, enabled nation-states to develop a monopoly over movement into and out of that state.⁴¹¹ The source of authority for an individuals' nationality is the nation-state. Yet it is the foreign state's recognition of an individuals' nationality that provides the terrain for migration control. That

⁴⁰⁸ Ibid., 142-44.

⁴⁰⁹ This is explored in chapter 4 and 6 in particular. The thesis argues the administrative and constitutional setting of migration law expands, by default, the discretion available to migration policing, and at the same time it obscures the lack of accountability for some discretionary decisions of migration policing.

⁴¹⁰ See the earlier discussion of Varsanyi's treatment of the formal legal jurisdiction of the federal government over citizenship law as equivalent to determining the national scale of its operation. She similarly saw localised state inclusionary practices as having solely a local remit: Varsanyi, "Rising Tensions Between National and Local Immigration and Citizenship Policy: Matrículas Consulares, Local Membership and Documenting the Undocumented," 21.

⁴¹¹ Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State*.

is, the ability to move across the globe is an outcome of nation-states across the globe recognising the authority of foreign states to confer nationality, on the global recognition of national authority. Yet, in a general sense, it is not the authority conferred by individual nation-states that is crucial here, but recognition of the authority of nation-states in general to confer nationality.⁴¹² Control then takes place over an individual entry and stay in foreign nations.

In a similar sense, the contexts of migration control explored in Part II of the thesis do reflect the authority of the nation-state through migration law, citizenship law and the Australian Constitution. However, even within the nation, policing exhibits authority founded in wider agendas for control. Thus the control contexts explore how perceptions of authority shape control over illegal migrants and their movements. This exploration is continued outside the national context in the last chapter of the thesis, which enables closer attention to policing outside the sponsorship of state authority.

Conclusion

This chapter has outlined the model of policing used as a definitional touchstone for the comparative method and analytical tool in the thesis. The model introduces four elements that are essential to policing, but it does not reduce policing to only these elements. Through comparing particular migration control contexts to the features of the policing model, migration control is identified as migration policing. The tools that identify policing focus on policing as a relationship of power, which enables recognition of policing as a process which is not bound to a particular institutional or state origin. It focuses therefore on policing as involving a powerful party and a weak party, which in the empirical exploration of control contexts commencing in the next part of the thesis, manifests in relationships including those between employers/employees, education institutions/students, Immigration Department/non-citizens, state police/non-citizens and visa sponsors/details. Policing was also identified as essentially involving discretion, which is integral in developing an asymmetry of power, as well opening up policing to diverse control objectives. Discretion is explored in the control contexts through focusing on examples of migration control practices, as well as the positive legal delegation of power, and the default expansion of discretion through weak accountability mechanisms. Authority was explained in the model as the element that distinguishes policing from other power relationships. Tracing the different ways that the

⁴¹² The individual source of authority being a particular nation state might arise in some circumstances. It arises insofar as the capacity to confer nationality, or provide a passport has been questioned, such as in so called "failing states", and affects the assessment of the authenticity of that passport.

legitimacy of migration controls is established in the national context finds the argument pursued in chapter 7 that migration policing is mobile. The last anchor in the policing model might be considered an extension of the key element of authority. Policing's urban quality highlights its concern with matters of the close coexistence between people, which in a globalised world connect the operation of control and its effects even when they are not located in the same space.

The next four chapters, which make up Part II of the thesis, compare the empirical reality of migration control with policing as modelled in this chapter. By studying particular migration control contexts through the analytical tools of policing, particular themes of migration policing emerge. Five themes recur across these different control contexts, and illustrate the distinctive character of Australian migration policing. Migration policing is characterised by the diverse and dynamic operation of discretion. It relies on endorsement of policing authority beyond the endorsement bestowed by migration law. Migration policing contributes to the social citizenship of migrant illegality. Migration policing is one factor that determines the social participation illegal migrants are able to achieve within Australia, and it also determines social citizenship in that the apprehension of illegal migrants results in control of their movement into detention and out of the nation. The "identity" of migrant illegality that emerges from study of the policing relationship emerges as one that is always constructed in relation to normative ideals of social citizenship. Lastly, migration policing is characterised by the particular legality of migration law in its administrative and constitutional setting.

Although the empirical study is located in the national context, the absence of citizenship in the Australian Constitution mirrors the lack of constitutional founding of citizenship in the supra-national context. This grounds the insights developed in the Australian context as to migration policing's determination of migratory movement, to inform the final exploration of the thesis into migration policing as a factor that shapes global citizenship.

Preface to Part II

Part II of the thesis explores four contexts of migration control and compares the operation of control with features of the policing model set out in chapter 2. The comparative contextual

Part II: is in the introduction to the thesis. The comparative analysis engages three sites to investigate whether migration control operates as policing: comparison between the policing model and each individual migration control context, comparison between the control contexts, and comparison of policing themes between the contexts of control.

Contexts within

Policing as a practice is identified by its relationships of power. Policing is not identified by its institutional identity or by bestowal of particular legal authority. This makes examination of

Australia to establish that migration control operates as policing. One or two features of the policing model form the primary focus in each context.

<i>Migration control context</i>	<i>Primary feature of the policing model explored</i>	<i>What identifies this control context as policy?</i>
The involvement of civil actors (employers and educational institutions) in migration control	The policing relationship at a political and social level, between civil actors and migrants, and between government and civil actors	The power of civil actors over migrants in both visa policy and legal duties over illegal migrants. The importance of civil actors support for substantive visa policy.
Immigration raids in the street, home and workplace	Policing discretion and authority	The power of migration policing agents to determine the exercise of power over illegal migrants, and the use of force to endorse authority.
Release from immigration detention	The policing relationship, and the urban quality of policing	Constitution of a policing relationship between a sponsor and detainee as a condition of release. Factors that influence release decision include those that are irrelevant in law, but gain legitimacy from their urban quality.
The character test in visa refusal and cancellation	Discretion	The confluence of discretionary power in the character test, and its operation to endorse inclusion and exclusion to visa states.

Preface to Part II

Part II of the thesis explores four contexts of migration control and compares the operation of control with features of the policing model set out in chapter 2. The comparative contextual method was overviewed in the introduction to the thesis. The comparative analysis engages three sites to investigate whether migration control operates as policing: comparison between the policing model and each individual migration control context, comparison between the policing model and the overall features of the four migration control contexts, and comparison of policing themes between the contexts of control.

Identifying each control context as policing

Policing as I have defined it exists only in *relationships* of power. Policing is not identified by its institutional identity or by bestowal of particular legal authority. This makes examination of encounters *in context* necessary to establish that migration control operates as policing. One or two features of the policing model form the primary focus in each context.

<i>Migration control context</i>	<i>Primary feature of the policing model explored</i>	<i>What identifies this control context as policing?</i>
The involvement of civil actors (employers and educational institutions) in migration control	The policing relationship at a political and social level, between civil actors and migrants, and between government and civil actors	The power of civil actors over migrants in both visa policy and legal duties over illegal migrants. The importance of civil actors support for substantive visa policy.
Immigration raids in the street, home and workplace	Policing discretion and authority	The power of migration policing agents to determine the exercise of power over illegal migrants, and the use of force to endorse authority.
Release from immigration detention	The policing relationship, and the urban quality of policing	Constitution of a policing relationship between a sponsor and detainee as a condition of release. Factors that influence release decision include those that are irrelevant in law, but gain legitimacy from their urban quality.
The character test in visa refusal and cancellation	Discretion	The confluence of discretionary power in the character test, and its operation to endorse inclusion and exclusion via visa status.

Comparison between the policing model and migration control overall

Each control context focuses on one or two features of the policing model, and the control contexts themselves do not comprehensively cover all migration control scenarios. However, together, the operation of policing in the control contexts studied supports the argument that migration control operates as policing. The presence of each policing feature identified in the particular control context examined can be traced to elements that recur across migration control more generally. In particular, although the control contexts concentrate on the control of illegal migrants, the operation of control in the contexts studied show that migration policing extends over legal and illegal migrants.

<i>Migration control context</i>	<i>Policing model feature</i>	<i>General applicability outside the control context studied</i>
The involvement of civil actors (employers and educational institutions) in migration control	The policing relationship at a political and social level, between civil actors and migrants, and between government and civil actors	The role of employers and educational institutions in this context reflects that of the Immigration Department and other migration policing agents, and thus is applicable outside this context.
Immigration raids in the street, home and workplace	Policing discretion and authority	The multi institutional operation of migration control results in the diverse determinations about how and who should be apprehended, that extends outside the raids context. The use of force to endorse authority also recurs elsewhere in migration control.
Release from immigration detention	Policing relationship, and the urban quality of policing	The features that create a power imbalance detainees relationship with sponsors – permission to work and study, cultural unfamiliarity – are not unique to detainees and bridging visa holders, they extend outside this context. The urban quality of movement between detention and the community also finds it analogy in other migration decisions that engage management of interpersonal proximity.
The character test in visa refusal and cancellation	Discretion	Credibility is instrumental in determination of visa applications throughout migration control. The various features of discretion that converge in character testing (legislated, individualised decision making, the Immigration Minister's personal discretion) extend this feature out the character context.

⁴¹⁹ Social citizenship refers to the social conditions and relations that mediate a uniform experience of legal citizenship. For illegal migrants, I use "social citizenship" to refer to social participation in work, study, culture, religion, community, friendships and intimate relationships despite illegal status. See Buckmaster and Thomas, "Social inclusion and social citizenship—towards a truly inclusive society."

The selection of control contexts for comparative analysis of policing themes

The review of existing migration control literature in chapter 1 scrutinised the limits of legal, institutional and statistical frameworks in determining the control of illegal migrants. It identified features important to include in the selection of control contexts for analysis so as to ensure that any recurrence of policing themes across these contexts would be meaningful. The selection of control contexts relies on a broad and deep coverage across the diverse operation of migration control in Australia. The critical feature in all four migration contexts is a high degree of policing discretion and thus asymmetry of power in the policing relationship, although these features vary in their form and application in each context. The control contexts cover a range of significant social sites – work, study, public space, and home - that allow us to see diverse interests that impact on control. The importance of the selection of these social sites is captured in the concept of “social citizenship”.⁴¹³ Key social relationships are included in the control contexts, these relationships determine the extent to which the migrant is able to “overcome” the restrictions of their illegal status – either through becoming part of a society they are legally excluded from or avoiding apprehension. Policing relationships generate and stabilise authority in different ways. Thus in the context of work and study, the authority at stake is that of civil actors political support for migration law and policing practices. In the context of release from immigration detention, the features of sponsorship arrangements affirm sponsors’ investment in released detainees’ compliance with the conditions of release, affirming the authority of migration controls by those community members most likely not to support these laws. The selection of contexts was also designed to cover the involvement of differing policing agents, to ensure that the themes emerging from comparative analysis do not reflect those of a single institution of migration policing. The control contexts developed in Part II of the thesis draw on the voice of the policing agent, generated largely from law, policy and processes, and the voice of the illegal migrant, derived from in depth interviews with illegal migrants of their experiences of migration policing within Australia. The coverage of the social sites, discretion, policing relationship, and policing in its role as law-in-action, in the following four studies of control contexts is set out below.

This reflects the potential of migration policing to operate over both public and private place, and to be exercised by a wide range of state, civil and community actors, both individuals and those with institutional backing.

⁴¹³ Social citizenship refers to the social conditions and relations that mediate a uniform experience of legal citizenship. For illegal migrants, I use “social citizenship” to refer to social participation in work, study, culture, religion, community, friendships and intimate relationships despite illegal status. See Buckmaster and Thomas, “Social inclusion and social citizenship—towards a truly inclusive society.”

<i>Social sites</i>	<i>Policing discretion</i>	<i>Policing agent and policing relationship</i>	<i>Law-in-action</i>
Work and study	Discretion over the inclusion or exclusion of illegal migrants from employment, the reporting of breach of student visa conditions, and the contradiction between economic incentives and enforcement of migration controls.	The relationship between employers and educational institutions and illegal and legal migrants. The relationship at a political and social level, maintaining social support for migration law and policing	Change in visa policy as a result of maintaining legitimacy for migration law and policing.
Public space, and the private spaces of home and work	The discretionary determination of who, how and where illegal migrants are detected and apprehended. The incorporation of individual and institutional discretion.	Individualised embodied encounters between policing agents with institutional authority (including state police and the Immigration Department) and those already illegal.	The social meaning of the change in experience of migrant illegality after detection, where there is no formal change in legal status.
Community and immigration detention	The tension between personal factors informing discretion to control, and constraints on that discretion.	Relationship between released detainees and supportive community members.	The social meanings of the change in migrant illegality signified by release from detention, but the continuation of control.
Character testing as visa determination	The diverse discretionary factors in visa determination.	Individualised policing relationship between decision makers and migrants.	The role of the character test as an avenue for inclusion and exclusion from immigration legal status.

Australian migration policing: the recurrence of themes across the contexts

Five policing themes recur across these different control contexts, and thus develop a portrait of the distinctive character of Australian migration policing.

- Migration policing is characterised by the diverse and dynamic operation of discretion. This reflects the potential of migration policing to operate over both public and private place, and to be exercised by a wide range of state, civil and community actors, both individuals and those with institutional backing.
- Migration policing relies on the endorsement of policing authority beyond the endorsement bestowed by migration law. This is evident from one-to-one policing encounters in which policing agents draw on the use of force, from civil actors' derivation

of authority from their social or economic power, and from the personal and cultural resources of individual Australians, which also operate to endorse their migration policing authority.

- Migration policing is one factor that determines the social participation illegal migrants are able to achieve within Australia. Employers, educational institutions, social, religious and cultural organisations and individuals all contribute to the potential inclusion (or exclusion) of illegal migrants in Australian society despite illegal status. Migration policing practices also determine whether an illegal migrant will be detected and apprehended. In other words, migration policing contributes to the social citizenship of migrant illegality, and thus to the control of migrants' movements into and out of detention, and into and out of the nation.
- The "identity" (or rather anti-identity) of migrant illegality that emerges from study of the policing relationship reveals it is always constructed in relation to normative ideals of social citizenship. Conceptualising "identity" in this way highlights how migration policing is not confined to the policing of illegal migrants. Migration policing practices similarly contribute to the anti-identity of migrants more generally.
- Finally, migration policing is characterised by the particular legality of migration law in its administrative and constitutional setting. The administrative setting enhances migration policing discretion. The absence of citizenship in the Australian Constitution weakens the constitutional differentiation between legislative citizens and illegal migrants and enhances the potential authority of migration policing over all migrants and potentially over citizens.

These themes are revealed in the following four control contexts. The order of the control contexts examined roughly reflects the process of becoming illegal itself. The first two contexts examine the exercise of discretion as it is exercised in apprehension of irregular migrants, the first at a policy and organisational level, the second focusing on individual encounters. The third context examines release from detention. The final context focuses on the character test as a source of discretion over visa cancellation and visa refusal. By the end of Part II of this thesis, I establish that migration control in Australia operates as migration policing.

¹⁴⁴ James F. Hollifield, "The Emerging Migration State," *International Migration Review* 38, no. 3 (2004):

825

¹⁴⁵ *Ibid.*

Employers: the new Immigration Department?

*Since the end of World War II, international economic forces (trade, investment, and migration) have been pushing states towards greater openness, while the international state system and powerful (domestic) political forces push states towards greater closure. This is a liberal paradox because it highlights some of the contradictions inherent in liberalism, which is the quintessentially modern political and economic philosophy and a defining feature of globalization.*⁴¹⁴

A Introduction to the role of employers and education providers in migration control

The thesis commences study of Australian migration control contexts with exploration of the employers' and education providers' direct role in migration policing and visa policy. This is explored first because it immediately reveals the competing imperatives in migration control between economic openness and normative national closure of citizenship that James Hollifield refers to as a "liberal paradox".⁴¹⁵ Employers are in a position to employ illegal migrants and thus enhance the effective social citizenship of illegal migrants. Educational institutions are in a position to frustrate the intentions of migration control by providing education to meet immigration requirements rather than government intentions to have education of overseas students meet Australia's future skills needs. Both employers and educational institutions face financial incentives to breach migration laws themselves. Their involvement in migration control draws global economies and labour markets into visa determination and migration policing.

⁴¹⁴ James F. Hollifield, "The Emerging Migration State," *International Migration Review* 38, no. 3 (2004): 886.

⁴¹⁵ Ibid.

It is against this backdrop that the chapter argues that the role of employers and educational institutions in migration control is revealed as engaged in a relationship of migration policing. The involvement of employers in determining whether migrants are granted visas to enter or remain in Australia operates as preventative policing. Increasing the emphasis on educational requirements for employer sponsorship in skilled labour migration systematically gives visa employers more scope for power over individuals' capacity to travel to reside in Australia.⁴¹⁶ Employer sponsorship institutionalises management of the risk of individuals with skills apparently needed, travelling to Australia but not locating work with that skill set, and potentially becoming illegal, or else not meeting the skilled labour market gap that grounded their visa grant. The increasing role of employers and education providers in visa grants is traced through development of visa policy on the management of labour migration from the mid 1970s to the present. Further, this chapter argues that the role of employers and educational institutions in the policing relationship is evident from the stock government places on securing their perception of the legitimacy of migration controls. The importance of the Immigration Department's relationship with organisations with a direct monitoring role in identifying and locating illegal migrants was flagged by the preliminary review of studies on migration control in chapter 1. I explore the importance placed on civil actors' support of migration control through two examples. The first instance shows how employers' contestation of the prohibition on employing illegal workers led to visa policy reform for migrant seasonal workers in the rural horticultural sector. The second example depicts how one part of Australia's international education sector, vocational training institutions, were constructed as sources of deviance. I argue this was an attempt to stabilise the authority of migration control to direct the migration policing function of educational institutions.

The context of employers and educational institutions involvement in migration control was selected for a number of reasons. It is a context that entails a high degree of discretion by these civil actors. Both these entities have specific legislative migration control responsibilities, but they are not primarily entities directed to migration control. As such there is an ever present potential for financial incentives facing employers and educational institutions to

⁴¹⁶ References to employer sponsored migration in this chapter include all those visas that incorporate sponsorship by employers as part of the visa grant criteria. These references are not restricted to the Immigration Department categories of employer sponsored visas. References to skilled migration include the variety of skilled migration visas, not solely those permanent skilled migration visas that are termed "skilled" by the Immigration Department. That is, references to skilled migration in this chapter are not restricted to skilled independent, skilled sponsored and skilled regional sponsored visas. They include temporary visas granted on the basis of skills such as *Business (Long Stay) Subclass 457 Visa*. Note that some visas, such as the *Business (Long Stay) Subclass 457 Visa* are both skilled and employer sponsored.

conflict with migration control responsibilities. Thus this context provides an important site to examine the resolution of such tension through practices that would be expected to illustrate the breadth of discretion available to employers and educational institutions in discharging their migration control responsibilities. Moreover, the extent of employers' and educational institutions' role in migration control encompasses influence over visa policy, individual visa grants, as well as the prevention of illegal work and direct monitoring of students' compliance with student visa conditions. This extensive role helps avoid the potential for focus on institutional culture as a defining theme in migration policing. It assists the identification of migration policing themes from the study of control contexts, and identification of themes that recur across the contexts, as those contingent factors determine control regardless of who is exercising power. Two themes that recur across the four control contexts emerge from the analysis of migration policing in this chapter. Both employers and educational institutions occupy an important role in shaping the social citizenship of illegal migrants. Employers in particular represent the potential for illegal migrants to work and thus survive while illegal in Australia. The contribution both institutions make to constituting the social citizenship of migrants has a broader remit outside Australia. Their influence over visa grants, and thus their influence over migratory movement, diminishes by comparison with the role of the state in determining visa status and citizenship. A second and connected theme emerges from this, which shows that the authority of migration policing is endorsed by more than the nation-state. Specifically in regulation of labour migration and education based migration, it is endorsed by economic factors that reflect global economic circuits.

The chapter is structured in three parts. Part A introduces the purpose of the chapter and the legal responsibilities of employers and educational institutions that provide education to overseas students in Australia. Part B conveys the historical development of labour migration policy in Australia through three connected trends: from permanent to temporary migration; from supply driven to demand driven skilled migration; and from pathway to pool. Together these trends highlight the operation of visa policy as preventative migration policing, as well as tracing the way in which these civil actors' powerful roles as policing agents in a policing relationship is deeply embedded in visa criteria and policy. Part C introduces the argument that civil actor involvement in policing is instrumental to a shared policing goal which almost completely reflects state interests. It argues that the involvement of employers and educational institutions refutes this characterisation. This is explored through two examples – one illuminating the relationship between government and employers, the other between government and educational institutions. The importance placed by government on

employers' and educational institutions' perceptions of the legitimacy of the substantive migration controls they enforce, and the authority of migration policing itself, demonstrate their identity as policing agents. The chapter ends by speculating on what the trends in civil involvement in migration policing signify about the boundaries drawn by migration policing.

The legal framework of employers' and educational institutions' responsibilities in migration control

Various civil actors are responsible for a range of migration control activities that seek to bar illegal migrants from arriving or surviving in Australia. Airlines and shipping companies face financial sanctions for delivering migrants without correct immigration authorisation into Australia.⁴¹⁷ This chapter examines two major civil actors I argue are involved in migration policing within Australia, employers and educational institutions. Explicit legislative powers and sanctions create an immediate asymmetric relationship of power between these institutions and migrants in Australia.

Employers as migration police

Approximately 25,000 non-citizens work illegally in Australia at any one time.⁴¹⁸ In introducing legislation that penalises employers hiring non-citizens who do not hold immigration permission to work, the Australian Government explained:

The incidence of illegal work in Australia is a significant problem that denies Australians the opportunity to gain employment and can result in the exploitation of non-citizens. It is also a concern to the Government because of its close association with cash economy industries, which are characterised by abuses of Australia's tax, employment and welfare laws.⁴¹⁹

This represented the start of employers' formal legal obligations in migration control. The *Migration Act* makes it an offence to allow an unlawful non-citizen, or a non-citizen holding a

⁴¹⁷ Angus Francis, "Removing barriers to protection at the exported border: Visas, carrier sanctions and international obligation," in *Sanctions, accountability and governance in a globalised world*, ed. Jeremy Matam Farrall and Kim Rubenstein, *Connecting International Law with Public Law* (Cambridge, England: Cambridge University Press, 2009), 92-93.

⁴¹⁸ The Immigration Department advised the Australian National Audit Office that it believes about half of the illegal migrant population in Australia work illegally. See Auditor-General, "ANAO Onshore Compliance Audit (2004)," 49. The figure of 50,000 is an approximate round figure for the changing estimates of the illegal population. See the report just referenced at 27, 38-41 for an overview on the methodology of developing an estimate.

⁴¹⁹ "Explanatory Memorandum, *Migration Amendment (Employer Sanctions) Bill 2006 (Cth)*," (Canberra), 1.

visa, to work in breach of restrictions on that non-citizen's right to work.⁴²⁰ This offence is made out when the employer knows or is reckless as to whether the worker is an unlawful non-citizen, or as to whether the non-citizen holds a visa with work restrictions that are being breached.⁴²¹ Employers face a maximum period of two years imprisonment for employing an unlawful non-citizen or a non-citizen in breach of visa work restrictions, or five years if the worker is being exploited.⁴²²

Prior to the introduction of these laws, the *Migration Act* did not provide specific legislative responsibilities or sanctions for employers found to employ illegal labour. It was only non-citizens who could commit the criminal offence of working without immigration authorisation.⁴²³ Since the introduction of employer sanctions the scheme remains largely self regulatory. The Immigration Department conducts *Employer Awareness Campaigns* to promote compliance with these laws and issues *Illegal Worker Warning Notices* to non-compliant employers. Until now no employers have been successfully prosecuted under these provisions. Many of the pre-sanction difficulties in prosecuting employers remain relevant, such as, obtaining witnesses for the prosecution, insufficient evidence of intention by the employer that they intended to aid and abet the illegal worker to commit the offence (for the knowledge arm of the offence), and the chain of evidence needed for prosecution.⁴²⁴ The Government has always prioritised the removal of illegal workers from Australia above prosecution of individual migrants for the criminal offence of working without immigration authorisation. It appears that the removal of illegal workers and discouraging the hire of illegal workers through the sanction scheme and Immigration Department education of employers remains the main strategy in policing illegal work.

The *Migration Act* 1958 (Cth) does not specifically require employers to request evidence of immigration status and work permission. However the effect of making it an offence to recklessly allow or refer a person to work in practice encourages prudent employers to request proof of the immigration status of every worker, regardless of citizenship. The

⁴²⁰ *Migration Act* 1958 (Cth) ss 245AB, 245AC

⁴²¹ *Migration Act* 1958 (Cth) ss 245AB, 245AC

⁴²² *Migration Act* 1958 (Cth) s 245AC sets out the offence in regards to employment in breach of visa work restrictions. Note that knowledge or recklessness as to whether a worker is being exploited makes the offence aggravated.

⁴²³ *Migration Act* 1958 (Cth) s 245AB sets out the offence in regards to unlawful non-citizens.

⁴²⁴ See: "Explanatory Memorandum, *Migration Amendment (Employer Sanctions) Bill* 2006 (Cth)," para 7.18.

Immigration Department advises employers that universal work entitlement checks are the “easiest way to avoid discrimination”.⁴²⁵ Employers had expressed concern that asking for such proof might ground racial discrimination claims.⁴²⁶ Further, legal advice sought by the Immigration Department advised that not checking work entitlement might amount to the reckless form of this offence. It would depend on factors such as whether the industry was one where a large number of illegal workers are located, whether the Immigration Department had highlighted the risks in those industries via the *Employer Awareness Campaign* or provided other information about the risks (such as being issued an *Illegal Worker Warning Notice* or guidance on how to check work rights). Other key considerations include whether or not the illegal worker said anything at their job interview that could have alerted the employer to the potential illegal work status of the job applicant, such as mentioning that they were visiting Australia from overseas.⁴²⁷ All employers face these requirements regardless of whether they are large public entities, such as state or territory governments, or the smallest corner shop. The power that employers hold over illegal workers and migrants is over the potential to survive in Australia despite illegal status or restricted work conditions, and thus is a power integral to autonomy over an individual’s life.

Education providers as migration police

Educational institutions providing education services to overseas students have a more active policing role than employers.⁴²⁸ Educational institutions are required to monitor student compliance with visa conditions, which require students to maintain satisfactory attendance and course progress.⁴²⁹ Should a student visa holder breach these conditions, the education

⁴²⁵ Department of Immigration and Citizenship, “Do your employees have a valid visa to work in Australia?,” 5. Note also that for those that refuse to provide evidence and to cooperate with the employers such as *Visa Entitlement Verification Online* (VEVO), the Immigration Department recommends not employing until verification is complete: *ibid.*, 9.

⁴²⁶ Compliance Strategy Section, “Review of Illegal Workers 1999,” 43.

⁴²⁷ The Senate Legal and Constitutional Legislation Committee, “Migration Amendment (Employer Sanctions) Bill 2006,” 15.

⁴²⁸ The education sector for overseas students includes universities and private higher education providers, vocational education and training (VET) providers, English language intensive courses (ELICOS), and secondary school programs: The Senate Education Employment and Workplace Relations References Committee, “Welfare of International Students,” (Canberra: Commonwealth of Australia, 2009), 9.

⁴²⁹ Education provider’s responsibilities in managing student compliance with these conditions are set out in the Australian Education International, “National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007 (the National Code 2007).” Educational institutions are required to monitor and report on student attendance (National Code Standard 11) and satisfactory course progress (National Code Standard 10) to the Immigration Department. The legislative framework is set out in the *Education Services for Overseas Students (Registration Charges) Act 1997 (Cth)*, (“the ESOS Registration Charges Act”). Although the *ESOS Registration Charges Act* and

provider is charged with issuing a notification to the student to report to the Immigration Department within 28 days. If students do not report within this timeframe, their student visa is automatically cancelled, and the student becomes an illegal migrant.⁴³⁰ The introduction of automatic cancellation in 2000 institutes a substantial discretionary power in education providers' relationships with students. This power is instituted from the fact that whether a student will become illegal rests primarily on educational institutions' effectiveness and accuracy in monitoring and reporting student attendance and course progress.⁴³¹ Both education providers' direct financial interest in student enrolment as consumers of Australian education, and employers' financial interest in benefiting from the flexible source of illegal labour, sit in tension with their migration policing responsibilities. In this context, legislative civil actor responsibility for policing critical arenas of social citizenship functions to coercively align the activities of civil actors with governmental objectives. In doing so, it also addresses the challenge posed by illegal migrants' ability to "disappear" into the community. It remedies this by extending monitoring illegal migrants into their everyday lives,⁴³² and thus contributes to maintaining access to potential problem populations of illegal migrants.⁴³³ It is not, however, solely explicit legislative powers that develop the asymmetric relationship of power between migrants and employers and educational institutions. Changes in migration visa policy and in the Australian economy over the last thirty years record an increasingly significant role for employers and educational institutions. These changes further institutionalise a relationship of power between migrants and employers, that with recent visa policy reform appears set to expand further.

the National Code are administered by the Department of Education, Employment and Workplace Relations (DEEWR), the Immigration Department is responsible for regulating the student visa program. For a plain English guide to these responsibilities see: Department of Immigration and Citizenship, "Education providers' roles and responsibilities," Commonwealth of Australia, www.immi.gov.au/business-services/education-providers/roles_responsibilities.htm.

⁴³⁰ *Migration Act 1958* (Cth) s 137J

⁴³¹ Kay Patterson (Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs), "Media Release: Senate Passes Measures to Promote Integrity of Student Visa Program," Media Release (Canberra: Commonwealth of Australia, 6 December 2000).

⁴³² As discussed in chapter 1 the Immigration Department acknowledges it relies on third parties with a direct monitoring interest such as employers, and educational institutions, to maintain an understanding of non-citizens' visa compliance. See Auditor-General, "ANAO Onshore Compliance Audit (2004)," 44-45.

⁴³³ DeLint argues that maintaining access to problem populations is an essential characteristic of policing, though it generally appears as a secondary objective alongside more immediate rationales. See Willem De Lint, "Keeping Open Windows: police as access brokers," *British Journal of Criminology* 43(2003).

B Visa policy as policing: embedding employers' power over entry and stay in Australia

The significance of the policing role of employers and educational institutions requires a broader examination of migration visa policy itself. By exploring the policy shifts that emphasise the increasing role of employers and education providers, I examine the trends evident from visa policy on the management of labour migration. An analysis of the impact of visa policy on the Australian labour market must involve more than analysis of changes to the skilled migration visa stream. It must encompass the labour market impact of family migration, temporary visitors, and student migration, all of which have had a demonstrable impact on labour market needs and planning. I examine three key interconnected shifts in managing labour migration that are also connected to changes in the Australian economy; the growing temporary migration trend, the movement towards a demand driven skilled migration program, and the shift in planning for Australia's future skilled needs from a pathway approach to a global labour pool. These shifts draw out employers' and educational institutions' embedded power over migrants in visa criteria and policy that, I argue, constructs these civil actors as policing agents in a policing relationship. This is evident from visa policy's function as a migration policing strategy to prevent illegal migration. It removes incentives for onshore visa applications. By instituting an ongoing policing relationship between employers and migrants through employer sponsorship, it also ensures a closer policing relationship after arrival in Australia than would have been the case as between the Immigration Department and migrants. Further these shifts give employers increasing power to determine entry for labour migration. Increasing the role of employers in determining entry institutionalises their power over migrants. In developing such a definitive role in migration control, whether employers view migration laws and policing as legitimate becomes even more crucial to the functioning of these laws and policing practices to control illegal migration.

Economic change and a shift from permanent to temporary migration

Economic restructuring in Australia since the 1980s has implemented economic rationalist policies and deregulated the labour market, shifting labour market emphasis away from primary industries and manufacturing.⁴³⁴ This reflected economic restructuring in other

⁴³⁴ Peter Marks, "The permanent shift to temporary migration," *Inside Story* (17 June 2019).

⁴³⁴ Jock Collins, "Globalisation, Deregulation and the Changing Australian Labour Market," in *Migrants in the New Economy – Problems, Perspectives and Policy*, ed. Santina Bertone and Helen Casey (Melbourne: Workplace Studies Centre, Victoria University: , 2000); Christine Inglis and Suzanne Model, "Diversity and Mobility in Australia," in *Proceedings of the British Academy 137: Unequal Chance –*

western countries at this time as a series of changes shifted the character of capitalism in the global north after the mid 1970s. Consequently, the demand for low skilled, low paid labour in the manufacturing industry diminished.⁴³⁵ In turn, this is said to have made the international division of labour, and thus migrant labour, more profitable to capital than what had been a racialised internal division of labour.⁴³⁶ That is, it became more profitable for industry to obtain labour outside developed western countries than from within. In some countries this economic restructuring has been proffered as explanation for flourishing informal economies staffed by illegal migrants. Illegal migrants provide a source of labour that is easily fired and hired in fluctuation with need, involves lower costs of social reproduction,⁴³⁷ as well as the convenience of location of industry within Europe and the global north without the conditions and wages otherwise attached to that location.⁴³⁸

Alongside a shift from permanent to temporary migration in Australia, the changing industry demand for labour was, at least statistically, met less by illegal migrant labour and more by temporary migrants.⁴³⁹ In part this is evidenced in visa policy reform which favoured skilled migration as a mix of permanent and temporary migration from the 1990s, and reduced the proportion of permanent family migration.⁴⁴⁰ Under this visa policy the supply of unskilled and semi-skilled labour which had been fed by entry under the family migration stream reduced, and this labour need was consequently met by temporary migrants. By the end of the 1990s, more permanently residing migrants had entered initially on temporary visas than on permanent visas.⁴⁴¹ By 2009 this was described as a "permanent shift to temporary migration."⁴⁴²

Temporary migration involves people entering Australia for short periods of time. A proportional increase in temporary migration means increased risk of persons overstaying

Ethnic Minorities in Western Labour Markets, ed. Anthony F. Heath, Sin Yi Cheung, and With Shawna N Smith (Oxford: Oxford University Press for the British Academy, 2007), 50.

⁴³⁵ Michael Samers, "Invisible Capitalism: Political Economy and the Regulation of Undocumented Immigration in France," *Economy and Society* 32, no. 4 (2003): 557.

⁴³⁶ Ibid.

⁴³⁷ Kitty Calavita, "A 'Reserve Army of Delinquents': The Criminalization and Economic Punishment of Immigrants in Spain," *Punishment & Society* 5, no. 4 (2003). Samers, "Invisible Capitalism: Political Economy and the Regulation of Undocumented Immigration in France," 556.

⁴³⁸ ———, "Invisible Capitalism: Political Economy and the Regulation of Undocumented Immigration in France," 557-58.

⁴³⁹ Peter Mares, "The permanent shift to temporary migration," *Inside Story* (17 June 2009), www.inside.org.au/the-permanent-shift-to-temporary-migration/.

⁴⁴⁰ S Castles et al., "Australia and Immigration: a partnership: a review of research and issues," (Canberra: Housing and Urban Development Council, 1997).

⁴⁴¹ Inglis and Model, "Diversity and Mobility in Australia."

⁴⁴² Mares, "The permanent shift to temporary migration".

their visa periods and working illegally. The control challenge in temporary migration is met in part by civil involvement in migration policing within Australia. Employers must risk breaking the law to enable illegal migrants to stay in Australia after their visas expire. Thus employers' perceptions of the legitimacy of migration laws and policing are critical to managing the risks of increased entry on temporary visas.

A second control challenge posed by temporary migration concerns visa grant decisions. Visa grant decisions need to take into account the risk of individuals remaining in Australia after their visa expires, but complying with their visa conditions. In labour migration, I argue that this challenge has been met by shifting the model for labour migration from one that is driven by the supply of migrants and the skills they offer, to a model driven by industry demand for particular skills. That employer sponsored visas become more important, as a proportion of overall visa grants, manages the risk that migrants entering on a certain visa grant will work outside the skill type identified as a labour market need that formed the basis of their visa grant in the first place. In this way migration as a strategy to address labour market needs is more closely controlled. Employer sponsored migration also manages the risk that temporary entrants will "disappear" into the community at the end of their visa because of the relationship it develops between employers and migrants. This relationship involves closer contact between the employer and the migrant as the relationship involves all aspects of employment including pay, taxation and so on, and the potential for future sponsorship.

Labour migration policy: a shift from supply to demand

Australia's migration intake is divided across three main visa program areas – family, humanitarian and skilled migration. The emphasis on each stream fluctuates according to the priorities of the time. From the mid 1990s skilled migration has been an increasingly important focus, and now forms the largest group of permanent migrants.⁴⁴³ Temporary skilled migration was at least five times the number of the permanent skilled migration intake in 2007-08.⁴⁴⁴

The official change from a supply to a demand driven skilled migration program was announced with a series of reforms in February 2010, though in practice it started earlier. Then Immigration Minister, Chris Evans, described the existing system as one which "served everyone in order, just like pulling a ticket number from the dispenser at the supermarket deli

⁴⁴³ Australian Bureau of Statistics, "Perspectives on Migrants 2009 (3416.0)." The Australian Bureau of Statistics states that in 2007-08, 108,540 permanent skilled visas were granted. This represented two skilled visa grants for every family visa granted.

⁴⁴⁴ Ibid. The number of temporary skilled visas included 418,000 business visitor visas and 110,570 employer sponsored *Business (Long Stay) Visas Subclass 457*.

counter"⁴⁴⁵. In contrast, the new approach seeks to "marry demand with supply".⁴⁴⁶ The new approach sees employer sponsored migration (whether by private employers or state, territory or commonwealth governments) as one way to identify the demands of intersecting labour markets that cannot be separated by either local, state, national industry and/or occupational boundaries.⁴⁴⁷ The reforms include setting a maximum number of visas available for applicants in any one occupation ("occupation ceiling"); an adjusted points test (to commence on 1 July 2011),⁴⁴⁸ a new *Skilled Occupation List* (which commenced on 1 July 2010),⁴⁴⁹ and a new skilled migrant selection model to commence on 1 July 2012 ("the model").⁴⁵⁰ Together, they bring about the most significant change in skilled migration for twenty years. In early 2009, prior to the announcement of these reforms, transition to a demand driven approach commenced by prioritising the processing of skilled migration applications in favour of sponsored arrangements.⁴⁵¹ "Priority processing" means that applications are not determined in order of when they are lodged, but in prioritised categories. Applications sponsored by an employer are processed first, then those sponsored by a state or territory government, followed by those who have nominated an occupation on the *Skilled Occupation List*,⁴⁵² and then the remaining applicants.

Under the new skilled migrant selection model, applicants who do not already have employer sponsorship do not commence with a visa application, but by lodging an electronic expression of interest.⁴⁵³ Employers or state and territory governments can access expressions of interest

⁴⁴⁵ Chris Evans (Minister for Immigration), "Changes to Australia's skilled migration program," (Australian National University 8 February 2010).

⁴⁴⁶ Ibid.

⁴⁴⁷ Ibid.

⁴⁴⁸ Department of Immigration and Citizenship, "Introduction of New Points Test (Fact Sheet)," (November 2010), www.immi.gov.au/skilled/general-skilled-migration/pdf/points-fact.pdf.

⁴⁴⁹ See ———, "Skilled Occupation List (SOL) - Schedule 3 (including DIAC-endorsed ASCO – ANZSCO correlations as at 1 July 2010)," (5 December 2010), http://www.immi.gov.au/skilled/_pdf/sol-schedule3.pdf. Note also, different *Skilled Occupation Lists* apply, depending on the time and type of visa application, see www.immi.gov.au/skilled/sol/. Also note that ASCO is an abbreviation for Australian Standard Classification of Occupations, and ANZSCO for Australian and New Zealand Standard Classification of Occupations.

⁴⁵⁰ ———, "Proposed Skilled Migrant Selection Model (the Model), Professionals and other Skilled Migrants," *Department of Immigration and Citizenship Website* 2011, no. 15 May 2011 (11 May 2011), www.immi.gov.au/skilled/general-skilled-migration/skilled-migrant-selection-model.htm.

⁴⁵¹ ———, "Priority processing arrangements for General Skilled Migration – Frequently Asked Questions," (19 July 2010), www.immi.gov.au/skilled/general-skilled-migration/pdf/gsm-priority-processing-faqs.pdf.

⁴⁵² ———, "Skilled Occupation List (SOL) - Schedule 3 (including DIAC-endorsed ASCO – ANZSCO correlations as at 1 July 2010)".

⁴⁵³ ———, "Frequently Asked Questions – Proposed Skilled Migrant Selection Model (the Model)," (May 2011), www.immi.gov.au/skilled/general-skilled-migration/pdf/model-faq.pdf.

via the "skills matching database" to nominate persons for permanent visas.⁴⁵⁴ Independent skilled migrant entry faces more requirements and restrictions. Persons expressing interest will be invited to make a visa application if they have the skills and qualifications needed in the Australian labour market at that time.⁴⁵⁵ Both independent and employer sponsored streams are included in the overall number of places available in permanent skilled migration. As employer sponsorship increases, independent skilled entry will reduce as the model in effect prioritises sponsored skilled migration.⁴⁵⁶ In 2007-08 sponsored grants amounted to 29 per cent of the permanent program, which increased to 56 per cent in 2009-10.⁴⁵⁷ It is anticipated that these trends will continue. Short term labour need is proposed to be met by temporary visas such as the *Business (Long Stay) Subclass 457 Visa* which has provided entry for an increasingly significant proportion of the temporary skilled market. Longer term planning for the Australian labour market involves planning for the Australian education sector to train workers for these positions, which I will return to shortly.

At the time it was announced Immigration Minister Senator Chris Evans explained that the overall effect of the skilled migration reforms develop the Immigration Department as the "job matching agency for the nation, connecting employers to the global labour market where skills cannot be sourced locally."⁴⁵⁸ As well as increasing the role of employers in determining migrant intake by identifying labour demand, the new model means migrants make more investment in pursuing visas with less certainty of outcome.⁴⁵⁹ The new model encourages offshore application in a number of ways and thus embeds prevention of onshore illegal migration. The growing emphasis on employer sponsorship encourages migrants to "job match" prior to entry. An expression of interest is not a visa application. Thus, submitting an expression of interest does not make one eligible for a bridging visa to maintain legal immigration status onshore while awaiting visa determination. Those submitting expressions of interest must either have another valid visa while remaining in Australia to be invited to the

⁴⁵⁴ Expressions of interest by persons who have expressed interest in independent or family sponsored migration (and thus not via any employer sponsorship arrangements) are not accessible on the skills matching database (ibid.)

⁴⁵⁵ Ibid.

⁴⁵⁶ Peter Mares, "From queue to pool: skilled migration gets a makeover," *Inside Story* (10 February 2010), www.inside.org.au/skilled-migration-gets-a-makeover/.

⁴⁵⁷ The figure of 56 per cent is based on 38 per cent employer sponsored and 18 per cent state and territory sponsored visas within the skilled migration intake: Department of Immigration and Citizenship, "Annual Report 2009-10," 53-54.

⁴⁵⁸ Evans, "Changes to Australia's skilled migration program."

⁴⁵⁹ Mark Webster, "New Selection Model for General Skilled Migration," (11 May 2011), www.acacia-au.com/selection_model_for_general_skilled_migration.php.

visa application stage, or remain outside of Australia.⁴⁶⁰ Further, potential migrants must complete skills assessment and English testing prior to lodging an online expression of interest. This involves considerable expense, and is a disincentive to visa application onshore for the purpose of obtaining the benefits of legal immigration status with temporary work permission on a bridging visa while awaiting a decision.

It is important to note that even those applying within Australia in effect remain "offshore" in the sense that they form part of a global pool of potential labour. The shift towards a more demand driven program did not begin with these reforms, despite its presentation by government as such. The change has been more gradual. Visa subclasses themselves have increasingly incorporated sponsorship elements, not restricted to the Immigration Department categories of employer sponsored visas, or those categories that come within the new skilled migrant selection model (skilled independent, skilled sponsored and skilled regional sponsored visas). For example, temporary visas for domestic workers in the exclusive employ of an eligible diplomat or consular officer,⁴⁶¹ religious workers,⁴⁶² visiting academics,⁴⁶³ seasonal workers from specific Pacific nations,⁴⁶⁴ various types of permanent business owner or investor visas⁴⁶⁵ all require types of employer sponsorship (either by businesses or by state or territory government authorities), although they fall outside the Immigration Department category of the employer sponsored migration stream. This illuminates how migration policing visa policy is increasingly within the power of employers, industry, and the market more broadly, than those visas formally falling within the new skilled migrant selection model.

Planning for the future of Australia's labour market: from pathway to pool

The third interconnected shift that gives employers increased power to determine entry involves the shift in the place of the student visa program as a tool that manages Australia's future labour market. The politically conservative Howard Liberal government first started

⁴⁶⁰ Department of Immigration and Citizenship, "Frequently Asked Questions – Proposed Skilled Migrant Selection Model (the Model)".

⁴⁶¹ *Migration Regulations* 1994 (Cth) Schedule 2 Visa Subclass 426, Domestic Worker (Diplomatic/Consular) Visa. This visa allows the temporary stay of domestic workers who intend to be employed full time and exclusively in the household of a Diplomatic visa (subclass 995) holder who is an accredited diplomat or consular officer in Australia.

⁴⁶² *Migration Regulations* 1994 (Cth) Schedule 2 Visa Subclass 428, Religious Worker Visa.

⁴⁶³ *Migration Regulations* 1994 (Cth) Schedule 2 Visa Subclass 419 Visiting Academic Visa.

⁴⁶⁴ *Migration Regulations* 1994 (Cth) Schedule 2 Visa Subclass 416, Special Program Visa.

⁴⁶⁵ These include Regional Established Business in Australia (*Migration Regulations* 1994 (Cth) Schedule 2 Visa Subclass 846), State/Territory Sponsored Business Owner (Residence) (*Migration Regulations* 1994 (Cth) Schedule 2 Visa Subclass 892), State/Territory Sponsored Investor (Residence) (*Migration Regulations* 1994 (Cth) Schedule 2 Visa Subclass 893), which must be sponsored by a state/territory government authority.

making public announcements about overseas students as an immigration issue in 1997.⁴⁶⁶ Managing the intake of the student visa program was explicitly acknowledged by the Howard government as important to Australia's economic growth and strategic planning in meeting skills shortages and an ageing population. Education is Australia's third largest export, following coal and iron ore, and the largest services export industry.⁴⁶⁷ Australian higher education accounts for one tenth of the world market, and is third in preference for English speaking destinations after the United States and the United Kingdom.⁴⁶⁸ Over time, the value of overseas students to meeting Australia's long term skilled labour needs was seen as even more critical than their direct economic benefit as consumers of Australia's export education market, as stated by Koeth:

The evolution of immigration policy over the past 13 years fostered the development of a complex nexus between the overseas student program and the skilled migration program.⁴⁶⁹

From the late 1990s, Federal Government policy sought to retain overseas students with skills in demand. Law reform enabled students to apply for permanent residency onshore (previously this required application outside the migration zone),⁴⁷⁰ and allocated points for Australian qualifications⁴⁷¹ and English language assessment. The introduction of the *Skilled Occupation List (SOL)* and *Migration Occupations in Demand List (MODL)* was intended to manage skilled migration by attributing points to occupations,⁴⁷² as well as to education and qualifications identified as needed in the labour market.⁴⁷³ These allocated points counted towards a total sum of points to determine general skilled migration (GSM) visa grants. However, the structure of skilled migration entry, and the MODL list in particular, fuelled perceptions of a migration pathway between qualifications for occupations on that list to permanent residency through skilled migration. The perception of this pathway (that

⁴⁶⁶ Elsa Koeth, "Overseas students: immigration policy changes 1997-May 2010," in *Background Note* (Canberra: Parliamentary Library, 2010), 1.

⁴⁶⁷ The Senate Education Employment and Workplace Relations References Committee, "Welfare of International Students," 8.

⁴⁶⁸ *Ibid.*, 10.

⁴⁶⁹ Koeth, "Overseas students: immigration policy changes," 4.

⁴⁷⁰ From July 2001, see *ibid.*, 8.

⁴⁷¹ This was implemented from August 1998, see *ibid.*, 7, 2nd dot point.

⁴⁷² The *Migration Occupations in Demand List (MODL)* was introduced in March 1999, and occupations on that list were given extra points in the new selection test from May 1999. See *Migration Regulations 1994 (Cth) Regulation 1.03*. Also see *ibid.*, 7, 19.

⁴⁷³ From 1 September 2004, migrants must have an occupation on the *Skilled Occupations List (SOL)*. *Ibid.*, 27.

"Skilled occupation" is defined at *Migration Regulations 1994 (Cth) Regulation 1.03* and 1.151. The *Skilled Occupation List* is subject to change by Gazette Notice.

government later denied was intentional) contributed to skewing overseas student interest in Australian education to particular occupations in light of expected permanent residency outcomes.⁴⁷⁴ Perception of a migration pathway similarly skewed the growth of the international education sector, to overwhelmingly favour training towards a few occupations.⁴⁷⁵ Overseas student enrolment in higher education grew from 21,000 in 1989 to over 250,000 in 2007.⁴⁷⁶ The strongest growth in enrolments was in the Vocational Education and Training (VET) sector. Enrolments in the VET sector tripled from 2007, which has been explained largely as a function of vocations added to the MODL.⁴⁷⁷ Ultimately, the structure of the points-based skilled migration visa grant scheme and the disproportionate trend in education provision towards particular MODL listed vocations frustrated the ability of the student visa program to meet Australia's future skilled labour needs.⁴⁷⁸ With low level qualifications for hairdressing listed on the MODL since 2001 and cooking added in 2005, there was an "explosion in hairdressing and cookery".⁴⁷⁹ Enrolments in cooking and hairdressing courses almost tripled between 2004 and 2006.⁴⁸⁰ There are a number of traditional trades on the MODL list such as in the metal, electrical and construction industries. However, cooking and hairdressing were particularly popular as these trades represented the "cheapest and most accessible training opportunity leading to the trade qualifications needed for immigration purposes."⁴⁸¹ Both encouraged by and encouraging student enrolments in these vocations, the international education industry (or new elements of it) saw low level qualifications additions to the MODL as an impetus to set up as bodies registered to deliver education and training to overseas students.⁴⁸²

⁴⁷⁴ In mid 2009 the Australian government denied there was an automatic link between study in Australia and permanent residency, and that the structure of the student visa and skilled migration visa programs were intended to provide a migration pathway from student visa to permanent resident. Instead it asserted that this perception was the result of students being misled by education agents. See Guy Healy, "Immigration link in doubt" *The Australian* 29 July 2009.

⁴⁷⁵ The Senate Education Employment and Workplace Relations References Committee, "Welfare of International Students," 18.

⁴⁷⁶ *Ibid.*, 10.

⁴⁷⁷ *Ibid.*, 13.

⁴⁷⁸ Healy, "Immigration link in doubt".

⁴⁷⁹ Michelle Bissett (Senior Industrial Officer, Australian Council of Trade Unions) Committee Hansard 18 September 2009 p3 cited by The Senate Education Employment and Workplace Relations References Committee, "Welfare of International Students," 19.

⁴⁸⁰ Robert Birrell, Ernest Healy, and Bob Kinnaird, "Cooks Galore and Hairdressers Aplenty," *People and Place* 15, no. 1 (2007).

⁴⁸¹ *Ibid.*, 33.

⁴⁸² This involved setting up as a Registered Training Organisation (RTO). Any education provider must be registered on the *Commonwealth Register of Institutions and Courses for Overseas Students* to provide

The long term impact of the results of this confluence of factors is evident in skilled migration visa applications and grants. At 31 March 2010, more than a quarter of the applicants for skilled migration (38,900) were former international students who studied in Australian educational institutions.⁴⁸³ Although there are 400 occupations that can ground a skilled migration visa, in 2007-08 over 12 per cent of grants went to cooks and hairdressers, that is, over 5000 of the total of 41,000 skilled migration visa grants.⁴⁸⁴ Further, a 2006 survey of new permanent residents found that only half of those who had entered on the basis of the MODL were employed in that occupation, and a third were unemployed or in an unskilled job.⁴⁸⁵ These factors hindered the realisation of the policy goals of skilled migration.

Government evaluation of this experience led to the reforms to skilled migration I have just discussed. The MODL was removed as part of determining points for skilled migration in 2010 because as a migration management tool it was backward looking rather than forward planning.⁴⁸⁶ Its removal largely severs the link between student visas and permanent residency for vocational education, but less so for professional university qualifications which still have a role in SOL.⁴⁸⁷ Likewise, occupation ceilings have been introduced to obtain the proportion of desired occupations required within skilled migration. Thus students now have no certainty that their studies in Australia will lead to permanent residency.⁴⁸⁸ As mentioned earlier,

education to overseas students pursuant to the *Education Services for Overseas Students Act 2000* (Cth) ("ESOS Act") s 8. The enforcement provisions setting out suspension and cancellation of registration, and penalties for failing to maintain records or follow notification requirements and so on are set out in the ESOS Act at Part 6 Division 3, that is, ss 83-110. The regulatory framework commenced in 2001. See the evidence given to the Senate Committee: The Senate Education Employment and Workplace Relations References Committee, "Welfare of International Students," 18-20.

⁴⁸³ Peter Mares, "Capping and culling the migration queue," *Inside Story* (3 June 2010), www.inside.org.au/capping-and-culling-the-migration-queue.

⁴⁸⁴ Laurie Ferguson, MP, "Migration Amendment (Visa Capping) Bill 2010 Second Reading Speech House of Representatives," (Hansard, 26 May 2010).

⁴⁸⁵ Evans, "Changes to Australia's skilled migration program."

⁴⁸⁶ *Ibid.* See also Ferguson, "Migration Amendment (Visa Capping) Bill 2010 Second Reading Speech House of Representatives." The *Migration Occupations in Demand List* was revoked on 8 February 2010: Chris Evans (Minister for Immigration and Citizenship), "Media Release: Migration reforms to deliver Australia's skills needs," (Canberra 8 February 2010).

⁴⁸⁷ Potential applicants seeking to nominate skilled occupations which are acceptable for permanent and temporary skilled migration to Australia under the General Skilled Migration program and the Employer Nominated Scheme must have skills and qualifications for an occupation listed on Australia's *Skilled Occupation List* (SOL). See Department of Immigration and Citizenship, "Skilled Occupation List (SOL) - Schedule 3 (including DIAC-endorsed ASCO - ANZSCO correlations as at 1 July 2010)". Note that other SOLs are in use for SM applicants who are nominated by a State or Territory government agency under a State Migration Plan, and as transitional arrangements depending on the time of visa application lodgement. See www.immi.gov.au/skilled/sol

⁴⁸⁸ Incidentally, with these changes, many students find themselves stuck in the queue. Having lodged their application for permanent residency on the old MODL they will still be processed. However, they are now in the bottom category (category four) of priority processing of skilled migration application instituted in 2009. This category will only be addressed once the higher priority categories are finalised.

students, like others expressing interest in skilled migration, become part of a global migrant labour pool, without prior notice of skills that are certain to ground permanent residency. Study in Australia no longer ensures priority in permanent residency.

Visa policy as policing

Overall these three trends in visa policy embed the relationship of power between employers (including governments in Australia) and migrants that I argue shows its character as policing. This relationship of power is constructed by trends in labour migration that make employer sponsorship increasingly important both as a proportion of overall labour migration visa grants, and as a factor that gives visa applications priority over independent skilled migrant applications. These trends are set to become more pronounced. Employer sponsorship as a visa requirement gives employers broad discretionary power over migration intake by entrusting employers' determination of what labour skills and occupations are in demand. In contrast, independent skilled migration determines skills in demand in accordance with the Immigration Department issued *Skilled Occupations List*. In effect, employer sponsorship of visa requirements institutionalises employers' authority in defining labour market demand over and above identification of skills in demand by the nation-state. In other words, migration controls' authority in labour migration is endorsed other than by the nation-state, specifically by employers' assessments, which are a function of the global economy and labour market.

There is a second sense in which the increasing power of employers over visa determination is evident from the trends in visa policy discussed. In particular the shift to demand driven labour migration encourages those interested in working in Australia to apply while remaining outside Australia. Those who do apply from within Australia are treated as though they are "offshore", in that they are constructed as part of a global pool of labour migrants, with no gain in terms of visa grant from being present onshore. The incentives of applying onshore, being temporary permission to work on a bridging visa, must be assessed against the competing costs under the new skilled migrant selection model. In this sense, visa policy takes on a preventative policing quality by discouraging visa application onshore, and thus managing the risk of failed skilled migration applicants remaining in Australia after visa refusal.

But as new applications in higher priority categories continue to be lodged, there are fears that these students may never be processed despite the Immigration Department's statements that these category four applicants will be processed in the year from March 2011. See Mares, "From queue to pool: skilled migration gets a makeover". ———, "Lives on Hold," *Inside Story* (2 May 2011), www.inside.org.au/lives-on-hold/.

As mentioned earlier, I argue that the increasing importance of employers in migration control makes their perception of the legitimacy of migration controls critical, which in turn identifies employers' function as policing agents. The increasing importance of employers in determining migration intake produces the sense that migration control is *for* employers and industry. Whereas the sanctions employers face for hire of illegal migrants coerce employers' alignment with state objectives in prevention of illegal migration, visa policy might also be seen as encouraging the consent of industry for migration controls. I now turn to exploration of conceptual approaches to civil involvement in state policing, and two examples that show the importance government attaches to civil actors' perceptions of the legitimacy of migration controls.

C Employers as migration police: instruments of government or "responsible citizens"?

The Immigration Department presents the relationship it has with employers and educational institutions as a partnership. Information for these bodies appears under the "Business Services" section of the Immigration Department website, together with information for migration agents, and doctors working for the Department who provide medical checks for visa applicants.⁴⁸⁹ Mazerolle and Ransley's text on *Third Party Policing* argues that civil involvement in the form of partnership is instrumental to an ultimate shared policing goal or ultimate target (such as the illegal migrant).⁴⁹⁰ They see legal sanctions on civil parties as a "legal lever" by police to encourage alignment of civil actor activities with police crime prevention or reduction goals.⁴⁹¹ Mazerolle and Ransley's argument assumes it is solely state based policing and state policing intentions that shape policing practice. It does not capture the dynamic interaction between civil actors and policing bodies that shapes the *formation* of policing authority, that is, migration visa policy, or the constant contestation between these bodies. The role of civil involvement in policing has also been described as a practice of "citizenship", not merely instrumental to government objectives. Les Johnston's influential 1992 book *The Rebirth of Private Police* is one of the few texts that explores state sanctioned civil involvement

⁴⁸⁹ Les Johnston, *The Rebirth of Private Policing* (London, New York: Routledge, 1992).

⁴⁸⁹ Department of Immigration and Citizenship, "Department of Immigration and Citizenship: Business Services," Commonwealth of Australia, www.immi.gov.au/business-services/.

⁴⁹⁰ Lorraine Green Mazerolle and Janet Ransley, *Third Party Policing* (Cambridge: Cambridge University Press, 2005), 171-92.

⁴⁹¹ *Ibid.*

in policing as a form of citizenship, though it is not fully developed.⁴⁹² Johnston refers to this as an “active” or “responsible citizenship”.⁴⁹³ Johnston did not mean citizenship as the individual legal description of membership, but rather the normative values of citizenship as a discourse of social responsibility, the effect of which works at challenging the public and private divide.⁴⁹⁴ Civil actors such as business and the media can act as “corporate citizens” in a very pragmatic sense by working with police to shape public agendas by publicising particular crimes and so on.⁴⁹⁵ In the example I turn to now, however, the act of “responsible citizenship” illuminates the deterioration of the public and private divide in policing. This is evident less in the notion of a shared responsibility for apparent social problems, and more in the comparative dominance of voices in law making.

The earlier discussion of policy trends asserted that the increasing role of employers in visa determination makes their perception of the legitimacy of migration law and policing more important to government. Two examples bear this out. The first example I look at considers the relationship between government and industry as seen through their competing views on the use of illegal migrant labour in the horticultural industry. Recalling Brogden’s argument that policing operates to unify social consensus,⁴⁹⁶ this study shows how government addresses industry dissent to prohibition on employment of illegal labour. In doing so, the example illustrates government viewpoints on the importance of industry support for migration laws. The second example examines the relationship between government and educational institutions. I argue that the construction of some education providers as deviant represents the government’s attempt to stabilise the authority of migration laws at a time when the economic incentives to breach migration laws held strong allure. These examples confirm that government sees civil actors with migration policing responsibilities as the audience for whom migration policing must be perceived as legitimate. I argue that the reason it is so important that employers’ and educational institutions’ support for migration controls is obtained is because of these civil actors’ identity as policing agents. That is, it confirms their role in the policing relationship, and thus confirms the operation of migration control in this context as policing.

⁴⁹² Les Johnston, *The Rebirth of Private Policing* (London; New York: Routledge, 1992).

⁴⁹³ *Ibid.*, 17 February 2004.

⁴⁹⁴ *Ibid.*, 138-40.

⁴⁹⁵ Johnston used the example Crimestoppers which involved a partnership between the media, business community, police and public. Police would select a target crime for publicity (sponsored by media and business) and invite community information.

⁴⁹⁶ This was discussed in chapter 2 at 91-93.

From rural raids in the horticultural industry to a pilot seasonal labour visa program

An alliance between illegal migrants and the conservative National Party would seem an unlikely prospect by anyone familiar with Australian politics. Yet the extent and vehemence of farmers' dissent to immigration raids on growers led in 2004 to National Party Riverina District Federal member, Kay Hull MP, calling for an amnesty on illegal workers.⁴⁹⁷ This call reflected arguments of the National Farmers' Federation, and others, that farmers ought to be able to employ illegal workers because of serious labour shortages.⁴⁹⁸ The need for seasonal labour by the rural industry and in particular the horticultural harvest industry had been advocated through the mid 1990s. In 1999 the government released its review of illegal workers and started giving more serious policy consideration to the possible introduction of employer sanctions and commenced an information campaign to encourage employers to conduct immigration status checks.⁴⁹⁹ It was at this time that rural industry dissent became more organised.

The rural industry challenged the Immigration Department's view on the seriousness of employing illegal migrants.⁵⁰⁰ The horticulture industry accounted for about half of all 43 submissions to the 1999 *Review of Illegal Workers*. It argued that in the context of overwhelming need for seasonal labour that a strict approach to locating illegal migrant workers was disproportionate, and not strongly supported. This resistance to immigration control of migrant work rights did not restrict itself to the political field. Some farmers were said to tip off workers when the Immigration Department were sighted in town so as to not

⁴⁹⁷ Note the Riverina District includes horticulture farms in Victoria. See Louise Yaxley, "Fed MP calls for amnesty for illegal workers" *AM*(2004), www.abc.net.au/am/content/2004/s1039291.htm.

⁴⁹⁸ See the Submission of the National Farmers' Federation (written by Richard Calver) Compliance Strategy Section, "Review of Illegal Workers 1999," 117. Other submissions by growers can also be found in the Review of Illegal Workers. More recently, see similar views of state and industry based farmers associations reported in the media: Katie Fisher and Sandra Godwin, "Fruit growers plead for illegal workers," *The Weekly Times* 2004. For reportage of the National Party's dissatisfaction with the Immigration Department on this issue, see: Sandra Godwin, "Pick Plea Desperate growers call on casual pickers not to desert them" *The Weekly Times*(2004). Michelle Grattan, "'Picking on' fruit pickers," *The Age*(2005), <http://fddp.theage.com.au/news/Immigration/Picking-on-fruit-pickers/2005/02/13/1108229854898.html>; Elizabeth Colman, "Anger over immigration raids," *The Australian*, 17 February 2005.)

⁴⁹⁹ Compliance Strategy Section, "Review of Illegal Workers 1999."; Minister for Immigration and Multicultural Affairs Philip Ruddock, "Media Release: Package to Help Employers Check Employees Work Rights Launched," (Canberra: Australian Government, 6 May 1999).

⁵⁰⁰ For example, the submission of the Northern Victoria Fruitgrowers' Association to the Compliance Strategy Section, "Review of Illegal Workers 1999."

lose their workforce.⁵⁰¹ A 2005 survey of 176 growers in the Murray Valley horticultural region, between Swan Hill and Mildura in north-west Victoria, reported that 28 per cent of growers responded that they employed illegal migrant workers "sometimes", "often" or "always".⁵⁰² Under-reporting and growers' lack of knowledge of the immigration status of employees suggest the true figure is higher.⁵⁰³ The survey's identification of a serious labour shortage in the Murray Valley region in Victoria informed its finding that labour needs will continue to be met by illegal workers.⁵⁰⁴ The survey took place prior to the 2007 introduction of sanctions on employers who hire illegal migrants, and no further studies have been conducted to estimate the extent to which this practice continues. Yet at least anecdotally it is regarded as an open secret that many farms rely on illegal labour.⁵⁰⁵

The rural industry challenged the authority of immigration laws against employing illegal workers on four main points. First, there was an acknowledged and documented need for seasonal labour, particularly intense in the horticultural industry.⁵⁰⁶ Growers have short term, high volume, seasonal labour needs. Without labour, the harvest cannot proceed and fruit remains on the trees and dies. This translated into a second and related challenge to the authority of immigration raids themselves. Many growers and farmers were dissatisfied with the conduct and style of immigration raids. Some farmers felt raids were timed to locate workers prior to harvest times, and that rumours of raids resulted in the loss of the workforce at critical times.⁵⁰⁷ The impact of immigration raids in 2004 and 2005 was felt particularly severely because of the rapid growth of labour intensive crops especially in north-west Victoria, which had led to reliance on illegal migrant workers.⁵⁰⁸ The Immigration Department

⁵⁰⁰ Woodard, "Labouring in the shadows: Illegal immigrants form the backbone of a much-needed workforce for many industries."

⁵⁰¹ See Amanda Woodard, "Labouring in the shadows: Illegal immigrants form the backbone of a much-needed workforce for many industries," *Sydney Morning Herald*, April 28 2005. Compliance Strategy Section, "Review of Illegal Workers 1999," 96, 101.

⁵⁰² Peter Mares, "Labour shortages in Murray Valley horticulture: A survey of growers' needs and attitudes," (Swinburne Pacific Labour and Australian Horticulture Project, 2006), 14.

⁵⁰³ *Ibid.* Note that many growers may not know the actual immigration status of employees as many employ through labour contractors who attend to the issue of permission to work. Illegal migrants may also present bogus documents to employers showing work entitlement.

⁵⁰⁴ *Ibid.*, 15.

⁵⁰⁵ John Stapleton, "Seasonal or illegal? Canberra, take your pick" *The Australian* (2008), www.theaustralian.com.au/news/executive-lifestyle/seasonal-or-illegal-canberra-take-your-pick/story-e6frga06-1111116770312.

⁵⁰⁶ See for example, National Harvest Trail Working Group, "Harvesting Australia: Report of the National Harvest Trail Working Group," (Canberra 2000); Mares, "Labour shortages in Murray Valley horticulture: A survey of growers' needs and attitudes."

⁵⁰⁷ See Submission of the Northern Victoria Fruitgrowers' Association Ltd to the Compliance Strategy Section, "Review of Illegal Workers 1999," 92-93.

⁵⁰⁸ Godwin, "Pick Plea Desperate growers call on casual pickers not to desert them".

located 150 illegal migrants in northern Victoria in February and March 2005⁵⁰⁹ at peak picking times which caused maximum disruption to business.⁵¹⁰ Targeting north-west Victoria, in the Mildura region, for raids is reported to have reduced the horticultural workforce by about 200 or so in 2004-05.⁵¹¹ These raids occurred following the two biggest years in a ten year period from 1996-97 for immigration compliance raids overall, which might have contributed to farmer dissatisfaction.⁵¹² The style of conduct of the raids in rural areas (as well as in other industries) also raised complaint by a farmer that when he asked to see the Immigration officers' warrant to search his property, one was written on the spot.⁵¹³

Third, the volume of work at harvest time, as well as the nature of the short term, casual character of employment made these industries feel that checking work rights was an unreasonable burden.⁵¹⁴ Farmers explained that: "Ripening fruit cannot wait to be picked, while recruitment processing takes place."⁵¹⁵ In addition, growers expressed concern that checking migration entitlements could lead to claims of privacy breaches or harassment,⁵¹⁶ and potentially damage their relations with employees.⁵¹⁷ Lastly, migrant labour, including that of illegal labour, was seen as preferable and more appropriate than labour schemes through social security or working holiday visas, which were the main alternatives at the time. The view expressed by the Victorian Farmers Federation president Colin McCormack was typical: "People on the dole never work hard enough and, unfortunately, most backpackers don't stick around for the whole picking season."⁵¹⁸

⁵⁰⁹ Woodard, "Labouring in the shadows: Illegal immigrants form the backbone of a much-needed workforce for many industries."

⁵¹⁰ Kate Adamson, "Grower plea for Pacific workforce," *The Weekly Times* (2006).

⁵¹¹ "Vic MP for Mildura Russell Savage has said that people on unemployment benefits..." *Federal Government Broadcast Alerts*(2005). Ralph Wragg, "Union wants to stop the import of Chinese fruit pickers" *Australian Business News*(2004).

⁵¹² Over 23,000 illegal migrants (including overstayers) overall were located in 2002-03, and over 20,000 in 2003-04. However these figures include other locations and the result of illegal migrants self reporting: Department of Immigration and Multicultural and Indigenous Affairs, "Annual Report 2003-04."

⁵¹³ Melissa Marino, "Grape grower angered by new-style raids," *The Age*(2005), www.theage.com.au/news/Immigration/Grape-grower-angered-by-newstyle-raids/2005/02/18/1108709431075.html.

⁵¹⁴ See for example the submissions of the National Farmers' Federation, the Victorian Peach and Apricot Growers' Association, the NSW Cherry Growers' Association to the Compliance Strategy Section, "Review of Illegal Workers 1999," 117, 23, 24.

⁵¹⁵ Submission of Deciduous Fruit Australia at *ibid.*, 128.

⁵¹⁶ See for example the submissions of the Queensland Fruit and Vegetable Growers and the National Farmers' Federation to *ibid.*, 112-14, 17.

⁵¹⁷ Submission of Strawberries Australia to *ibid.*, 120.

⁵¹⁸ Fisher and Godwin, "Fruit growers plead for illegal workers."

In short, in the 1990s and at least until 2005, many in the horticultural industry felt it was legitimate and justified to employ illegal migrants. Further, they enjoyed political support from organised advocacy from industry associations such as the National Farmers' Federation, and from the National Party, for, rather than despite, their legal breaches in employing illegal migrants. This political support remains an exception across industry groups targeted for immigration raids in Australia. Other industries targeted as employers of illegal migrants such as construction, hospitality, and the sex industry have not challenged the legitimacy of immigration laws over work permission in the same way.⁵¹⁹

Governmental response: from policing to policy reform

Government rhetoric about illegal workers positions citizens and to a lesser degree, permanent residents, as having exclusive rights to "Australian employment".⁵²⁰ Initial governmental responses to pressure from the horticultural industry reflected the official values of protecting citizenship (and permanent residency) as status that should have primacy in employment vacancy.⁵²¹ In 2000 the government initiated an inquiry into seasonal labour needs through the *National Harvest Trail Working Group*.⁵²² The inquiry recommended that the labour supply should be met by "fit unemployed" Australians living in harvest areas, recent retirees and students, as well as ensuring the working holiday scheme was well advertised.⁵²³ In addition, the existing scheme of working holiday visas (which permit 18-30 year olds from overseas to live and work in Australia for up to one year provided they spend less than three months with any one employer)⁵²⁴ continued to expand through the 1990s as further reciprocal agreements between Australia and other governments were made. Although not explicitly framed as a response to growing horticultural industry dissatisfaction, there was also a sharp increase in working holiday visa grants between 1997-98 and 2001-02.⁵²⁵

⁵¹⁹ In fact, the construction industry for example actively reports on suspected illegal workers, as noted in chapter 1 at 58-59.

⁵²⁰ Then Immigration Minister Phillip Ruddock's succinct statement is representative: "Illegal workers take jobs away from Australians...": Minister for Immigration and Multicultural Affairs Philip Ruddock, "Media Release: Package to Help Employers Check Employees Work Rights Launched," (Canberra: Australian Government, 6 May 1999).

⁵²¹ Compliance Strategy Section, "Review of Illegal Workers 1999," 9, 18.

⁵²² National Harvest Trail Working Group, "Harvesting Australia: Report of the National Harvest Trail Working Group."

⁵²³ Ibid.

⁵²⁴ Department of Immigration and Citizenship, "Fact Sheet 49 - Working Holiday Program" Commonwealth of Australia, www.immi.gov.au/media/fact-sheets/49whm.htm. Note also that the present working holiday program enables up to 6 months work with any one employer

⁵²⁵ Jayde Hanson and Martin Bell, "Harvest trails in Australia: Patterns of seasonal migration in the fruit and vegetable industry," *Journal of Rural Studies* 23, no. 1 (2007). They reference that in 1997-98 57,000 Working Holiday Maker visas were granted, and in 2001-02 85,000 were granted.

Yet these changes to encourage participation in horticultural industry employment by Australian workers, and working holiday makers did not fully meet industry concerns. As mentioned before, farmers saw migrants as more desirable labour than social security recipients or those "forced" into it.⁵²⁶ In addition, there was no requirement that working holiday visa employment be taken up in rural areas. In 2004 the horticultural industry argued for a trial program like the *United States and Canadian Mexican Seasonal Agricultural Workers Program*, which enabled Mexican workers to travel for work for the harvest period to meet gaps in the local labour supply.⁵²⁷ In 2005 the National Farmer's Federation recommended the feasibility of a guest worker visa scheme for seasonal workers be investigated,⁵²⁸ and in 2006 made submissions recommending a guest worker scheme restricted to regional areas unable to access labour by other means.⁵²⁹ The adoption of a seasonal or guest worker scheme has a controversial history in Australia. Parliamentary Senate committees on Australian foreign aid,⁵³⁰ foreign affairs and defence,⁵³¹ and the Australian Agency for International Development (AusAID)⁵³² have debated introducing such a scheme for more than 25 years.⁵³³ The Immigration Department was particularly resistant to a Pacific guest worker program on the grounds that it would set a precedent (for other countries and employers) for similar variations in the migration program. The Immigration Department considered there was a high risk that Pacific Islanders would remain after the expiry of their temporary visa.⁵³⁴ Further they considered that ensuring employers and workers complied with migration law, as well as ensuring workers were not exploited by employers, would make a Pacific guest worker

⁵²⁶ See for example the submissions of Mr. S, Pickers Plus Ltd, Riverina Area Consultative Committee, Leeton Development Corporation and Employment National Griffith to the Compliance Strategy Section, "Review of Illegal Workers 1999." of *ibid.*, 103, 95. See also: Woodard, "Labouring in the shadows: Illegal immigrants form the backbone of a much-needed workforce for many industries."

⁵²⁷ "Opinion: New thinking needed to fill labour shortfall", *The Weekly Times*(2004).

⁵²⁸ National Farmers' Federation, "Discussion Paper on Migration Options to resolve Labour Shortages in the Agricultural Industry," (Canberra 2005).

⁵²⁹ ———, "National Farmers' Federation Submission to the Inquiry into Pacific Region Seasonal Contract Labour," (Canberra 2006).

⁵³⁰ Committee to Review Australia's Overseas Aid Program, "Report of the Committee to Review Australia's Overseas Aid Program," (Canberra 1984).

⁵³¹ Defence and Trade Joint Committee on Foreign Affairs, "Australia's Relations with the South Pacific," (Canberra: Australian Government Publishing Service, 1989); Defence and Trade References Committee Foreign Affairs, 2003.

⁵³² Reg Appleyard and Charles Stahl, "South Pacific Migration: New Zealand Experience and Implications for Australia" (Canberra: AusAID, 1995). Committee to Review the Australian Overseas Aid Program, "One Clear Objective: Poverty Reduction through Sustainable Development," (Canberra: AusAID, 1997); White Paper Core Group, "Core Group Recommendations Report for a White Paper on Australia's Aid Program," (Canberra: AusAID, 2005).

⁵³³ Adrienne Millbank, "A seasonal guest-worker program for Australia?," in *Research Brief* (Canberra: Parliamentary Library 2006), 6-7.

⁵³⁴ *Ibid.*, 15-16.

scheme prohibitively expensive.⁵³⁵ The concerns about guest worker exploitation also resonate with the kidnapping and coercion of South Sea workers in early post settlement Australia.⁵³⁶

Yet while in opposition, the Australian Labor Party released a "Pacific Policy Discussion Paper" proposing a "limited mobility scheme" with visas for periods of between three to twelve months, with a goal of 10,000 Pacific guest workers per year, concentrated in the seasonal horticultural industry.⁵³⁷ In 2008, after Labor took government, the *Pacific Seasonal Worker Pilot Scheme* commenced. It is presently limited to the horticulture industry, and to citizens of selected Pacific countries.⁵³⁸ It is scheduled to run until June 2012, when it will be evaluated.⁵³⁹

The example of the introduction of the *Pacific Seasonal Worker Pilot Scheme* demonstrates how industry dissent to the policing of certain illegal workers can be seen as driving migration policy reform. In this instance I suggest it was the persistent and organised resistance to the legitimacy of migration laws against employing illegal workers, combined with the context of the new involvement of employers in migration policing through employer sanctions laws, which led to this visa policy reform. As mentioned earlier, the role of private or multi agency involvement in policing can be said to gain "active citizenship".⁵⁴⁰ As Adam Crawford argues, these agencies represent "...organized interests and the control and regulation of members via intermediary interest associations."⁵⁴¹ The various governmental policy moves to meet the demands of the rural industry for seasonal labour, which culminated in the introduction of a pilot seasonal workers scheme in 2008, demonstrates that it is the authority which employers, not citizens, attach to the legitimacy of migration controls that the government sees as critical. That is, the relevant audience whose perception of the legitimacy of policing authority was important was industry more than the general citizenry. In this instance, the support of industry for migration laws and policing was shown to be more important than the rhetoric that illegal work must be policed to protect "Australian" jobs. This did not result in systemic change for those working in breach of immigration authorisation, except insofar as there might be some cross-over between the demographics of migrants granted visas under the *Pacific Seasonal Worker Pilot Scheme* and those who might otherwise become illegal after

⁵³⁵ Ibid.

⁵³⁶ Tracey Flanagan, Meredith Wilkie, and Susanna Iuliano, "A History of South Sea Islanders in Australia," (Sydney: Human Rights and Equal Opportunity Commission, 2003).

⁵³⁷ Millbank, "A seasonal guest-worker program for Australia?"

⁵³⁸ Department of Immigration and Citizenship, "Pacific Seasonal Worker Pilot Scheme," Commonwealth of Australia, www.immi.gov.au/skiled/pacific-seasonal-worker.htm. ———, "Annual Report 2009-10," 72.

⁵³⁹ ———, "Pacific Seasonal Worker Pilot Scheme"; ———, "Annual Report 2009-10."

⁵⁴⁰ Johnston, *The Rebirth of Private Policing*: 138-40.

⁵⁴¹ Adam Crawford, "The Partnership Approach To Community Crime Prevention: Corporatism At the Local Level?," *Social & Legal Studies* 3(1994): 501.

arrival in Australia. In fact, the legitimacy of migration policing in the horticultural industry has been strengthened as a result of policy reform.

From “suspect students” to “bogus colleges” and “visa factories”

The regulation of the international student education sector shows another side to the relationship between government and the civil actors engaged in migration policing.

Educational institutions hold a comparatively more active role in policing migration than employers. As mentioned earlier, educational institutions are required to monitor compliance with student visa conditions for course attendance and progress. Since 2000, educational institutions' notifications to students of their visa non-compliance that do not result in the student making contact with the Immigration Department result in automatic student visa cancellation.⁵⁴² Further, since the removal of the MODL from the skilled migration scheme, skilled migration depends on the integrity of education providers to maintain course standards and the quality of qualifications, as well as their assurance of student compliance. Thus there are strong reasons for government to manage the integrity of the education sector.

The relationship between migration objectives in utilising the education sector as a source for Australia's future skilled migrant labour force and the methods adopted to regulate this sector has been rather ambivalent. This might reflect competing governmental objectives in supporting Australian education as an export industry versus its role in creating future skilled migrant labour. In any case, the relationship between government and education providers that I now turn to, illustrates the challenges of unifying commitment to policing objectives amongst civil actors whose primary objectives are economic outcomes. I argue that the construction of certain educational institutions and specifically vocational training institutions in cooking and hairdressing as deviant institutions was an attempt to stabilise migration policing authority at a time when regulation of the education industry by migration was not effective.

It was not until two years into the Howard government, in 1998, that the Immigration Department made public comment on the issue of student visas. Then Immigration Minister, Phillip Ruddock, initially focused on the issue of student bona fides, with a number said to be “abusing Australia's generosity”.⁵⁴³ In December 1998, laws were reformed to prevent student visas being used as an avenue for working in Australia by restricting work permission until

⁵⁴² Patterson, "Media Release: Senate Passes Measures to Promote Integrity of Student Visa Program," (6 December 2000).

⁵⁴³ Phillip Ruddock (Minister for Immigration and Multicultural Affairs), "Changes to Overseas Students Visas," Media Release (Canberra: Commonwealth of Australia, 1 December 1998).

after entry to Australia and course commencement.⁵⁴⁴ It was around this time that populist sentiment against illegal migration, particularly asylum seekers, was just heating up. Senator Carr, the opposition Education Parliamentary Secretary, positioned it more strongly, drawing an analogy between the payment for illegal boat entry with the legal entry of thousands on the basis of what he alleged to be inappropriately granted student visas and unethical private colleges recruiting students by inducements of visas rather than education.⁵⁴⁵ He identified twelve private colleges that needed investigation in October 1999⁵⁴⁶ and by early 2000 this number had reached thirty.⁵⁴⁷

Although the media had started using the terms "student visa scams"⁵⁴⁸ and "bogus colleges",⁵⁴⁹ public announcements from the government's immigration portfolio were cautious in 2000 when they first presented education providers as fraudulent, presenting the problem as just a few unscrupulous providers to be "weeded out".⁵⁵⁰ Public comment on education agents recruiting for education providers and students suspected of fraud prior to entry to Australia was less restrained, as over thirty students and ten education agents had been taken into police custody by the Australian High Commission in New Delhi.⁵⁵¹

Within a year, and after an Australian Parliamentary Senate Inquiry into quality vocational education, as well as a joint governmental planning committee on the accreditation of higher educational institutions, there was growing media discourse on sophisticated immigration fraud in the sector.⁵⁵² In 2000, due to the number of non-genuine overseas students, new powers enabled the Immigration Minister to cease visa grants to applicants who were planning to study with providers that the Immigration Department deemed suspicious.⁵⁵³

⁵⁴⁴ Philip Ruddock (Minister for Immigration and Multicultural Affairs) and David Kemp (Minister for Employment Education Training and Youth Affairs), "Joint Statement with Minister for Employment, Education, Training and Youth Affairs, Dr David Kemp, MP: New Measures to Attract More Overseas Fee-paying Students and Improve Immigration Controls," Media Release (Canberra: Commonwealth of Australia, 21 July 1998).

⁵⁴⁵ Patrick Lawnham, "Visa scam a threat to the sector," *The Australian* 1 September 1999.

⁵⁴⁶ ———, "Search begins for missing students," *The Australian* 20 October 1999.

⁵⁴⁷ ———, "Promise of action on visa rorts," *The Australian* 12 January 2000.

⁵⁴⁸ *Ibid.*

⁵⁴⁹ Richard McGregor, "Kemp canes bogus colleges," *The Australian* 27 March 2000.

⁵⁵⁰ Kay Patterson (Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs), "Media Release: Record Increase in Student Visa Numbers," Media Release (Canberra: Commonwealth of Australia, 10 August 2000).

⁵⁵¹ Janine Macdonald, "Senator Defends Visa Fraud Tactics" *The Age* 8 February 2000.

⁵⁵² See "Government Backdown Exposed", *Canberra Times* 15 May 2000. See also Emma Macdonald, "Crackdown To Target Student Visa Rorts" *Canberra Times* 28 March 2000.

⁵⁵³ Patterson, "Media Release: Senate Passes Measures to Promote Integrity of Student Visa Program." This was introduced at the same time as automated visa cancellations 28 days after an education provider notifies students of their breach of visa condition also commenced at this time.

These reforms, however, did not address the financial incentives that fuelled the rapid expansion of some occupational training and vocational training sectors, nor did they address the soft regulation of education providers.

The legislative accountability of education providers relied on a monitoring regime which involved financial sanctions, imprisonment, suspension, or the ultimate penalty of deregistration or refusal of registration to provide education to overseas students.⁵⁵⁴ The 2009 *Review of the Education Services for Overseas Students (ESOS) Act 2000* ("the Baird Review"), reviewed the education sector within the thesis study period,⁵⁵⁵ and emphasised the lack of consistent and strong enforcement of ESOS as the primary problem in regulation of the sector.⁵⁵⁶ Bruce Baird recommended increased use of financial penalties.⁵⁵⁷

Too many international education providers have become comfortable with the idea that they will not get caught, and if they do get caught, the sanctions will be weak and they will be given time to come up to standard.⁵⁵⁸

The failures in accountability do not require comprehensive reporting here. I mention just those that illustrate the particular challenge of regulation of private bodies whose central identity is not migration control. Of particular interest is the challenge in regulating the involvement of external agents paid by education providers to promote and facilitate study in Australia, who are mostly located outside Australia and have no direct relationship with the Immigration Department or Australian Government.⁵⁵⁹ Further, the confusion by regulators (which include both Australian and state and territory governments) as to who is responsible for enforcement of particular parts of the National Code is indicative of the practical

⁵⁵⁴ *Education Services for Overseas Students Act 2000* (Cth) ("ESOS Act") Education providers must be registered on the *Commonwealth Register of Institutions and Courses for Overseas Students* to provide education to overseas students (ESOS Act s 8). The enforcement provisions setting out suspension and cancellation of registration, and penalties for failing to maintain records or follow notification requirements and so on are set out in the ESOS Act at Part 6 Division 3, that is ss 83-110. The regulatory framework commenced in 2001.

⁵⁵⁵ Bruce Baird, "Stronger, Simpler, Smarter ESOS: Supporting International Students Review of the Education Services for Overseas Students (ESOS) Act 2000 Final report—February 2010," (Barton ACT: Australian Education International, 2010). While migration and visa issues were beyond the scope of the review, other matters that are critical the implementation of monitoring and reporting were considered. The terms of reference of the review were to consider what enhancements were needed to the ESOS regulatory framework so as to support the interests of students, consider quality control, and effective regulation and sustainability of the international education sector. August 2008. Elizabeth

⁵⁵⁶ *Ibid.*, 22. Harris, and Uyan Wang, "Police targeting language schools," *The Australian* 19 July

⁵⁵⁷ *Ibid.*, 23. Lawrence, "How Asian gang lord pupils live a life of crime," *Daily Telegraph* 16 May 2003.

⁵⁵⁸ *Ibid.*, 22. and Neuman, "News And Features - Probe accused of forging results for foreign

⁵⁵⁹ *Ibid.*, iii. Calman, Harris, and Wang, "Police targeting language schools."

difficulties in regulating the education industry.⁵⁶⁰ Numerous outcomes can be attributed to failures in accountability: skilled migration visa grants on the basis of false qualifications, the financial collapse of education providers placing students in precarious positions, and the exploitation of overseas students.

Rogue educational institutions

It is within this context that the construction of certain education providers as "rogue" or deviant by the Immigration Minister and Immigration Department can be understood as an attempt to unify the remainder of the education sector, and thus strengthen commitment to the authority of migration laws and policing. I examined media releases from 1996 to 2007 by the incumbent Immigration Ministers, media reporting of student visa issues, and the changing role of education providers in migration policing in this period.

Within this time period, the public construction of which educational entities were fraudulent became more specific. Vocational training colleges initially became suspect in various ways for confirming false attendance records. Later, vocational training providers became suspect for setting up workplaces themselves and providing bogus work experience documents that certified that the student had completed the 900 hours work experience required to fulfil skilled migration visa criteria, or charged students additional fees of up to \$9000 for a certificate verifying completion of work experience.⁵⁶¹ Overseas education industry associations highlighted that it was cooking and hairdressing colleges that were deviant,⁵⁶² other education providers became more outspoken about the effect of "visa shops" on their reputation and attraction to genuine students.⁵⁶³ By 2008, exposés of vocational training colleges "cash for certificates", and fraudulent English language school schemes had become public and subject to multi-agency investigations involving immigration, education and tax officials.⁵⁶⁴ By mid 2002, one hundred colleges had their registration to provide education to overseas students suspended or cancelled.⁵⁶⁵

⁵⁶⁰ Ibid., 24.

⁵⁶¹ Elisabeth Wynhausen, "We'll say you did the hours" *The Australian* 26 July 2008.

⁵⁶² Ibid.

⁵⁶³ Aban Contractor and Gerard Noonan, "News And Features - Printer accused of forging results for foreign students," *The Sydney Morning Herald* 2 July 2002.

⁵⁶⁴ Chris Johnston, "Rogue colleges in cash-for-certificates scam" *The Age* 11 August 2008. Elizabeth Colman, Trudy Harris, and Linyan Wang, "Police targeting language schools.," *The Australian* 19 July 2003. Kara Lawrence, "How Asian gang lured pupils into a life of crime.," *Daily Telegraph* 16 May 2003.

⁵⁶⁵ Contractor and Noonan, "News And Features - Printer accused of forging results for foreign students." Colman, Harris, and Wang, "Police targeting language schools. ."

The focus in governmental and public discourse was on deviant vocational education providers, but students also faced problems from the mainstream education providers seen as "good" providers by the government.⁵⁶⁶ This underscores that the function of taking a selective approach to identifying deviance in education providers was to garner and stabilise support for the regulation of the industry rather than deal with the particular problems. For example, incorrect notifications of automatic student visa cancellations issued by education providers between May 2001 and mid August 2005 affected 8000 student visa holders.⁵⁶⁷ After the Federal Magistrates Court decided in *Uddin* in 2005 that the notification issued to these students was incorrect, the Immigration Department decided to reverse all the automated cancellations in this period.⁵⁶⁸ In effect, this reinstated the lawful status of those students, unless their student visa had expired. Yet by the time this correction was made, over 5200 of those affected were outside Australia and no longer held a valid student visa because the reinstated visa had already expired.⁵⁶⁹ About 1360 persons, overseas at the time of the visa cancellation reversal, had their student visas reinstated, and needed a confirmation of enrolment to return to Australia to study.⁵⁷⁰ The post *Uddin* impact exemplifies the problem of fixing problems after the event. Students suffer the consequences of poor regulation of education providers. Further, it significantly disrupted student visa entry as a source of future skilled migrants as it stood at the time. It is clear that the effectiveness of the student visa program as a source of skilled migration for labour market needs goes beyond problems caused by fraudulent behaviour. For example, students faced problems with education providers closing down due to financial troubles,⁵⁷¹ paid sums of up to \$200,000 for substandard education and poor facilities,⁵⁷² and faced accompanying consequences of delays in course completion that impacted on living costs and so on.⁵⁷³ All these issues impacted on

⁵⁶⁶ Sushi Das, "Private college system a fiasco in need of a fix" *The Sydney Morning Herald* (24 November 2009), www.smh.com.au/opinion/society-and-culture/private-college-system-a-fiasco-in-need-of-a-fix-20091123-ixi3.html.

⁵⁶⁷ *Migration Act 1958* (Cth) s 137J

⁵⁶⁸ *Uddin v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FMCA 841

⁵⁶⁹ Department of Immigration and Citizenship, "Advice to Education Providers Regarding Federal Court Decision," Commonwealth of Australia, www.immi.gov.au/business-services/education-providers/advice_providers.htm.

⁵⁷⁰ *Ibid.*

⁵⁷¹ Das, "Private college system a fiasco in need of a fix". The 2009 closure of nine colleges in Melbourne and Sydney which went into voluntary administration left nearly 3000 overseas students stranded.

⁵⁷² Adam Morton and Nick McKenzie, "Canberra failing to regulate colleges: industry," *The Age* (15 March 2007).

⁵⁷³ David Barrow (National President National Union of Students), "Meridian College closures quickly descending into Calamity," (10 November 2009).

the efficiency of developing skilled migrants for Australia's future through the student visa program.

The construction of certain vocational training institutions as deviant was a stop-gap measure. In any case, as discussed, the policy approach to the relationship between international student education and planning for Australia's future skill needs has radically changed. The new skilled migrant selection model means that there is no longer a pathway from temporary student visas to permanent visas. The new skilled migrant selection model thus removes the economic incentives to design education with migration rather than skill outcomes in mind. It represents the latest attempt to manage the market or at least reorient the responsibility for pursuing migration outcomes to individual migrants.

The treatment of civil actors with policing responsibilities differed in the example of the horticultural industry and the international education sector. The first example outlined how the organised dissent of the horticultural industry to prohibitions on employing illegal migrant labour was met by changing the boundaries of authority, that being migration visa policy itself. The second example shows how some vocational education providers were constructed in public and political discourse as deviant. However, both examples demonstrate that the support of civil actors for the substance and authority of migration controls is important. That importance, I argue, drawing on Brogden's approach to policing's role in fostering social consensus, arises from the role these civil actors play in migration policing.

Conclusion

This chapter started the thesis investigation into migration control at a distance from individual encounters between migration policing agents and illegal migrants. It sought to draw attention to the broader social dynamics at work that entrench the relationships of power that construct migration policing. This chapter has explored how the increasing importance of employers over individualised migrant intake, evident from visa policy changes over time, embed a deep asymmetry of power between migrants and employers. Under the new skilled migrant selection model, the nation-state is starting to look more like an intermediary between employers and prospective migrants, rather than the primary and ultimate decision maker with regards to visa grants. The extent of power that employers directly have over whether a prospective migrant is granted a visa signals that the relationship between migrants and employers in this context is one of migration policing.

Employer sponsorship as a visa requirement represents a strategy that places identification of Australia's labour market needs in the hands of employers, and in doing so, operates as a preventative policing strategy against migrants remaining illegally after their visa expires. Given the global operation of labour markets and economies, employer sponsorship in this way demonstrates that migration policing authority is endorsed by economic factors that reflect global economic circuits. The endorsement of migration policing by elements other than the nation-state, and other than migration law, is a recurring theme across the migration control contexts studied here. This is evident in the next chapter which shows how force endorses migration policing authority in the context of immigration raids.

The asymmetry of power between employers and educational institutions and migrants, established by their role in visa grant decisions, frames the policing role of these civil actors over migrants in Australia. Civil actors' hold formal migration control responsibilities within Australia that provide considerable power over illegal migrants. Employers occupy an especially powerful position with respect to illegal migrants. The ability for illegal migrants to remain in Australia without immigration permission rests to a large degree on their ability to obtain work, and thus on employers' adherence to legal requirements not to employ illegal migrants. Educational institutions occupy a similar position in that they represent the potential to gain skills that enhance employment opportunities and life more generally. The role of civil actors here illustrates a second policing theme that recurs across the migration control contexts – the role of migration policing as one that facilitates or constrains the social citizenship of illegal migrants. In this chapter, the constitutive role of migration policing in social citizenship has been scrutinised through the power of migration policing agents over migrants' inclusion in work and study. In the next chapter, the power of migration policing is explored as it extends over private and public space, each of which imposes different constraints on migration policing practices.

My argument that the context of the regulation of migrant work and study reveals that migration control operates as policing is flagged through the asymmetry of power between employers and educational institutions and migrants. The identification of migration control as policing in this context is confirmed by the importance placed on these civil actors' perceptions of the legitimacy of the substance and authority of migration controls. Employers' and educational institutions' attitudes towards migration policing are critically important because of their role in effecting migration policing. Yet, as the instances examined demonstrate, obtaining employers' and education providers' support for migration controls is

not simply a matter of legislating requirements for these bodies. It involves political negotiation over the substance of migration visa policy, and also involves fostering popular support for controls amongst these civil actors by constructing parts of the industry as deviant.

The next chapter turns to the study of the individual encounter in policing in immigration raids. It is in individual encounters that the reach of the migration policing model element of discretion appears most forcefully. The raids context was selected to explore the potential extent of discretionary powers, and those elements that expand or constrain such discretion. The chapter powerfully demonstrates that migration control cannot be understood solely by reference to migration law, as law operates more as justification than guidance for the exercise of power in raids. Thus, the raids context shows the extent to which migration control is a practice of policing rather than law.

Raids: the breadth and depth of migration policing discretion

A Introduction

“Raids”, “stings”, and “arrests” of illegal migrants - either living without a visa in Australia or in breach of visa work restrictions - are a routine activity for the Immigration Department’s compliance section. Between 1996 and 2010, an average of 13,320 illegal migrants was located each year.⁵⁷⁴ Over this period, roughly half of the total locations were from field activities of the Immigration Department and other government departments, while the remainder were the result of self reporting by illegal migrants.⁵⁷⁵ Raids and location activities intuitively accord with common understandings of policing, as the activities they involve are those familiar from populist images of criminal justice policing; locations and arrests. “Raids” refer to proactive planned operations to locate illegal migrants. “Location activities” refer to all those activities that go towards locating illegal migrants, including obtaining and reporting information about illegal migrants, incidental locations of illegal migrants and their apprehension. For brevity in this chapter, references to “raids” also mean location activities, unless specifically stated otherwise.

Raids provide the context wherein the policing model element of discretion can be fruitfully studied. The reach of discretion is sharply evident through raids because the policing activity is clarified down to what appears as its most simple, most black and white ingredients: finding and apprehending illegal migrants. Policing agency is at its most empowered when its authority is derived from the positive obligation to detain illegal migrants.⁵⁷⁶ Further, the raids context entails a stark imbalance of power between the illegal migrant and policing agent, that facilitates policing discretion. This chapter aims to illustrate some of the elements that enliven

⁵⁷⁴ This figure is an average of the total locations reported in the fourteen Immigration Department annual reports from 1 July 1996 – 30 June 2010.

⁵⁷⁵ This is evident from the fourteen Immigration Department annual reports from 1 July 1996 – 30 June 2010.

⁵⁷⁶ *Migration Act 1958 (Cth)* s 189.

and activate discretion; that give discretion as it appears in migration policing its dynamic and diverse operation.

The essence of what this chapter shows through examining the context of raids and location activities is just how much migration control is a practice of policing rather law. By that I mean that while law provides the formal authority for officers, it does not *determine* the exercise of power, it merely bestows that power. The chapter is structured in four parts. The chapter starts with this introduction and then outlines the legal framework for raids. Part B of the chapter explores how migration policing discretion expands through the multi institutional delivery of migration policing. The impetus for intervention that leads to identification of illegal migrants is shown to be broad and diverse. In focusing on policing as a process rather than the outcome of identification as an illegal migrant, I explore how migration policing discretion is potentially activated by any activities, and exercised over any persons, regardless of immigration status. The challenge for law, in enabling guidance of policing power, is particularly captured in the inherent tension imposed by the migration policing power to require identification of non-citizens or those reasonably suspected to be non-citizens. Discretion is circumscribed so that it may only be exercised by these persons, but defining the boundaries of discretion in this way attempts to circumscribe that very activity that determines its limit. The third part of the chapter, Part C, shows how the expansive discretion available to migration policing in raids ultimately relies on the endorsement of authority by force. Practices that communicate social norms do not explicitly rely on physical force, but they perform the same function as force by diminishing the legitimacy of the policed individual. Apprehension of illegal migrants involves a violent separation from their established social lives, and the use of physical force in these contexts dramatically illustrates how policing's authority relies on physical force, not solely the coercive power of detention and removal authorised by law. The operation of force as endorsement for migration authority in raids provides a further example of the recurring theme whereby migration authority is endorsed other than by migration law and the nation-state. The last part of the chapter, Part D, explores how the particular *legality* of migration law further enables the expansive operation of migration policing's discretion. The examples examined show how the administrative law setting of migration law does not effectively make policing practices accountable for setting legal standards for policing practices that breach legal requirements and policy guidance. It demonstrates a migration policing theme that emerges in three of the thesis control contexts studied, but that I argue is residually present in all Australian migration control contexts.

In its most abstract form, policing can be described as a practice of inclusion and exclusion. The exercise of discretion in raids literally results in social exclusion via its outcomes of detention and removal from Australia. The exercise of discretion also acts on normative notions of inclusion and exclusion, whether that be assessments of respectful demeanour that are functionally necessary for policing, stereotypes with regard to race, gender and class and so on. Further discretionary practices communicate who is included and excluded. Thus alongside the chapter's exploration of discretion is attention to the policing role in social inclusion and exclusion which is a key theme in the thesis. The last chapter touched on how migration policing delineates social citizenship in the way it controls access to work and study. This chapter shows how the direct practices of migration policing in locating and apprehending illegal migrants delineates social citizenship. By showing how this targeting is established by multiple institutions influenced by multiple frames of authority, it foreshadows the thesis's exploration of the notion of migration policing's operation outside the nation. In the final chapter of the thesis, the continuity in migration policing's role in constituting social citizenship outside the nation is considered in terms of how its control over migrants' autonomy to move constitutes a crucial element of global citizenship.

This chapter draws on accounts of raids and locations from seven interviews with illegal migrants (or those who were illegal in the past) with personal experience of being apprehended. Only seven of the twelve illegal migrants I interviewed were located by the Immigration Department or police, the remaining five self reported. This conforms in a general sense with the overall statistics on the proportion of locations that take place through self reporting.⁵⁷⁷ The chapter also draws on seven interviews with advocates working with illegal migrants. Interviews with non-legal advocates were richer in this regard. This makes sense in the context of what is learned in this chapter of the few legal opportunities to challenge raids practices, and the separation between the validity of visa decisions and the outcomes of raids practices that are inconsistent with legislative requirements. Partial accounts of raids are also drawn from Migration Review Tribunal decisions, and federal court cases provide insight into the legality of practices adopted in raids and location activities. The chapter also draws on material that emerged from public reports by the Ombudsman and the Palmer and Comrie inquiries.⁵⁷⁸

⁵⁷⁷ See *Figure E*: The comparative numbers of illegal migrants located by self referral and Immigration Department fieldwork in chapter 1.

⁵⁷⁸ Palmer, "Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau."; McMillan, "The Comrie Inquiry."

The legal and institutional framework of immigration raids and location activities

The imbalance of power between illegal migrants and policing agents is particularly stark in raids and location activities. It is in these contexts, when the non-citizen is illegal or in breach of their visa conditions, that the only thing standing in the way of detention and removal from Australia is apprehension by migration policing agents. As introduced in chapter 1, Immigration's core legal powers - the universal visa policy and mandatory detention of persons known or reasonably suspected to be "unlawful non-citizens" - establish an asymmetric relationship of power between the illegal migrant and policing agent.⁵⁷⁹ The relationship of power activated in the context of raids and location activities is further elaborated primarily through three features. First, the fragmentation of migration control functions through multiple institutions and individuals expands the coverage and activation of migration policing powers. This thus enables the power relationship to operate anywhere over anyone. It is established by empowering officers of a range of agencies as "officers" under the *Migration Act*.⁵⁸⁰ References to "officers" in this chapter mean officers holding *Migration Act* powers. Second, the context of a raid itself provides opportunities for action within an extreme power imbalance, which also produces outcomes that can only ever be constrained after the event. Thirdly, policing agents hold a range of policing powers that shape the power relationship in raids. The primary power, as mentioned, is the power to detain.⁵⁸¹ Officers also hold the power to require evidence of lawfulness of persons an officer knows or reasonably suspects to be a non citizen,⁵⁸² some search and seizure powers, including the powers permitted under the terms of a search warrant;⁵⁸³ and the power to use reasonable force.⁵⁸⁴ The legislative powers however do not guide how or when such powers should be utilised. Nor does the Procedures Advice Manual ("PAM 3") provide guidance on prioritising migration

⁵⁷⁹ *Migration Act 1958 (Cth)*, s 189.

⁵⁸⁰ *Migration Act 1958 (Cth)* s 5. Section 5 of the *Migration Act* sets out who is defined to be an "officer" for the purposes of the Act, and also empowers the Minister for Immigration to authorise individuals or a class of persons to be officers under the Act. See chapter 1, *Figure A* for a full listing of agencies that are empowered as officers under the *Migration Act 1958 (Cth)*

⁵⁸¹ *Migration Act 1958 (Cth)*, s 189.

⁵⁸² *Migration Act 1958 (Cth)* s 188

⁵⁸³ *Migration Act 1958 (Cth)* ss 251, 252, 268CA and 268CI.

⁵⁸⁴ Officers may also utilise other powers under the *Migration Act*. Officers hold the power to detain certain lawful non-citizens for questioning. This is permitted where an officer reasonably suspects that a lawful non-citizen would be liable to visa cancellation (see *Migration Act 1958 (Cth)* ss 109, 116) and also believes that the visa holder would attempt to evade compliance action or would not cooperate with their inquiries (*Migration Act 1958 (Cth)* s 192). Officers also have the power to request information on the whereabouts of suspected unlawful non citizens from third parties, see *Migration Act 1958 (Cth)* s 18. Note that failure to comply with such a notice issued by the Department of Immigration is an offence (s 21), as is knowingly providing misleading information (s 22).

policing operations. This is left to the discretion of migration policing agents. It is the discretionary power to determine how policing powers should be practised that sets up part of the power relationship of policing in raids. Returning to the concept of “boundaries of permission”, the discretionary breadth is visible in the broad array of opportunities for exercise of discretion to participate in the process and practice of locating and apprehending illegal migrants.⁵⁸⁵

The particular imbalance of power between migrants and policing agents in the circumstances of raids and location activities is evident from the power policing agents have to determine their own practice. That is, through their discretion over *how* to locate and apprehend, and thus their discretionary power to determine *who* is in fact (rather than simply in law) illegal. Policing discretion is given wide range to define how to conduct raids and location activities, and this free rein is institutionalised in the legal arrangements of migration policing. It is this quality of expansive discretion that grounds this chapter’s argument that the control exercised in raids and location activities operates as policing.

B Migration policing power: anywhere, anything, anyone

A mutual enlargement of policing discretion

The range of actors empowered to exercise migration policing produces a mutual enlargement of policing discretion for both migration policing officers and for other policing agencies. For non Immigration Department officers, designation as officers who can thus wield *Migration Act* powers provides additional legal powers as a resource for justification for intervention. Rules treated as justification for policing activities are sometimes referred to as “presentational rules”.⁵⁸⁶ This terminology was adopted to differentiate between types of rules and the influence they exert over policing behaviour. “Presentational rules” referred to those rules which do not guide police behaviour, but inform how police justify and present their activities. Ultimately, a typology of rules according to their influence is problematic, as the type of legal rule will not necessarily correspond to a particular influence over behaviour.⁵⁸⁷ Nevertheless, shifting the question from an examination of how rules influence

⁵⁸⁵ This was discussed in chapter 2, and references the concept of “boundaries of permission” introduced by Findlay, “The Ambiguity of Accountability: deaths in custody, and the regulation of police power.”

⁵⁸⁶ See the typology of rules developed in this report that differentiate between the effectiveness of legal rules in influencing police behavior: Smith, Gray, and Policy Studies Institute, *Police and people in London: the PSI report*: 440-42.

⁵⁸⁷ Reiner, *The Politics of the Police*: 108-09.

policing behaviour, to how policing agents use rules to present action as legitimate, remains useful.

The designation of non Immigration Department officers as officers under the Migration Act expands the “net” available to locate illegal migrants. In other words, it expands the discretionary factors that act as impetus for migration policing, and creates the dynamic and diverse character of migration policing. It means the impetus driving the locating of illegal migrants reflects a range of factors including: the legal powers of these officers which guide their everyday activities; organisational operational plans and priorities; the culture that shapes practices of that institution or part of that institution, and all those other elements such as particular political priorities at the time of apprehension. Illegal migrants may first come to police notice not because of their visibility as illegal migrants per se, but because of where they are, what they are doing, what they look like, and how they behave, in addition to contemporary policing priorities, that is, all those reasons that explain how and why people in general come to police notice.



Figure F: Mutual enlargement of discretion: the relationship between migration policing and otherwise unrelated policing powers and priorities

Expanding the impetus for migration policing: Stop and search after the Cronulla riots

Interview participant John believed his location as an illegal migrant was directly related to how police read his ethnicity in the context of political pressures facing NSW State Police at that time.⁵⁸⁸ His experience of apprehension is an example of how the empowerment of State Police as officers under the Migration Act serves to legitimate intervention, and in this case,

⁵⁸⁸ This account is developed from interview with migrant M9, 26 July 2008, as well as documents from his Immigration Department file, which he had obtained by a freedom of information request.

masks the racial basis of police suspicion. It also serves as an example of the apprehension of an individual who otherwise may not have been detected. Police located John two weeks after the Cronulla "riots". On 11 December 2005 a gathering of about 5000 people attended Cronulla Beach ostensibly to protest against recent reports of assaults, and perceived intimidating behaviour by persons described by the crowd as Middle Eastern people from the western suburbs of Sydney NSW. The gathering became violent as the crowd chased a man of Middle Eastern appearance into a hotel and two other youths of Middle Eastern appearance were assaulted on a train. The Cronulla "riots" sparked off a number of incidents in the subsequent week which were represented in the media as ethnic clashes between Middle Eastern (particularly Lebanese) and Caucasian Australians.

Soon after, John was stopped by police at about 8am in a quiet residential street in Bankstown. A notation in his Immigration Department file shows that the police officer locating John advised the Immigration Department that the impetus for the stop was that John was "looking lost".⁵⁸⁹ John tells a different story. He was walking down a quiet residential street to buy cigarettes. Some people were waiting at a nearby bus stop but there was no one else around. A police patrol car noticed him and stopped and asked him for his identification, passport and to examine his mobile phone. The police did not stop and check anyone else. John stated that police had been checking many people of "Middle Eastern appearance" in the area following the Cronulla events and in particular had been checking mobile phones for SMS messages. The racial profiling that informed policing post Cronulla, and has in the past informed policing practice, is well documented.⁵⁹⁰

At that time, news of the Cronulla "riots" and the events following them were understood to have been circulated by SMS messages; mobile phones were seen as key to "rioting for a tech-savvy generation".⁵⁹¹ The NSW Government had just introduced laws enabling police to confiscate mobile phones and outlawing the sending, receipt or keeping of racist or inflammatory text messages.⁵⁹² Police locked down Sydney beaches on 15-19 December 2005,

⁵⁸⁹ Documents from the Immigration Department file of migrant M9, Immigration Department file note, 2006 (exact date anonymised).

⁵⁹⁰ See for example Jock Collins, Greg Noble, and Scott Poynting, *Kebabs, Kids, Cops and Crime: youth ethnicity and crime* (Annandale, N.S.W.: Pluto Press, 2000); Scott Poynting et al., *Bin Laden in the suburbs: criminalising the Arab other* (Sydney, N.S.W.: Sydney Institute of Criminology, 2004).

⁵⁹¹ Gerard Goggin, "SMS Riot: Transmitting Race on a Sydney Beach, December 2005," *M/C Journal* 9, no. 1 (2006): para 8.

⁵⁹² An emergency session of NSW Parliament on 15 December 2005 passed the *Law Enforcement Legislation Amendment (Public Safety) Act 2005 (NSW)*. The powers under the new laws were first used with roadblocks established at three points leading into Sutherland Shire/Cronulla. See NSW

and intercepted cars and buses en route to the beach from mid December 2005.⁵⁹³ At least one person was arrested for transmitting banned text messages.⁵⁹⁴

John was taken to the police station and, after about three hours, was told that the police had no criminal interest in him. However, his visa had expired, unbeknown to him, as he had believed he was awaiting the Minister's decision on his intervention request. Around the same time that John was taken into detention, he explained that a few more Lebanese men were detained. One was also located by police, in this instance stopped while driving, although not explicitly breaching any laws.

John's experience demonstrates how the impetus for intervention can emerge as a result of non migration related policing priorities. It is just one of the many examples that emerged through interview participants accounts of the circumstances of their apprehension.⁵⁹⁵ In this way, the factors that activate migration policing discretion over *who* in the illegal migration population is identified as illegal encompass the range of impetus for non migration policing intervention. John's experience also illustrates how the *context* of migration policing powers, as always among a broader array of powers when exercised by non Immigration Department officers under the *Migration Act*, makes law a weak constraint on policing discretion. Or in other words, it shows how the context of the encounter can make legislative enunciation of powers operate solely as *empowerment*, rather than a constraint on migration policing discretion, as these powers are drawn on to present the legality of intervention.

Ombudsman, "Issues Paper: Law Enforcement Legislation Amendment (Public Safety) Act 2005," (Sydney: NSW Ombudsman, December 2006), 3.

⁵⁹³ "Police established security checkpoints and roadblocks en route to a number of beachside suburbs, to intercept and prevent potential 'trouble-makers' from entering these areas. Large numbers of vehicles and people were stopped and searched. Numerous items were seized including: vehicles, mobile phones, drugs, alcohol, weapons (knives, swords, arrows, spears etc), gardening and sporting equipment (baseball bats, hockey sticks, golf clubs and a pool cue), tools such as hammers, chisels, scissors, box cutters and crowbars, a club-lock, and items considered inflammatory, such as offensive t-shirts and Australian flags." ———, "Issues Paper: Law Enforcement Legislation Amendment (Public Safety) Act 2005.", 5.

⁵⁹⁴ Goggin, "SMS Riot: Transmitting Race on a Sydney Beach, December 2005," para 15.

⁵⁹⁵ As a further example, Stephen was located when driving. Police at the time advised him the stop was a random breath test for alcohol level, but in his account of what happened after he was stopped, the questions police asked Stephen indicated more that the stop was on suspicion of possession of drugs or illegal items such as weapons. From Stephen's perspective, he felt he was stopped because of a combination of elements: his Asian ethnicity, his two door yellow sports car, his appearance, appearing well dressed and wearing jewellery while driving at 4.30am on a Monday morning in Granville, NSW. He felt these factors led them to believe he was doing something illegal such as street racing (Interview with migrant M10, 3 August 2008).

The range of options to intervene available for police make the requirement that an officer hold reasonable suspicion an ineffective guide for discretion, because the required reasonable suspicion can be present in anything arising from the commission of an offence for non-migration related offences, or unlawful immigration status. However, the increase in overall power does not sit easily with the legal framework that stipulates reasonable suspicion for a particular offence as a requirement *prior* to intervention. The increase in overall power and discretion created by the range of options available to police is characteristic of multi-institutional or plural policing. In a street setting, it broadens the potential basis for initial policing contact.

The thin edge of the wedge: the power to require identification from non-citizens and citizens

The migration power to require identification appears innocuous;⁵⁹⁶ it appears a minor power compared to that of mandatory detention, for example. Yet this power is the perfect illustration of how limiting the exercise of powers by reference to knowledge or suspicion of immigration legal status provides no limit at all as to who this power encompasses. Officers under the *Migration Act* are empowered to require identification from a person whom the officer knows or reasonably suspects is a non-citizen.⁵⁹⁷ The officer may require evidence of a person's lawful non-citizen status or of their identity,⁵⁹⁸ such as a photograph, signature, or any other personal identifier contained in the person's passport or other travel document.⁵⁹⁹

That is, officers have the power to require identification to determine an individual's identity, but without provision of identification, their suspicion may not be satisfied. This provision sets up an inherent tension between the legitimate and illegitimate exercise of power that, in practice, provides little if any protection for the policed subject from the illegitimate exercise of power. In effect, the boundaries of permission of policing discretion, in this context, come down to the relative power and authority each party is able to garner in the encounter.

Policing agents stopping individuals to ascertain their identity rarely explain what it is that has prompted suspicion. Individuals who have been asked to provide evidence of identity are confronted with popular wisdom that one should comply if one has nothing to hide. The power to require identification operates as the thin edge of the wedge in a number of ways. The consequences for identification as an illegal migrant make non compliance with identity requests serious, and have resulted in the past in detention and even removal from

⁵⁹⁶ *Migration Act 1958* (Cth) s 188(1)

⁵⁹⁷ *Migration Act 1958* (Cth) s 188(1)

⁵⁹⁸ *Migration Act 1958* (Cth) s 188 (1)(a), (1)(b)

⁵⁹⁹ *Migration Act 1958* (Cth) s 188(4A)

Australia.⁶⁰⁰ Migration officers' powers to require identification also involve consequences for Australian citizens and lawful residents, with a political dimension, as this represents a covert introduction of a highly controversial practice.

Migration policing: a default Australia card?

Migration policing practices can be interpreted as establishing a universal requirement to produce identification that amounts to an Australian identity card by default. The expansion of migration policing powers specifically via identification powers must be understood in the context of the political resistance by the Australian community to a national identification scheme. The Hawke Labor Government proposals for an "Australia Card" failed in the 1980s, and became a trigger for a double dissolution election in 1987.⁶⁰¹ Following this, repeated consideration of other forms of identity card did not come to fruition. After consideration, the Howard Government decided against proposals for an identity card in 2005-06 as part of anti crime and terrorism initiatives and also following the Palmer report into Cornelia Rau's detention as part of a national identity fraud project. In 2006-07 Cabinet approved a smart access card for access to government health and social services, but the Bill introducing this access card was withdrawn after recommendations that it be delayed until privacy and security safeguards were considered.⁶⁰²

The power to request identification on reasonable suspicion that a person is a non-citizen, provided in the *Migration Act*, and extended to all those regarded as officers under the Act, effectively institutes an identity card by default. Outside this *Migration Act* provision, powers compelling citizens to produce identification are specific and delineated for limited circumstances. Proof of citizenship is required in immigration clearance at entry and exit from Australia.⁶⁰³ Proof of identification may be required of persons while driving⁶⁰⁴ or where police reasonably suspect a person may be able to assist in the investigation of an alleged indictable offence.⁶⁰⁵ Most expansively, proof of identity may be required by shops, clubs, associations

⁶⁰⁰ See the consideration of the Palmer and Comrie Inquiries in chapter 1.

⁶⁰¹ Roy Jordan, "Identity Cards and the Access Card," in *E-brief* (Canberra: Parliament of Australia, Parliamentary Library, 2006).

⁶⁰² *Ibid.*

⁶⁰³ *Ibid.*

⁶⁰⁴ See for example *Road Transport (General) Act 2005 (NSW)*, s 171. Similar provisions exist in other state and territory road laws.

⁶⁰⁵ See for example *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)*, s 11. Note in this section persons are required to disclose identity, not necessarily produce proof of identification. Similar provisions exist in other state and territory policing laws.

and other private business and government agencies, for example, in relation to supply of a good or service, or conferral of a right or benefit.⁶⁰⁶

There are limited scenarios in which proof of the citizenship or identity of citizens can be required by law. Yet in practice, the power to require identification of non-citizens authorises officers to require identification of both non-citizens and citizens. When an officer suspects a person to be an unlawful non-citizen, the contestation of legal authority between an officer and the policed person is framed less by the limits indicated by the positive power to require identification, that is, the reasonable suspicion a person is a non-citizen. It is framed more by the power the officer can exert (the power to detain) and their authority as formed in that context. Formally, it could be argued that an officer's requirement that an individual provide identification is lawful either because of their reasonable suspicion, or alternately from implied consent from individuals.⁶⁰⁷ But in the circumstances individuals are faced with the choice to provide identification or risk immigration detention. This was dramatically illustrated in the Immigration Department's removal of Australian citizen Vivian Alvarez Solon.⁶⁰⁸ Underlying both the Palmer and Comrie Inquiries was the finding that the Immigration Department took a "detain first, determine identification later" approach to interpreting the mandatory detention powers.⁶⁰⁹ Importantly, the Inquiries found that officers had little understanding of how to apply "reasonable suspicion" in exercising the detention power.⁶¹⁰ It could be expected that officers faced the same mistake in understanding "reasonable suspicion" in exercise of their identification powers. Whether or not "reasonable suspicion" is well grounded, it is clear from cases investigated by the Ombudsman, that even when individuals produce their identification for inspection such as citizenship certificates, this is not always considered sufficient to dispel suspicion.⁶¹¹ Between 2000 and 2006, seventy persons were detained even though they were not unlawful non-citizens. This number included fifteen Australian citizens and thirteen permanent residents.⁶¹² Thus, although the power to require

⁶⁰⁶ See for example *Road Transport (General) Act 2005 (NSW)*, s 175. Section 175 empowers an organisation to require production of a driver's licence to verify identity or age in connection with the supply of any goods or services, or in connection with the conferring of any right, title or benefit, or in other circumstances, provided it is reasonable for the person making the request to require evidence of the other person's identity or age.

⁶⁰⁷ I highlighted the difficulty of establishing a genuine quality of consent in these circumstances because of the asymmetric power relationship, see the discussion in chapter 2 at 90-91.

⁶⁰⁸ This case was reviewed in chapter 1 at 46-52.

⁶⁰⁹ Palmer, "Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau," 21, McMillan, "The Comrie Inquiry," 69.

⁶¹⁰ Palmer, "Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau," 24. See also McMillan, "The Comrie Inquiry," 69.

⁶¹¹ ———, "Report into Referred Immigration Cases: Detention Process Issues."

⁶¹² *Ibid.*

identification does not formally extend over citizens, in practice, that power is exercised over citizens. It is also evident from interviews that in raids, officers oftentimes check the identity of all persons in proximity of a raid. Interview participants reported that in conducting a raid the doors at the entry and exit of premises were closed, and then the occupants of the premises subjected to identity checks, sometimes including customers, clients and visitors to the space.⁶¹³ In restaurants this is because persons suspected of being non-citizens might be wait and floor staff, not solely kitchen staff.⁶¹⁴ Raids in restaurants can involve requests for all staff to produce their visas for checking.⁶¹⁵ In brothels and parlours the reported frequency of raids increases the potential effects on persons other than illegal migrants.⁶¹⁶ This is clear from one brothel owner who placed a laminated sign in his waiting area stating:

Attention visitors the Department of Immigration may visit this brothel at any time. The Department will ask everyone to provide ID and some kind of evidence that they are lawfully in Australia. This applies to the customers, the receptionist and the workers in this premise.⁶¹⁷

Not all raids however involve checking the identity of all persons in the place being raided. In one example, the Immigration Department raided a factory where all but one of the staff were of Asian ethnicity. In contrast, the Caucasian individual, who was in fact an illegal migrant, was not asked for identification.⁶¹⁸ From the examples of apprehension outlined in this part of the

⁶¹³ This was reported in the following interviews: Interviews with migrants M4, 7 June 2008; M7, 25 June 2008; and M12, 10 July 2010. Interviews with community advocates A8, 28 May 2008; and A6, 26 March 2008. Elena Jeffreys (President, Scarlet Alliance, Australian sex workers' association), in interview with author, 5 August 2008, Maria McMahon (Sex Work Policy Advisor, ACON) in interview with author, 5 August 2008. Peter Bollard (solicitor and Migration Agent of Bollard and Associates, and accredited specialist in Australian migration law by the Law Society of New South Wales), in interview with author, 19 March 2008.

⁶¹⁴ Interview with community advocate A8, 28 May 2008.

⁶¹⁵ Interview with community advocate A8, 28 May 2008.

⁶¹⁶ Elena Jeffreys (President, Scarlet Alliance, Australian sex workers' association), in interview with author, 5 August 2008, Maria McMahon (Sex Work Policy Advisor, ACON) in interview with author, 5 August 2008.

⁶¹⁷ Maria McMahon (Sex Work Policy Advisor, ACON) in interview with author, 5 August 2008. Note that in the context of a brothel workplace, neither workers nor clients take their identification because of privacy and confidentiality issues, so identification checks can take some time. The particularity of the privacy needs in the sex work industry also increases the impact of raids on others (such as clients) in the raid, and workers. Questioning as to identity frequently takes places in front of workers' colleagues, whereas workers often adopt a work alias, and have not shared their personal information with colleagues, regardless of their lawful immigration status. The importance of privacy in sex work contexts was also highlighted in Fiona David, "Trafficking of women for sexual purposes," in *Research and Public Policy Series* (Canberra: Australian Institute of Criminology 2008).

⁶¹⁸ Peter Bollard (solicitor and Migration Agent of Bollard and Associates, and accredited specialist in Australian migration law by the Law Society of New South Wales), in interview with author, 19 March 2008.

chapter, it is evident that the relationship of power explored in the context of raids and locations is both deep in terms of the potential power it exercises, and broad in the discretionary factors it potentially encompasses in selecting who is to be located. The result is that there is not a single stereotype that arises from the activity of raids and locations about *who* is primarily targeted as an illegal migrant. Rather the character of migration policing is established as policing that can *potentially* operate over all persons, in all places, and can be initiated by anything from a data correlation between the Immigration Department and Australian social security, or suspicion based on stereotype on the street.

C Discretion ultimately relies on force for authority

In all scenarios just discussed, migration policing practices both create and act on norms about normality/deviancy and safety/risk that contribute to normative and legal judgments about social inclusion or exclusion. In this section I show how the expansive discretion available to migration policing in raids ultimately relies on the endorsement of authority by force. Force is the ultimate exertion of policing's inclusion and exclusion function. The legitimacy to use physical force has been used to define that which distinguishes police from ordinary citizens.⁶¹⁹ Authority to use force which is an interference with autonomy over one's body indicates the extent of discretion bestowed upon migration policing. Force might always be said to be present in the power over illegal migrants, simply from the legal empowerment of officers to detain those known or reasonably suspected to be illegal migrants and remove them from Australia.⁶²⁰ However, the role of force in supplanting this legal authority is especially evident in the individual encounter of raids as recounted by illegal migrants. Force is not included as an *essential* element of the thesis policing model because it is not necessarily used in every policing encounter, in comparison to the essential element of authority in policing. However as Klockars observes, the presence of force imparts flexibility for police intervention in situations which may not be illegal, and where intervention does not necessarily rely on arrest and the law.⁶²¹ In other words, force is residual and potentially present in policing. Force is activated to underscore policing authority where the law is not explicit, or in grey areas of the law that are open to interpretation, such as those powers contingent upon a grounding of "reasonable suspicion". In this section I draw on three types of policing practices in raids that work to include and exclude policed individuals, and show how the authority of these practices is connected to force. The first example shows the connection

⁶¹⁹ Bittner, "The Capacity to Use Force as the Core of the Police Function."

⁶²⁰ *Migration Act 1958* (Cth) s 189 and s 198.

⁶²¹ Klockars, *The Idea of the Police*.

between force and police pronouncements on the normative identity of those policed. The second focuses on the separation consequent on apprehension as illegal as a metaphysical experience of force. The third shows how actual physical force is used to control the raid encounter.

Force and social exclusion: connected by function

Practices that communicate social norms do not explicitly rely on physical force, but they perform the same function as force by diminishing the legitimacy of the policed individual. The connection revealed through their common function is testament to the residual presence of force in policing social inclusion and exclusion. If policing authority is compromised, force might be used to achieve that same function. The key role that diminishing the legitimacy of the policed individual plays in the raids context is evident from accounts that show that police perform their normative authority over the policed in excess of what is functionally necessary in the immediate circumstances.

Stephen's experience of being identified as an illegal migrant shows how police deploy their discretion to exclude beyond what is necessary in apprehension, which underscores policing agents' crucial role in creating social attitudes towards criminality and deviancy.⁶²² Stephen was stopped by NSW police when driving with his Australian citizen girlfriend.⁶²³ Police searched his body and bags, and found his brother's Medicare card. Police took him to the police station for driving without a licence (though never proceeded to charge on that basis). The police advised Stephen that they would check his status with the Immigration Department, and if he was found to hold lawful status they would charge him with defrauding the Australian public health system. It is the way police spoke about Stephen to his girlfriend's parents that shows one way that police use their authority to influence the social inclusion and exclusion of policed individuals. Police transported Stephen's girlfriend to her parents' house, and conversed with his girlfriend's parents. Police portrayed him as deviant, claiming to them their daughter was with "a criminal", despite the fact that Stephen had no criminal record. As a result, Stephen's girlfriend's parents grounded her for three to four months.

Makes me feel like an idiot too, the way they go through everything. How will I show my face to the family? And because they use the badge and the gun and the uniform they're wearing over me, you know what I mean? I've got no badge, no gun, no uniform.

⁶²² Note that at the time of Stephen's apprehension, John Howard was Prime Minister of Australia and known in particular for his harsh views and measures in border control.

⁶²³ Interview with migrant M1, 15 May 2008.

⁶²² Brogden, *The Police: Autonomy and Consent*.

⁶²³ Interview with migrant M10, 3 August 2008.

He explained that this really changed how his girlfriend's parents saw him and his relationship with their daughter.

At the time of his apprehension in 2006, Stephen had been living in Australia for ten years, most of that time without a visa. Stephen's impression from his treatment by police was that all his personal decisions were open to comment, and were characterised as outside the norm. He implicitly linked police attitudes towards his appearance and life with policing his social inclusion. For example when police questioned his wearing jewellery, Stephen responded: "Do I need the permission of John Howard?"⁶²⁴ Police comments directly to Stephen as well as to his girlfriend's parents illustrate how practices that socially include and exclude are integrated in everyday policing activities, sometimes extraneous to the legal basis for policing intervention, but nevertheless serving a function. The function in their comments to Stephen might be to humiliate him or make him feel abnormal or deviant in any way possible, no matter how minor. More importantly, police comments function to delegitimise his voice and resistance to police authority, and thus emphasise their own comparative power and authority. Thus these practices connect to force through their common function in endorsing policing authority.

Location and dislocation

Apprehension as an illegal migrant, referred to as "location" in Immigration Department terminology, involves literal rather than solely normative exclusion. It involves an immediate physical and social removal from one's existing life; in the words of one interview participant "you're just kidnapped".⁶²⁵ This underscores that policing authority here relies on the use of force, and on those institutions that can exert such force, including prisoner transport, detention centres, police holding cells and so on. The removal itself, regardless of whether force is used, is also experienced as a violent disruption to one's life. None of the interview participants were allowed to return home prior to proceeding to the immigration detention centre.⁶²⁶ One interview participant who was located at home was able to pack a small bag prior to being taken down to the police station, yet this did not dispel the suddenness of disruption: "you're evicted from your house and then you disappear."⁶²⁷ The violence of this disruption is evident from the small details of domestic life. For one interview participant this

⁶²⁴ Note that at the time of Stephen's apprehension, John Howard was Prime Minister of Australia and known in particular for his harsh views and measures in border control.

⁶²⁵ Interview with migrant M1, 28 May 2008.

⁶²⁶ Interviews with migrants: M2, 28 May 2008; M4, 7 June 2008; M12, 10 July 2010; M3, 30 May 2008; M9, 26 July 2008, and interview with community advocate A8, 28 May 2008.

⁶²⁷ Interview with migrant M1, 28 May 2008.

meant leaving pets (two cats and fish) locked inside the house, without being able to arrange for their food, water or care, as she lived alone.⁶²⁸ Almost all interview participants lost all their possessions when they were apprehended: clothes, computer, furniture, car, personal documents and possessions, legal and educational documents and so on.⁶²⁹ This was particularly galling for those who were later granted visas, and for those who were found to be holding a valid visa all along, as their visa cancellation was void.⁶³⁰ Some interview participants also told of how removal from the community forcefully clarified friendships and relationships, as people revealed whether they themselves considered the detained migrant to belong in the community, or alternatively took advantage by retaining their valuable possessions.⁶³¹ Thus the impact and experience of being located is itself an experience of social exclusion.

Handcuffs and the use of force in raids

The legal power to detain (and then remove from Australia) can be seen as the force or threat of force that policing activities rely on for their authority in all encounters with illegal migrants and those suspected to be illegal migrants. However it is the use of physical force that dramatically illustrates the discretion this power encompasses. The use of force in migration control practices is not unusual, whether undertaken by Immigration Department officials and state, territory or federal police. In extreme circumstances immigration raids might result in death, such as occurred in 2005, when immigration officers attended a Sydney house and an illegal migrant ran and was hit by a car.⁶³² Of the seven interview participants in the thesis study who had been apprehended by police or by the Immigration Department (or both), five experienced some use of force, from mild restraint to manhandling and the use of handcuffs.⁶³³

⁶²⁸ Interview with migrant M4, 7 June 2008.

⁶²⁹ Interviews with migrants: M1, 28 May 2008; M2, 28 May 2008; M4, 7 June 2008; M12, 10 July 2010; M3, 30 May 2008; M9, 26 July 2008, and interview with community advocate A8, 28 May 2008.

⁶³⁰ Interviews with migrants: M1, 28 May 2008; M3, 30 May 2008; M12, 10 July 2010.

⁶³¹ Interviews with migrants: M4, 7 June 2008; M10, 3 August 2008.

⁶³² See Geesche Jacobsen, "Immigration death sparks training queries," *Sydney Morning Herald*(2005), <http://www.smh.com.au/news/national/immigration-death-sparks-training-queries/2005/08/28/1125167552329.html>. In the United Kingdom death during raids is not uncommon and has earned the macabre shorthand of "balcony deaths": Weber and Bowling, "Policing Migration: A Framework for Investigating the Regulation of Global Mobility."

⁶³³ The following interview participants reported the use of handcuffs in their location in NSW, and Victoria: M1, 28 May 2008; M2, 28 May 2008; M10, 3 August 2008; and M12, 10 July 2010. Two interview participants were handcuffed by NSW state police (M10 and M2), and two by the Immigration Department (M1 and M12). M3's, interviewed on 30 May 2008, hands were restrained not cuffed. For M11, interviewed 21 August 2008, a work colleague advised that when immigration did attend her workplace that while she was not there, they had brought handcuffs and she believed that was to handcuff her.

The number of officers deployed to detain illegal migrants can also be seen as a display of forceful authority. Ten immigration officers arrived for the apprehension of just one individual (Noori) at a restaurant in a small inner Melbourne suburb.⁶³⁴ Stephen (who was pulled over by NSW Police while driving) stated that he was pulled over by one police paddy wagon, but soon after six paddy wagons and two or three sedans came when the initial police called for back-up.⁶³⁵ The police rationales for the use of force reflect a discourse of managing the risk of violence by illegal migrants upon detection, and the risk of flight during the raid.⁶³⁶ Force, however, is not used solely to control the physical terms of the arrest. It is also used to control perceptions of the legitimacy of the encounter by those who witness it, including illegal migrants themselves. Like every policing encounter, the location and apprehension of illegal migrants involves a dynamic between power and resistance such that perceptions of the legitimacy of policing actions affect the potential contestation of policing practice. Alison Young argued that the use of a body belt and handcuffs in a plane deportation operated as “racial labelling” of that illegal immigrant.⁶³⁷ That might be true in specific contexts such as planes where it makes sense that the person being transported is a migrant. In the cases discussed here, where apprehension takes place in the street or in workplaces, that is, not in immigration associated settings, the use of handcuffs and or physical restraint communicates the legitimacy of policing actions and the illegitimacy of those policed. Mohammad’s experience provides an example.⁶³⁸ Mohammad was working as a security guard at a bus depot when he was located by NSW Police at the depot, handcuffed and removed in front of his colleagues with whom he had friendly relationships of mutual respect. He immediately felt his reputation amongst his colleagues was ruined. It was their perception of him that was uppermost in his mind with regards to the police use of handcuffs on him:

They handcuff me, the police, in the bus depot and I’m a security officer. All the bus depot people, they’re looking at me... [They were thinking:] Oh I’m a drug dealer? ...They’re thinking this guy committed some crime, because it’s the police, it’s not the

⁶³⁴ Interview with migrant M12, 10 July 2010.

⁶³⁵ Stephen explained the police pull over as a random breath test, but his description of the events as they unfolded were more consistent with a random licence check (Interview with migrant M10, 3 August 2008).

⁶³⁶ See for example the explanations provided by policing agents in the apprehension of Scott Morrison, discussed later in this chapter.

⁶³⁷ Alison Young, *Imagining Crime: textual outlaws and criminal conversations* (London; Thousand Oaks, California: Sage, 1996), 70-73. Young also explained the strictures imposed on the deportee such as being permitted to pack for her removal and so on were part of the moral training imposed through identifying “difficult” behaviour.

⁶³⁸ Interview with migrant M2, 28 May 2008.

Immigration. When the police come, they think it's something else, because when they see the uniform they think something else.⁶³⁹

Handcuffs are also used in transporting detainees and persons being deported, whether metal or plastic. The experience of humiliation is part of the product of such restraint, as one interview participant relayed his experience of transport from Adelaide to Darwin:

[The handcuffs were] very tight, the plastic ones. When you go to the toilet you have to tell the officer and he can't do anything, so you just put your hand like this...The officer has to, you know, zip it for you.⁶⁴⁰

For this interview participant, the handcuffs symbolised the total authority of the officers over his body and movement.

For citizens, policing practices construct and effect social inclusion and exclusion at both the normative level by constructing and circulating stereotypes and more literally by arrest practices that remove persons from civil society. Migration policing practices act in an analogous way. Yet the literal exclusion of migrants is not achieved solely through detention, it also involves removal from Australia. If migrants have left Australia as a result of a visa cancellation, breach of a visa condition, a period of illegality, or been removed or deported,⁶⁴¹ they may be banned from Australia permanently⁶⁴² or for a certain period.⁶⁴³ The normative and literal exclusion effected by policing practices shares a common function, being to supplant and endorse policing authority in the context of raids. The instances outlined also illustrate how force enhances migration policing discretion. Like many policing practices, the

⁶³⁹ Interview with migrant M2, 28 May 2008.

⁶⁴⁰ Interview with migrant M12, 10 July 2010.

⁶⁴¹ "Removal" refers to when the Immigration Department locates and detains an illegal migrant and arranges their departure from Australia. The *Migration Act* requires that unlawful non-citizens be removed as soon as reasonably practicable per s 198 and s 199 of the *Migration Act* 1958 (Cth). In contrast "deportation" refers to a situation where a non-citizen is expelled from Australia for particular reasons. These include the commission of a criminal offence where the non-citizen has been a permanent resident for less than ten years and has been sentenced to 12 months or more imprisonment per s 201 *Migration Act* 1958 (Cth); conviction for certain serious offences s 203 *Migration Act* 1958 (Cth); or for national security reasons s 202 *Migration Act* 1958 (Cth).

⁶⁴² Persons who are deported from Australia because of a criminal conviction or for security reasons face a permanent ban on return to Australia. See *Migration Regulations* 1994 (Cth) Schedule 5, Special return criteria 5001.

⁶⁴³ *Migration Regulations* 1994 (Cth) Schedule 4, Public Interest criteria, clauses 4013 and 4014, and Schedule 5, Special return criteria. For example, if a migrant has been removed from Australia (which occurs if they are held in immigration detention) they are excluded from re entry for 12 months. If a person has made their own arrangements to leave Australia and left voluntarily, then they will not be subject to an exclusion period for most visas, but the question of whether departure is voluntary is not always easily determined. See Suhad Kamand et al., *The Immigration Kit: a practical guide to Australia's immigration law* 8th ed. (Annandale, N.S.W: Federation Press, 2008), 111.

reliance of authority on force in any particular instance is largely not subject to judicial review. This is either because the non-citizen is in fact identified as an illegal migrant and thus the outcome legitimates the use of force, or, alternatively, in the opposite scenario, where the suspected non-citizen is identified as a citizen or a lawful non-citizen, their interaction with policing agents does not lead to a legal outcome such as detention. Thus, by and large the basis of intervention is not judicially reviewed and so becomes part of "invisible" policing practices.

D The legality of migration law and the default expansion of discretion

The place of law in the raids scenarios considered thus far has appeared to be presentational. The legal requirement to detain illegal migrants justifies policing conduct, but does not determine its practice. I have shown rather how the impetus for policing might reflect both social norms that signify suspicious persons or behaviour for policing agents, and structural reasons for targeting individuals that reflect particular institutional projects or priorities. My purpose in exploring these aspects of the raid has been to show the diverse and dynamic operation of migration policing discretion, and to canvass its potential breadth. I do not mean to argue that migration policing practices are defined solely by policing subcultures⁶⁴⁴ nor do I mean to imply that the expansiveness of policing discretion is the result solely of vaguely defined legal powers. A generalised theory that determines the influence that rules have on policing practices cannot be sustained, as neither law nor policing practices are uniform. Rather the effectiveness of legal rules in keeping policing practices accountable can only be explored in specific instances.⁶⁴⁵ The legality of migration law specifically as an administrative legal practice has implications for the effectiveness of the accountability of migration policing practices to legal rules governing raids. In this final part of the chapter I examine two examples of how ineffective accountability institutionalises policing deviation from the rules governing raids, and thus shows how policing discretion is enhanced in the raids context.

⁶⁴⁴ McBarnet makes a good argument that police sociologists often overlook the significance of legal rules not because they assume police comply with the rules but that rules have no impact in determining police practice. See McBarnet, "The Police and the State: Arrest, Legality and the Law." in

⁶⁴⁵ Reiner, *The Politics of the Police*: 207-23.

The limited accountability posed by the requirement for search warrants

Migration raids in private spaces such as homes and workplaces require a search warrant. Migration officers do not have the power to enter premises (other than vessels)⁶⁴⁶ without a warrant, except where the occupier consents to officers entering and searching the premises.⁶⁴⁷ Entry onto private property without consent amounts to trespass, except where specifically legislatively authorised.⁶⁴⁸ The requirement of a warrant imposes an additional check on the evidence said to support an intrusion into private space.⁶⁴⁹ This requirement recognises social and Immigration Department expectations that:

...a person has a fundamental right to their dignity, to their privacy, to the integrity of their person, to their reputation, to the security of their residence and any other premises, and to respect, as a member of a civil society.⁶⁵⁰

That is, migration law recognises that policing should be restricted to public spaces unless there is good evidence that such intrusion will result in discovery of a legal breach.

To obtain a search warrant an officer needs "reasonable cause to believe" that on those premises there will be found an unlawful non-citizen, a removee or a deportee, a person whose visa has work restrictions, or particular documents relating to the entry or proposed entry of these persons.⁶⁵¹ In non-migration policing matters search warrants might require the approval of a magistrate. In migration matters, the Secretary of the Immigration Department or an officer of the Immigration Department delegated that task by the Immigration Minister must approve the issue of a search warrant.⁶⁵²

⁶⁴⁶ Department of Immigration and Citizenship, "PAM 3," National Compliance Operational Instructions (NCOI) [P A136.32]. Details to be included in the search warrant application are set out at 32.3.

⁶⁴⁷ Ibid. National Instructions (NCOI) [P A136.33]. The scope of the search is limited to the premises specified in the warrant. *Department of Immigration and Citizenship v Bellard and Associates*, and accredited specialist in Australia.

⁶⁴⁸ This is established by common law: *Bathurst City Council v Saban* (1985) 2 NSWLR 704, 706.; *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, 494. It is also reflected in state and territory statutory criminal law.

⁶⁴⁹ This is institutionally recognised in the Department of Immigration and Citizenship, "Procedures Advice Manual 3," (Canberra: Commonwealth of Australia, 2010), National Compliance Operational Instructions (NCOI) [P A136.1]. 1.2 of this part of the Compliance Instructions states "Powers of entry, search and seizure are intrusive by their very nature. They necessarily involve an invasion of a person's privacy and property interests that the common law has always valued highly and gone to great lengths to protect."

⁶⁵⁰ Ibid. The purpose nature and exercise of these powers is set out at 1.2.

⁶⁵¹ *Migration Act 1958* (Cth) s 251(6).

⁶⁵² *Migration Act 1958* (Cth) s 251(4) provides the Secretary may issue to an officer a search warrant in accordance with the prescribed form.

Policy restricts the scope of the search to only those named unlawful non-citizens and those items specified in the search warrant.⁶⁵³ The search “should not be regarded merely as a search for any lawful non-citizen or visa holder with limited work rights who happens to be found on the premises”.⁶⁵⁴ The delegate issuing the search warrant sets the scope of the warrant, being the specified persons, items, and the means permitted for locating those items.⁶⁵⁵ However the reported experiences of searches from my interviews with illegal migrants and advocates, as well as from Migration Review Tribunal reported cases, show that it is not uncommon for search operations to name one person as the target for attention but detain others not specified in the search warrant.⁶⁵⁶ This highlights the identity of search warrants as not only legal documents that limit the scope of a search, but most importantly, as legal documents that empower police to search premises that would otherwise not be permitted.

Search warrants: the effectiveness of legal limits in the case of Mahabub Alam

Mr. Mahabub Alam was a 19 year old student with limited work rights living in a share house in Sydney.⁶⁵⁷ One night in December 2002 immigration officers conducted a warrant visit to locate his friend with whom he shared the house. Immigration officers came to Mahabub Alam’s house looking for his friend Mr. Shah Nazran Alam (no relation) who also lived at the house. Mr. Alam provided his name and his passport on request. The officers then proceeded to search his belongings and room without a search warrant, and without Mahabub Alam’s consent.⁶⁵⁸ In their search of Mr. Alam’s drawers, they found payslips from his employment.⁶⁵⁹ On this basis immigration officers detained Mr. Alam and cancelled his visa, for working in

⁶⁵³ Department of Immigration and Citizenship, “PAM 3,” National Compliance Operational Instructions (NCOI) [P A136.32]. Details to be included in the search warrant application are set out at 32.3.

⁶⁵⁴ *Ibid.*, National Compliance Operational Instructions (NCOI) [P A136.33]. The scope of the search warrant is discussed at 33.4.

⁶⁵⁵ *Ibid.*

⁶⁵⁶ Interviews with community advocates: A8, 28 May 2008; A14, 10 July 2010; A9, 29 May 2008. Peter Bollard (solicitor and Migration Agent of Bollard and Associates, and accredited specialist in Australian migration law by the Law Society of New South Wales), in interview with author, 19 March 2008.

⁶⁵⁷ The facts relied on here are those accepted by the Federal Magistrates Court and the Full Court of the Federal Court. See *Alam v Minister for Immigration [2004] FMCA 583*; *Minister for Immigration & Multicultural & Indigenous Affairs v Alam [2005] FCAFC 132*.

⁶⁵⁸ The absence of consent was noted by the Federal Court in *Minister for Immigration & Multicultural & Indigenous Affairs v Alam [2005] FCAFC 132*, per Wilcox J at para 7, Stone J at para 3. The absence of consent was not contested by the Immigration Minister.

⁶⁵⁹ Note that policy guidance to the Immigration Department stipulates that “A search warrant under s251(6) does not authorize seizure of documents relating to the cancellation of a person’s visa on the basis that they have been working in breach of visa conditions. Examples of these documents are employment records or pay cheques.” See Department of Immigration and Citizenship, “PAM 3,” National Compliance Operational Instructions (NCOI) [P A136.39]. Details on how to execute a search warrant, and the discovery of articles not within the authority of the warrant are set out at 39.3.

excess of his visa work conditions. Setting aside the fact that the immigration officers who cancelled his visa did not follow the legislatively required cancellation process, evidence of Mr. Alam's work was permitted into evidence even though it was discovered as a result of an improper search that exceeded the terms of the search warrant.

Exceeding the immigration search warrant parameters does not mean that information gathered in an unlawful search is excluded from migration decisions. It is the specifically administrative classification of migration law that limits the accountability of migration policing to the scope of the search warrant. Migration decisions simply see this information as information relevant to the decision at hand. Administrative law does not place any brakes on the use of this information at the primary (Immigration Department) and review (Migration Review Tribunal or Administrative Appeal Tribunal) stages of decision making. This approach contrasts with the routine contestation of the admission of evidence obtained through improper action in criminal trials. As administrative decision makers, the Immigration Department delegate and the Migration Review Tribunal are not bound by the laws of evidence, and may take any information into account in making their decision. In judicial review of the legal basis or jurisdiction of that decision, the court has discretion to exclude improperly obtained evidence.⁶⁶⁰ The factors the court may take into account in exercising its discretion include the probative value and importance of the evidence, as well as the gravity of the improper conduct.⁶⁶¹ In Mr. Alam's scenario, evidence such as pay-slips that indicate working without immigration authorisation are highly probative and if the admissibility was contested would likely be admitted. However, the question of admissibility does not arise because judicial review in migration matters is not able to review the facts of the case.⁶⁶² It is restricted to reviewing whether the review tribunal made an error of law, and whether it erred in how it conceived of its jurisdiction; this restriction is referred to as the *Migration Act's* privative clause.⁶⁶³ Thus, for example in Mr. Alam's case, the court reviewed the legality of the

⁶⁶⁰ *Evidence Act 1995 (Cth)*, s 138(1). The court may take into account a range of considerations in exercising its discretion including the probative value and importance of the evidence, and the gravity of the impropriety, but is not limited to these considerations, see *Evidence Act 1995 (Cth)* s138(3). See also Jill Anderson, Neil Williams, and Louise Clegg, *The New Law of Evidence: Annotation and Commentary on the Uniform Evidence Acts*, 2nd ed. (Chatswood, N.S.W.: LexisNexis Butterworths, 2009), 665-672 and 674-681.

⁶⁶¹ *Evidence Act 1995 (Cth)* s 138(3)

⁶⁶² *Migration Act 1958 (Cth)* s 474

⁶⁶³ *Plaintiff S157/2002 v Commonwealth* (2003) 77 ALJR 454. This case interpreted the judicial jurisdiction in light of the *Migration Act* privative clause (*Migration Act 1958 (Cth)* s 474) which purported to make the decision of migration review tribunals final. The High Court found that for the privative clause to be valid, it must be interpreted not to oust the original jurisdiction of the High Court to order mandamus, a writ of prohibition or an injunction as set out in s 75(v) of the *Australian*

visa cancellation in terms of the legal meaning of "week" so as to determine whether the hours worked by Mr. Alam, evident from his pay-slips, amounted to a breach of his visa conditions. The impact, thus, of migration's privative clause is that review of the migration decision that was the outcome of the improperly obtained evidence does permit contestation of its admissibility. Contesting the adverse Immigration Department and review tribunal visa decision necessarily involves the non-citizen's *acceptance* of that improperly obtained evidence. Mr. Alam had grounds to proceed to judicial review only by accepting the admission of the improperly obtained pay slips, as it was the information in those pay slips that grounded Mr. Alam's challenge of the legal interpretation of "week" that enabled his visa cancellation.

There is another potential avenue for legal accountability for wrongful search, but it is not automatic or connected to the visa process. It requires either initiation of a legal challenge in tort, or making a case for the Attorney-General or Department of Public Prosecutions to initiate action to pursue prosecution for criminal trespass or false imprisonment. Yet initiating those actions provides no protection from removal from Australia.⁶⁶⁴ Thus, the absence of legal accountability for searches without warrants, or exceeding the limits of the search warrant, expands migration policing's discretion to conduct searches improperly or without warrants, with impunity.

The consequences for non-citizens are serious. In Mr. Alam's case, ultimately the Federal Magistrate's Court (later upheld by the Federal Court) set aside the visa cancellation as the wrong legal definition of "week" was used to calculate breach of visa conditions.⁶⁶⁵ However, this decision occurred almost two years later. In the intervening period, Mr. Alam had been detained at Villawood Immigration Detention Centre for almost three weeks and remained without a student visa, and thus unable to continue with his studies, once released on a bridging visa while seeking review of this cancellation.⁶⁶⁶ This raises issues analogous to those raised by a stream of literature that critiques the "criminalisation" of migration control, in that the powers exercised by migration policing are not subject to the same level of accountability

Constitution. In effect this case found that the privative clause did not prevent judicial review of review tribunal decisions affected by jurisdictional error.

⁶⁶⁴ Kamand et al., *The Immigration Kit: a practical guide to Australia's immigration law* 144-62, 739-84.

⁶⁶⁵ The Federal Magistrates Court set aside the visa cancellation decision and returned the matter to the Migration Review Tribunal (MRT) for decision. *Alam v Minister for Immigration* [2004] FMCA 583. The Federal Magistrate's Court delivered their decision on 11 October 2004.

⁶⁶⁶ *Minister for Immigration & Multicultural & Indigenous Affairs v Alam* [2005] FCAFC 132, per Allsop J at para 28. Mr Alam was detained from the evening of 18 December 2002, to 6 January 2003 when he was granted a bridging visa.

as analogous powers in the arena of criminal justice.⁶⁶⁷ I am not asserting that requirements for search warrants in entering private property are completely and routinely side-stepped, indeed, they are regularly sought and utilised. However, the ineffective accountability engaged in the requirement for and terms of a search warrant in migration can be understood, like McBarnet's findings that police deviance is institutionalised in the law itself, as a product of the administrative arena of migration law working in tandem with the Migration Act's privative clause.⁶⁶⁸

Living outside of citizenship: there's no place like home

Migration laws' tolerance of migration policing breaches of trespass laws opens the private space of the home to migration policing so that, in effect, the non-citizen is never "home" within Australia. In her gender analysis of the expansion of law enforcement in the United States, Anannya Bhattacharjee argues that immigration laws and their enforcement change the protection that private and public space offer.⁶⁶⁹ In the context of raids, I have shown how migration policing can potentially treat the home space as if it were another public space without respecting the expectations of privacy the home space entails. Bhattacharjee draws attention to how migration policing challenges some feminist analysis of violence where the "public" of law enforcement provides remedy for the "private" partner perpetrated violence within the home. Her point is that it is often overlooked that the home is also a space of public violence for migrants, as states enforce immigration laws (and other policing practices that particularly affect communities of colour), but the opposing space of the public does not provide refuge. The lack of protection that both spaces offer illustrates the social exclusion of migrants within Australia.

The raid strategy of simultaneous notification of visa cancellation and apprehension

The second example of policing raids that shows the implications of migration law's administrative legality for effectiveness of accountability to legal rules governing raids is the practice of notifying an illegal migrant of their visa cancellation at the same time as

⁶⁶⁷ Legomsky, "The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms."; Teresa A. Miller, "Blurring the Boundaries between Immigration and Crime Control After September 11th" *Boston College Third World Law Journal* 25(2005); Daniel Kanstroom, "Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases," *Harvard Law Review* 113 (2000).

⁶⁶⁸ McBarnet, "The Police and the State: Arrest, Legality and the Law."

⁶⁶⁹ Anannya Bhattacharjee, "Private Fists and Public Force: Race, Gender, and Surveillance," in *Policing the National Body: Sex, Race, and Criminalization*, ed. Jael Silliman and Anannya Bhattacharjee (Cambridge, Massachusetts: South End Press, 2002), see in particular pages 44-46.

apprehending them. The chapter has shown migration policing's considerable discretion in deciding *where* and *who* to target. This example explores migration policing's discretion over *how* location is conducted, and argues that the administrative setting of migration law expands such discretion by default through the mismatch between control practices and legal measures of accountability.

I argue that the practice of compressing notification of visa cancellation, detention and removal effectively hinders the non-citizen's ability to obtain adequate legal representation, and lodge judicial review to enable stay in Australia while awaiting determination of the review of visa cancellation. Further, the legal test for administrative accountability of "lawful purpose" serves to obscure the absence of accountability for those policing practices that actually effect control. The practices that conduct control are relatively "minor" or "ordinary" policing strategies – control over the process, the place, the timing of events and the force that is used. Nonetheless these practices cumulatively reduce the capacity and opportunity for the non-citizen to contest removal. This is illustrated in the character based visa cancellation and removal of Mr. Morrison which I will discuss, but the findings are relevant in any location activity that involves simultaneous notification of visa cancellation and removal.

Visas can be cancelled on a number of grounds including breach of the character test⁶⁷⁰ or providing incorrect information to the Immigration Department.⁶⁷¹ The power to cancel visas ranges from a general cancellation power,⁶⁷² power to cancel for breach of *Migration Act* obligations,⁶⁷³ character test failure,⁶⁷⁴ and "consequential cancellation", that is, visas cancelled as a consequence of the visa cancellation of another visa held by the non-citizen or visa holder.⁶⁷⁵ However the effect of a cancellation is the same. It causes a visa to cease to be

⁶⁷⁰ *Migration Act* 1958 (Cth) s 501

⁶⁷¹ *Migration Act* 1958 (Cth) ss 109, 116.

⁶⁷² *Migration Act* 1958 (Cth) s 116 is known as the general cancellation power.

⁶⁷³ *Migration Act* 1958 (Cth) s 119 is known as the non-compliance power. Breach of obligations include failing to advise of a change in circumstances, incorrect answers (even when that information is in fact provided by someone else such as when a non-citizen has had help in completing a passenger arrival card, or assistance from a migration agent in a visa application) and providing bogus documents. See *Migration Act* 1958 (Cth) ss101-105, 107 for details of obligations that give rise to cancellation if they are not complied with. See *Migration Act* 1958 (Cth) ss 110-111 which gives the power for a visa to be cancelled regardless of the source of knowledge, and even in circumstances where the breach is not be deliberate nor covert.

⁶⁷⁴ *Migration Act* 1958 (Cth) s 501

⁶⁷⁵ *Migration Act* 1958 (Cth) s 140. By operation of law, s 140 empowers the cancellation of visas held by the members of the family unit of the cancelled visa holder, persons who hold a visa solely because of the person whose visa was cancelled, or hold a visa granted under s 78 because a parent held a visa. Section 140 empowers consequential cancellation for visas cancelled under s 109, 116, 128 or 137J of the *Migration Act*.

in effect,⁶⁷⁶ such that a visa holder becomes an unlawful non-citizen.⁶⁷⁷ This takes effect from the time a record of that decision is made.⁶⁷⁸ That is, a non-citizen can become unlawful prior to (or without) knowledge or notification of that fact.

The Immigration Minister can decide how a person should be notified of their visa cancellation. The written visa cancellation decision can be handed to the person directly,⁶⁷⁹ delivered to a person who appears to live or work at the last residential or work address of the former visa holder, or by posting, faxing or emailing the decision.⁶⁸⁰ A practice has developed in some situations (which I will go on to explain) of advising a former visa holder of their visa cancellation some time after their visa is cancelled, and at the same time as proceeding to detain and then remove them from Australia. This practice maximises control by making a non-citizen illegal and then immediately removing them from Australia. This process is not explicitly set out in law, but is possible through controlling the timing of operation of these various migration powers.

Compressing notification of visa cancellation, detention and removal into a single arrest process effectively removes the ability for the non-citizen to remain in Australia while awaiting merits or judicial review of that visa cancellation decision.⁶⁸¹ Removal cannot be challenged of itself as the *Migration Act* requires that unlawful non-citizens be removed as soon as reasonably possible, that is, there is no decision to review.⁶⁸² However the successive policing processes manipulate various migration powers, departing in several important ways from policy, to produce in effect a non-reviewable removal decision and also effect removal. The

⁶⁷⁶ *Migration Act* 1958 (Cth) s 82(1). See also *Migration Act* 1958 (Cth) s 501F which provides that if a visa application is refused or cancelled under the *Migration Act* provisions of ss 501, 501A or 501B, then any outstanding visa applications made by the person are taken to have been refused.

⁶⁷⁷ *Migration Act* 1958 (Cth) s 15

⁶⁷⁸ *Migration Act* 1958 (Cth) s 138. Note a visa is cancelled by the Minister causing a record of that cancellation to be made, except for cancellations that are made automatically under *Migration Act* 1958 (Cth) s 137J, that is, automatic student visa cancellations.

⁶⁷⁹ Notice of a visa cancellation decision must be in writing: See *Migration Regulations* 1994 (Cth) 2.45 (general cancellation power). Note also that even if a notice is not given in the prescribed form, the cancellation remains valid, but the period allowed for review application is affected (see *Migration Act* 1958 (Cth) s127(3)). See *Migration Regulations* 1994 (Cth) 2.42 for notice of cancellation under the non-compliance power.

⁶⁸⁰ *Migration Regulations* 1994 (Cth) 2.55. Note that this process does not apply to student visa cancellation decisions under *Migration Act* 1958 (Cth) s137J, nor to those in immigration detention. Service of documents to those in immigration detention is set out at *Migration Regulations* 1994 (Cth) 5.02, which prescribes service by directly handing the document to the former visa holder or to another person whom the detainee has authorised to receive documents such as their migration agent or a friend.

⁶⁸¹ The non-citizen can seek an injunction but these are rarely granted.

⁶⁸² Kamand et al., *The Immigration Kit: a practical guide to Australia's immigration law* 138. The obligation to remove is at *Migration Act* 1958 (Cth) s 198.

effect in law is somewhat subtle. It does not inevitably remove merits or judicial review options.⁶⁸³ However, the effect of simultaneous visa cancellation notification and removal is that, unlike those provided notification by post or other means, they do not remain in Australia (for character cancellation, this involves remaining in detention) awaiting review of their decision.⁶⁸⁴ These policing processes fast track the “as soon as reasonably possible” element of the *Migration Act* requirement to remove illegal migrants.⁶⁸⁵ People are thus removed from their social lives, family, work and friends, oftentimes after long-term residency in Australia.

The arrest of Scott Morrison

A number of elements in the location of Mr. Morrison demonstrate how policing practices utilised as an arrest strategy largely eliminated his chance to remain in Australia for review of his visa cancellation. Mr. Scott Morrison is a citizen of the United Kingdom. He arrived in Australia in 1977 at twelve years of age with his family, and remained in Australia, never leaving until he was removed at thirty years of age in May 2007.⁶⁸⁶ The policing practices that controlled the raid and removal of Mr. Morrison were as follows.

The location was conducted in a violent manner. On 8 May 2007 Mr. Morrison and his fiancée Ms Roberts were in a bank car park after attending to banking matters, and had intended then to purchase a present for their daughter who turned five years old that day. The arrest at about 10am was sudden, violent, and without warning, by non-uniformed officers and without indication that it was legally authorised officials undertaking the arrest.⁶⁸⁷ Mr. Morrison’s apprehension did not necessarily need to take place in public or in such a dramatic fashion, as

⁶⁸³ Merits review of visa cancellation is available if the cancellation decision was made while the non-citizen is in the migration zone, provided the person is not in immigration clearance and the Immigration Minister has not made that cancellation personally exempt from procedural fairness. See *Migration Act* 1958 (Cth) s 500, and Part 5 and Part 7. Note that where the Immigration Minister exercises this personal power under s 501(3) the visa applicant or holder is not entitled to natural justice or to merits review by the AAT or the MRT: *Migration Act* 1958 (Cth) ss 500, 337. The Immigration Minister’s powers in this regard are considered in chapter 6. Those whose visas are cancelled are entitled to seek review by the Federal Court, see *Migration Act* 1958 (Cth) s 476A(c). Note if the Immigration Minister has personally made the decision to cancel or refuse a visa on character grounds, the non-citizen is still entitled to lodge an application for judicial review.

⁶⁸⁴ *Migration Act* 1958 (Cth) s 501F. Note that those in Australia who have had their visa cancelled or refused by a delegate are entitled to seek merits review if the decision is made by a delegate and the person would otherwise have a review right if the decision was made on other grounds: *Migration Act* 1958 s 500(3). Therefore, cancellation and visa refusal decisions where the person is in the migration zone are reviewable: *Migration Act* 1958 (Cth) ss 338, 411.

⁶⁸⁵ *Migration Act* 1958 (Cth) s 198.

⁶⁸⁶ Information about this case was obtained from *Morrison v Minister for immigration and Citizenship* [2008] FCA 54.

⁶⁸⁷ Note that the Minister accepted that the nature of the detention was violent. See at *Morrison v Minister for Immigration and Citizenship* [2008] FCA 54 at para 122.

his home address was registered with the Immigration Department, and had been his residence for about three months. He was tasered four times, the taser barbs were later removed from his body and his head was cut when he fell during the arrest.⁶⁸⁸ The Federal Court accepted the evidence of Mr. Morrison that following being shot with the taser when he was arrested, he was "stunned for most of the day, confused, dazed" and that he could not recall everything of the early part of that day due to the effects of the taser.⁶⁸⁹ In light of studies on the effect of taser shots, the force used could have hindered Mr. Morrison's capacity to pursue review options.⁶⁹⁰ Yet the Federal Court did not take this into account to find that Mr. Morrison's capacity was hindered.⁶⁹¹

The compression of notification of visa cancellation, apprehension and notification of removal

Removal was planned to take place immediately despite policy that stipulated 48 hours notice of removal and the 28 day period within which an application for judicial review might be lodged.⁶⁹² Both the physical and legal logistics of immediate removal had been planned. Ten officers were allocated as escorts for Mr. Morrison, and the last six rows of an international flight were booked. It was an expensive operation that would increase in cost if delayed. Escort Group Commander, Mr. Richard Battersby, had prepared an affidavit prior to the location activity in the event this needed to be lodged for any injunction to delay Mr. Morrison's removal.⁶⁹³

Part of achieving immediate removal involved controlling when Mr. Morrison would be advised of his impending removal, as the Immigration Department explained that Mr.

⁶⁸⁸ *Morrison v Minister for Immigration and Citizenship [2008] FCA 54*, at para 126. Note the judge also referred to Mr Morrison's demeanour in giving evidence as "somewhat aggressive and belligerent". It is not clear what weight the judge placed on this observation, except to increase the court's acceptance of the contrasting candour of his evidence about his recall of being dazed and stunned for most of the day.

⁶⁸⁹ *Ibid.*

⁶⁹⁰ Western Australia Police, "Post Implementation Review of Taser," in *Research report prepared for the Corporate Executive Team* (Perth 2010), 57-58. The use of the taser on Mr. Morrison appears (to the extent ascertainable through the account in the Federal Court decision) to have been contrary to Western Australian police policy on the use of tasers, both in the use of the drive-stun mode, and in the guidance to use only to prevent injury to any person.

⁶⁹¹ Instead the Federal Court drew on this evidence to support their finding that the evidence of the officers who stated that Mr. Morrison was not denied telephone calls was more reliable because of the blurriness of Mr. Morrison's memory of the events.

⁶⁹² *Morrison v Minister for Immigration and Citizenship [2008] FCA 54*, at para 35.

⁶⁹³ *Ibid.*, at para 85. The Immigration Department said that they intended to remove Mr. Morrison on the same day he was detained. They pointed to the arrangements they had made should an interim injunction preventing Mr. Morrison's removal been granted, as evidence against the Immigration Department's intention to deprive Mr. Morrison of his appeal rights.

Morrison's knowledge of this would be disruptive to removal. Thus although Mr. Morrison was apprehended at 10am, he was notified that he was to be removed only at 1pm, just hours before the plane was due to depart (note though that Mr. Morrison alleged he was informed even later). The question of whether this delay was intended to deprive Mr. Morrison's review options or was intended to effect removal is what determines the legality of purpose informing his removal. If the Federal Court found the purpose of the Immigration Department and Minister was to deprive Mr. Morrison of his appeal rights, this would be a purpose collateral to removal and thus beyond Immigration's jurisdiction.

From Mr. Morrison's standpoint, his capacity to seek meaningful legal representation on his removal was hampered by the time available after he was notified of his removal, as well as access to the telephone and his diminished capacity following the violence of his apprehension. The Federal Court examined access to telephone calls across the whole of the period he was detained.⁶⁹⁴ Yet the critical period was only that after Mr. Morrison was advised of his impending removal at 1.08pm. Even accepting the Immigration Department's evidence (as the court did) that Mr. Morrison was afforded a telephone call after he was advised of his removal, he had less than four hours to lodge an interim injunction to restrain departure until 4.48pm (which was when airport security conducted pre boarding checks and Mr. Morrison was required to board the flight). If Mr. Morrison's evidence is accepted, he was offered a telephone call just 20 minutes prior to the plane's planned departure.⁶⁹⁵

***The framework of accountability: the purpose of policing in "Operation Dugite"*⁶⁹⁶**

The evidence the Federal Court relied on to determine purpose focused primarily on the stated intention of governmental agents. It provides a prime example for criticism that purposive interpretation allows the governmental agent to define their own boundaries and operates as an ineffective accountability mechanism.⁶⁹⁷ The Immigration Department and the other agencies involved in the location and removal believed that Mr. Morrison's apprehension involved a risk of violence to himself and to custodial officers as well as a high risk of escape during removal. This was based on Mr. Morrison's past convictions and

⁶⁹⁴ *Ibid.*, at para 71.

⁶⁹⁵ As it turned out the plane was delayed due to a technical repair, which allowed Mr. Morrison to lodge an interim injunction prior to it leaving at 6.43pm, though this delay to the flight had not been apparent from the outset.

⁶⁹⁶ *Morrison v Minister for Immigration and Citizenship [2008] FCA 54*, at para 45. This policing operation was named "Operation Dugite" referencing an extremely venomous Australian snake.

⁶⁹⁷ Tamanaha, *Law as a means to an end: threat to the rule of law*.

allegations that he had made threats towards the Immigration Department officers.⁶⁹⁸ Although the risk of violence was the explicit reason emphasized in the assessment, the first line of the Immigration Department's reasons recorded that the problem created by that violence was its potential to "disrupt the removal"⁶⁹⁹. In this way knowledge of removal is identified as dangerous in its capacity to "trigger" disruption.⁷⁰⁰ It is true that such self harm might result in delayed departure, but the same could be said of judicial review.

Prior to Mr. Morrison's removal, the Immigration Department had prepared an affidavit to be lodged in court should Mr. Morrison seek an interim injunction preventing removal.⁷⁰¹ The Federal Court treated this as evidence *against* the intention to deprive Mr. Morrison of appeal rights as it conceived of that possibility, rather than evidence of intention to control his apprehension so as to effect immediate removal.⁷⁰² The Federal Court gave more weight to this than the other practical elements mentioned above that worked to make it pragmatically difficult for Mr. Morrison to pursue review, and instilled a state of mind in Mr. Morrison that discouraged lodging an application for an injunction to prevent removal. While at the airport Mr. Morrison did seek urgent interlocutory relief to restrain the Immigration Minister from causing his deportation to occur, which was declined.⁷⁰³ However the point is that policing practices can always be justified in terms of the immediate purpose they serve – to address the risk and danger of the particular arrest at hand.

Setting lawful *purpose* as the test for legitimacy of governmental action provides a weak limit for that action. Brian Tamanaha's argument that purposive interpretation fosters an instrumental approach to legal interpretation that represents a shift away from rule-bound orientation, shows the flaw in the use of lawful purpose as an accountability measure.⁷⁰⁴

Arguably all removal operations carry a risk of violence that might disrupt removal, and thus

⁶⁹⁸ See *Morrison v Minister for Immigration and Citizenship* [2008] FCA 54, at para 27-45. The risk assessment itself was formed by WAPOL (Western Australia Police) and a Justice Intelligence Service Prisoner Risk assessment from Western Australia Department of Corrective Services. On the basis of his past convictions and allegations that Mr. Morrison had made threats towards Immigration Department officers, Mr. Morrison was assessed to pose a high risk of escape during movement, a risk of extreme violence and an elevated risk of self harm that thus required a maximum security rating.

⁶⁹⁹ *Ibid.*, at para 41.

⁷⁰⁰ *Ibid.*

⁷⁰¹ *Ibid.*, at para 127.

⁷⁰² *Ibid.*, at para 85.

⁷⁰³ *Ibid.*, at para 1.

⁷⁰⁴ See ———, *Law as a means to an end: threat to the rule of law*.

justify the compressed timeframe imposed in notification of visa cancellation.⁷⁰⁵ In effect, it is arguable that government would need to admit a positive intention to deprive judicial review to constrain its discretionary power to depart from the migration policy requirement for 48 hours notification. Shifting the test from *purpose* to the *effect* of actions would set a lower bar for breach, and would place the actions of government that infringe access to review under scrutiny, rather than simply governmental intentions to do so. The test of lawful purpose obscures what I have shown to be the actual control relationship, which is that social relation between the practices of policing and the capacity of the subject of policing. This is not something that can be viewed via stated intentions or statements by the policing agents at the time. It should be determined by deep examination of the context and process, that is, by *how* control is undertaken. Thus, the essential mismatch between how policing practices exert control and the potential for making policing accountable to law demonstrates how policing discretion to act to control, regardless of policy guidance, is supported.

Conclusion

This chapter has shown how migration control is a practice of policing rather than law. Law retains a role and does impact on policing practice. However the breadth and depth of discretion demonstrated in the context of raids and location activities shows just how much factors other than legal text determine where and how migration policing takes place and who it targets. The expansiveness of discretion means that it is not possible to determine strong targeting tendencies in the *outcome* of policing discretion over raids, that is, in terms of the demographics of who are located or where they are located. It is possible however to delineate themes in the *process* of policing discretion over raids. The themes that emerged rather include, first, the dynamic and diverse character of the policing of raids as a product of its expansion of discretion over activities and its expanded capacity to operate over places invoked by its multi-institutional operation. The second theme that emerged concerns *how* the process of location is manifested. The exercise of discretion operates through a process of social inclusion and exclusion that ultimately relies on force to endorse its authority. Policing discretion in raids might be explained as a product of the expansive powers bestowed on migration policing officers, which involve limits, such as reasonable suspicion, that are hard to review. However, it is more than that. The particular legality of migration law as administrative law, and its effect in limiting the capacity for law to tie policing practice to legal standards,

⁷⁰⁵ In chapter 5, another example is explored where purpose legitimates governmental action to transfer an illegal migrant from an immigration detention centre to a prison setting: *Soh v Commonwealth of Australia* [2008] FCA 520. See discussion of the *Soh* case at 206-207.

forms the third theme. The practice of control is not tempered by accountability that limits that control practice directly. Search warrants intend to recognise the sanctity of private space by limiting policing intrusion. Yet, any process of accountability is divorced from processes that determine the non-citizens continued stay in Australia. The compression of notification of visa cancellation and removal practices can be understood as the upward mobility of policing practices acting as policy, by exerting control over who can stay in Australia for the duration of their review applications. It is achieved by the accumulation of legitimate policing practices but produces something new that has no effective legal accountability.

This chapter has aimed to show the significance of migration policing discretion that does not always nor ultimately rely on law, or any single institutional authority, in determining its action. Through its capacity to socially include and exclude, the practices of migration policing here foreshadow the final chapter of the thesis. In part this will explore how the role of migration policing in constituting social citizenship is rendered in the global context as the facilitation or constraint of movement across the globe. It considers migration policing's operation outside the nation through its role in this feature of global citizenship.

The subjective experience of power – described through the extent of discretion the policing agent is able to harness – demonstrates that one side of the policing relationship is considerably powerful. In this chapter we have also seen indications of the relative powerlessness of the policed subject, an insight that emerged from the outcomes of the control encounters. This further supports the policing model's approach to policing as a relationship of differential power, but the correlation between migration control and the policing model requires more than this chapter's sketch to establish. The next chapter turns to a more direct examination of the subjective experience of illegal migrants from the stories of illegal migrants themselves. It teases out the legal and social conditions that permit illegal migrants' release from immigration detention.

¹⁹⁴ interview with migrant M3, 30 May 2008. Other interview participants also talked about relationships with their (non-family) sponsors as familial in the same way, see interviews with migrants M5, 6 June 2007 and M11, 21 August 2008.

¹⁹⁵ interviews with migrants M1, 28 May 2008; M2, 28 May 2008.

¹⁹⁶ interview with migrant M1, 28 May 2008.

Mums, Mafia and Ransom Money: policing release from detention

Introduction

In my interviews with illegal migrants, three words stood out in the way they talked about the conditions of their release from immigration detention. Some talked about their community sponsors as “mums”, capturing the intense familial bonds that developed as a result of their dependency on sponsors who provided guarantees in the form of security deposits and contributed to meeting the everyday costs of living in the community.⁷⁰⁶ Others described various refugee support groups as “mafia”, the flip-side of familial intimacy, suggesting the intense visibility that operates in the relationship between the illegal migrant and the sponsors.⁷⁰⁷ Several interviewees referred to bonds as “ransom money”, or else spoke about how the security bond made them feel trapped in a corner and they had the experience of being held hostage.⁷⁰⁸

The context of release from immigration detention scrutinised in this chapter demonstrates that migration control operates as policing primarily through two features of the policing model. The control context of release from immigration detention operates as a relationship of policing. This is evident from the contrast between what the *Migration Act* sets out with regards to the detention and removal of illegal migrants, and the operation of release from detention more generally. The universal visa and mandatory detention legal policies draw a distinct separation between legal and illegal immigration status. They state that should a non-citizen not hold a visa, that person should be detained and removed from Australia, and that

⁷⁰⁶ Interview with migrant M3, 30 May 2008. Other interview participants also talked about relationships with their (non family) sponsors as familial in the same way, see interviews with migrants M5, 8 June 2008; and M11, 21 August 2008.

⁷⁰⁷ Interviews with migrants M1, 28 May 2008; M2, 28 May 2008.

⁷⁰⁸ Interview with migrant M1, 28 May 2008.

these rules comprehensively and exclusively determine the movement of migrants within Australia.⁷⁰⁹ In this way, immigration legal status is set out as the primary determinant of whether an illegal migrant should be in detention, or in the community, or outside Australia, that is, immigration legal status is asserted to determine the legitimacy of migrant movement or placement. The context of release provides the best opportunity to explore the tension between immigration law and policing (or in other words between the normative closure of citizenship and broader control agendas), and the factors underlying that decision. Studying this context illuminates any differentiation between the release decisions of illegal migrants because all the scenarios considered involve persons who are *already* illegal and *already* in detention. The chapter examines how the release of detainees is not necessarily *always* contingent on grant of a visa. Further, it argues that the crucial condition of release is sponsorship by an Australian permanent resident or citizen, not a visa grant.

The second feature of the policing model that confirms that control in this context operates as policing involves how the legitimacy of migration controls are established through the conditions placed on release from immigration detention. Some decisions to release illegal migrants from detention do not require the migrant to be sponsored in the community. The factors that enable release in some instances include the comparative risk an illegal migrant poses within and outside of detention. Although these factors are not relevant legal considerations for release, I argue the legitimacy of release decisions rests on the character of these factors as managing issues that arise from interpersonal proximity, termed in the policing model as the urban quality of policing. Chapter 2 argued that today the urban quality of policing refutes confinement within a particular geographical space. This chapter shows how the influence of globalised circuits on migratory movements makes the urban quality of migration control evident. This is clear from the way that apparently “local” issues inform control over the movements of migrants. The movements of migrants are always embedded in globalised dynamics, whether these dynamics are those of education, labour and economies, or whether it is personal or familial connections that propel migrants’ desires to move. Issues that might appear as solely pertinent to, for example, order within detention or the attitudes of local community, operate to mediate global issues of proximity which through their urban quality further demonstrate the operation of migration control as policing.

⁷⁰⁹ The object of the *Migration Act* as exclusive is set out at *Migration Act* 1958 (Cth) s 4, and requirement to detain and then remove illegal migrants as soon as reasonably practicable is set out at s 189 and s 198 *Migration Act* 1958 (Cth).

The chapter draws on interviews with illegal migrants and with sponsors to establish that the relationship between these parties on release from detention involves a difference in social power that gives the community sponsor power over the illegal migrant. I draw on interviews with nine illegal migrants who have been detained and released from detention and a further three who had experienced living in the community with marginal legality on bridging visas. I also draw on interviews with four community members who have sponsored migrants' release from detention.

This chapter's analysis of migration policing illustrates themes that recur across the migration control contexts studied in the thesis. Migration policing's role in determining the social citizenship of illegal migrants was demonstrated in chapter 3 through the extent of power employers hold by determining whether illegal migrants can obtain work, and that power held by educational institutions over whether they discharge their legislative responsibilities to monitor student visa non-compliance or choose to facilitate student visa fraud. In chapter 4, how, where and when immigration raids take place shapes whether illegal migrants are apprehended as such, and thus determine the capacity and identity of illegal migrants and their ability to achieve social citizenship in terms of living in the community undetected. In this chapter, this central role of migration policing is once again affirmed, despite the different contexts and the different policing agents studied. The conditions of release from detention show the *extent* of social citizenship illegal (or marginally legal) migrants are permitted, indicated both through the control endorsed in detainees' relationships with community sponsors and the conditions imposed on release through bridging visas or other undertakings. In this chapter, migration policing's role in constituting social citizenship is developed further through exploring the identity of migrant illegality. Migrant illegality is explored as a status without a core common identity, and as always relational to normative ideals of social citizenship. By exploring this identity, or rather, anti-identity, the connection between formal migrant illegality and the marginal and precarious legality of bridging visas is demonstrated. The second recurring migration policing theme that emerges in this chapter flags how the connection between the identity of illegal migrants may extend as far as legislative citizens. The last chapter showed how the administrative legality of migration law constrained the accountability of migration policing practices, thus expanding the discretionary power of migration policing by default. This chapter shows how the particular constitutional legality of

¹²⁹ The absence of constitutional founding of citizenship in Australia is reflected in a similar lack of founding of global citizenship in the global context. This similarity grounds chapter 7's exploration of migration policing outside the nation as an *anakegma* context to that within Australia.

migration law connects illegal migrants and citizens in unexpected ways, through the lack of constitutional founding of citizenship in Australia.⁷¹⁰

The chapter is structured in three parts. Part A examines the legal framework of release from immigration detention, and overviews its operation in practice which establishes that release from detention does not always equate to a change in immigration legal status. Part B examines the dominant form of release from detention, release on a bridging visa grant, which routinely requires sponsorship of the detainee's release. This part of the chapter explores the accounts of sponsorship from the perspectives of the community sponsor and of the released detainee. It argues that the relationship between the sponsor and released detainee operates as a relationship of policing, and confirms control. The themes that emerge from the experience and impact of release into sponsorship arrangements from both parties further present migration policing's central role in determination of migrant social citizenship. This is developed further through the notion of migrant illegality as a relational anti-identity. The next part of the chapter, Part C, considers those instances where detainees are not released into policing relationships with community sponsors. It explores the factors that inform these release decisions from the perspective of released detainees and immigration officials, and evaluates these against the urban quality that is important in establishing the legitimacy of policing. In this way, the context of release from detention demonstrates that immigration legal status (or more accurately illegal status) is not the final nor ultimate element that dictates migrants' autonomy to move, as the control exercised over release from detention operates as policing. Although this control context empirically explores migrant illegality, or marginal legality, the chapter ends by flagging the potential significance of the analysis of migrant illegality as a relational identity for Australian citizens through the legality of migration law. The absence of citizenship from the Australian Constitution connects the identity of migrant illegality as it is produced by migration policing, and the relational construction of legislative citizenship against the constitutional identity of aliens.

A The law of release from detention

Immigration detention is the single most controversial immigration policy in contemporary Australia, particularly over the detention of refugees and children. Release from detention represents a transition from total deprivation of liberty in difficult conditions for an indefinite

⁷¹⁰ The absence of constitutional founding of citizenship in Australia is reflected in a similar lack of founding of global citizenship in the global context. This similarity grounds chapter 7's exploration of migration policing outside the nation as an analogous context to that within Australia.

period, to greater autonomy over one's movements and activities in the community. The legislative scheme of mandatory detention, the universal visa policy, and the provision for bridging visas to be granted for release from immigration detention all suggest that a person will be released from immigration detention if granted a visa, whether that is a substantive visa or merely a bridging visa. However there are other circumstances whereby detainees are released without a visa. This, together with the conditions imposed in practice to permit release, shows that the operation of control is not described by the legislative scheme.

The legislative scheme for release from detention

The Immigration Department is empowered to grant a bridging visa for release from detention to some detainees in some circumstances. A bridging visa is a temporary visa which allows migrants to remain in Australia while waiting determination or review of a visa application or while making arrangements to depart Australia.⁷¹¹ It bridges the period of time between substantive visas. Three types of bridging visas provide legal status on release from immigration detention. Firstly, migrants who passed through immigration clearance on arrival in Australia are eligible for general bridging visas for release from detention. Secondly, those migrants who arrived by unauthorised boat or without documents by plane, are eligible for release on a bridging visa *only* if they are awaiting determination of their refugee protection visa application and are either under 18 years or over 75 years of age, or have health needs that cannot be met in detention.⁷¹² Both these types of bridging visas are *Bridging Visa E*. A third unique type of bridging visa provides legal status but is granted purely at the Immigration Minister's personal discretion. It does not share the same policy considerations as the others and is called the *Removal Pending Bridging Visa*.⁷¹³ It commenced in 2005 and it is for long term detainees who cannot be removed from Australia despite their co-operation with efforts to remove them, for example persons who are stateless.⁷¹⁴ Thus all bridging visas other than

⁷¹¹ See *Migration Regulations* 1994 (Cth), Schedule 2, Subclass 050 Bridging (General) and Subclass 051 Bridging (Protection Visa Applicant). See also Department of Immigration and Citizenship, "Procedures Advice Manual 3: Schedule 2 Visa 050, Bridging E (General)," (Canberra: Commonwealth of Australia, 2010); ———, "Procedures Advice Manual 3: Schedule 2 Visa 051, Bridging E (Protection visa applicant)," (Canberra: Commonwealth of Australia, 2010).

⁷¹² *Migration Regulations* 1994 (Cth), Schedule 2, Subclass 051 Bridging (Protection Visa Applicant)

⁷¹³ *Migration Regulations* 1994 (Cth), Schedule 2, Subclass 070 Bridging (Removal Pending). This visa commenced on 11 May 2005 and the *Migration Regulations* were amended on 16 June 2005. See Department of Immigration and Citizenship (National Communications Branch), "DIAC Fact Sheet 85 - Removal Pending Bridging visa" Commonwealth of Australia, www.immi.gov.au/media/fact-sheets/85removalpending.htm.

⁷¹⁴ The *Removal Pending Bridging Visa* is termed a "visa". However, there is no application. The process of obtaining such a visa commences by invitation of the Immigration Minister or by the Minister indicating the Minister is inclined to exercise the s 195A *Migration Act* 1958 (Cth) power. Note that the

the general bridging visa first mentioned are directly aimed at individuals who are especially vulnerable or disempowered in some way.

On the basis of the last available figures, in the 2007-09 period, 280 *Bridging Visa E* grants were made for release from detention, 390 in 2006-07 and 823 in 2005-06.⁷¹⁵ Because resolution of immigration status may persist for some time, at 30 June 2008, 5925 persons held a *Bridging Visa E*, and 15 held a *Removal Pending Bridging Visa*, albeit not all these persons held such visas as a result of release from detention.⁷¹⁶

The Immigration Department holds considerable discretion in determining whether conditions for bridging visas are met.⁷¹⁷ In deciding on a general or protection bridging visa grant, policy directs the Immigration Department to consider the unlawful non-citizen's identification, immigration history, past co-operation, conduct in detention, and likely compliance with visa conditions.⁷¹⁸ The main questions for the Immigration Department are whether the detainee is likely to abide by any visa conditions imposed. The visas conditions set out in migration law which are usually imposed are no work⁷¹⁹, no study,⁷²⁰ reporting to the Immigration Department,⁷²¹ arrangements to pay detention costs,⁷²² and to live at a specified address.⁷²³ In

term "residence determination" is used in the *Migration Act*, though it is commonly referred to as "community detention".

⁷¹⁵ The Parliament of the Commonwealth of Australia Joint Standing Committee on Migration, "Immigration Detention in Australia: Community-based alternatives to detention, Second report of the inquiry into immigration detention in Australia," (Canberra 2009), 26. This data was provided in a supplementary submission (129o) from the Department of Immigration and Citizenship at 1. Note that the number of bridging visa grants specifically for release from detention is not comprehensively published.

⁷¹⁶ *Ibid.*, Table 2.4, 28. Given that overall, in 2009-10, 446 731 bridging visas were issued, it is clear the number of *Bridging Visa E* grants for release from detention is a minute proportion of overall grants. This is confirmed by a snapshot at 30 June 2010, which indicates that 83,000 bridging visas were current at any one time, 80% of which were *Bridging Visa A*. See Economic Analysis Unit (Department of Immigration and Citizenship), "Population flows Immigration aspects 2009-2010 edition," (Belconnen, ACT: Department of Immigration and Citizenship, 2011), 57, 60, 85.

⁷¹⁷ Bridging visa decisions are made at the first point by an Immigration Department Compliance Officer, and may then be reviewed by the Migration Review Tribunal (MRT). Both the Immigration Department and the MRT are bound to follow any Ministerial Directions through which the Minister mandates interpretation (*Migration Act* 1958 (Cth) s 499). Decision makers should also follow policy guidance in the *Migration Series Instructions* (MSIs) or *Procedures Advice Manual* (PAM 3) where relevant, though policy does not take precedence over the law.

⁷¹⁸ Department of Immigration and Citizenship, "Procedures Advice Manual 3: Schedule 2 Visa 050, Bridging E (General)."; ———, "Procedures Advice Manual 3: Schedule 2 Visa 051, Bridging E (Protection visa applicant)."

⁷¹⁹ *Migration Regulations* 1994 (Cth) Schedule 8, 8101

⁷²⁰ *Migration Regulations* 1994 (Cth) Schedule 8, 8207

⁷²¹ *Migration Regulations* 1994 (Cth) Schedule 8, 8401

⁷²² *Migration Regulations* 1994 (Cth) Schedule 8, 8507

other words, the Immigration Department has discretion to impose conditions that limit the social and economic life of released detainees outside detention.

The practice of release: more than bridging visas

In practice, release as a consequence of a bridging visa grant typically requires two conditions that are not set out in the legislative scheme:⁷²⁴

- an undertaking by an Australia citizen or permanent resident sponsor to meet the living costs and housing needs of the detainee once released; and
- deposit of a security bond to be forfeited if the conditions of release are breached.

Further, in practice release from immigration detention is not dependent on the grant of visa. Since 2005, the Immigration Minister has been empowered to order “community detention” that enables a person to reside at a specified place rather than in immigration detention.⁷²⁵

Formally, this release does not grant legal status; by law the person remains in detention albeit in the community. They may be required to notify the Immigration Department should they intend to spend the night outside the designated residence and may also need to be present should institutions such as the Red Cross or the Immigration Department notify them they intend to visit. Nonetheless, in general they are free to move in the community, go shopping and go on outings and so on. It is a constrained social life, but there are more common features than differences between community detention and living on a bridging visa. That is, persons in community detention are sociologically as “legal” as those holding bridging visas. This suggests that the grant of legal status is not the key criterion in determining release from detention.

The legal “illegal”: release without a visa

The uncoupling of control from the legislative scheme is also clear from the Federal Court’s power to issue *habeas corpus* orders to release persons from custody.⁷²⁶ Mr. Al Masri

⁷²³ *Migration Regulations* 1994 (Cth) Schedule 8, 8506, Note this provides that the visa holder must notify the Immigration Department at least 2 working days in advance of any change in the holder’s address

⁷²⁴ While these are not included in the *Migration Regulations* as per other conditions, they form part of the decision template officers examine.

⁷²⁵ *Migration Act* 1958 (Cth) ss 197AA – 197AG. This has been used almost exclusively for families with children, to implement the principle that children should be detained only as a “measure of last resort”. This principle was legislatively enshrined in the *Migration Act* 1958 (Cth) s 4AA, and commenced on 29 June 2005.

⁷²⁶ The Australian Constitution empowers *habeas corpus* as part of the original jurisdiction of the judiciary. George Williams and Tony Blackshield, *Australian Constitutional Law and Theory: Commentary and Materials*, 2nd ed. (Sydney: The Federation Press, 1998).

challenged the legality of his continued detention on the basis that his stateless Palestinian identity meant there was no real likelihood that he would be able to be removed in the foreseeable future.⁷²⁷ The Full Federal Court found that Parliament did not show a clear intention that detention is authorised when there is no reasonable prospect of removal in the mandatory detention provisions. Thus the Federal Court ordered his release.⁷²⁸ The Federal Court decision was lauded as a landmark case that demonstrated the limits of the mandatory detention scheme. The legislative scheme of mandatory detention suggests that the release of Mr. Al Masri and others in his position without a visa was an anomaly from the normal scheme where all those without visas are detained.⁷²⁹ The primacy of the legislative scheme was confirmed fifteen months later by the High Court in the case of *Al-Kateb* which held indefinite detention to be lawful.⁷³⁰ The cases of *Al Masri* and *Al-Kateb* are remembered mostly for their legal legacies concerning the limits (or lack thereof) on executive detention of aliens.⁷³¹ The mechanics of the conditions imposed for *habeas corpus* based release, however, escape attention.

As a condition of Mr. Al Masri's release (which in total amounted to less than a month) the court ordered that he provide his address and contact details to his solicitors and to the Minister's solicitors, and that Mr. Al Masri comply with the Immigration Department's actions to remove him should that become possible.⁷³² The Immigration Department did not issue him with a Bridging Visa, but he was required to report daily to the Immigration Department.⁷³³ In the period between the *Al Masri* Federal Court judgment in August 2003 and the High Court's judgment in *Al-Kateb* in August 2004, the Immigration Department released other stateless individuals they had been unable to remove to their countries of former habitual residence. These persons were mostly from the Occupied Palestinian Territories or Iraq, and like Mr. Al Masri, they were also released without a visa. Mr. Al Kateb was released for about a year and

⁷²⁷ Mr. Al Masri claimed that the power to detain is impliedly limited to a reasonable time, and terminates when there is no reasonable likelihood of removal. Accordingly, it was contended that ss 196(1)(a) and 198 do not permit indefinite detention: *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* [2003] FCAFC 70, ("Al Masri").

⁷²⁸ *Ibid.*

⁷²⁹ *Ibid.*

⁷³⁰ *Al-Kateb v Godwin* [2004] HCA 37; (2004) 219 CLR 562, ("Al-Kateb").

⁷³¹ Michael Head, "Detention without trial: is there no limit?," *Alternative Law Journal* 30, no. 2 (2005); Alex Reilly, "Immigration detention: pushing the boundaries," *Alternative Law Journal* 29, no. 5 (2004); Oscar Roos, "Commonwealth legislative power and 'non punitive' detention: a constitutional roadmap," *High Court Quarterly Review* 1, no. 3 (2005); Matthew Zagor, "Uncertainty and exclusion: detention of aliens and the High Court," *Federal Law Review* 34, no. 1 (2006).

⁷³² *Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1037.

⁷³³ Natalie Bugalski, "Asylum Seekers: a taste of freedom from limbo in Woomera," *Alternative Law Journal* 27, no. 5 (2002).

a half,⁷³⁴ and anywhere between eight to thirty one others were released in similar circumstances.⁷³⁵ As well as confirming that control does not hinge on immigration legal status, the *habeas corpus* based releases also suggest the form or requirements of control. The Federal Court required Mr. Al Masri to regularly report to the Immigration Department, as is usual for those released on bridging visas, and also reflected the function of government organisation visits to those in community detention. Bridging visas for release from detention *always* include reporting requirements, and other conditions that function to maintain contact post release between the Immigration Department and the detainee.⁷³⁶ Despite differing legal structures and sources of authority, the conditions of release in bridging visa grants and *habeas corpus* orders are the same. This confirms that release under *habeas corpus* without a visa is not an anomaly. Rather it highlights a shared governmental view that formal legal status is less important than the imposition of conditions that mandate contact with the Immigration Department.

B Release: contingent on the construction of a policing relationship

Release of detainees is not necessarily *always* contingent on grant of a visa. However, it is routinely contingent on sponsorship by an Australian permanent resident or citizen, in conjunction with a visa grant. The focus here is on the relationship of policing that I argue develops between community sponsors that formally provide a security deposit for a detainee or undertake to support residential and living expenses, and the released detainee. However I

⁷³⁴ Mr. Al Kateb was released from Baxter detention at Easter 2003 on *habeas corpus* grounds and remained in the community without a visa until October 2004. He was initially required to report to the Immigration Department daily, but later this was varied. (Ahmed Al Kateb, "Submission No 86 to the Senate Legal and Constitutional References Committee Inquiry into the *Administration and Operation of the Migration Act 1958*," (2005), 2.) Mr. Al Kateb's High Court decision was handed down in August 2004, which found that indefinite detention was authorised by the legislation. It found that the legality of detention was determined by the purpose of detention, not by the duration. Despite this, in October 2004 he was issued a *Bridging Visa E* which did not permit work, nor receipt of welfare benefits.

⁷³⁵ The number of people released on *habeas corpus* orders between the judgments of Al Masri and Al Kateb cannot be definitively stated. The number of eight was derived from: Marilyn Shepherd, "What happened to Akram al Masri," in *Webdiary - Founded and Inspired by Margo Kingston* (Webdiary, 2008). For other figures see also Jamal A. Daoud, "Submission No 85 to the Senate Legal and Constitutional References Committee Inquiry into the *Administration and Operation of the Migration Act 1958*," (2005), 1. Note also that prior to the conclusion of the Al Masri 2003 Federal Court case, there were an estimated 31 Palestinian and Iraqi persons in immigration detention that would be potentially affected by the Al Masri outcome: Natalie Bugalski, "A taste of freedom from limbo in Woomera," *Alternative Law Journal* 27, no. 5 (2002): 241. The figures that Bugalski relied on were derived from a letter from Fr Frank Brennan SJ, Director of the Uniya Jesuit Social Justice Centre to the Minister for Immigration dated 20 August 2002.

⁷³⁶ The usual conditions imposed on bridging visa grants for release from detention include regular reporting to the Immigration Department (*Migration Regulations 1994* (Cth) Schedule 8, 8401) and residence at a specified address (*Migration Regulations 1994* (Cth) Schedule 8, 8505), or notification of a change of address (*Migration Regulations 1994* (Cth) Schedule 8, 8506).

argue that it is not solely in sponsorship arrangements that the relationship of policing is constituted upon release. The conditions imposed on release from detention make released detainees dependent on supportive community members who provide assistance to released detainees in a variety of ways, regardless of whether or not these supportive members are named as formal sponsors.

Release from immigration detention represents a shift in the primary control over detainees from detention authorities to supportive community members. The responsibilities the released detainee holds to report and comply with bridging visa conditions are to the Immigration Department. Yet the conditions imposed make it clear that more immediate control is exercised by supportive community members. The shift in immediate control is a consequence of the financial restrictions imposed on released migrants by the prohibition on work normally imposed,⁷³⁷ as well as the requirement to show evidence that living costs can be met, and the deposit of a security bond. The shift in immediate control is also shown by the fact that in contrast to the difficulties in obtaining release on a bridging visa, once a person is released, proactive state based policing attention drops immediately. In an application for release the residential sponsor is carefully scrutinised. The sponsor may be required to provide evidence of home ownership or rental details, and show there is sufficient space to accommodate the detainee, so as to provide a credible account that this is where the detainee will reside. The Immigration Department must be satisfied that the released detainee has accommodation, so that the released detainee will abide by the bridging visa condition not to work. However, once released, a change of address by the bridging visa holder is merely procedural and does not require prior permission.⁷³⁸ Even when the bridging visa of a released detainee expires, the Immigration Department may not necessarily attend the residence listed with the Immigration Department to apprehend the illegal migrant.⁷³⁹ The operation of control over released detainees shows that it is at a distance from the Immigration Department.

Some community advocates, whose relation to detainees was one of humanitarian or political solidarity, believed that migration authorities saw their role as control. This is shown for example in the importance these advocates attached to attending Migration Review Tribunal (MRT) appeals, for a favourable decision against Immigration Department decisions to refuse release:

⁷³⁷ *Migration Regulations* 1994 (Cth) Schedule 8, 8101

⁷³⁸ Interview with community advocate and sponsor A6, 26 March 2008 explained "It is no problem with the Department provided the address is notified in advance... All they care about is basically where to find them."

⁷³⁹ Interview with community advocate and sponsor A8, 28 May 2008.

... I think if we look respectable and middle class, as if we will keep an eye on the person so they don't rampage around, I think it shows the community support which the person will have to help them to survive.⁷⁴⁰

These sponsors see clearly that the Migration Review Tribunal (or Immigration Department) requires their "control" of released detainees.

The community sponsor: the sponsors' accounts of the policing relationship

An important factor in release is whether a detainee has someone prepared to act as a sponsor for release. "Sponsor" has a specific meaning and role in individual visa sponsorships, but I use the term here more broadly to mean any individual or organisation that provides financial assistance to facilitate a bridging visa grant to a detainee. The term is not used in the *Migration Act* or *Regulations* for bridging visa grants, nor is there a formal policing role instituted for these sponsors. Nonetheless a policing relationship is implicitly constructed through the conditions of release. These conditions also demonstrate the limits placed on sponsors in their relationships with released detainees.

Why do individuals act as sponsors?

Most detainees are sponsored because of their relationships with family, spouses and other intimate partners, or friends. During the thesis study period, some community groups also organised sponsorship for asylum seekers and stateless persons, and sometimes those with particular health needs or special vulnerabilities that amounted to compelling humanitarian needs.⁷⁴¹ The motivation for these individuals and groups was humanitarian and political solidarity. Most of these sponsors were involved in active support and activism in refugee, humanitarian and mandatory detention politics.⁷⁴² That is, these sponsors did not enter into these arrangements so as to become "migration police", and their motivations suggest that the exertion of power over illegal migrants would be minimal. Yet that is not the case.

⁷⁴⁰ Interview with community advocate and sponsor A6, 26 March 2008.

⁷⁴¹ A limited number of eligible asylum seekers on bridging visas might receive some rent assistance through a government funded scheme, the Asylum Seekers Assistance Scheme, administered through the Australian Red Cross (Australian Red Cross, "Asylum Seeker Assistance Scheme," Australian Red Cross, www.redcross.org.au/act/services_ASAS.htm.) This fund was used to support those asylum seekers not in detention, and potential eligibility for this fund did not provide evidence that the bridging visa holder would abide by prohibitions on work if released. Other community based organisations that provide post release support for detainees include the *Bridge for Asylum Seekers* (auspiced by the Ecumenical Council).

⁷⁴² Interview with community advocates and sponsors A6, 26 March 2008; A8, 28 May 2008; A7, 20 April 2008; A9, 29 May 2008.

Some community sponsors may have been sympathetic with the desires of released detainees to disappear into the community. Nevertheless, the conditions imposed on release worked to align community sponsors' activities with governmental control objectives. Sponsors' investment in released detainees' ongoing contact with the Immigration Department involves both their finances and their reputation and thus their effectiveness in advocacy. All the interview participants who had acted as sponsors spoke of the lack of control they felt at some point of their sponsorship. Sponsors were in a position of power relative to the illegal migrant. However their power over migrants was limited by language barriers, lack of resources, their own inexperience, and the pressures placed upon them by their undertakings to the Immigration Department.⁷⁴³ The investment of resources and reputation of community sponsors were essential in aligning the subjectivity of community sponsors with Immigration Department control functions.

The act of sponsorship as financial assistance sets up an immediate power relationship between sponsors and detainees. Security bonds were generally between \$5000 and \$50,000.⁷⁴⁴ The Immigration Department steered the actions of the community sponsor by returning their security bond only if the bridging visa holder complied with visa conditions, up to and including removal from Australia or the grant of a substantive visa. This encourages maintenance of contact between the released bridging visa holder and the security depositor, that is, the sponsor or sponsors. For those sponsors involved in community organised financial grant schemes, the limited funds these groups could raise meant that those detainees with the best prospects of obtaining a substantive visa were given priority for financial support for security deposits or living expenses to enable release.⁷⁴⁵ In effect, this meant that those detainees who received such financial support roughly mirrored those to whom the Immigration Department would eventually grant permission to join the Australian community.

⁷⁴³ Interview with community advocates and sponsors A6, 26 March 2008; A8, 28 May 2008; A7, 20 April 2008; A9, 29 May 2008: Community sponsors/advocates describe what at times feels like a mismatch between the diversity of needs of those released from immigration detention and their own skills, capacity and resources. Studies especially into refugee communities show the particularities of social exclusion they face, though the particularities arising from visa conditions and uncertainty waiting for decisions have relevance beyond refugee visa applicants, see for instance Janet Taylor, "Refugees and social exclusion: What the literature says," *Migration Action* 26, no. 2 (2004).

⁷⁴⁴ The Parliament of the Commonwealth of Australia Joint Standing Committee on Migration, "Immigration Detention in Australia: A New Beginning, Criteria for release from immigration detention, First report of the inquiry into immigration detention in Australia" (Canberra 2008), 160. The amount of security (generally in the form of a bank guarantee) was at the Immigration Department's discretion.

⁷⁴⁵ Interviews with community advocates and sponsors A6, 26 March 2008; A7, 30 April 2008; A9, 29 May 2008.

The intimacy of the sponsorship arrangement, which, for some, involved sharing a home and life, involves more than the bare investment in maintaining released detainees' contact with the Immigration Department.⁷⁴⁶ The "power" the community sponsor holds is that of knowledge of Australian society and customs, particularly as some detainees have seen just the airport and immigration detention.⁷⁴⁷ A lot of the support community sponsors provide consists of orientation to Australian society. It includes matters as diverse as crossing the road and dealing with cars, transport, shopping and so on.⁷⁴⁸ This should not be underestimated and involves cultural orientation to the day to day elements of social belonging. Bridging visas are generally issued for short periods of between a week to three months. Even in the event that work or study is legally permitted, short bridging visa periods may make it difficult to obtain work or enter study.⁷⁴⁹ These factors increase the bridging visa holders' reliance on supportive community members. Oftentimes the social integration of released detainees is contingent on personal networks developed between supportive community members and individuals in organisations that might be regarded as gateways to social citizenship, such as educational institutions, government and corporate bodies. For example, obtaining sufficient identification to open a bank account sometimes can only be done by individuals in institutions making exceptions to rules. The social constraints faced by bridging visa holders are also faced by other migrants with limited visas. But for bridging visa holders, the extent of uncertainty is magnified as their circumstances may mean they are less able to predict whether there will be a favourable visa outcome and when their status will be resolved.⁷⁵⁰ All

⁷⁴⁶ Interviews with community advocates and sponsors A6, 26 March 2008; A7, 30 April 2008; A8, 28 May 2008; A9, 29 May 2008.

⁷⁴⁷ Interview with community advocate and sponsor A8, 28 May 2008.

⁷⁴⁸ Interview with community advocate and sponsor A8, 28 May 2008. See also Morteza Poorvadi, an ex-immigration detainee, whose story of being released from detention into the community echoed the matters identified by community sponsors on what was needed on release from detention: Joint Standing Committee on Migration, "Immigration Detention in Australia: Community-based alternatives to detention, Second report of the inquiry into immigration detention in Australia," 90.

⁷⁴⁹ Many of the migrant interview participants stated that once potential employers saw that their permission to work could be guaranteed only for a short period, such as a month, employers said they did not want to risk training a new employee only to risk needing to find someone to rehire once the migrant's work permission expired.

⁷⁵⁰ Studies particularly into the social exclusion and limitations faced by Temporary Protection Visa (TPV) holders resonate with the experience of bridging visa holders. TPVs are now disbanded. TPVs were three year temporary visas granted to all those persons recognised by Australian authorities as refugees but who arrived in Australia without immigration authority. Temporary protection visa holders enjoyed lesser social rights and entitlements than permanent protection visa holders. They could not sponsor family members, held lower entitlement to social security, and could not leave and re-enter Australia on that visa, thus sharing key characteristics that provide analogous experience to that of bridging visa holders: see Fethi Mansouri and Melek Bagdas, *Politics of social exclusion: refugees on temporary protection visa in Victoria* (Geelong, Victoria: Deakin University Centre for Citizenship & Human Rights, and Victorian Arabic Social Services, 2002); Michael Leach and Fethi Mansouri, *Lives in limbo: voices of refugees under temporary protection* (Sydney: University of New South Wales Press, 2004).

these factors contribute towards the special role that community sponsors and a supportive community have in determining the extent to which released detainees are included (or excluded) in the community outside detention. That is, the community sponsors' role continues the theme that has emerged thus far in the contexts of migration policing agents' determination of the social citizenship of illegal migrants or marginally legal migrants. The asymmetry of power between released detainees and community sponsors also results from their respective emotional and psychological wellbeing, which for released detainees is handicapped by uncertainty while awaiting resolution of immigration status.⁷⁵¹ The mental health of released detainees is not solely the result of trauma from immigration detention or prior refugee experiences. It is also affected by the boredom and depression experienced by those released and living in the community but without permission to work or study.⁷⁵²

In addition to co-optation through financial investments, the Immigration Department also co-opts community sponsors' acts of generosity and solidarity through their concerns about their reputation. Sponsors and advocates believe their reputation with the Immigration Department is important because of requests for the Immigration Minister to intervene and grant a visa. The Immigration Minister holds discretionary power to intervene and grant a visa to a non-citizen, despite the refusal of their review application at the Migration Review Tribunal or Refugee Review Tribunal.⁷⁵³ The Minister may grant a visa in exceptional cases that have compelling humanitarian value.⁷⁵⁴ The Minister is not required to read requests, thus the Immigration Department's Ministerial Intervention Unit plays an important role in determining which requests they will recommend the Minister examine. Nor is the Minister required to make a decision on such requests, and if a decision is made, there is no avenue for review of that decision.⁷⁵⁵ In my interviews, a number of advocates talked about their own or their groups "credibility rating" with the Immigration Department as important in how the Immigration Department treated requests for intervention they had prepared for non-citizens.⁷⁵⁶ One sponsor and advocate explained that the credibility of her refugee support group was due in large part to the selectivity they imposed in preparing requests for

⁷⁵¹ Studies show that both the time in detention as well as the reason for detention impacts on mental and physical health, see Janette P Green and Kathy Eagar, "The health of people in Australian immigration detention centres," *Medical Journal of Australia* 192, no. 2 (2010). Bernadette McSherry, "The government's duty of care to provide adequate health care to immigration detainees," *Journal of Law and Medicine* 13, no. 3 (2006).

⁷⁵² Interview with community advocate and sponsor A8, 28 May 2008.

⁷⁵³ *Migration Act 1958* (Cth) ss 351, 417.

⁷⁵⁴ Department of Immigration and Citizenship, "Procedures Advice Manual 3: Act, Ministerial powers, Administration of ministerial powers," (Canberra: Commonwealth of Australia, 2010).

⁷⁵⁵ *Migration Act 1958* (Cth) ss 351, 417.

⁷⁵⁶ Interviews with community advocates and sponsors A6, 26 March 2008; and A7, 30 April 2008.

Ministerial intervention.⁷⁵⁷ Community advocates see these requests as potentially making the difference of life and death for failed protection applicants. Further their close involvement with this process means that advocates witness its arbitrariness.⁷⁵⁸ Requests for Ministerial intervention have a less than 5% success rate,⁷⁵⁹ and advocates are alive to the "huge responsibility" that their involvement in applications for Ministerial intervention entails.⁷⁶⁰

The sponsors affected by concerns about their reputation are those community sponsors and welfare advocates with ongoing involvement in sponsorship. Thus concerns about reputation affect those motivated by political or humanitarian solidarity, more than those who sponsored family members. Making community sponsors concerned about their reputation if released detainees breach their visa conditions has particular sway because of the lack of public funding for requests to the Immigration Minister for intervention.⁷⁶¹ Community advocates have stepped in to assist persons in preparing their requests to the Minister and writing some requests, which increases the advocates' perception of the importance of their reputation.⁷⁶² Other community advocates spoke of how Immigration Department perceptions of their personal character impact on other solidarity work, such as being granted permission to take detainees on excursions outside the detention centre. In 2008, some persons from the community applied and were granted permission to take detainees on excursions.⁷⁶³ This involved these community members being temporarily empowered as migration officers or guards.

Shifting primary control over released detainees to community sponsors also has an additional function. Supportive community members, whatever their connection or motivations, are potentially the strongest source of disruption to Immigration objectives for released detainees

⁷⁵⁷ Interview with community advocate and sponsor A6, 26 March 2008. Interview participant A6 explained that they do not help if they feel that an individual does not have a meritorious case under the guidelines for Ministerial intervention.

⁷⁵⁸ Interview with community advocate and sponsor A6, 26 March 2008.

⁷⁵⁹ Louise Boon-Kuo, *Ministerial Intervention Practice and Procedure Resource Handbook* (Sydney: Refugee Advice and Casework Service, 2006), 44.

⁷⁶⁰ Interview with community advocate and sponsor A6, 26 March 2008.

⁷⁶¹ The Immigration Advice and Application Assistance Scheme (IAAAS), which enables free migration advice (through community legal centres and the state run Legal Aid Commission) does not include assistance in requests for Ministerial intervention. See Senate Select Committee on Ministerial Discretion in Migration Matters, "Senate Select Committee on Ministerial Discretion in Migration Matters, Report," (Canberra 2004), 71-73. As a result, free professional assistance is highly limited at the Ministerial Intervention stage of the legal process. In general, the Legal Aid Commission and community legal centres provide this assistance only for those persons who were already clients at an earlier stage in the process, and also whose claims for Ministerial Intervention are especially strong.

⁷⁶² Interviews with community advocates and sponsors A6, 26 March 2008; A7, 30 April 2008; A8, 28 May 2008; A9, 29 May 2008.

⁷⁶³ Interview with community advocate and sponsor A9, 29 May 2008.

to maintain contact with the Immigration Department until either visa grant or removal. Aligning the activities and attitudes of supportive community members with Immigration Department objectives stabilises the authority and legitimacy of migration policing. Security deposits and concerns about reputation only, however, affect those who care about the loss of money or reputation. This reflects Ken Muir's approach to the "paradox of dispossession", which argues that the more you have, the more that is able to be taken hostage.⁷⁶⁴

The accounts of community sponsors show their interpretation of the power they hold over released detainees. Their sponsorship is a major determinant as to whether detainees are released from detention, and also over the social inclusion that detainees experience after release. I have drawn specifically on the accounts of community sponsors to explore the relationship between supportive community members and released detainees. Yet insofar as supportive community members make it possible for released detainees to survive outside the detention environment, the role of supportive community members and sponsors is the same. The role of supportive community members supports the social citizenship of those released from detention. Release from detention symbolises a transition to legal immigration status, even when that does not involve formal immigration legal status. Supportive community members thus determine the effective immigration legal status of illegal migrants, whether through sponsorship that directly impacts on whether a detainee will be released, or through other support that enables their social inclusion in the community. This is equally true for those released under *habeas corpus* orders or those released by grant of a bridging visa. The extent of power that sponsors and supportive community members have over released detainees is indicated by the effective legality this provides to released detainees, and these factors identify the relationship of power between the parties as a feature of policing. Investigating released detainees' experiences of their relationship with community sponsors provides confirmation that migration control through release from detention operates as a relationship of policing.

The released detainee: migrant experiences of the relationship of policing

Accounts of released detainees' experiences of social life outside detention provide insight into how the social practices of sponsors, and society more generally, shape released detainees' experiences. Sponsors do not have the power legally to compel bridging visa holders. Nonetheless, released detainees' financial and social dependency, coupled with the intimate context of residential sponsorship, imbues the relationship between sponsors and

⁷⁶⁴ The "paradox of dispossession" was introduced by William Muir in his model of coercive powers in William Ker Muir, *Police: Streetcorner Politicians* (Chicago: University of Chicago Press, 1977).

released detainees with a personal sense of obligation that has the capacity to influence the actions of the released detainee. Three main themes in the experience of social life after release from detention emerge from the accounts of released detainees. First, it is clear that the experiences of living on a bridging visa share many qualities with living illegally in the community. Second, released detainees' experiences show how their relationship with community sponsors shapes their social citizenship. Third, the Immigration Department's routine pressure on bridging visa holders to obtain their travel documents frames the legality of a bridging visa as one that is temporary and precarious.

Blurred lines between illegal and legal bridging visa status

Life on a bridging visa provides formal legal status but the experience shares much with migrant illegality. Mr. Al-Kateb described his release from detention into the community on a *Bridging Visa E* as a move from "a small detention to big detention."⁷⁶⁵ When recounting their lives on a bridging visa in the community, interview participants often returned to their experiences of living without a visa. I argue the slippage in interviewees' accounts between their experiences of living illegally and on a bridging visa is meaningful. It shows migrants' perceptions of life on a bridging visa and life without a visa at times become blurred. This is in part due to the nature of a bridging visa. It is a temporary visa that might be anywhere between a few days to few months. The short periods of bridging visas highlight the precarious legal status afforded by these visas.⁷⁶⁶ A bridging visa does not provide protection from removal. The Immigration Department can detain a person when they report for renewal of their bridging visa, if they are concerned that the bridging visa holder has not or will not comply with visa conditions. Further the Immigration Department can remove the bridging visa holder if they are beyond the review stage of their visa application and have only a discretionary request to the Minister for intervention under foot.⁷⁶⁷ A bridging visa is only ever

⁷⁶⁵ Al Kateb, "Submission No 86 to the Senate Legal and Constitutional References Committee Inquiry into the *Administration and Operation of the Migration Act 1958*," 1.

⁷⁶⁶ Interviews with migrants M1, 28 May 2008; M2, 28 May 2008; M3, 30 May 2008; M4, 7 June 2008; M5, 8 June 2008; M6, 8 June 2008; M7, 25 June 2008; M8, 30 June 2008; M9, 26 July 2008; M11, 21 August 2008.

⁷⁶⁷ Non-citizens are entitled to remain in Australia if they are awaiting decision on a visa application at the stage of primary application to the Immigration Department, or are awaiting determination of review of that primary application by the Migration Review Tribunal, Refugee Review Tribunal or review of visa refusal or cancellation by the Administrative Appeals Tribunal. Visa applicants are also entitled to remain in Australia while awaiting judicial determination of an application that the review tribunal decision was afflicted by jurisdictional error, that is, that the review tribunal acted outside its jurisdiction because of an error in their approach to making their decision. That is, non-citizens are entitled to remain in Australia until their visa application is "finally determined": *Migration Act 1958* (Cth) s 5(9). After their visa application is determined, any stay in Australia is at the discretion of the

a step away from detention and removal. One interview participant, Andy, reported that he chose not to report himself to the Immigration Department as illegal, because living illegally and undetected was preferable to living on a bridging visa.⁷⁶⁸ At the time, a number of persons from his country and with a similar background had lodged requests for intervention of the Immigration Minister because of a change in circumstances in his country of origin. These persons had been granted bridging visas, and the Immigration Minister had intervened to grant some persons from his country a visa, or permission to reapply for refugee status on the basis of changed conditions. Yet for Andy the uncertainty of outcome, short bridging visa periods, and no permission to work outweighed the opportunity to regularise his status. Instead, Andy stated "I will just keep falling."⁷⁶⁹

Interview participants felt that poor Immigration Department practices meant that bridging visas provided little protection from being wrongly identified as illegal. In the two years he held a *Removal Pending Bridging* visa, Mohammad was incorrectly recorded in the Immigration Department database as illegal.⁷⁷⁰ Mohammad's visa required him to report to the Immigration Department each fortnight, at first in person, and then over time by telephone.⁷⁷¹ Yet when he attempted to report by telephone he said on about 18-20 occasions he was advised he was unlawful and to report in person. The visa was not sufficient to assuage his fears:

... I get paranoid. This is shocking me... What's going to happen if this happens after five o'clock in the evening, the lawyer is going to go home? I don't even have his personal number, so who am I going to contact?... Why [is my visa] not in the system? Because the problem, he [a particular officer who knows he holds a visa] might be working in this chair today; tomorrow he might quit, tomorrow he get different job, he can go and then what's going to happen?

Other interview participants reported similar fears that their bridging visa would not prevent their detention. John feared that his lack of photo identification for two years meant that he would not be able to prove that he held a bridging visa, if police or the Immigration

Immigration Minister and Immigration Department: Kamand et al., *The Immigration Kit: a practical guide to Australia's immigration law* 144-62, and 739-84.

⁷⁶⁸ Interview with migrant M8, 30 June 2008.

⁷⁶⁹ Interview with migrant M8, 30 June 2008.

⁷⁷⁰ *Removal Pending Bridging Visas* are issued when a person has consented to be returned but has not yet been returned. This is generally the case where the person is stateless and their last country of habitual residence has not accepted their return. *Migration Regulations* 1994 (Cth), Schedule 2, Subclass 070 Bridging (Removal Pending).

⁷⁷¹ Interview with migrant M2, 28 May 2008.

Department asked for it and thus would be detained.⁷⁷² The blurring between legal and illegal status also reflects that some bridging visa holders' activities give rise to potential visa cancellation. Some bridging visa holders, who had held these visas for long periods, felt that they have no choice but to work in breach of visa conditions as a matter of survival, despite a constant fear of detection.⁷⁷³ One interviewee described the bridging visa as "creating criminals", because working without immigration authorisation is a criminal offence.⁷⁷⁴ Life on a bridging visa was characterised by a constant vigilance, on guard for potential exposure, as one interview participant stated "...you are just taking precautions for everything".⁷⁷⁵ This meant adhering to legal rules, being careful to pay transport tickets,⁷⁷⁶ being particularly aware of persons in uniform,⁷⁷⁷ and noticing even while sleeping at night whether a car stops in front of their residence.⁷⁷⁸ One interview participant had a bag packed with essentials for the entire six years he lived without a visa.⁷⁷⁹ Another prepared for a visit to the police station by packing up his room, being ready in case he was detained.⁷⁸⁰ Taking precautions against detection above all else meant not talking about immigration legal status with acquaintances and even friends because of fear of being reported. Taking such precautions, however, gave bridging visa holders a sense of social isolation.⁷⁸¹

Sponsorship relationships defined the social citizenship experienced by bridging visa holders

Paradoxically, the sense of social isolation persists even when detainees are released from detention in sponsorship arrangements, despite intimate domestic living arrangements and constant interaction with others. This is a result of the power differential between the parties. For example, interview participant Janet was a refugee from Africa in her early twenties. Janet was detained for about nine months, and was then sponsored from detention by a family involved in refugee support who had been visiting her in detention for some time. Janet's life experience meant she relied on her sponsors for more than accommodation and financial

⁷⁷² Interview with migrant M9, 26 July 2008.

⁷⁷³ Interviews with migrants M5, 8 June 2008 and M8, 30 June 2008.

⁷⁷⁴ Interview with migrant M8, 30 June 2008. See also *Migration Act 1958* (Cth) s 235 which sets out prohibitions on illegal work.

⁷⁷⁵ Interview with migrant M10, 3 August 2008.

⁷⁷⁶ Interview with migrant M8, 30 June 2008.

⁷⁷⁷ Interview with migrant M5, 8 June 2008.

⁷⁷⁸ Interview with migrant M11, 21 August 2008.

⁷⁷⁹ Interview with migrant M10, 3 August 2008.

⁷⁸⁰ Interview with migrant M8, 30 June 2008.

⁷⁸¹ Interviews with migrants M1, 28 May 2008 and 2 August 2008; M2, 28 May 2008; M3, 30 May 2008; M4, 7 June 2008 and 24 July 2008; M5, 8 June 2008; M6, 8 June 2008; M7, 25 June 2008; M8, 30 June 2008; M9, 26 July 2008; M10, 3 August 2008; M11, 21 August 2008; M12, 10 July 2010.

support. She had grown up in a small remote area in her country, and was illiterate in her own language, which was a marginal language of her country. She had no prior experience with governments or law in her own country or in Australia. The support she relied on from her sponsors extended beyond financial support to social support, English language assistance, assistance in liaising with her lawyers, assistance seeking documentary evidence from her country of origin and so on. Janet was extremely grateful for the support of this family in making her release possible, but there were a number of occasions that she felt a disjuncture between what the intimacy of her place in the household signified to her about her familial role, and how she was perceived by others in the sponsor family. She saw the mother of the family as holding a maternal role to herself, but the adult daughter of the family repeatedly intimated that her role was not familial, but rather she was required to do as she was told, like a "slave". Other instances similarly made her feel isolated such as being asked to drink a different kind of milk, or not being treated equally within the family. These experiences were of course subjective, and as they were relayed in interview, it seemed that Janet's interpretation of these interactions was very much framed by her limited English and unfamiliarity with Australian social norms. My point is not, however, to make any judgment about whether these interactions should be objectively interpreted as purposefully isolating. The point, rather, is that Janet's subjective perception of her place within the family tempered her sense of social belonging more generally.

The difference in knowledge about Australian society, social institutions, customs and law between Janet and her sponsor family also had other impacts. It meant that Janet interpreted comments or advice from her sponsors as holding the authority of legal requirements. Janet did not feel she had autonomy over even personal matters in her life. She felt her sponsor sought to compel her not to work (even after she held a substantive refugee visa) and not to start a romantic relationship. Janet believed the personal advice that her sponsor gave her might be conditions of her temporary protection visa, that, if breached, would mean her removal from Australia. These were not in fact conditions of her temporary protection visa.⁷⁸² However, Janet found it difficult to distinguish between the legal requirements of her visa, and the advice her sponsors gave her. Her sponsor had accompanied her on her legal appointments, and Janet relied on her sponsor for reminders about what her visa conditions meant in practice.

⁷⁸² *Migration Regulations* 1992 (Cth), Regulation 2.08F; Schedule 1, 1401 Protection (Class XA); Schedule 2, Subclass 785 Temporary Protection Visa. This visa *does* permit the holder to undertake work. This visa does not prohibit visa holders entering romantic relationships, nor does any other visa.

Katrina and her husband Ben's relationship with their sponsor was shaped less by their lack of familiarity with Australian societal customs, and was more completely shaped by their financial dependency and debt to their sponsors. They were sponsored by Katrina's Australian citizen uncle and his wife. They lived for almost six years on a bridging visa, five of which were without work permission, and only in the last year and a half received income support of \$60 per week from a charitable organisation. The financial support and loans from their relatives effectively developed into a situation of unpaid domestic service where they undertook driving, cooking and cleaning for their relatives. It compromised their ability to make plans, even day to day, as the structure of their days was defined by what was needed of them by their relatives.⁷⁸³

Andy had a very different experience, which I argue, is a product of a more balanced power relationship between him and his sponsors. Charitable organisation, *Bridge for Asylum Seekers*, provided weekly income support, and one of their members arranged for deposit of his \$12,000 bond. That the financial support was through an organisation might account for why Andy's sponsorship did not form the intense individualised policing relationship that developed in the scenarios just mentioned. Andy's rent was paid largely by his friends, who fulfilled the residential element of his sponsorship. His friends were refugees from his ethnic community, and had faced similar struggles in their own applications for refugee status in Australia. The commonality of history and experience that Andy shared with his housemates meant that although these individuals were not yet citizens, Andy said he felt a sense of inclusion.

The difference between the experiences of Janet, Katrina and Ben and Andy can be attributed to the difference between their relationships with their sponsors. The relationship between Janet, Katrina and Ben, and Andy and their sponsors was shaped by the extent of their financial dependency, and their respective social citizenship in comparison with their sponsors. The social citizenship of bridging visa holders and sponsors is a product of multiple social norms. For released detainees it may also reflect specific migration or refugee related social stigmas. For example, the stigma attached to bridging visas because of their association with failed asylum claims, in some ethnic and refugee communities,⁷⁸⁴ or that attached to apprehension while illegally employed in sex work.⁷⁸⁵ Social citizenship is also shaped by the

⁷⁸³ Interviews with migrants M5, 8 June 2008; and M6, 8 June 2008.

⁷⁸⁴ Interviews with migrants M5, 8 June 2008; and M6, 8 June 2008.

⁷⁸⁵ Interview with migrant M4, 7 June 2008 and 24 July 2008; Interviews with community advocates A8, 28 May 2008; and A6, 26 March 2008. Elena Jeffreys (President, Scarlet Alliance, Australian sex workers'

personal emotional response of individuals to the accumulated stress from detention, and their present circumstances awaiting migration decisions and the uncertainty of favourable resolution:

Well to be honest, people are very supportive, but I feel that I'm overloading them with sorrow. I never have nothing nice to talk about.⁷⁸⁶

Many bridging visa holders' withdraw from their usual social networks. This thus increased the importance of new networks and relationships, and made sponsors even more central in their lives. Some talked for example about the support they felt from religious organisations from a faith other than their own, or from organised refugee support groups and so on, as new sources of social connection in their lives.⁷⁸⁷ The relationship of power between released detainees and supportive community members operates as an outcome of migration legal processes. However, the accounts of bridging visa holders show that the relationship of power exerts influence through social norms and relationships. In other words, the policing model's relationship of power is constituted by social, not legal, citizenship, and in this way contributes to destabilising the state's normative closure through legal citizenship.

Immobile migrants: the pressure to obtain travel documents

The Immigration Department's practice of insisting bridging visa holders obtain their travel documents is testament to the destabilising potential of migrant illegality as a source of statelessness. Yet the very experience of being illegal in a country for an extended period of time can lead to scenarios that replicate features of stateless identity. Some embassies and consulates of migrants' countries of origin may have difficulty in confirming an individual's identification, particularly if migrants travelled to Australia in the first place on false documents. Factors in the migrants' countries of origin may make individuals temporarily or permanently stateless. These include the effect of war and change on national governments, the accuracy of national identity record keeping in migrants' countries of origin, as well as

association), in interview with author, 5 August 2008; Maria McMahon (Sex Work Policy Advisor, ACON) in interview with author.

⁷⁸⁶ Interview with migrant M4, 7 June 2008 and 24 July 2008. The mental health impact of immigration detention is well documented, see for example Green and Eagar, "The health of people in Australian immigration detention centres." A comparison of the mental health of refugees granted temporary rather than permanent protection visas provides insight into the impact of uncertainty of stay in Australia on the mental health of migrants: Shakeh Momartin et al., "A comparison of the mental health of refugees with temporary versus permanent protection visas," *Medical Journal Australia* Vol 185, no. No 7 (2006).

⁷⁸⁷ Interviews with migrants M3, 30 May 2008; M5, 8 June 2008; M4, 7 June 2008 and 24 July 2008; M11, 21 August 2008.

national policies that confirm nationality. For example, Feili Kurds were stripped of their Iraqi nationality and expelled from Iraq in 1980 under Saddam Hussein's regime. It has only been since 2006 that law reform in Iraq enables the recognition of the nationality of Feili Kurds, though there are considerable flaws with the recognition process in practice.⁷⁸⁸

Non-citizens cannot be removed from Australia unless they have a travel document, that is, a passport that confirms their nationality and thus permission to enter their home country. This is one of the main barriers to removal processes. Every bridging visa holder is required to report to the Immigration Department at the end of each bridging visa and seek renewal. If a visa applicant is refused a favourable decision at the review tribunal stage, from that time, they have a lawful claim to remain in Australia on the grounds that they have lodged a valid judicial review application⁷⁸⁹ or a first request to the Immigration Minister for intervention,⁷⁹⁰ or they have lodged a valid visa application.⁷⁹¹ Alternatively, the non-citizen is eligible for a bridging visa on the grounds that the non-citizen is making arrangements to depart Australia.⁷⁹² However, grant of a bridging visa in these circumstances depends on the Immigration Minister's determination that the Minister is "satisfied" that the applicant is making acceptable arrangements to depart.⁷⁹³ From that time, the Immigration Department places increasing pressure on the applicant when non-citizens report for bridging visa renewal.⁷⁹⁴ The Immigration Department's Compliance section routinely requests bridging visa holders show current travel documents (or obtain them if they are not current) and show an airplane ticket to leave Australia.⁷⁹⁵ Pressure is applied through denying permission to work, short periods of visa grants, and refusal to grant a bridging visa until these actions are undertaken.⁷⁹⁶

⁷⁸⁸ Vivian Tan, "Feili Kurds in Iran seek way out of identity impasse," *United Nations High Commission on Refugees News Stories* (28 May 2008), www.unhcr.org/483d60872.html.

⁷⁸⁹ *Migration Regulations* 1994 (Cth) Schedule 2, Subclass 050 Bridging (General) Visa, 050.211 (3A), (4) (4AAA), and (5A).

⁷⁹⁰ *Migration Regulations* 1994 (Cth) Schedule 2, Subclass 050 Bridging (General) Visa, 050.211 (5B), (6)

⁷⁹¹ *Migration Regulations* 1994 (Cth) Schedule 2, Subclass 050 Bridging (General) Visa, 050.211 (3)(a)

⁷⁹² *Migration Regulations* 1994 (Cth) Schedule 2, Subclass 050 Bridging (General) Visa, 050.211(2)

⁷⁹³ *Migration Regulations* 1994 (Cth) Schedule 2, Subclass 050 Bridging (General) Visa, 050.211(2)

⁷⁹⁴ Interview with migrant M5, 8 June 2008. This is confirmed, obliquely, in an inquiry into criteria for release from detention which states that a common category of non compliance with bridging visa conditions is continued failure to make arrangements for departure from the country when a bridging visa has been granted on that condition: Joint Standing Committee on Migration, "Immigration Detention in Australia: A New Beginning," 55.

⁷⁹⁵ Interviews with migrants M5, 8 June 2008; M9, 26 July 2008. Interviews with community advocates and sponsors A6, 26 March 2008; A8, 28 May 2008.

⁷⁹⁶ Interviews with migrants M5, 8 June 2008; M2, 28 May 2008.

In addition, pressure has been placed on bridging visa holders to obtain travel documents that the Immigration Department would otherwise have trouble obtaining. The Immigration Department had provided one interview participant, a Burmese asylum seeker, with only fortnightly bridging visas. She was told that she would be granted a longer visa if she obtained an extension to her passport to make it valid.⁷⁹⁷ She was able to obtain an extension only by paying a fee of \$1500 to the Myanmar embassy, much of which was a bribe, which would have posed a barrier for the Immigration Department had they sought a travel document on her behalf.⁷⁹⁸ Yet once she obtained a passport, the Immigration Department did not grant a longer visa, as they advised that she was now able to return to Myanmar (Burma). The Immigration Department later recognised this interview participant faced a real chance of persecution if returned and she was granted refugee status in Australia. Yet the same Immigration Department had earlier placed her in danger by requiring her to obtain travel documents from the national government from which she feared harm.⁷⁹⁹

A stateless interview participant said that release from detention was held out as an inducement for him to attest he was of Indian nationality, despite his insistence he was of Bangladeshi nationality. The Immigration Department's purpose was to obtain travel documents for him from India and thus enable his removal, as the Bangladesh Consulate had not recognised his nationality as he did not hold identification.⁸⁰⁰ Having been held in immigration detention for some time, he explained that the Immigration Department had advised him that if he signed for an application for an Indian travel document that he would be released from detention to await removal. He did so and was released from detention. However he became effectively stateless, with no country willing to recognize him as their national. Notably, this has reportedly led to persons who are stateless being issued travel documents from countries of which they are not a national, an observation borne out by my research.⁸⁰¹ The Immigration Department has also reportedly bribed consulates to provide

⁷⁹⁷ Interview with migrant M5, 8 June 2008.

⁷⁹⁸ The Myanmar embassy said that the extension would cost AUD \$3000, despite her explanations that she did not have work nor work permission, which the interview participant interpreted to be a bribe requirement. Eventually a relative of her husband provided a loan of \$1500 which she sent to the Embassy, and confirming her suspicion of that a portion of the fee constituted a bribe, she was provided a receipt for only \$600.

⁷⁹⁹ This highlights the particular dangers that asylum seekers face when pressure is placed on them to obtain identity documents, as contact with the Consulate means the Consulate knows their whereabouts in Australia. For this asylum seeker, characteristic of most Burmese asylum seekers, their fear of persecution is from government, so this holds a real chance of harm for the particular asylum seeker and any family or other connections remaining in Burma (Myanmar).

⁸⁰⁰ Interview with migrant M2, 28 May 2008.

⁸⁰¹ Interview with migrant M2, 28 May 2008.

these documents, and knowingly facilitated these documents being utilised by individuals to enter foreign nations on false documents.⁸⁰²

Overall, the experiences of released detainees show the extent of power that sponsors and supportive community members have over released detainees. This powerful influence was acknowledged by sponsors, and experienced by released detainees. It demonstrates that control over those released from immigration detention operates through a relationship of power that thus identifies such control as policing. From the accounts of sponsors and released detainees, three aspects of control over released detainees are evident. The security deposit requirement for release, and concerns that sponsors have over their reputation because of the Immigration Department's visa decision making role, encourages sponsors to exercise control over released detainees to ensure they comply with visa conditions. The control that supportive community members exercise arises from their particular capacity to facilitate or constrain the social citizenship of released detainees. However, supportive community members' capacity to extend released detainees' social citizenship is itself constrained by competing economic and reputation based incentives. The role of supportive community members in constituting the social citizenship of released detainees is a theme that recurs across all the migration policing contexts examined in the thesis. The third feature of control evident from this policing relationship is that it operates at a distance from the Immigration Department and migration law. Although the sponsorship and other conditions imposed are imposed in the context of Immigration Department decisions to permit release from immigration detention, the sponsor's authority does not arise solely from the Australian migration law. This is a second recurring theme across the migration control contexts studied. In the context of release, the experiences of released detainees on bridging visas show that social norms and social obligations generated in the relationship between released detainees and supportive community members can be just as influential in shaping the activities of released detainees as formal legal conditions. The attitudes and actions of a sponsor can be authoritative, and are experienced as authority by migrants, regardless of whether that source of authority has legal backing.

⁸⁰² Phil Glendenning et al., "Deported to Danger: A Study of Australia's Treatment of 40 Rejected Asylum Seekers," (Homebush West, N.S.W.: Edmund Rice Centre for Justice & Community Education; School of Education, Australian Catholic University, 2004); Phil Glendenning et al., "Deported to Danger II: The Continuing Study of Australia's Treatment of Rejected Asylum Seekers" (Homebush West, N.S.W.: Edmund Rice Centre for Justice and Community Education, 2006).

The policing relationship and the anti-identity of migrant illegality

In the control contexts examined in chapters 3 and 4, migration policing's constraint on the social citizenship of illegal migrants emphasises the role of law. Laws against employing illegal migrants affect the potential for illegal migrants to obtain work. Factors shaping migration policing practices affect who and how illegal migrants are apprehended, and thus shape the potential for illegal migrants to remain living illegally in the community.⁸⁰³ In contrast, the release context reveals the social citizenship of illegal (or marginally legal) migrants as established in *relation* to normative practices of social citizenship. That is, migrants can engage in all those practices that go towards making a life: from the mundane but necessary aspect of obtaining identity documents so as to open bank accounts and send post overseas, driver's licence, work, study, relationships, friendships, a daily routine and so on.

In the release decision, I have argued that control occurs through the constitution of a policing relationship between community sponsors and released migrants. The accounts of released detainees, however, show that it is not solely sponsors that determine the social citizenship of released migrants. Supportive community members and society in general plays a role in constituting their social citizenship. Yet society more generally does not have an official role in migration policing in contrast to employers, educational institutions and visa sponsors. General community members are invited to report persons they suspect to be illegal migrants, but do not have an explicit policing role in relation to migrants holding a visa. Nor are there distinct points (like the release decision) or distinct individualised relationships (like that with sponsors) that signify the start of a policing relationship. Instead the role of the general community in contributing to the social citizenship of migrants is diffuse and constant when migrants are in the community. Investigating the anti-identity of migrant illegality better illuminates the role the community in general plays in shaping migrants' social citizenship. Further developing the identity of migrant illegality focuses on the active way in which that status charges all the social interactions of illegal migrants, and transforms these encounters.

The relational anti-identity of migrant illegality

The concept of migrant illegality as an anti-identity was introduced by Nicholas De Genova in an article where he draws on the anti-identity of queer politics to explore a "politics of migration that exceeds the normative confinements of citizenship altogether and subverts the fetishized fixities of identity outright."⁸⁰⁴ He takes his starting point as the political claims put

⁸⁰³ See chapters 3 and 4.

⁸⁰⁴ De Genova, "The Queer Politics of Migration: Reflections on 'Illegality' and Incurability," 106.

forward during street demonstrations of estimated more than five million illegal migrants in the United States in Spring 2006:

¡Aquí Estamos, y No Nos Vamos! [Here we are, and we're not leaving!]

Like the queer call "We're here, we're queer, get used to it!", the slogan for illegal migrants does not seek legal inclusion, it is anti-assimilationist. As suggested by the name, GLBTI politics (gay, lesbian, bisexual, transgender, inter-sex) calls for the positive inclusion of diverse sexuality and genders. It calls for "equal rights", and the expansion of normative categories of sexuality and gender. In contrast, queer politics defines "queer" as that which is counter-normative, so the intention is to refuse categorisations of identity in this way. De Genova draws on David Halperin's definition of queer to explain:

It is an identity without an essence. 'Queer,' then, demarcates not a positivity but a positionality vis-à-vis the normative... 'Queer' ...describes a horizon of possibility whose precise extent and heterogeneous scope cannot in principle be delimited in advance.⁸⁰⁵

De Genova argues that the slogan "We're here, we're illegal, get used to it" espouses an analogous politics, one that rejects calls for more utopian demands for legalisation or amnesty. Rather than calling for citizenship and inclusion, this politics insists that deviation from the normal will persist. As such, there is no identity that applies to all illegal migrants, it is an anti-identity.

De Genova argues that migrant illegality is relational because it can be defined only through the spectrum of its "...juridical and socio-political relations to the state, and must be actively and more or less deliberately produced through the law and its enforcement."⁸⁰⁶ This, however, does not precisely pin down what defines the counter normative identity of migrant illegality. The identity and experience of illegal migrants cannot be described simply as the reverse of citizenship. Nor can they be understood simply as the opposite of legal migrant status. There are important connections, for example, between the subjugated experience of illegal migrants and those of bridging visa holders as outlined in this chapter. Susan Bibler Coutin's attention to the disjuncture between the physical presence of illegal migrants, and their illegal status which erases their presence into a "non-existence", exposes the crux of the tension in the experience of migrant illegality.⁸⁰⁷ That is, the identity of migrant illegality sits at

⁸⁰⁵ David. M Halperin, *Saint Foucault: Towards A Gay Hagiography* (New York: Oxford University Press, 1995), 62.

⁸⁰⁶ De Genova, "The Queer Politics of Migration: Reflections on 'Illegality' and Incorrigeability," 110.

⁸⁰⁷ Susan Bibler Coutin *Legalizing moves: Salvadoran immigrants' struggle for U.S. residency* (Ann Arbor, Michigan: University of Michigan Press, 2000), 27-47.

the tension between presence and non-existence, with each state being a result of both legal and social factors. Taking on both De Genova and Coutin's approach, I argue that migrant illegality is an anti-identity constructed in relation to migration policing practices of social citizenship. Coutin refers to migrant illegality as a "space of non-existence",⁸⁰⁸ but the reference to "space" confuses because of the specific physical spatial meaning ascribed to this term in legal geography. I argue Coutin's approach to conceptualising the tension between presence and non-existence in migrant illegality finds a better fit with the approach to migrant illegality as a relational anti-identity. Coutin's use of the term "space" does not refer to geographical space. Rather the "space" of illegality and non-existence she refers to is metaphysical, in that it is carried with the migrant, and shapes migrants' interactions with people, activities and places. Coutin relocates the clandestine legality of certain illegal migrants, specifically, into the broader frame of Salvadoran migrants' and refugees' experiences of persecution and exile that motivated their illegal existence in the United States. In doing so, she shows how certain migrants experience their "non-existence" in the United States as a continuation of their life in their home country, where they erased their lives to avoid death squads. In this way she highlights that non-existence is a characteristic of a subjugated existence rather than specific to illegal migrant status.⁸⁰⁹ De Genova's argument that it is deportability not deportation that is the goal of migrant illegality further underscores the argument that it is not legal status per se that constitutes the non existence of migrant illegality. He states:

Migrant "illegality" is lived through a palpable sense of deportability, which is to say, the possibility of deportation, the possibility of being removed from the space of the nation-state.⁸¹⁰ [emphasis added]

Coutin's later work also engages with the way in which migrant illegality is attached to illegal migrants (rather than "spaces").⁸¹¹ She draws attention to how the illegal status of migrants transforms mundane and legal activities, such as working, into illicit activities. Migrant illegality connects the licit and the illicit domains through their involvement, such as in selling

⁸⁰⁸ Ibid.

⁸⁰⁹ Coutin argues that for the Salvadoran refugees who participated in her study, their entire move to and stay in the United States can be seen as a non-existence, in the sense that they left their home country so as to not exist there, to erase their existence in their home country: *ibid.*

⁸¹⁰ De Genova, "Migrant 'Illegality' and Deportability in Everyday Life," 439.

⁸¹¹ Susan Bibler Coutin, "Contesting Criminality: Illegal Immigration and the Spatialization of Legality," *Theoretical Criminology* 9, no. 1 (2005); ———, "Questionable Transactions as Grounds for Legalization: Immigration, Illegality, and Law," *Crime, Law and Social Change* 37, no. 1 (2002).

fruit, which can be dependent on the exploitation of undocumented labour.⁸¹² By showing that it is the interactions of illegal migrants that transform these activities, she emphasises that migrant illegality is mobile and interactive. Coutin also underscores how the legal presence of illegal migrants is never completely erased, despite illegal status, as records of existence may still be generated, and these records used to evidence residence of ten years to ground applications against removal from the United States. All these features of migrant illegality that Coutin highlights are congruent with my approach to migrant illegality as a relational anti-identity, that is essentially described through the practices that generate or constrain illegal migrants' social citizenship.

The identity of migrant illegality as constructed in relation to practices of social citizenship helps place the significance of illegal status in perspective. Migration policing practices do not solely enhance or constrain the social citizenship of *illegal* migrants, as they extend over all migrants, who can be similarly described as holding a relational anti-identity. For example, systemic practices that supervise visa compliance construct the social citizenship of visa-holding migrants. Further, visa conditions, such as temporary visa periods, prompt social experiences of precariousness that entail the potential for a subjugated and exploited social citizenship associated with illegal migrants. This can be seen, for example, in the exploitation of temporary migrant workers holding 457 visas in Australia, despite their legal status.⁸¹³

Recognising that the social citizenship of migrants is not completely described by legal status also draws attention to how legal status is part of a process. From this chapter, it is clear that migrants can move between illegal and legal status multiple times, and although there is some difference in social citizenship with the move to legal status, it may be less than what might be anticipated. Further, the process of shifting between legal and illegal status is one that produces different outcomes (whether that be control, release from detention, or maintenance of order), rather than being an outcome itself. The construction of migrant anti-identity through migration policing practices will be explored further in chapter 7. Global

⁸¹² Coutin *Legalizing moves: Salvadoran immigrants' struggle for U.S. residency*; Coutin, "Contesting Criminality: Illegal Immigration and the Spatialization of Legality."

⁸¹³ Exploitation of workers of this visa type has been well documented. See for example: Michelle Bissett and Ingrid Landau, "Australia's 457 Visa Scheme and the Rights of Migrant Workers," *Alternative Law Journal* 33, no. 3 (2008); Emily Bourke, "Deaths prompt calls for 457 visa inquiry," *ABC News*(2007), www.abc.net.au/news/stories/2007/08/28/2018015.htm; Matthew Moore and Malcolm Knox, "Foreign workers 'enslaved'," *The Age*(2007), www.theage.com.au/news/investigations/foreign-workers-slaves/2007/08/27/1188067032708.html?page=fullpage#contentSwap1; Yuko Narushima, "Visa worker deaths double in a year," *Sydney Morning Herald*(2008), www.smh.com.au/news/national/visa-worker-deaths-double-in-a-year/2008/11/17/1226770355964.html; ———, "Migrant worker died on job, union says," *Sydney Morning Herald*(2008), www.smh.com.au/news/national/migrant-worker-died-on-job-union-says/2008/11/10/1226165481853.html.

citizenship has no explicit legal identity in terms of rights and entitlements. I argue in chapter 7 that it is in part constructed by its relation to migration policing practices that determine a feature of global social citizenship, being individual autonomy to move across the globe.

C Release from detention as management of urban problems

As mentioned earlier in the chapter, not all those released from detention are required to enter into a policing relationship with their sponsors as a condition of release. I argue that decisions that permit release without security bonds and sponsorship relationships demonstrate another feature of the thesis policing model, its urban quality. I introduced the urban quality of the policing model in chapter 2. This policing feature grounds the legitimacy of policing over issues arising from the impact of persons living close to one another, physically and socially. Policing's legitimacy over these issues reflects its historical development as a form of governance that arose with and addressed the variety of issues that emerged with urbanisation.⁸¹⁴

Immigration detention itself can be seen as a practice that manages issues arising from proximity. It operates to physically segregate illegal migrants from the rest of the population in Australia. In Australia, this is especially acute in the remote physical location of detention centres in the Australian desert,⁸¹⁵ and during the "Pacific Solution" which involved the interception and transfer of illegal boat arrivals to Nauru and Papua New Guinea, and now the detention of boat arrivals on Australia's Christmas island which is 2650km north-west of Perth but only 360km south of Java, Indonesia.⁸¹⁶ Immigration detention also creates a social separation. Detention rules limit and manage communication between the inside and outside, such that the social distance from the remainder of Australia shields detention practices from scrutiny.⁸¹⁷ Rules on media access arguably limit the transparency of immigration detention conditions.⁸¹⁸ Further, there is substantial documentation of practices within detention that

⁸¹⁴ This was discussed in more detail in chapter 2.

⁸¹⁵ Baxter, Woomera, Port Hedland, and Christmas Island in Australia were all active in the period of my study. Nauru and Manus Island (Papua New Guinea) detention centres were formally managed by those respective governments but Australia met all the costs associated with the detention centre, as well as those costs associated with the transfer and processing of asylum seekers. Further, it was unauthorised arrivals in Australian waters that were transferred to these offshore detention facilities.

⁸¹⁶ Australian Human Rights Commission, "Immigration detention and offshore processing on Christmas Island," (Sydney: Australian Human Rights Commission, 2009), 11.

⁸¹⁷ The Parliament of the Commonwealth of Australia Joint Standing Committee on Migration, "Immigration Detention in Australia: Facilities, Services and Transparency, Third report of the inquiry into immigration detention in Australia" (Canberra 2009).

⁸¹⁸ *Ibid.*, 117-21. The Immigration Department's policy on media access is set out at 118, and states that media do have access, but cannot use audio recording within immigration detention nor are permitted

have at various times limited communication from inside detention to the outside. During the bulk of the study period, detainees were prohibited mobile phones and also access to the internet. Although that has now changed, as a practical matter, access to the internet and public phones varies across detention centres.⁸¹⁹ Detainees have also complained of restrictions in legal and political communication within detention, arising from the initial segregation of detainees on entry, which prevents legal advice prior to the initial immigration interview,⁸²⁰ and isolation of protesting or hunger striking detainees, for example, through the use of black plastic screens.⁸²¹ Immigration detention effects a physical and social separation between those within and those outside detention, and thus can be interpreted as managing the proximity between illegal migrants and the rest of the Australian population.

The accounts of interview participants in my study who were released from immigration detention without the requirement of a community sponsor and without a security deposit reveal that management of interpersonal issues and conflict within detention operated as factors in their release. Thus the practice of release confirms its urban quality, and consequently identifies this context of migration control as policing.

The release of detainees who are “walking trouble”⁸²²

Katarina was detained in Villawood detention centre in 2004. In January 2005 she was assaulted by a fellow detainee (“Jade”).⁸²³ She suffered injuries including chipped teeth, bruising and scratches.⁸²⁴ The NSW State Police attended the next day but advised they could not proceed as the detention centre was out of their jurisdiction. Although the Australian Federal Police later attended the detention centre, they did not proceed to charge. This was characteristic of the inter-institutional uncertainty with regards to which agency held

to take photographs that might identify individuals, but can photograph interview rooms and accommodation when these spaces are unoccupied. However, many submissions to this government inquiry outlined their view that media access was limited, and the Committee recommended media be provided greater access.

⁸¹⁹ Ibid., 20-22, 39, 55, 160.

⁸²⁰ Human Rights and Equal Opportunity Commission, *Those who've come across the seas: detention of unauthorised arrivals*: 127-30.

⁸²¹ Ibid., 104-10. The Human Rights and Equal Opportunity Commission described this restriction as “the most serious infringement of the rights of detainees on hunger strike” (104).

⁸²² Interview with migrant M4, 7 June 2008 and 24 July 2008, and documents from her Immigration Department file obtained through freedom of information request.

⁸²³ Note Jade is an alias adopted to protect the anonymity of this detainee.

⁸²⁴ This was recorded on her Immigration Department file in an incident report “Assault – occasioning actual bodily harm – Detainee on detainee”. The record notes that she was the victim of the assault. The incident report prepared by various GSL staff, notes that while Katarina required medical attention, the other detainee did not.

responsibility for immigration detention centres at the time.⁸²⁵ The company contracted to provide detention services, that is, manage detention, at this time was Global Solutions Limited ("GSL"). GSL's inappropriate responses to Katarina's assault, and Katarina's persistent complaints against GSL's handling of the matter meant that Katarina felt she was made to appear as "walking trouble" to the detention centre.⁸²⁶ A GSL officer witnessed the conflict but did not intervene.⁸²⁷ The Ombudsman's office criticised the GSL officer's response, as it did not accord with procedures to maintain the good order and security of the centre,⁸²⁸ and found "administrative deficiency against the Immigration Department on the assault issues".⁸²⁹ Katarina felt that GSL staff were prejudiced against her in their response to the assault on her. GSL viewed her as "trouble" after she was assaulted. They classed her as high risk for any transport requirements.⁸³⁰ As a result of further threats from the other detainee, Katarina feared she would be assaulted a second time and that GSL did not take adequate steps to protect her. GSL imposed cursory restrictions on the other detainee, Jade. Jade was advised that she was prohibited from part of the detention centre the weekend after the assault. Other than that, GSL advised Katarina to keep away from the detainee Jade, even though they did not prevent the other detainee from attending the kitchen and visits areas. However, three days after the assault, even the cursory restriction imposed on Jade was not enforced, and Jade entered the prohibited area. When Katarina confronted GSL staff, Katarina was told that they had not been instructed to treat the detainee Jade any differently, and in fact that they were not aware of the assault. Katarina complained to the detention centre supervisor, but in response was advised GSL could transfer her to Lima, the women's only section at

⁸²⁵ In 2001 the Commonwealth Ombudsman recommended the Immigration Department negotiate memorandum of understandings (MOUs) with state, federal and territory police services regarding their involvement with immigration detention centres: Commonwealth Ombudsman, "Report of an Own Motion Investigation into the Department of Immigration and Multicultural Affairs' Immigration Detention Centres: Report under section 35A of the *Ombudsman Act 1976*," in *Own Motion Investigations* (Canberra: Commonwealth Ombudsman, 2001). Yet while steps had been taken towards this, no formal agreement had been reached by August 2008: John McMillan, "Submission by the Commonwealth and Immigration Ombudsman, Submission no. 126 to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia," (Canberra: Commonwealth Immigration 2008), 21.

⁸²⁶ Interview with migrant M4, 24 July 2008.

⁸²⁷ This was confirmed by the Immigration Department who recorded that "he remained at his post to ensure other detainees did not become involved in the incident.": John McMillan, "Report for tabling in Parliament by the Commonwealth and Immigration Ombudsman: under s486O of the Migration Act 1958, Personal Identifier 226/07, tabled in Parliament 13 February 2008," (Canberra: Commonwealth and Immigration Ombudsman, 2007), 2.

⁸²⁸ *Ibid.*

⁸²⁹ *Ibid.*, 2.

⁸³⁰ The restraints risk assessment, which provides advice on restraint for the transport of detainees, records Katarina as high risk, advising that she should be monitored closely and restrained if required during "escort" or at "a location accessible to the public".

Villawood IDC. The small size of Lima and the limited access for Lima residents to the open plan visit area of the centre meant Lima was seen as “detention within detention”.⁸³¹ Katarina interpreted this as a punitive threat, and felt that she was the one being punished for being victimised by the assault.

From this time onwards, Katarina felt that she was considered a troublesome detainee. This was compounded by three matters: first, her Ministerial intervention request on humanitarian grounds that arose from a breach of privacy made by the Immigration Department; second, some conflict she had with detention centre staff over her role in challenging detention conditions, particularly through participation in the detention advisory committee seeking improvements in the nutritional value of meals, kitchen work conditions and clothing collection and distribution, and third, her steadily deteriorating mental health.

All these elements culminated prior to the Immigration Department granting her release in 2006 with work permission and without a security bond. This was an extremely unusual situation, especially considering the prospects of being permitted to remain in Australia were very low at this stage. She had been refused refugee status, had exhausted judicial review of that process, and been refused ministerial intervention though she had submitted a further request for consideration. It also marked a complete turnaround in the conditions of release that the Immigration Department required in her earlier applications for release on a bridging visa. In her prior application, the Immigration Department refused her bridging visa application completely because they were not satisfied that she would abide by bridging visa conditions. The Immigration Department indicated that if even if they were satisfied of this, a security bond of \$12,000 would be required.⁸³²

Four months prior to her release she had received an acknowledgement from the Immigration Department that they had breached her privacy in allowing media personnel to accompany the raid that led to her detention. That she had received this acknowledgment but was still in detention further affected her mental health, and at the point that she sought release they were arranging her transfer to Brisbane Mental Hospital. These factors combined, in Katarina’s view, to make the problems she presented within the detention environment more pressing than the risk of her disappearance into the community on release.

⁸³¹ Interview with migrant M4, 7 June 2008 and 24 July 2008.

⁸³² Examination of Assessment of Application for Bridging visa E (Class WE 050) of Interview participant M4, 2-3.

The legal relevance of the risks that detainees pose within and outside detention

The impetus for Katarina's release – maintaining order within detention - was not isolated.⁸³³ Even amongst the small pool of interview participants, another detainee, Ahmed, was released in his view solely because his political activities to improve detention conditions made his continued detention troublesome.⁸³⁴ In Ahmed's three years of detention, his frequent applications for release were consistently met with requirements of security bonds of about \$10,000.⁸³⁵ Yet eventually he too was released without a bond. The only thing that had changed was his continued high profile involvement in political activities while in detention, ranging from judicial challenges to conditions, complaints to external bodies, and campaigning for the repair of a computer centre in detention. His chance of a favourable immigration outcome had not substantially changed at the time of his release.

The law does not set management of order within detention as a relevant consideration for bridging visa grant decisions. However the release of Katarina and Ahmed suggests that this was considered in their respective release decisions. The problems that Katarina and Ahmed faced were primarily from the contracted detention service providers, but it is the Immigration Department that makes release decisions. Reports have noted confusion amongst Immigration Department staff as to whether it is the contracted company or the Immigration Department that holds responsibility for detention centre management.⁸³⁶ However, both the common law and the contract between the Immigration Department and detention service provider clearly state that the Immigration Department shares duty of care responsibilities for detainees. Examining release from immigration detention decisions outside the confines of bridging visa grants shows these release decisions *do* take into account the comparative risks detainees pose within and outside the detention setting. In a 2008 case, Mr. Soh was transferred from immigration detention to serve his detention in a prison environment because of his disruptive behaviour. The Federal Court found his transfer was not punitive, even though it was in

⁸³³ Note that reasons are not provided for bridging visa grants. However reasons for refusals might be provided and are commonly based on periods of time as unlawful, prior breach of visa conditions, a false identity having been presented at some time and so on.

⁸³⁴ Interview with migrant M1, 28 May 2008 and 2 August 2008, and documents from his Immigration Department file obtained through Freedom of Information request.

⁸³⁵ Ahmed was detained for three years from 2004 to 2007, and had one brief mistaken detention period in 2003. During his period of detention he applied to be released on a bridging visa upwards of ten times. He recounts that he lodged bridging visa applications every month "just to check what is going on to their mind".

⁸³⁶ The Auditor-General, "Management of the Detention Centre Contracts—Part A Department of Immigration and Multicultural and Indigenous Affairs," 69-71.

response to his behaviour, because it was approved to maintain good order at Villawood, ensuring officers' safety and averting risk to other detainees and staff.⁸³⁷ The risk to order within detention was acknowledged as a valid reason for transfer outside immigration detention.

The risk to the community outside detention is also not formally acknowledged as a relevant consideration in considering release on a bridging visa from detention. Nonetheless the broader legal policy framework regulating release shows that this impetus has been a systemic though unacknowledged factor. The Immigration Minister is empowered to detain an illegal migrant in the community if the Minister thinks that it is in the "public interest" to do so.⁸³⁸ In 2009, those released into community detention on Christmas Island were subject to curfews and required to remain within 500m of their designated residence between 7pm and 6am.⁸³⁹ The Immigration Department stated this was to address concerns raised by some members of the local community about "having 'strangers' wandering around the community at night."⁸⁴⁰ Similarly, since 2008, the new direction in detention policy introduced risk to the community as a factor in determining whether an illegal migrant should be detained.⁸⁴¹ Even before these values were formalised to reform the *Migration Act*, the Immigration Department interpreted risk to the community as a relevant factor for release. This was exposed in a case which showed that Immigration Department policy guidance for decision makers incorrectly presented the law. This policy guidance required the decision maker to consider the best interests of the community, whereas the correct question for the decision maker was whether the applicant would abide by the bridging visa conditions if released from detention.⁸⁴² Immigration policy was subsequently amended, but it is fair to assume that until it was, the incorrect policy interpretation was systemically relied upon by decision makers.

⁸³⁷ *Soh v Commonwealth of Australia* [2008] FCA 520.

⁸³⁸ *Migration Act* 1958 (Cth) s 197AB

⁸³⁹ Australian Human Rights Commission, "Immigration detention and offshore processing on Christmas Island," 46.

⁸⁴⁰ *Ibid.*, 47.

⁸⁴¹ These values are incorporated into the *Migration Amendment (Immigration Detention Reform) Bill* 2009, but have not yet been enacted. See chapter 1, Figure D, *Key Immigration Values*.

⁸⁴² *Ghomrawi v Minister for Immigration and Multicultural Affairs* (1998) FCA 21 December 1998, unreported, BC9807073; *Ghomrawi v Minister for Immigration & Multicultural Affairs* [1999] FCA 1454; *Ghomrawi v Minister for Immigration & Multicultural Affairs* [2000] FCA 724.

The urban quality of policing, and control of the movement of illegal migrants

Chapter 2 outlined how local social inclusion of illegal migrants by governmental and other authorities has been interpreted by Monica Varsanyi as gesturing towards a "citizenship-as-inhabitation" not inheritance, or an "urban citizenship".⁸⁴³ This contradicts the study in this chapter that shows that release from detention is not always contingent on grant of a visa, and that the crucial condition of release is sponsorship by an Australian resident or the relative risk an illegal migrant poses in and out of detention. In this chapter, a migrant's freedom to move (here, in and out of detention) depends on their social inclusion and the risk they pose in policing's broader control agenda, not their membership within a legal framework.

The practices that Varsanyi highlights are significant inclusionary practices and, as she argues, contest nation-state identity as a closed membership based community rendered through citizenship and migration law.⁸⁴⁴ However, it does not follow that such inclusionary practices create a localised legal membership and migration policy within a legal framework of national membership.⁸⁴⁵ In her study she considers the activities, for example, of some local police departments in the United States that have decided not to enforce immigration law,⁸⁴⁶ and the growing number of United States' city police agencies that accept "matrículas consulares" (identity cards issued by the Mexican government to its citizens living in the US) as identification.⁸⁴⁷ Police in the United States argue that enforcing immigration laws frustrates their competing objective to encourage victims of crime to report to police regardless of their immigration status.⁸⁴⁸ This rationale by police suggests that police practices that operate to socially include illegal migrants reflect their normative notions of risk and suspicion, and police decisions about how to manage such risks. Policing practices in that context thus contribute to the *social* citizenship that illegal migrants can enjoy while in the US, but arguably do not

⁸⁴³ Varsanyi, "Interrogating 'Urban Citizenship' vis-à-vis Undocumented Migration," 239-40.

⁸⁴⁴ ———, "Rising Tensions Between National and Local Immigration and Citizenship Policy: Matrículas Consulares, Local Membership and Documenting the Undocumented." James Hollifield refers to the competing logic of nation-state closure and economic openness as the "liberal paradox": Hollifield, "The Emerging Migration State."

⁸⁴⁵ Varsanyi, "Interrogating 'Urban Citizenship' vis-à-vis Undocumented Migration."

⁸⁴⁶ Ibid.

⁸⁴⁷ The Mexican government states 377 cities and 1,180 law enforcement agencies in the US accept the matrículas consular as identification. See Gonzalez, C. (2004) Use of consular ID stirs debate: immigrant advocates are fighting a bill in the U.S. House that would limit the usefulness of a matricula, Omaha World-Herald, 23 July, p. 01B. See Varsanyi by *ibid.*, 242.

⁸⁴⁸ Ridgely, "Cities of Refuge: Immigration Enforcement, Police, and the Insurgent Genealogies of Citizenship in U.S. Sanctuary Cities."

construct localised membership within the legal framework of national membership. The legitimacy of such policing decisions arguably relies on the social recognition that governance of issues arising from close living (such as the risks of crime) is necessary. The same policing considerations – the management of issues relating to individuals living in close proximity – have been shown in this chapter to authorise a migrant's movement from detention to the community.

Examining decision making within the broader framework of inclusion and exclusion turns the focus away from the outcome of these practices as determination of membership and towards their outcome as control of movement. Release from detention itself can be interpreted as management of the close living of individuals in the global dimension. Immigration detention centres have been characterised by some scholars as "not Australia".⁸⁴⁹ The standards upheld in immigration detention arguably set them aside from "Australian" standards, even within other prison facilities.⁸⁵⁰ Some see immigration detention as part of Australia's stretching "borderlands", or transit areas. As such, release from immigration detention is movement from "not Australia" to Australia.

More than that, migration control inevitably substantively engages the global, as it involves the control of migratory movement across the globe. Thus, any decisions that control migrant movement across the globe are determinations about permission and about access to living spaces and communities. In this way, migration control is critical to globalising urbanisation. Migration control decision making compresses the spatial distance between migrants and their potential living places, and brings a global dimension to matters of interpersonal proximity. As argued by Sassen, with reference to the transformation of certain cities within economic globalisation,⁸⁵¹ the city is not defined by its geographical locality. The global city is identified as a concentrated centre for global economic flows and migratory circuits, which produces its own transnational push and pulls for labour and capital. It is a social and economic confluence of flows more than a particular spatial locality.⁸⁵² I suggest that the legitimacy of migration decisions that encompass issues of risk and order, even though these

⁸⁴⁹ Perera, "What is a Camp...? ".

⁸⁵⁰ Joint Standing Committee on Migration, "Immigration Detention in Australia: Facilities, Services and Transparency, Third report of the inquiry into immigration detention in Australia ". One submission to this inquiry from a community legal centre noted that clients had reported that the quality of care in prison was better than that in Perth immigration detention centre (166-167). Others note the contrast between the low security needs and the high security operation of immigration detention (22, 58, 170), which provides a further example of immigration detention's departure from Australian imprisonment standards.

⁸⁵¹ Sassen, "Global Cities and Survival Circuits."

⁸⁵² Ibid.

decisions are not formally empowered to take these considerations into account, reflect the issues of close living that migration controls entail. The urban quality of migration decision making in this context demonstrates that the control of movement can be as much an outcome of the social citizenship of migrants as their immigration legal status.

Conclusion

This chapter has demonstrated that migration control, studied in the context of release from immigration detention, operates as policing. Study of release from immigration detention showed that the release of detainees is not always contingent on grant of a visa. The crucial determinant rather is whether the conditions of release encourage released detainees' continued contact with the Immigration Department. This is routinely fostered through the requirement of a sponsor, thus making release from detention contingent on the constitution of a policing relationship. The second feature of migration control of release from detention that confirms its operation as policing is the release decision as one that manages issues arising from close living. The urban feature of policing is embedded in the use of immigration detention itself as managing the proximity between illegal migrants and the rest of the Australia population, and is also expressed in the factors that the Immigration Department considers in determining release.

Migration policing in this context grapples with the tension between the importance of the nation-state dictating complete control over entry and expulsion via immigration legal status, and practices of the state that show immigration legal status is not the sole determinant over control of migrant movement. It is the policing relationship of control that is shown to be crucial, and that policing encompasses decision making on normative notions of risk that are not formally included as relevant considerations for release. Migration policing thus does not draw authority solely from migration law with its sharply defined juncture suggested by the binary of legality and illegality.

Migration policing's role in delineating social citizenship is affirmed in this chapter. Sponsors' control over how released detainees participate in society, feel included, and avoid stigma, demonstrates this. It is also clear from those release decisions made on the basis of the risk that the Immigration Department attributes to a detainees' presence either within or outside detention. As a critical recurring theme in migration policing, the notion of social citizenship was developed further in this chapter by exploring the identity of migrant illegality. Illegal migrants have no core common identity that applies to all illegal migrants. Rather they are

connected by their construction in relation to migration policing practices of inclusion/exclusion and their presence in Australia. By noticing this form of anti-identity, the connection between illegal migrants and those with legal status becomes more apparent. Migrants are connected through their experience of subjugation, that arises from the social experience of identity, rather than their formal legal status. The notion of a relational anti-identity signals an identification not through positive rights, but via the constraints on autonomy over their lives.⁸⁵³ Legal citizenship is conventionally defined by specific rights and entitlements. However the constitutional framework of citizenship in Australia suggests the potential for legal citizenship to be conceived as a relational anti-identity. In Australia, there is no specific constitutionally founded head or power that empowers the legislature to make laws with regards to citizenship. Instead, the legislature is empowered to make laws on citizenship under the power to make laws with regards to immigration and naturalisation or aliens.⁸⁵⁴ Thus, in the *Australian Constitution* the tension is not that between citizens and aliens, but between aliens and non-aliens.⁸⁵⁵ That is, legislative citizenship is determined by its relation to constitutional alien status. There are various implied rights that emerge for citizenship, such as what was once known as the constitutional immunity for citizens from involuntary detention except as judicial adjudication of criminal guilt,⁸⁵⁶ but this protection is increasingly in doubt.⁸⁵⁷ On

⁸⁵³ De Genova, "The Queer Politics of Migration: Reflections on 'Illegality' and Incurability."

⁸⁵⁴ *Commonwealth of Australia Constitution Act*, s 51(xix) Naturalisation and aliens.

⁸⁵⁵ See discussion of this in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* [2005] HCA 36. Prior to *Ame*, citizens and aliens had been considered mutually exclusive, but this case dismantled that notion. See Prince, "Mate! Citizens, Aliens and 'Real Australians' - the High Court and the case of Amos Ame".

⁸⁵⁶ *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* [1992] HCA 64; (1992) 176 CLR 1 See the majority judgment of Brennan, Deane and Dawson JJ at [23].

⁸⁵⁷ I have written elsewhere on this. See Boon-Kuo, "The challenge to restrain the power to detain: the impact of immigration detention decisions on control orders and the making of the Alien Citizen." This citizen's "constitutional immunity" has been increasingly uncertain since *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* [1992] HCA 64; (1992) 176 CLR 1. Conflict over this apparent citizens' constitutional immunity arises in obiter comments on the character of executive detention in the following challenges to the detention of non-citizens: *Al-Kateb v Godwin* [2004] HCA 37; (2004) 219 CLR 562; *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* [2004] HCA 49; (2004) 225 CLR 1; *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* [2004] HCA 38; (2004) 78 ALJR 1156.

The High Court more directly considered executive detention of citizens in *Fardon v Attorney-General for the State of Queensland* [2004] HCA 46. The High Court found the preventive detention of Australian citizen Mr. Fardon, after his period of criminal imprisonment had been served, was permitted under the Queensland Constitution. It remains unclear whether this would be allowed in the federal jurisdiction as the separation of powers is stricter at the federal level. Some insight is provided in the High Court's finding that control orders were constitutionally valid, even though the legislative scheme can potentially amount to home imprisonment: *Thomas v Mowbray* [2007] HCA 33.

current High Court authority in some circumstances it is possible to treat an Australian citizen who is also a national of another nation as an alien under the *Australian Constitution*, and also unilaterally deprive that person of citizenship.⁸⁵⁸ In other words, Australian citizenship signifies membership only insofar as the citizen is non-alien. It is not my intention to argue a particular contemporary constitutional interpretation of the status of legislative citizenship. I mean just to illustrate that the conventional notion of legislative citizenship as defined by rights and protections is not clear cut in Australia, and like migrant illegality it is constructed by its relation, for citizens, to constitutional aliens. The definition of non-alien is not settled, and as a negative identity it does not have the capacity for closure.⁸⁵⁹

The unstable protection that citizenship and legal status offers means there is more room for social and political practices to determine the freedom or otherwise of migrant movement, and enhances migration policing discretionary power over citizens by default. That is, the constitutional legality of migration law does not constitutionally protect specific rights and entitlements of citizenship. Legislatively conferred citizenship does not *necessarily* provide constitutional protection from parliament legislating that citizens should be subject to practices that are associated today with migration control. It therefore signals the potential legality of exercise of migration policing discretion, should legislation provide such powers. The way in which the particular legality of migration law shapes migration policing is the second recurring theme that emerges from studying release from detention.⁸⁶⁰

Importantly, the lack of constitutional founding of citizenship is analogous to the absence of constitutional (and legal) founding of notions of global citizenship. I draw on the absence of constitutional founding to illustrate the connection from the national contexts explored in Part II of the thesis, forward to the supra-national global citizenship speculated upon in the last chapter of the thesis. Australian citizenship, like concepts of supra-national citizenship, is not articulated in a constitutional sense in terms of setting out rights and entitlements connected

⁸⁵⁸ Prince, "Mate! Citizens, Aliens and 'Real Australians' - the High Court and the case of Amos Ame "; Kim Rubenstein, "Alien Citizen? Living in a State of Confusion," in *The Blake Dawson Waldron Lecture 2007* (Australian National University, Canberra: Centre for International and Public Law, 2 August 2007).

⁸⁵⁹ It is beyond the scope of this thesis however to suggest the contemporary interpretation of constitutional membership in Australia. For the argument that constitutional case law suggests that Australian membership is delineated rather by the phrase "people of the Commonwealth", see Prince, "Mate! Citizens, Aliens and 'Real Australians' - the High Court and the case of Amos Ame ".

⁸⁶⁰ In chapter 4, I explored this in terms of the administrative legality of migration law, which enhanced migration policing by default. In this chapter, the constitutional legality of citizenship law does not provide constitutional protection of citizens, and thus conversely leaves open the potential for executive or legislative power, such as migration policing powers, over citizens in the same way as non-citizens.

to that status. Rather the determination of citizenship in both contexts is politically determined, in the national context via legislation and in the global context more diffusely as an outcome of multiple legal systems, policing and norms.

Each migration control context studied thus far has engaged the feature of discretion from the policing model. In this chapter, community sponsors' social practices that operate to include or exclude migrants entailed discretion that enabled detainees to be released from detention, but otherwise did not hold the capacity to determine whether or not the released detainee obtained a substantive visa.⁸⁶¹ The context of the *Migration Act* character test considered in the next chapter epitomises the intense discretion potentially engaged in migration control that can and does affect substantive visa refusal or cancellation. The character test engages the confluence of discretionary power engaged in legislated power, individualised discretionary decisions, and concealed control consequences. Character testing operates to include migrants into the citizen community, and "outlaw" those determined to be of bad character, and those unable to neutralise the negative exercise of policing discretion.

of character epitomises the character of policing. The exploration of the context of character forms a companion piece to chapter 4's focus on raids. Whereas chapter 4 argued that raids practices demonstrated that while migration law provided the formal authority for officers, it did not determine the exercise of power. The examination in this chapter shows the same thing, but the context is substantive visa determination via the character test. The character test draws together a number of terrains of discretionary practice, individual elements of which have been explored in the control contexts studied in prior chapters. All non-citizens, no matter what their immigration status, are required to satisfy the character test to obtain a visa and continue to satisfy this condition to remain in Australia.⁸⁶² Thus all non-citizens are within the scope of the character test power. By exploring the structure and use of the character test, I argue it operates as a policing power. As I will show through studying elements of its practice in this chapter, the character test does not operate as a universal criterion that must be satisfied by every visa applicant and visa holder. Instead, its integration as a universal criterion for all non-citizens empowers policing agents to endorse inclusion into the citizen community, to confirm the exclusive privileges of that community, and to "outlaw" others. The particular effect of non-citizen's failure of the character test as empowering visa refusal and cancellation illustrates the ultimate role of the character test in migration control, to police the legal

⁸⁶¹ The actions of sponsors and supportive community members does hold potential to affect the chance of a migrant obtaining substantive visa status through, for example, assistance preparing requests for the Immigration Minister's intervention to grant a visa, assistance in liaison with legal representatives and so on. However, they do not have capacity to *determine* a substantive visa grant.

The Policing of Character and the Character of Policing

Introduction

The Migration Act empowers visa refusal and cancellation if a non-citizen fails the character test. The control context of migration's character test shows its operation as policing by revealing that the role it plays determining the substantive visas of non-citizens is framed by various manifestations of discretionary power. That is, this chapter illustrates how the policing of character epitomises the character of policing. The exploration of the context of character forms a companion piece to chapter 4's focus on raids. Whereas chapter 4 argued that raids practices demonstrated that while migration law provided the formal authority for officers, it did not determine the exercise of power. The examination in this chapter shows the same thing, but the context is substantive visa determination via the character test. The character test draws together a number of terrains of discretionary practice, individual elements of which have been explored in the control contexts studied in prior chapters. All non-citizens, no matter what their immigration status, are required to satisfy the character test to obtain a visa and continue to satisfy this condition to remain in Australia.⁸⁶² Thus all non-citizens are within the scope of the character test power. By exploring the structure and use of the character test, I argue it operates as a policing power. As I will show through studying elements of its practice in this chapter, the character test does not operate as a universal criterion that must be satisfied by every visa applicant and visa holder. Instead, its integration as a universal criterion for all non-citizens empowers policing agents to endorse inclusion into the citizen community, to confirm the exclusive privileges of that community, and to "outlaw" others. The particular effect of non-citizen's failure of the character test as empowering visa refusal and cancellation illustrates the ultimate role of the character test in migration control, to police the legal inclusion and exclusion of non-citizens in Australia.

⁸⁶² *Migration Act 1958 (Cth)* s 501

It is possible to establish my argument that character testing operates as policing by examining the openness of the text of the character test, and drawing on its use to demonstrate the diversity of activities and behaviours that qualify a non-citizen for character based exclusion. The open legal text of the test which shows that “good character” is open to diverse interpretations is certainly one aspect that supports the argument that the character test operates as policing. Nevertheless, this chapter focuses instead on the layering of discretionary power, and illustrations of the discretionary power facilitated by such a structure. The purpose in adopting this focus is to highlight the resonance between the discretionary power illustrated through the character test, and other aspects of legislated migration control. The character test represents the intersection of multiple features of discretion in migration control. Each aspect of discretion is evident outside the character test in migration control. But in the character test discretion is intensified, both in its operation, and in its effect over immigration legal status.

The chapter starts by introducing the legal framework of the character test. It illustrates how discretion is layered into the character test and thus enables maximum discretion in determining character based exclusion. Three critical instances of the layering of character test discretion demonstrate the breadth of discretion that is permitted by the character test in practice. The first two examples examine a feature of character test determination that might be anticipated to employ *less* discretion, but in fact demonstrates its broad discretion in practice. The first example in Part B of the chapter explores review tribunal decision making, arguably the most “objective” stage of decision making. Yet, the policing aspect is evident in these cases, by the way that review tribunal determinations about alleged migration fraud engage judgements that are beyond what is knowable on the facts before the decision maker. The second instance (Part C of the chapter) examines the criminal history provisions of the character test, which is the most circumscribed ground of the test. In this instance, discretionary power is activated in the power to waive failure of the character test. Character testing in this instance reveals a broader tension in migration policing more generally, that between legal non-citizenship status and claims of an effective or social citizenship. The final example illustrates how the use of the character test cannot be constrained to solely character test purposes. The ineffective accountability of the Immigration Minister’s personal power to cancel on character grounds means the character test is open to be used to detain persons for reasons other than bad character. These examples are not held out to be representative of the factors relevant for character decision making. Rather, these examples demonstrate the ways in which the role of the character test within the broader remit of migration control, as well as

the structure and legal regulation of the character test itself, enables its use to police exclusion from the benefits of citizenship.

A A legal test of character

The “character test” provisions in the Migration Act enable the exclusion of those assessed as not of “good character”. The *Migration Act* vests decision makers with a discretionary power to refuse or cancel a non citizen’s visa if that person fails the “character test”.⁸⁶³ Under the *Migration Act* a non-citizen is deemed not to pass the character test if:

- the person has a substantial criminal record which in brief includes where a person has been sentenced to death, imprisoned for 12 months or more, or subjected to a number of periods of imprisonment which total two years or more, or where a person has been acquitted of an offence on the grounds of insanity and was consequently detained in an institution;⁸⁶⁴ or
- the person has or has had an association with someone else, or with a group or organisation, that the Immigration Minister reasonably suspects has been or is involved in criminal conduct;⁸⁶⁵ or
- the person’s past and present criminal and/or general conduct mean the person is not of good character;⁸⁶⁶ or
- there is a significant risk that the person would engage in criminal conduct, or would molest, harass, intimidate or stalk another person;⁸⁶⁷ or
- there is a significant risk that the person would engage in activities in Australia that would affect or endanger the community or a segment of the community. These activities include those that vilify a segment of the community or incite discord, or involvement in activities that are disruptive to, or involve violence threatening harm to, that community or segment, or in any other way.⁸⁶⁸

The discretion engaged in the character test is evident even from its text. Both the Immigration Department’s delegates and the Immigration Minister are empowered to make

⁸⁶³ The *Migration Act 1958* (Cth) s 501 character test commenced operation on 1 June 1999.

⁸⁶⁴ *Migration Act 1958* (Cth) ss 501(6)(a), s 501(7)

⁸⁶⁵ *Migration Act 1958* (Cth) s 501(6)(b)

⁸⁶⁶ *Migration Act 1958* (Cth) s 501(6)(c)

⁸⁶⁷ *Migration Act 1958* (Cth) ss 501(6)(d)(i), (ii) respectively.

⁸⁶⁸ *Migration Act 1958* (Cth) ss 501(6)(d)(iii), (iv), (v) respectively.

these decisions. The decision maker may refuse a visa application if the person *does not satisfy* the Immigration Department or Minister that the person passes the character test.⁸⁶⁹ A higher standard is required to empower visa cancellation, as the decision maker must also *reasonably suspect* that the person does not in fact pass the character test.⁸⁷⁰ Until 2005-06, public reporting did not distinguish between the number of visa refusals and visa cancellations on character grounds.⁸⁷¹ In the five years from 2005 to 2010, delegates of the Immigration Minister made an average of 73 visa cancellations on character grounds and 393 visa refusals each year. The number of visa refusals in 2005-06 is anomalous. Excluding that year from consideration, between 2006-2010 about 200 character exclusion decisions were made each year, comprised of about 40% visa cancellations represent and 60% visa refusal decisions.

Figure G: Visa cancellation and refusal decisions made pursuant to s 501 *Migration Act* 1958 (Cth) by delegates or the Immigration Minister from 1 July 2005 - 30 June 2010⁸⁷²

Year	Total number of character related decisions	Number of visa cancellation decisions by delegate/Minister	Number of visa refusal decisions by delegate/Minister	Number of warnings issued by delegate/Minister
2005-06	1539	50	1489	2
2006-07	582	70	178	334
2007-08	736	103	16	617
2008-09	359	86	124	149
2009-10	1078	58	156	864
Total	4294	367	1963	1966

The language of the character test as set out in the *Migration Act* leaves much open to interpretation. On the face of the legislation it is impossible to know just what activities amount to bad character on the basis of past and present general or criminal conduct, association or incitement to discord and so on. Some grounds clearly invite differing interpretations depending on one's political viewpoint. For example bad character, on the basis of significant risk that a person will become involved in activities that are disruptive or

⁸⁶⁹ *Migration Act* 1958 (Cth) s 501(1)

⁸⁷⁰ *Migration Act* 1958 (Cth) s 501(2)

⁸⁷¹ This was determined by review of Immigration Department annual reports covering the periods 1996-97 to 2009-10.

⁸⁷² The data used to create this table is from annual reports of the Immigration Department covering the period from 1 July 2005 to 30 June 2010. The figures refer to decisions made by delegates of the Immigration Minister or the Immigration Minister pursuant to the *Migration Act* 1958 (Cth) ss 501(1), (2), not pursuant to *Migration Act* 1958 (Cth) ss 501(3), (4), (5) and s501A which provide the Immigration Minister with the personal power to make character decisions.

threaten violence to a segment of the community, has been the basis for refusal to permit alleged holocaust denier David Irving to visit Australia to promote his books.⁸⁷³ and that are

essential moral qualities of an individual.
The role of the character test in migration law is ostensibly to determine who should be excluded from Australia on the basis of their "character". The general conduct provision in the character test is the only subsection of the test that explicitly ties failure of the character test with the bad character of the applicant or visa holder. In the context of Mohammad Haneef's 2007 challenge to his visa cancellation on the basis of his alleged association with criminals, the Immigration Minister argued that the association subsection did not require reference to a visa applicant's character because failure of the character test on the grounds of association did not require bad character.⁸⁷⁴ The Immigration Minister argued that the title of the character provision "the character test" was "just a convenient definition".⁸⁷⁵ The Federal Court rejected this argument.⁸⁷⁶ It is now settled that all parts of the character test entail character assessment even when not explicit in the legislative text.⁸⁷⁷ The common law defines "good character" in its ordinary sense to mean:

...the enduring moral qualities of a person, and not to the good standing, fame or repute of that person in the community. The former is an objective assessment apt to be proved as a fact while the latter is a review of subjective public opinion...⁸⁷⁸

One need not have an "exemplary or saintly character" to be of good character.⁸⁷⁹ Criminal conviction does not necessitate a finding of bad character, nor does good reputation or

⁸⁷³ David Irving was refused a visa to enter Australia in the predecessor to the character test ground *Migration Act 1958* (Cth) s 501(6)(d)(iv) and (v). In his 1992 visa application he wished to visit Australia to promote his books: a biography of the Nazi leader, Herman Goring, and a revised edition of a book entitled "Hitler's War". See *Re: David John Cawdell Irving and: Minister of State for Immigration Local Government and Ethnic Affairs* (1993) 115 ALR 125. Note that David Irving has been refused entry to Australia on other character grounds, such as his past criminal conduct and general conduct (in an earlier version of the general conduct grounds), see *David John Cawdell Irving v Minister of State for Immigration, Local Government & Ethnic Affairs* [1996] FCA 663

⁸⁷⁴ *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273, per Spender J at para 203.

⁸⁷⁵ *Ibid.*

⁸⁷⁶ *Ibid.*, per Spender J at para 206.

⁸⁷⁷ *Ibid.*

⁸⁷⁸ *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 139 ALR 84, per Lee J at para 19. Lee J went on to add: "A person who has been convicted of a serious crime and thereafter held in contempt in the community, nonetheless may show that he or she has reformed and is of good character: see *Re Davis* [1947] HCA 53; (1947) 75 CLR 409, per Latham CJ at 416. *Clearihan v Registrar of Motor Vehicle Dealers in the Australian Capital Territory* (1994) 117 FLR 455 per Miles CJ at 461.. Conversely, a person of good repute may be shown by objective assessment to be a person of bad character."

⁸⁷⁹ *Re Strangio and Minister for Immigration and Ethnic Affairs* (1994) 35 ALD 676, 683-4.

standing in the community necessarily avoid bad character.⁸⁸⁰ The judicial approach to good character thus presents it as qualities that can be assessed on an objective basis, and that are essential moral qualities of an individual.

Including character as a legal provision for exclusion implies it is legally possible to determine a standard for character. However, Immigration Department discourse suggests that the character test is conceived in terms of its capacity to control the risk posed by the entry of those of bad character. The Immigration Department reports on character based visa cancellation under the heading "managing the risks associated with serious breaches of Australia law by non-citizens".⁸⁸¹ The explorations of the operation of the character test confirm it operates as proactive, subjective, discretionary policing, not as an objective legal standard.

Integrated and layered: discretion in the character test

The features of the character test that provide discretion are elements that are evident elsewhere in the *Migration Act*. In the character test however, the confluence of discretionary elements intensifies the discretion available to decision makers. Considering these elements in turn highlights its significance in terms of expanding the power available to decision makers, and curtailing the opportunity for migrants to contest that power. Considering these elements together shows how the character test is structured to enhance discretion.

Kenneth Culp Davis's typology of discretion sets out how discretion can be "confined" (for example through legislation), or can be "structured" through setting out a procedure for the exercise of discretion, and can be "checked" through review options.⁸⁸² The structure of the character test shows how it is possible to structure discretion in an unconfined fashion. That is, it is structured to enhance rather than limit discretion, for at any stage a non-reviewable final decision can be made by the Immigration Minister. In the character test discretion is layered and integrated, as it enables the potential for policing at any stage of the visa process until citizenship is granted. The integration of discretion into the character test means that the determination of character is always fluid. Moreover it shows that, contrary to its legal presentation as a universal requirement all non-citizens must satisfy, the character of non-citizens is not uniformly considered, rather individuals are suspected of bad character.

⁸⁸⁰ *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 139 ALR 84, per Lee J at para 19.

⁸⁸¹ Department of Immigration and Citizenship, "Annual Report 2009-10," 164.

⁸⁸² Davis, *Discretionary Justice: A Preliminary Inquiry*.

The onus for showing good character versus the identification of suspected bad character

The *Migration Act* states the onus is on the visa applicant or visa holder to satisfy the Minister that they are of good character, and that it is a universal requirement that all must satisfy.⁸⁸³ The format of visa application reinforces this. Visa application forms include a series of questions designed to identify bad character. Yet questions such as "have you ever committed crimes against the United Nations charter" included in the form are unlikely to invoke an affirmative response,⁸⁸⁴ not least because most applicants will simply not know what activities meet this criteria. In any case the character refusal or cancellation process set out by the *Migration Regulations* provides a more accurate picture of whether good character must be established by non-citizens or whether bad character is identified by the Immigration Department or Minister. The *Migration Regulations* state that the first step in the process is an invitation to the non-citizen to comment, implying that identification of character concerns occurred prior to the invitation to comment.⁸⁸⁵ Suspicion of bad character starts with the decision-maker on all character test grounds, except that of disclosure of criminal history in visa applications.

These additions include the requirement that decision makers consider whether the non-Migration policing discretion over the initial identification of suspicion was examined in the context of raids in chapter 4. The involvement of multiple institutions was shown to expand the activities that initiated initial suspicion of an individual and that subsequently led to apprehension of illegal migrants. In the context of raids, thus, the outcome of discretion was apprehension of the already illegal individual, that is, the discretion was bounded by the social capacity to locate and detain the individual, not change their legal status. In the context of

⁸⁸³ *Migration Act* 1958 (Cth) s 501 provides for those decisions made by the Minister or delegate subject to natural justice at s 501(1) states "The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test". Similarly, s 501(2) provides: "The Minister may cancel a visa that has been granted to a person if: (a) the Minister reasonably suspects that the person does not pass the character test; and (b) the person does not satisfy the Minister that the person passes the character test." See s 501(2) (cancellation) and Department of Immigration and Citizenship, "Procedures Advice Manual 3, Character instructions, [P A066] s501 The character test, visa refusal & visa cancellation," (Canberra: Commonwealth of Australia, 2010).

⁸⁸⁴ Similar information is required in the form that is the basis of the ASIO security check. See Form 80 'Personal particulars for character assessment' is collected by the Immigration Department and then dispatched to ASIO for security checking purposes. The information required also includes disclosure of any criminal convictions, findings of guilt, pending criminal charges, period of time in imprisonment, spent convictions, court ordered criminal confinement in a psychiatric institution, bonds, commission of war crimes, training or association in violence (including freedom fighting, terrorism, protest), involvement in development of weapons of mass destruction and involvement in the illegal movement of people.

⁸⁸⁵ *Migration Regulations* 1994 (Cth) Regulations 2.43-2.46. This process is also set out in policy, see the Department of Immigration and Citizenship, "Procedures Advice Manual 3, Character instructions, [P A066] s501 The character test, visa refusal & visa cancellation."

character, discretion to identify and find an individual to be of bad character has the capacity to change the immigration legal status of the non-citizen.

Discretion over the visa outcome of character test failure

The character test provides for the exclusion of individuals found to be of bad character, but it also provides for waiver of refusal or cancellation despite character test failure. The Immigration Minister sets out binding criteria to guide this decision.⁸⁸⁶ However, there is no guidance on how to balance competing considerations.⁸⁸⁷ The relevant factors for decision makers are very broad: the primary considerations must be taken into account, but the other considerations should be taken into account only when relevant. The primary considerations that have remained stable over time include the protection of the Australian community, including the nature and seriousness of the person's conduct and the risk of repetition of that conduct; and the best interests of any Australian citizen child of the non-citizen or any other Australian citizen child is an important consideration.⁸⁸⁸ In mid 2009, the Immigration Minister set out further directions that require decision makers to take into account certain criteria. These additions include the requirement that decision makers consider whether the non-citizen whose character is in question was a minor when they began living in Australia, the length of time the non-citizen resided in Australia before engaging in the conduct that prompted character test consideration, and relevant international obligations.⁸⁸⁹

Review of character decisions: containing discretion?

Non-citizens have access to review of an adverse character based visa decision, which ostensibly would indicate a limit to the character test's discretion. However, this is hindered by both practical access to legal assistance and the circumscription of review of migration matters more generally. In practical terms access is hindered by the lack of Immigration Advice and Application Assistance Scheme (IAAAS) funding. This results in unrepresented applicants appearing in the Administrative Appeals Tribunal (AAT). In turn, this is problematic because unlike review of Immigration Department decisions in general, review of adverse character

⁸⁸⁶ From 15 June 2009 the *Ministerial Direction No. 41* "Visa Refusal and cancellation under s501" applied. Prior to that another Ministerial Direction applied: *Ministerial Direction No. 21* "Visa Refusal and Cancellation under s501."

⁸⁸⁷ John McMillan (Commonwealth and Immigration Ombudsman), "Department of Immigration and Multicultural Affairs administration of s501 of the Migration Act 1958 as it applies to long-term residents," (Canberra: Commonwealth Ombudsman, Commonwealth of Australia, 2006), 16.

⁸⁸⁸ The introduction of the 2009 Ministerial Direction removed the expectations of the Australian community to be assessed by decision makers and with regard to government viewpoints from the primary considerations.

⁸⁸⁹ *Ministerial Direction No. 41* "Visa Refusal and cancellation under s501," s 10 at 11.

decisions are conducted by the AAT. Although formally remaining in the inquisitorial framework of administrative review, unlike the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT), AAT hearings include features associated with the adversarial framework. For example, the Immigration Department is represented as a separate party in the hearing, represented by counsel, which does not occur at the MRT and the RRT. Further, as outlined in chapter 4, judicial review of visa applications is limited to matters that involve the decision maker erring in conceiving their jurisdiction.⁸⁹⁰ The effect of this restricted judicial review is that grounds for review of adverse decisions are either with regards to errors of law, or mistakes in procedural fairness.⁸⁹¹ This makes the extent of the discretionary power over character decision making even more apparent, which is further underscored by the power of the Immigration Minister to intervene at any stage of the process and exclude a non-citizen on character grounds, without the requirement for procedural fairness in character decision making.

The Immigration Minister's power to depart from established review practices

The Immigration Minister holds special power to make character based exclusions. Unlike decisions made by delegates, since 1998 the Immigration Minister may refuse or cancel a visa, if the Immigration Minister reasonably suspects that the person does not pass the character test and the Minister is satisfied that exclusion is in the national interest.⁸⁹² Further, the Immigration Minister has the power to intervene or set aside a decision of an Immigration

⁸⁹⁰ Review is limited to jurisdictional error by the privative clause set out in *Migration Act 1958* (Cth) s 474 and interpreted by the High Court in *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2.

⁸⁹¹ There is ongoing advocacy calling for at least limited merits review. See for example Julian Burnside QC evidence to the Senate Legal and Constitutional References Committee, "Inquiry into the Administration and Operation of the Migration Act 1958," (Canberra: Federal Parliament Senate Legal and Constitutional References Committee 2006). Mr Burnside called for a process analogous to the special leave to appear provisions which operate to the High Court, so as to allow merits review in some cases, while focusing on appeals from Refugee Review Tribunal decisions, which he said do not provide confidence that justice has been done; this would operate across the board in migration litigation: Julian Burnside QC, "Evidence to the Senate Legal and Constitutional References Committee, Parliament of Australia, Inquiry into the Administration and Operation of the Migration Act 1958," (Melbourne 27 September 2005), 112-14.

⁸⁹² *Migration Act 1958* (Cth) s 501(3)(a) and (b) provide the Minister with power to refuse or cancel a visa respectively; and s 501(3)(c) and (d) set out the requirements for exercise of that power, being reasonable suspicion and the national interest respectively. Section 501(4) limits this power personally to the Minister. These powers were part of a raft of legislative reform in 1998 in the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth).

Department delegate or the AAT in the national interest,⁸⁹³ intervening at the beginning, the middle or the end of character determination. Further, the Minister holds the power to make the Minister's personal decision exempt from the rules of natural justice.⁸⁹⁴ Like other specific discretions allocated to the Immigration Minister, these powers are personal and non delegable, and cannot be compelled to be exercised. Decisions that are made are not subject to review except insofar as they exceed jurisdiction.⁸⁹⁵ The formal role of other Ministerial discretions in the Migration Act is to address exceptional circumstances that might not be canvassed by law. However, the character based Ministerial discretion was introduced specifically to enable the Immigration Minister to over-rule the AAT in instances where the Immigration Minister disagrees with the substantive decision about an individual's character. In the Second Reading of the bill into Parliament, the Immigration Minister at the time, Phillip Ruddock explained that these powers were necessary because "...the AAT has made a number of character decisions that are clearly at odds with community standards and expectations."⁸⁹⁶

Upon its enactment, the Immigration Minister explained that Ministerial personal power over character was for "exceptional or emergency circumstances"⁸⁹⁷, for those "who may be a significant threat to the community. These people may be threatening violence or some other act of destruction or have a prior history of serious crime..."⁸⁹⁸ However, once enacted, about 80% of the character cancellation decisions were made personally by Minister Ruddock,⁸⁹⁹ and he also overturned a number of AAT decisions. Other Immigration Ministers following Phillip Ruddock made less use of this personal power. In 2003-2004, about 15% of all character refusals and cancellations were made personally by the Immigration Minister, and in 2006-2007 this amounted to 19%.⁹⁰⁰ Following the change of Federal government from Liberal to

⁸⁹³ *Migration Act 1958* (Cth) s 501A

⁸⁹⁴ *Migration Act 1958* (Cth) s 501(5)

⁸⁹⁵ See for example *Migration Act 1958* (Cth) ss 501, 195, 197, 351 and 417.

⁸⁹⁶ Phillip Ruddock (Minister for Immigration and Multicultural Affairs), "Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1998 (Cth) Second Reading," (Canberra: House of Representatives, Parliament of Australia, 2 December 1998), 1229-32, 43-45. Note that Phillip Ruddock was Immigration Minister from March 1996-October 2003 which formed the bulk of the Howard headed Government.

⁸⁹⁷ *Ibid.*

⁸⁹⁸ *Ibid.*, 1231.

⁸⁹⁹ John McMillan (Commonwealth and Immigration Ombudsman), "Department of Immigration and Multicultural Affairs administration of s501 of the Migration Act 1958 as it applies to long-term residents", 9.

⁹⁰⁰ The first succeeding Immigration Minister Amanda Vanstone made on average 15% of these decisions in 2003-2004. (Senator Amanda Vanstone was the Immigration Minister between October 2003 and January 2007). In a 12 month period in which Minister Vanstone and Minister Andrews

Labor in November 2007, personal Ministerial decisions on character have become almost non-existent.⁹⁰¹ Nevertheless, the Immigration Minister retains the power to depart from established review processes as well as from established procedural fairness standards, which empowers the Minister with absolute discretion for exclusion of any non-citizen from Australia.

Discretion over pursuing matters via the character test

The choice to pursue a particular issue through refusal or cancellation based on the character test is itself a discretionary decision by the decision makers. For example, decision makers can cancel a visa on the basis of criminal record under s 501 of the *Migration Act*, or utilise s 201 of the *Migration Act* which empowers deportation for criminal history of permanent residents who have resided in Australia for less than ten years.⁹⁰² Decision makers may also choose to pursue visa refusal or cancellation on the basis of the character test, or security based exclusions, as there is some crossover between these provisions. Further, in practice, concerns about an applicant's credibility might be taken up either in assessing the visa application claims as a whole (resulting in visa refusal), or through the character provisions, or in fact through both:

One frustrating area is sometimes, I've had it a couple of times, they'll refuse a case, say a spouse visa case on the grounds that it is not a genuine relationship. You take it to the Migration Review Tribunal, you win, and then it goes back to wherever and they refuse it on character.⁹⁰³

(Minister from January to December 2007) each accounted for 6 months of decisions, personal decisions amounted to 19% of total character refusals and cancellations. See Department of Immigration and Citizenship, "Annual Report 2006-07," Output 1.3.2 Prevent Unlawful Entry.

⁹⁰¹ Labor Party Immigration Minister Chris Evans (Minister from December 2007 to the present) has made just one personal decision since his appointment: Senate Standing Committee on Legal and Constitutional Affairs Estimates, "Additional Budget Estimates," (Canberra: Parliament of Australia, 19 February 2008), 103. While the Senate Estimates Hansard record does not disclose the visa holders whom faced cancellation, a media release by Minister Senator Evans reported that the protection visa for Mr Ali Al Jenabi was refused on character grounds, Chris Evans (Minister for Immigration and Citizenship), "Media release: Minister refuses protection visa for people smuggler," (Canberra: Minister for Immigration and Citizenship, 7 February 2008). For details of the shift back to exceptional use of personal discretion, see Senate Standing Committee on Legal and Constitutional Affairs Estimates, "Additional Budget Estimates," 83-84.

⁹⁰² *Migration Act* 1958 (Cth) ss 201, 501.

⁹⁰³ Peter Bollard (solicitor and Migration Agent of Bollard and Associates, and accredited specialist in Australian migration law by the Law Society of New South Wales), in interview with author, 19 March 2008. Interviews with legal advocates provided insight into how character policing is deployed in practice and the process of visa determination.

Alternatively, suspicion of migration fraud might be pursued via criminal provisions in the Migration Act rather than through character based exclusion. Factors that might influence decision makers to pursue character based exclusion include the lower standard of proof required in administrative matters and the outcome of character exclusion, which bans the non-citizen from re-entry to Australia. Character based refusal, like criminal arrest, carries with it more serious consequences than refusal for not satisfying other parts of the visa requirement as character test failure invokes a permanent ban from Australia.⁹⁰⁴ This is a consequence regardless of which ground invokes character test failure, and applies unless that cancellation is revoked or set aside.

The character test as a policing power

The way discretion is integrated into the structure, not solely the text of legislation, challenges the argument that the law is intended to guide decision making about character. Instead, it enhances discretion and opens the character test for use as a mechanism for control. The character test literally takes on a policing role within the legislative text. Rather than operating as a requirement that every non-citizen must meet, in almost every matter, consideration of whether a non-citizen fails the character test starts with the decision makers' suspicion of bad character. Further, there is discretion as to whether a non-citizen is of bad character, and if they are, whether exclusion should be the outcome. Although there is an independent review process through the Administrative Appeals Tribunal, there are practical barriers that make appeal difficult for non-citizens as well as legal barriers that limit what aspects of the AAT decision can be reviewed in judicial review. In any case, the administrative decision making and review process can be commandeered by the Immigration Minister, who can make a personal decision with regards to character exclusion that is exempt from review and from procedural fairness requirements. The layering of discretion into decision making shows the multiple ways the character test is defined by discretion.

There was tension in policing scholarship in the 1980s in conceptualising the relation between policing and rules. Some argued that policing practices were defined solely by the sub-cultural rules and norms of policing institutions, and that legal rules did not determine policing practice.⁹⁰⁵ The alternative argument was that legal rules institutionalise police deviance from the rules, with the result that legal principles (like due process) hold little bearing on the

⁹⁰⁴ *Migration Regulations* 1994 (Cth) Schedule 5, Special return criteria 5001.

⁹⁰⁵ A culture based approach was typified by Michael Banton, *Policeman in the Community* (New York: Tavistock, 1964); Jonathan Rubinstein, *City Police* (New York: Farrar Straus and Giroux, 1973).

substance of the accountability of policing to law.⁹⁰⁶ My argument about the character test is not that police practice deviates from the law, nor that apparent deviation is institutionalised in the law. It is simply that the character test is defined by its policing, not by its legal text. In other words, I argue that the text of the law is less important in understanding migration control than the use of discretion and its practice. The examples of discretionary power in character testing are not unique to the character test, as these powers are available in other migration determinations as well. The character test however entails the gamut of legislated discretionary power such that discretion is intensified. From this I argue that the role of the character test as a legal requirement obscures its role as a mechanism for discretionary policing and for control. This will be explored first by examining the decision making process that enables the best opportunity for an objective and independent decision, the merits review process.

B Stereotypes: individualised vs generalised assessments of bad character

In the outline of discretionary power in the character test, it is review tribunal decision making that might be anticipated to employ less discretion than other stages of character determination. In contrast to the Immigration Department and the Immigration Minister, review tribunals are independent. The scope of discretion available to review tribunals is structured more narrowly than that of the initial identification of potential character concern. The latter process involves significant discretion by the varied impetuses that bring a non-citizen to the attention of the Immigration Department. Further, the intervention of the Immigration Minister, which since Minister Ruddock has not been routine, always signifies particular targeting and selection. However, even at the least discretionary part of the decision making process, that is, at the AAT, the extent of discretion over decision making is considerable.

This section of the chapter specifically selects cases for consideration where the applicant's visa has been cancelled or refused on the basis of past or present general and criminal conduct pursuant to s501(6)(c) of the *Migration Act* 1958 (Cth), referred to from here as the "general conduct provisions". This focus was selected so as to explore the discretion available to determine character even at the AAT level. The openness of discretion in these matters can partly be attributed to the open language of the general conduct provisions. A non-citizen can

⁹⁰⁶ For example McBarnet, *Conviction: law, the state and the construction of justice*.

fail the character test on these grounds without a criminal offence being proven, and on the basis of conduct that is not criminal. Decision makers must simply interpret such conduct to mean the person is "not of good character".⁹⁰⁷ Thus, the selection of cases invoking the general conduct provisions allows focus on the meaning decision makers attribute to "good character". This analysis is based on the examination of thirty ones cases determined under the general conduct provisions in the AAT between 1996 and 2007, being the term of the Howard government.⁹⁰⁸ All AAT decisions on character are published, unless a rarely issued confidentiality order is made. However, AAT decisions did not consistently set out the specific legal basis under the character provisions for their determinations, often times referring simply to s 501 of the *Migration Act* as the ground, thus it is unlikely that the cases examined here represent all the general conduct character cases of this period. This is emphasised by the total number of AAT decisions made each year. Between 1 July 2003 and 30 June 2011, on average each year the AAT finalised just under 100 applications for review of character exclusion, across all basis of s 501 of the *Migration Act*.⁹⁰⁹ Nevertheless, the research conclusions do not rely on these cases being representative, as the purpose is to explore how discretion is empowered within the process of character test determination.

This examination reveals the strongest theme in identification of bad character on general conduct grounds was for alleged migration fraud offences. That is, in essence, where the credibility of non-citizens' statements and documentation submitted in support of visa applications has come into question. Review tribunal determinations about alleged migration fraud are shown to engage judgments that are beyond what is knowable on the facts before the decision maker.

Assessment of honesty and the credibility of non-citizens' statements, visa applications and documents are critical to the function of the Immigration Department in managing the migration system. The potential for migration control to achieve its visa intake objectives in accordance with legislation and regulations rests on migrants' honesty, and it is limited by

⁹⁰⁷ *Migration Act 1958* (Cth) s 501(6)(c). Recall as well that this subsection of the s501 character test is the only part that explicitly references the requirement of "good character".

⁹⁰⁸ In this period, one major legislative reform was made – the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth) ("Strengthening of Character Act"). The general and criminal conduct provisions were slightly expanded in this legislative reform. The capture of conduct under these provisions was expanded from the person's past criminal conduct or general conduct to a person's past and present criminal or past and present general conduct.

⁹⁰⁹ This figure is based on information in eight annual reports of the Administrative Appeals Tribunal covering the period 1 July 2003 – 30 June 2011. The average number of applications lodged for review of character exclusion was slightly lower for this period, namely approximately 85 lodgements each year, compared to an average of 97 applications finalised each year.

migration fraud. The premium placed on honesty is clear from the fact that general migration fraud amounts to a criminal offence. The bulk of the activities caught by the general conduct character provisions involve presenting false documents or documents that are misleading in a material particular to the Immigration Department, and making false or misleading statements. If pursued through criminal prosecution rather than the character test, these offences entail a maximum criminal penalty of imprisonment for ten years and/or \$110,000 fine.⁹¹⁰ The central importance of the honesty and credibility of non-citizens emerges in other control contexts this thesis has explored; it is not restricted to the character test.⁹¹¹ Like these other contexts, the determination of honesty and credibility involves discretionary determination.⁹¹² Unlike those other migration control contexts, the consequences of character exclusion are more serious, and involve permanent ban from Australia.⁹¹³

The significance of non-citizens' honesty is suggested by Jonathan Pratt's argument about the link between "unknowability" and "ungovernability", despite the difference in subject matter from this thesis.⁹¹⁴ Modern modes of governing that developed in mid 1800s England relied on records established for births and deaths and so on, that facilitated the checking and supervision and statistical calculation of population.⁹¹⁵ The provision of false information and documents in support of visa applications is almost exclusively policed by way of visa cancellation and refusal, both on character or other grounds, rather than by prosecution.⁹¹⁶

⁹¹⁰ *Migration Act 1958* (Cth) s 234. Note at the time of writing the monetary fine was set at 1000 penalty units, with 1 penalty unit set as \$110 (penalty units are set out at *Crimes Act 1914* (Cth) s4AA).

⁹¹¹ The credibility of education institutions in chapter 3 was shown to be critical to the effectiveness of the overseas student education sector to deliver future migrants with skills in demand for Australia. In chapter 4, the weak limit imposed on migration officers over their power to require identification via the requirement that officers "reasonably suspect" an individual is a non-citizen is testament that the power to identify an individual is comparatively more important than potentially exceeding that power by requiring persons who are not non-citizens to produce identification. Further in the last chapter, release from detention was shown to depend on assessments of the credibility of detainees' statement they would abide by any conditions imposed on their release.

⁹¹² Jenni Millbank's study of the assessment of sexuality demonstrates the discretion involved in credibility assessment in refugee determination. Millbank studied over 1000 refugee determinations of "a particular social group" grounds over a period of 15 years. At times these were based on stereotypes of gay lifestyle, inferences about the applicant's motivations or state of mind that went beyond what the decision maker was able to ascertain. See Jenni Millbank, "The Ring of Truth: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations," *International Journal of Refugee Law* 21, no. 1 (2009).

⁹¹³ *Migration Regulations 1994* (Cth) Schedule 5, Special return criteria 5001.

⁹¹⁴ John Pratt, *Governing the Dangerous: dangerousness, law and social change* (Leichhardt The Federation Press, 1997).

⁹¹⁵ *Ibid.*, 28.

⁹¹⁶ Peter Bollard (solicitor and Migration Agent of Bollard and Associates, and accredited specialist in Australian migration law by the Law Society of New South Wales), in interview with author, 19 March 2008. Peter Bollard stated: "...the reality of it is that DIAC could prosecute large numbers of people

This discretionary decision about how to proceed (criminal prosecution vs. visa cancellation) frames the issue of credibility at the outset as a problem where the only appropriate response is exclusion, not as a problem of individual moral and criminal culpability requiring punishment. This accords more with the Immigration Department interpreting the fraudulent non-citizen as "ungovernable", or in other words, as only governable by exclusion. This signifies the degree of discretion migration authorities utilise by addressing migration fraud by exclusion.

Stereotypes: the character and credibility of non-citizens from "emigrant societies"

The use of stereotypes to interpret migrant motivations and attitudes towards migration to Australia shows how character determination, even in the formally independent review tribunal process, engages significant discretion. In a number of AAT general conduct cases, the AAT interprets the plausibility of non-citizens submitting fraudulent information within a framework of largely unstated assumed common knowledge of the comparative economic conditions of foreign countries and Australia. This is evident from the language adopted in these cases to categorise countries. For example, a number of AAT cases used the term "emigrant societies" to refer to countries from which migrants leave to migrate to other countries. The AAT has referred to Thailand,⁹¹⁷ the Philippines⁹¹⁸ and South Korea⁹¹⁹ for example as "emigrant societies". It is true in the particular cases described (and indeed in any cases that arise in the Australian migration law context) that foreign countries are those from which migrants emigrate, and Australia is the destination for that migrant. However its use as a noun rather than a verb in this context signifies that by using this term the AAT alludes to more than the movement undertaken by migration to Australia. It indicates migration decision makers' stereotyping of some countries as "emigrant societies" or "migration source countries", whereas others are countries of "destination". It sets up a binary of desired and undesired. Precisely which countries might be included in this stereotype-laden noun might change at different times.

whom they determine at least have supplied false information or whatever but the reality of it is that they would be bogged down."

⁹¹⁷ See *Sorensen and Minister for Immigration and Multicultural and Indigenous Affairs [2006] AATA 96* at para 30. Relying for authority for this statement on the following - see *Azar and Minister for Immigration and Multicultural and Indigenous Affairs [2005] AATA 1061* at para 37. P. Winters, A de Janvry, and E. Sadoulet, "Family and Community Networks in Mexico - US Migration," in *Working Paper Series in Agricultural and Resource Economics* (Armidale, N.S.W.1999); I. Light, P. Bachu, and S. Karageorgis, "Immigrant Networks and Entrepreneurship," in *Immigration and Entrepreneurship*, ed. I. Light and P. Bachu (New Brunswick: Transaction Books, 1993).

⁹¹⁸ *Howard and Minister for Immigration and Multicultural Affairs [2006] AATA 474*

⁹¹⁹ *Lim and Minister for Immigration and Multicultural and Indigenous Affairs [2005] AATA 893*

Similarly, the relative attractiveness of Australia as a place to migrate and as an incentive for migration fraud has been treated as self evident in some cases. For example:

The spate of spouse visa cases coming from the Philippines does not appear to be slowing. The reasons are not hard to discern. The Philippines is a poor country and Australia by contrast is a rich country which provides numerous benefits including social security, medical care and education.⁹²⁰

The cases show that a range of inferences are drawn in cases where the non-citizen whose credibility is at issue or is a national of an "emigrant society", that go beyond what can be sustained on the information before the AAT. I do not mean to suggest that nationals from particular countries are always treated with suspicion. Rather, it is that where their credibility is in question, their country of origin is deemed relevant in supporting an interpretation of events, rather than information pertinent to the individual non-citizen in question. For example, the Immigration Minister refused Mr. Tae Doo Ban's contributory parent visa application on the basis that his past and present conduct meant he was not of good character.⁹²¹ He had lived illegally in Australia on two separate occasions that amounted to about ten years. He worked in Australia without permission and in contravention of a bridging visa, and he made false and misleading statements to the Immigration Department. At the time of his application he was 51 years of age, a citizen of South Korea, with three Australian citizen children, and an Australian citizen de facto stepson. In reviewing his past conduct, the AAT found unconvincing Mr. Ban's evidence that when he arrived in Australia in 1988 he did not recall whether he thought he could lawfully work.⁹²² The AAT based their finding of the implausibility that Mr. Ban did not know he was not permitted to work partly by inferring from his personal characteristics as a "mature man aged 34 ... a successful businessman", but also on knowledge of Australian migration law that the AAT imputed to those from "emigrant societies". No evidence of actual public awareness of Australian law in South Korea was put forward to base this finding:

Especially in emigrant societies such as South Korea, from which many people migrate to western countries in search of work or business opportunities, there is today a considerable degree of public awareness about the importance and availability of green cards, work permits and similar documents. Mr. Ban is an intelligent and enterprising man and it is not credible that he would have landed in Australia in 1988 with no idea

⁹²⁰ *Reyes and Minister for Immigration and Multicultural and Indigenous Affairs [2003] AATA 497*, para 45.

⁹²¹ *Lim and Minister for Immigration and Multicultural and Indigenous Affairs [2005] AATA 893*

⁹²² *Ibid.*, para 30.

about whether he was permitted to work or not or, if he was in any doubt on the point, that he had no idea how to go about obtaining information on the subject.⁹²³

AAT decision making is not bound by precedent of factual interpretation. However, through referencing the observations of previously constituted AAT matters, the AAT has in effect constructed and affirmed a stereotype about migration fraud. The AAT has given weight to its prior acceptance of a particular series of migration steps undertaken specifically by single Filipino women that cast suspicion on their credibility.⁹²⁴ In *Reyes*, for example, the AAT formed the view that the female visa applicant Naomi Lulu fitted this stereotype:

Many of the cases coming before me have a common theme; a young and single woman obtains a visitor's visa. She enters Australia and starts working within a short period; within one month she applies for a protection visa on grounds which are spurious. The refusal of a protection visa leads to an appeal to the RRT and when that fails, there is a further application to the Respondent under section 417 of the Act. Marriage occurs a short time before she returns to the Philippines.⁹²⁵

In some cases the visa applicant had admitted their earlier protection visa application was not based on genuine refugee claims, but they stated that their later relationship was genuine (and that claim was accepted by the Immigration Department).⁹²⁶ In others, the applicants maintain their earlier protection visa application was genuine, but this was not accepted by the AAT, in part influenced by the stereotype of a particular immigration history of single women from the Philippines as indicative of migration fraud. In some of these matters the AAT effectively judged the refugee claims put forward by the visa applicants in terms of whether these claims were a genuine attempt to seek protection.⁹²⁷ This is an inherently problematic

⁹²³ *Ibid.*

⁹²⁴ For examples of other decisions on female Filipino visa applicants where the AAT considered deterrence to be a major consideration in the exercise of discretion, see the following in chronological order of decision: *Gawronski and Minister for Immigration and Multicultural Affairs [2000] AATA 790*, *Golding and Minister for Immigration and Multicultural Affairs [2000] AATA 956*, *Peljha and Minister for Immigration and Multicultural Affairs [2000] AATA 967*, *Reyes and Minister for Immigration and Multicultural and Indigenous Affairs [2003] AATA 497*.

⁹²⁵ *Reyes and Minister for Immigration and Multicultural and Indigenous Affairs [2003] AATA 497*, at para 45. The AAT in this case was constituted by Deputy President J Block. The background of the case is as follows: In this decision, a de facto spouse visa application had been refused on the basis that the Naomi Lulu, who was offshore at the time of decision, failed the character test because of a number of migration offences over a period of two years. Ms Lulu entered Australia on a false passport, the Tribunal also found she worked illegally though this was denied by Ms Lulu, she lodged a protection visa in this false name, the application failed, she subsequently appealed, and later made a s 417 request in her true name. She and her de facto spouse had a child, and later left Australia.

⁹²⁶ *Peljha and Minister for Immigration and Multicultural Affairs [2000] AATA 967*, at para 11.

⁹²⁷ *Gawronski and Minister for Immigration and Multicultural Affairs [2000] AATA 790*, *Golding and Minister for Immigration and Multicultural Affairs [2000] AATA 956.*, *Reyes and Minister for Immigration*

assessment because the complexity of refugee law raises matters that can only ever be judged on their individual merits. Yet in *Golding* for example, the AAT treated the refugee claims that were put forward as disingenuous as a matter of commonsense:

The evidence before me points to a desire, from the outset, on the part of Mrs. Golding to become resident in Australia. This arose purely for economic reasons and not for reasons of persecution. The Philippines may be a Catholic country and it may be that there is something of a stigma against single mothers, but it is difficult to believe that there is actual persecution of what must, in this day and age, be a considerable number of citizens of the country similarly placed. In any event, the single-mother ground did not amount to one which constituted sufficient ground for the grant of a protection visa.⁹²⁸

The “commonsense” of this notion is dispelled by even a cursory investigation of refugee determinations for applicants from the Philippines. Although at the time of *Golding* it does not appear that a refugee claim on the grounds of being a single mother in the Philippines had been successful, since then, unmarried mothers of foreign national children have been found in some circumstances to be refugees.⁹²⁹ Further the Refugee Review Tribunal has recognised women fearful of domestic violence in the Philippines as refugees in some circumstances.⁹³⁰ It is enough to encourage caution about a cursory dismissal of the genuine basis of such applications. The use of stereotypes to guide determination of whether an individual fails the character test demonstrates the extent of discretion available to review tribunals in character determination. Whether a non-citizen is of bad character is an individualised decision, and the fact that generalised stereotypes do inform these determinations is testament to the free rein of decision making through the character test.

Determining exclusion on the basis of stereotypes about deterrent effect

The use of stereotypes extends to influence over the visa consequence for character test failure. If a decision maker finds the non-citizen fails the character test, they then need to decide whether the non-citizens’ visa should be refused or cancelled as a consequence of that failure. In making that decision, the AAT may consider the likelihood that visa refusal or

and *Multicultural and Indigenous Affairs* [2003] AATA 497. *Peljha and Minister for Immigration and Multicultural Affairs* [2000] AATA 967

⁹²⁸ *Golding and Minister for Immigration and Multicultural Affairs* [2000] AATA 956, at para 13.

⁹²⁹ 1001289 [2010] RRTA 310 (21 April 2010).

⁹³⁰ N94/06730 [1996] RRTA 2897 (14 October 1996); N93/02263 [1996] RRTA 1049 (8 May 1996).

cancellation may deter others from committing similar offences.⁹³¹ In criminal justice sentencing principles, deterrence is engaged when an offence is so serious that the sentence should take into account its potential symbolic and practical impact on discouraging similar behaviour. Deterrence plays a similar role in general conduct based character decisions. However, in the general conduct cases examined in this thesis, when deterrence was considered as a factor in deciding visa refusal or cancellation as a consequence of character test failure, the AAT relied on evidence of the potential deterrence that was anecdotal or not specifically relevant to the case before the AAT. Findings of character are more readily attributed with deterrent effect when "migration source countries" are involved. For example, in one decision, the Immigration Department delegate was satisfied of the effect of deterrence from generalised anecdotal evidence that was otherwise unsupported:

Islamabad caseload is characterised by a high rate of attempted fraud and false claims and identities. The culture in Pakistan encourages sharing of all personal information and it is generally the case that applicants share information on visa applications and decisions with a wide range of people. Refusal of such cases, especially under s 501 is an effective general deterrent.⁹³²

This was not accepted, however, as evidence for the effectiveness of deterrence at the AAT, which stated "... Whilst there might be information known to the Australian Consulate in support of that allegation, there is nothing which links Mr. Ahmad to persons who do share or exchange such information (if such persons do exist)."⁹³³ But in another case the AAT did accept the opinion of Immigration Department officers stationed overseas that the nature and extent of migration fraud emanating from the Philippines meant that visa refusal would act as an effective deterrent against such fraud.⁹³⁴ In this case the Immigration Department officer's opinion was relied on to support inferences outside what was knowable as to the plausibility of the individual non-citizen's motivations. The AAT stated:

Ms Gawronski's general conduct must be viewed in the context of the convincing and authoritative evidence provided in Ms Reay-Young's statement about the pervasive

⁹³¹ *Character Direction No. 21* at para 2.11. *Ministerial Direction No. 21* was replaced by *Ministerial Direction No. 41* "Visa refusal and cancellation under s501" that was introduced on 3 June 2009 and commenced on 15 June 2009.

⁹³² See page 9 of the Immigration Department delegate decision: *Ribarich and Minister for Immigration and Multicultural and Indigenous Affairs [2005] AATA 1014*, at para 12.

⁹³³ *Ibid.*, at para 70.

⁹³⁴ *Gawronski and Minister for Immigration and Multicultural Affairs [2000] AATA 790* at para 39.

nature of the false claims made by Filipino citizens for protection visas in order to allow them to remain in Australia for economic and allied reasons.⁹³⁵

Some AAT cases refer more or less explicitly to the existence of “immigrant networks” that give visa refusals or cancellations deterrent value. These “immigrant networks” are described as follows:

In emigrant societies such as Thailand, there are said to be strong communication networks conveying information about green cards, work permits, visas and other requirements for settling in the usual host countries.⁹³⁶

The scholarly studies cited support the general proposition that “immigrant networks” may operate to transmit information.⁹³⁷ However, not all AAT decisions take into account the relevance of the individual applicant’s particular networks, as opposed to the general potential of “immigrant networks” to make deterrence effective.⁹³⁸ Evidence of some potential offenders’ networks may be interpreted to colour the whole population. For example:

The Philippines has provided many migrants to Australia. As the evidence in this case shows, there is in that country an industry (see Massey et al, supra p61) that assists other Philippine residents to follow in their footsteps, if necessary by means of bogus passports and other documents. Visa refusal in this case could well become known in that quarter through the operation of such a network and might tend to undermine any belief that Australian migration law can be flouted with impunity.⁹³⁹

Further, the AAT in a number of cases relies on evidence of the existence of such networks anywhere in the world as evidence for the existence of such a network in the country of origin of the non-citizen whose character is in issue. For example, in a case regarding a Thai visa

⁹³⁵ *Ibid.*, at para 44.

⁹³⁶ *Sorensen and Minister for Immigration and Multicultural and Indigenous Affairs* [2006] AATA 96 at para 30.

⁹³⁷ See for example the scholarly study Philip L. Martin, *Promise Unfulfilled: unions, immigration and the farm workers* (Ithaca: Cornell University Press, 2003). This was cited at para 37 by *Azar and Minister for Immigration and Multicultural and Indigenous Affairs* [2005] AATA 1061

⁹³⁸ A case which does recognise this is *Yap and Minister for Immigration and Multicultural Affairs* [2006] AATA 510. The AAT states at para 54 “The proposition of deterrence assumes that the person who has had their visa cancelled is a member of a community which is likely to learn of that decision and the reasons for the making of that decision. There is no evidence that Ms Chai-inpan associates with persons who intend to enter Australia by offending the *Migration Act*.” See also *Ribarich* especially at para 12 and para 70. Although “immigrant networks” are not explicitly referred to in this case, they are implicitly considered but rejected as argument for deterrent value because of the absence of information with regard to the visa applicant’s involvement in information sharing about himself.

⁹³⁹ *Howard and Minister for Immigration and Multicultural Affairs* [2006] AATA 474 at para 105

applicant, the AAT relied on a number of studies of "immigrant networks".⁹⁴⁰ The AAT relied on a study of family and community networks in Mexico-US migration, without attention to the different social relationships in Thailand.⁹⁴¹ This case also arguably overstated the relevance of a text that theorised about migrant entrepreneurial networks with regard to the transmission of economic information, which might be seen as distinct from networks that involve breaches of foreign law.⁹⁴² The study cited in this case in fact can be seen to evidence a contrary argument to that pursued by the AAT because it highlights that not all migrants exist within "immigrant networks".⁹⁴³ As well, it cautions against equating studies of one network with another due to the uniqueness of immigrant networks, which are the product of ideologies, cultures and beliefs.⁹⁴⁴

Profiling the demographics of migration fraud offences might be good evidence to cast initial suspicion on the credibility of a non-citizen's statements and visa applications. However, the exploration here shows how stereotypes about "emigrant societies" and "immigrant networks" are at times used to determine a non-citizen's intentions and motivations without proper regard to the individual's particular circumstances. These stereotypes influence determination of both whether the non-citizen has engaged in conduct amounting to bad character, and, if so, whether an adverse visa consequence will result in a broader deterrence. It moves determination of individual bad character to generalised bad character on the basis of whether the non-citizen's country of nationality is judged to be an "emigrant" nation. The subjective determination of what behaviour and activities and identities prove fraud demonstrates the AAT's discretionary power to develop certain knowledge as commonsense. Thus, even when considered by the most independent of the character decision makers, the broad discretion typical of the character test is evident. The significance of this finding is more broadly relevant. As mentioned above, there are multiple points in visa determination when the credibility and honesty of non-citizens is considered, beyond the character test. The

⁹⁴⁰ This is confirmed by research into the credibility of sexuality claims in refugee matters: Laurie Berg and Jenni Millbank, "Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants," *Journal of Refugee Studies* 27, no. 2 (2009); Jenni Millbank, "From discretion to disbelief: Recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom," *The Interdisciplinary Journal of Human Rights* 13, no. 2 (2021); ———, "The Ring of Truth: A Study of Gender-Based Asylum in Particular Social Group Refugee Determinations."

⁹⁴¹ *Sorensen and Minister for Immigration and Multicultural and Indigenous Affairs* [2006] AATA 96.

⁹⁴² *Ibid.*, at para 30.: P. Winters, A de Janvry, E. Sadoulet, "Family and Community Networks in Mexico – US Migration", No. 99-12, Working Paper Series in Agricultural and Resource Economics, University of New England, Armidale, N.S.W., August 1999, 14-16.

⁹⁴³ *Ibid.* at para 30: Ivan Light, Parminder Bhachu, and S. Karageorgis, "Immigrant Networks and Entrepreneurship," in *Immigration and Entrepreneurship*, ed. Ivan Light and Parminder Bhachu (New Brunswick: Transaction Books, 2004).

⁹⁴⁴ *Ibid.*, 26.

⁹⁴⁴ *Ibid.*, 39.

discretion that is demonstrated in the character test context in relation to credibility is integrated into migration visa determination more generally.⁹⁴⁵

C The character test: policing when migrants *become* Australian?

The criminal history provisions of the character test are the most circumscribed and most objective ground of the test. A non-citizen automatically fails the character test if they have a "substantial criminal record", which includes a sentence of 12 months or more imprisonment.⁹⁴⁶ There is no discretion to determine whether the character test is met on this ground, the discretion lies in whether or not to cancel the visa despite failure of the character test. There are no statistics available to determine the frequency decisions are made not to cancel a visa despite failure of the character test. The permission to remain in Australia even after conviction of the most heinous crime is one of the benefits of citizenship. Character testing in this scenario reveals a broader tension in migration policing between the limits to legal claims to remain in Australia without citizenship and claims to remain arising from social citizenship. This tension is especially apparent in decisions to waive visa cancellation of the permanent residents' visas despite their bad character. I argue that policy guidance and exercise of this discretion show how migration's "good character" is not a matter of enduring moral qualities;⁹⁴⁷ rather the discretion is guided by normative ideas of social integration defined by decision makers. The exercise of discretion thus performs the essential policing function of inclusion and exclusion, in this instance specifically with respect to the benefits of citizenship.

⁹⁴⁵ This is confirmed by research into the credibility of sexuality claims in refugee matters: Laurie Berg and Jenni Millbank, "Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants," *Journal of Refugee Studies* 22, no. 2 (2009); Jenni Millbank, "From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom" *The International Journal of Human Rights* 13, no. 2 (2009); ———, "The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations."

⁹⁴⁶ *Migration Act 1958* (Cth) s 501(6)(a) provides that a person whom has a substantial criminal record does not pass the character test, and s 501(7) defines a substantial criminal record as one in which the person has been sentenced to death, life imprisonment, sentenced to a term of imprisonment of 12 months or more, or a number of terms of imprisonment which amount to two or more years, or more generally has been acquitted of an offence on grounds of unsoundness of kin or insanity, and as a result has been detained in a facility or institution. Note the substantial criminal record grounds both visa refusal and cancellation, but I discuss only the operation of visa cancellation here.

⁹⁴⁷ This was referenced in Part A of this chapter, "enduring moral qualities" define good character: *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 139 ALR 84, per Lee J at para 19.

Policing the benefits of citizenship

Legal advocates stated they noticed that concern over bad character is triggered by applications for citizenship, that is, by potential progress in legal membership.⁹⁴⁸ This trigger illustrates how character testing is timed to police access to the benefits of legal citizenship. Precisely what benefits are being policed is illustrated by another trigger to identification of bad character on criminal history grounds. Non-citizens permitted to remain in Australia indefinitely, permanent residents, enjoy almost all the social benefits of citizenship.⁹⁴⁹ Permanent residents are permitted to work without restriction, study as local residents, sponsor family members, leave Australia and re enter on the same visa. One of the key differences is that their visas can be cancelled on character grounds. However, whether a non-citizen knows and identifies themselves as a non-citizen affects whether they are identified as such upon entry into the criminal justice system. Whether a non-citizen's entry into the criminal justice system results in identification of bad character, or not, has been described as *ad hoc*.⁹⁵⁰ Policy and procedures do not provide guidance on how visa holders liable for cancellation should be identified.⁹⁵¹ The Commonwealth Immigration Ombudsman has observed:

In practice, the way such visa holders come to DIMA's attention varies between States, and often depends on the relationship between the local DIMA office and the State police and correctional services. Sometimes State police or correctional services will advise the Department when they believe a person convicted of a crime or undertaking a custodial sentence is not, or may not be, an Australian citizen. Sometimes former police officers now working in DIMA's Compliance area will be aware of the visa status

⁹⁴⁸ Peter Bollard (solicitor and Migration Agent of Bollard and Associates, and accredited specialist in Australian migration law by the Law Society of New South Wales), in interview with author, 19 March 2008. Zoe Anderson (solicitor and migration agent of Refugee Advice and Casework Service NSW), in interview with author, 19 February 2008, see also the Kamand et al., *The Immigration Kit: a practical guide to Australia's immigration law* 792.

⁹⁴⁹ Rubenstein, *Australian Citizenship Law in Context* 177-255. Note that the right to vote in national elections, as a political benefit, is restricted to citizens.

⁹⁵⁰ Note the acronym DIMA used here was a prior name for the Immigration Department. See John McMillan (Commonwealth and Immigration Ombudsman), "Department of Immigration and Multicultural Affairs administration of s501 of the Migration Act 1958 as it applies to long-term residents," 20.

⁹⁵¹ See Department of Immigration and Citizenship, "Procedures Advice Manual 3, Character instructions, [P A066] s501 The character test, visa refusal & visa cancellation."

of a convicted person. Sometimes non-citizens will be identified through dob-ins or information from community organisations.⁹⁵²

However, importantly, whether a non-citizen's bad character comes to the notice of the Immigration Department upon their entry to the criminal justice system also depends on whether individuals *know* they are not citizens. Those who assume they are citizens have not always been identified by the criminal justice system as non-citizens, and thus, their convictions are not reported to the Immigration Department. Many of those who arrived in Australia as babies or children incorrectly assume they are citizens.⁹⁵³ Others arrived in Australia prior to 1994, when there was no universal requirement for all those in Australia to hold visas.⁹⁵⁴ Under the prior migration system, certain migrants were permitted to remain indefinitely but this permission did not entail issue of a visa.⁹⁵⁵ With the 1994 law reforms, these persons were deemed to hold visas, and thus became part of the constituency whose visas could thus be cancelled. However, they were never informed of this fact, and many assumed they did not hold visas that could be cancelled.⁹⁵⁶

Thus the first trigger discussed displays character testing as policing the benefits of legal citizenship. However the second trigger discussed shows that whether a person is identified as of bad character depends in part on their own understanding and disclosure of their immigration status, and thus, their subjective sense of their own social citizenship in Australia. Interestingly, factors pertaining to Australian social integration are also relevant in determining whether a non-citizen should not be excluded despite their bad character.

Policy factors against exclusion despite bad character

Prior to 1998, the Immigration Minister held the power to deport only those permanent residents who had resided in Australia for less than ten years if they had been convicted of a criminal offence and sentenced to imprisonment for one or more years.⁹⁵⁷ By limiting

⁹⁵² John McMillan (Commonwealth and Immigration Ombudsman), "Department of Immigration and Multicultural Affairs administration of s501 of the Migration Act 1958 as it applies to long-term residents," 20.

⁹⁵³ The Ombudsman examined DIMA files which indicated that many of those proposed for cancellation did not know they were only permanent residents and they did not know what type of visa they had. See *ibid.*

⁹⁵⁴ The universal visa system was introduced in 1994, see chapter 1.

⁹⁵⁵ Prince, "Deporting British Settlers."

⁹⁵⁶ John McMillan (Commonwealth and Immigration Ombudsman), "Department of Immigration and Multicultural Affairs administration of s501 of the Migration Act 1958 as it applies to long-term residents," 20. See also Prince, "Deporting British Settlers."

⁹⁵⁷ *Migration Act 1958* (Cth) s 201. Section 201 of the *Migration Act* empowers the Minister to deport permanent residents who have resided in Australia for less than 10 years if they have been convicted of

deportation powers in this way it was recognised that even without legal citizenship, length of residence provides legitimacy to remain despite bad character. The introduction of the character test in 1998 expanded the constituency that is potentially liable to visa cancellation, making it possible for the Immigration Minister to cancel visas and as a consequence remove non-citizens regardless of their length of residence in Australia. Since the introduction of the s501 character test, the Commonwealth has preferred these broader powers than the criminal deportation provisions under s201 of the *Migration Act*, although the latter provisions remain on the books.⁹⁵⁸ For example, between 2000-01 and November 2005, 293 people were removed under the s501 *Migration Act* character test, whereas just 18 were removed under s201 criminal deportation powers.⁹⁵⁹ This law reform, and the preferential use of the character test, demonstrates that more than the length of residence is needed to ground entitlement to remain in Australia.

Moving from a rule excluding deportation of long term residents to leaving the decision about exclusion to decision makers has been criticised. The judiciary has expressed disquiet, stating that the function of the s501 character test in relation to long term permanent residents can be seen as "retrospectively disadvantage[ing] permanent visa holders who happen to be non-citizens".⁹⁶⁰ Some scholars writing on the criminalisation of migration control have argued that visa cancellation operates as an additional punishment for the conviction of a criminal offence, thus offending the criminal law principle against double jeopardy.⁹⁶¹ They argue that visa

a criminal offence and sentenced to imprisonment for one year or more. This power to deport also includes New Zealand citizens who are exempt non-citizens or a special visa category holder: *Migration Act 1958* (Cth) s 201(b)(ii)

⁹⁵⁸ Senate Legal and Constitutional References Committee, "Inquiry into the Administration and Operation of the Migration Act 1958," 280. See also John McMillan (Commonwealth and Immigration Ombudsman), "Department of Immigration and Multicultural Affairs administration of s501 of the Migration Act 1958 as it applies to long-term residents." Note that much of the dissatisfaction (for example *ibid.*) with the use of s501 against long term permanent residents highlights that the s501 character test was introduced for use in visa refusals not visa cancellations of permanent residents which was expected to proceed in accordance with the existing s201 power, despite the legislative authority over all non-citizens in the character test.

⁹⁵⁹ Meaghan Shaw, "Get out: almost 3000 given their marching orders from Australia," *The Age* 2005, 2. cited in the Senate Legal and Constitutional References Committee, "Inquiry into the Administration and Operation of the Migration Act 1958," at para 9.50, p 285. Note that the respective figures for these cancellations are not comprehensively reported.

⁹⁶⁰ *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 121, para 27 per joint judgment of Moore and Gyles JJ. The applicant in this case, Stefan Nystrom, was born in Sweden but had spent all but the first 27 days of his life in Australia. His visa was cancelled due to his substantial criminal record. See also the High Court on *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50.

⁹⁶¹ See for example Michael Grewcock, "Multiple punishments: the detention and removal of convicted non-citizens," *University of New South Wales Legal Research Series* 41(2009). ———, "Conviction,

cancellation operates as double punishment both because it is a consequence additional to criminal conviction, but also because the severity of the outcome (deportation) is disproportionate in that the impact is particularly high for long term residents.⁹⁶²

Policy guides the discretion of decision makers to permit stay despite character test failure, setting out mandatory primary considerations (noted above in the outline of the legal framework) and other considerations for decision makers to take into account if relevant.⁹⁶³

Despite the reform of these considerations, the importance of factors that approximate social integration has remained constant.⁹⁶⁴ The primary considerations require decision makers to consider whether the person was a minor when they began living in Australia, as well as the length of time that the person has been ordinarily resident in Australia prior to engaging in the relevant conduct, and the best interests of any Australian citizen child in the life of the non-citizen.⁹⁶⁵ Under previous policy, the decision makers took account of social integration through the primary considerations of the expectations of the Australian community. The non-mandatory considerations also guide decision makers to take the non-citizen's social integration into account.⁹⁶⁶ These include the non-citizen's family ties and the extent of disruption removal would have on the non-citizen's family, business and other ties to the Australian community; marriage and analogous relationships with an Australian citizen, permanent resident or eligible New Zealand citizen; the degree of hardship which removal would cause to immediate family members in Australia; and the non-citizen's family composition and any other links in the country to which they would be removed.

detention and removal: the multiple punishment of offenders under section 501 Migration Act," *University of New South Wales Legal Research Series* 49(2009).

⁹⁶² Legomsky, "The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms." While not specifically on deportation on character grounds, Legomsky argues more generally that the incorporation of criminal justice norms and theories without the attendant procedural safeguards found in criminal law deepen asymmetry in the control relationship between government and migrants. He draws attention to this asymmetry where the severity of the outcomes are often disproportionate, particularly when considering both the risk of error and effect on individuals concerned is high. See also Kanstroom, "Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases." Kanstroom analyses US deportation law arguing that the deportation specifically of long term non citizen residents mirrors criminal punishment functions of deterrence, incapacitation and retribution.

⁹⁶³ *Ministerial Direction No. 41* "Visa refusal and cancellation under s501" that was introduced on 3 June 2009 and commenced on 15 June 2009.

⁹⁶⁴ *Ministerial Direction No. 21* "Visa Refusal and Cancellation under s501" commenced 23 August 2001, and was replaced by *Ministerial Direction No. 41* "Visa Refusal and cancellation under s501" which commenced on 15 June 2009.

⁹⁶⁵ *Ministerial Direction No. 41* "Visa Refusal and cancellation under s501" s 10(1)(b) and (c) at 11, 14-17.

⁹⁶⁶ These factors are not compulsory and are accorded less individual weight than the primary considerations, but where relevant they must be considered: *ibid.*, s 11 at 18-19. This was also the case in the prior direction: *Ministerial Direction No. 21* "Visa Refusal and Cancellation under s501," at 2.17.

Both the primary and other considerations are established in practice by evidence such as letters and declarations from family members in Australia, employers, friends and other evidence such as business evidence, evidence of cohabitation, of involvement with a child who is an Australian citizen and so on. This evidence seeks to demonstrate the intimate ways in which the non-citizen is integrated into the Australian community and that their family life, work and community ties show that for all practical purposes, they are Australian. Thus social integration is measured in effect by the perceptions of others, that is, by the non-citizen's standing and good repute.⁹⁶⁷ As such it contradicts the suggested judicial approach to character as about essential moral qualities of an individual. From this it appears that good character for the purposes of migration turns not on a person's moral qualities but whether a permanent resident has *become* Australian. This is confirmed by the example to which I now turn, which shows that the social recognition by others of the non-citizen's effectively Australian identity triggered the unprecedented scenario of a non-citizen who was deported from Australia being permitted to return and eventually being granted a permanent visa. The exceptional nature of return in these circumstances is underscored by the permanent ban on the return of all those whose visas have been cancelled for bad character on the basis of their criminal history.⁹⁶⁸

Revoking deportation: I am trash, but Australian trash

Mr. Jovicic migrated to Australia with his parents in 1968 at two years of age. His parents were Serbian nationals. He was jailed for a string of thefts to support a heroin addiction. Immigration Minister Phillip Ruddock cancelled his permanent resident visa on the grounds of his substantial criminal record, and in 2004, at the age of 36 he was deported to Serbia. There were no formal legal mechanisms for review of Mr. Jovicic's visa cancellation after he was removed. Yet two years later in March 2006 he was permitted to return. I argue it was the construction of Mr. Jovicic as someone for whom Australia had some responsibility, albeit as a non-citizen, that triggered Immigration Minister Vanstone's 2006 decision to grant him a visa to return to Australia. In effect, the trigger was governmental recognition that he held social claims to Australian identity. This was developed by the following elements.

First, the Australian embassy in Serbia treated Mr. Jovicic not as any Serbian national, but one with links and possibly claims on Australia. Mr. Jovicic was returned to Serbia, a country to

⁹⁶⁷ The judicial interpretation of good character was set out in Part A of this chapter.

⁹⁶⁸ Persons who are deported from Australia because of a criminal conviction or for security reasons face a permanent ban on return to Australia. See *Migration Regulations* 1994 (Cth) Schedule 5, Special return criteria 5001.

which he had never been and whose language he did not speak. He had lived in Australia for 36 years, his sister and brother remained in Australia, as did his de facto spouse. His father had returned to Serbia but was estranged from his family. In Serbia he did not hold the right to work or receive welfare, and after his arrival, the Serbian government cancelled his citizenship and he became stateless. In November 2005, a year after his deportation from Australia, Mr. Jovicic slept outside the Australian embassy in Belgrade in desperation as a "last resort".⁹⁶⁹ His actions clearly showed he identified as Australian as he fronted up to the Australian embassy, not the Serbian government. Mr. Jovicic later stated "I've explained to the embassy, if I am considered Australian trash, then I will rot on Australian soil."⁹⁷⁰ He had no money, was homeless, and faced serious physical and mental health issues.⁹⁷¹ The embassy responded by arranging three nights' accommodation in a hotel and a medical examination. The Australian Ambassador John Oliver also emailed Mr. Jovicic's sister in Australia to alert her to Mr. Jovicic's deteriorating health and welfare.⁹⁷² The actions of the embassy were significant in recognising an ongoing claim by Mr. Jovicic on the Australian Government, something that was also recognised by the then Federal Government Opposition Immigration spokesperson Tony Burke:

The Department of Foreign Affairs, through the ambassador, clearly acknowledge that this is a genuine problem. They're not treating him as though he's any Serbian national.

They are treating him as somebody who has intrinsic links back to Australia.⁹⁷³

From December 2005, the Immigration Department expended over \$10,000 looking after Mr. Jovicic in Serbia, and when he was returned to Australia they paid for his flight.⁹⁷⁴

Second, Mr. Jovicic's situation had developed a public profile in the media and the issue of deportation of long term residents was becoming controversial. ABC television program *Lateline* investigated his case, interviewing Mr. Jovicic, his sister and then Labor opposition immigration spokesperson Tony Burke. They also followed Mr. Jovicic and his sister Susannah's

⁹⁶⁹ Margot O'Neill, "Family pleads for deportee's return " *Lateline ABC, TV Broadcast* 23 November 2005.

⁹⁷⁰ Margot O'Neill, "Family pleads for deportee's return," *Lateline ABC, TV Broadcast* 23 November 2005.

⁹⁷¹ These problems affected his walking (diagnosed as degenerative disc disease) and potentially prostrate cancer

⁹⁷² O'Neill, "Family pleads for deportee's return " .

⁹⁷³ Tony Jones, "Jovicic's deportation 'disproportionate punishment'," *Lateline ABC, TV Broadcast* 23 November 2005.

⁹⁷⁴ Brett Evans, "Deportee allowed to return to Australia " *Lateline ABC, TV Broadcast* 2 March 2006.

campaign to have him returned to Australia.⁹⁷⁵ His circumstances encapsulated the argument against removal as an appropriate response for long term permanent residents.

Mr. Jovicic's arrival in Australia commenced with a short period of unlawfulness as if to underline the legal fragility of his presence.⁹⁷⁶ Contrary to Immigration Department promises of a permanent visa within a day of return, from Mr. Jovicic's return in March 2006 until the grant of a permanent visa in early 2008 he lived in limbo on short visas extended not by right of law but by discretion.⁹⁷⁷ It is arguable that this period of uncertainty functioned as punishment in the same way that deportation is argued to operate for permanent residents.

Examination of the character testing of permanent residents on criminal history grounds, its triggers, policy and practice, show that the character test polices the benefits of citizenship. Character testing of permanent residents acutely grapples with the competing claims to remain within Australia. Although migration authorities hold the power to exclude persons for bad character because they are not citizens, migrants to be effectively Australian are an important factor in character decisions. As such, character testing is not solely about determining bad character, it also engages in determination of who is effectively "Australian" to decide who should be permitted to become legally Australian. The introduction of the Australian citizenship test, which aspiring citizens undertake as part of their citizenship application, has been argued to operate as a test of compatibility with "Australian" values. Questions in the test are directed to apparently "Australian" civic values and also Australian political, cultural and popular history.⁹⁷⁸ The citizenship test is more visible than character determination, in terms of its symbolic definition of Australia's national identity.⁹⁷⁹ The criminal history grounds which make character exclusion possible tend to obscure the

⁹⁷⁵ This sparked a *Lateline* focus on the plight of character deportations of permanent residents. See for example *Lateline's* coverage of the character deportation of permanent resident Mr. Fatih Tuncok: Michael Edwards, "Permanent resident faces deportation" *Lateline ABC, TV Broadcast* 24 November 2005. and ———, "Permanent resident released from Villawood," *Lateline ABC, TV Broadcast* 25 November 2005.

⁹⁷⁶ Brett Evans, "Jovicic awaits residency decision," *Lateline ABC, TV Broadcast* 9 March 2006.

⁹⁷⁷ See ———, "Deportee allowed to return to Australia"; Tom Iggulden, "Jovicic asked to apply for Serbian citizenship," *Lateline ABC, TV Broadcast* 10 March 2006; Lindy Kerin, "Jovicic's permanent residency a "wonderful surprise" " *ABC News (online)* 23 February 2008.

⁹⁷⁸ Susan Harris- Rimmer argues that the Australian citizenship test, which aspiring citizens undertake as part of their citizenship application, operates as character test: Susan Harris Rimmer, "The Dangers of Character Tests: Dr Haneef and other cautionary tales," (Canberra: The Australia Institute, 2008).

⁹⁷⁹ Citizenship tests are argued to be a technology that naturalises authority. By signalling particular civic values as national values and obscuring the economic needs of states for new citizens, citizenship tests construct integration as a one way instead of two way process. In this way citizenship tests arguably act to produce new citizens who govern their own right to difference. Oded Löwenheim and Orit Gazit, "Power and Examination: A Critique of Citizenship Tests," *Security Dialogue* 40, no. 2 (2009).

discretion involved in waiver of character exclusion. However, the determination of Australian identity through that element of character testing is just as powerful.

The legislative expression in the character test and the judicial interpretation of good character both construct good character as a particular kind of morality. In its legislative expression, the absence of a criminal history and honesty amongst other qualities is set as good character. The common law states enduring moral qualities can be objectively ascertained, unlike the test of good standing and repute which is subjectively determined by public opinion.⁹⁸⁰ However, in the examples discussed thus far, the importance of excluding persons engaged in migration fraud reflects the necessity of honesty to the function of the migration program, more so than policing honesty as a moral quality. In the criminal history provisions, character based exclusion turns on the social citizenship of non-citizens, not solely their criminal history. This reinforces the policing role as a coercive practice of inclusion and exclusion that draws on social norms in decision making, and contradicts the judicial definition of good character as an essentially moral quality. A final example develops this analysis by exploring the character test in a broader policing context. In this final part of the chapter I argue that the character test cannot be constrained to solely character test purposes. It explores how the legal regulation of the character test allows its use for broader control purposes, specifically, to empower detention. The analysis underscores the role of the character test not as a legal standard of character to which all non-citizens must abide but as a tool of policing that is selectively deployed for diverse control functions.

D Visa cancellation via bad character: a shortcut to detention powers

The legal regulation of the character test enables discretion over its deployment for broader control agendas. The routine operation of visa cancellation for criminal convictions and the consequent detention and removal of non-citizens arguably demonstrates the extension of punishment beyond the criminal process, as a form of "multiple punishment".⁹⁸¹ Further, the potential for the character test to facilitate broader control agendas is evident in the visa cancellation and detention of Dr. Haneef. This case was not selected as representative of

⁹⁸⁰ *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 139 ALR 84, per Lee J at para 19.

⁹⁸¹ See for example: Michael Grewcock, "Conviction, detention and removal: the multiple punishment of offenders under section 501 Migration Act," *University of New South Wales Legal Research Series* 49(2009); Daniel Kanstroom, "Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases," *Harvard Law Review* 113 (2000).

those non-citizens held in detention.⁹⁸² Rather, it was selected because the unfolding of the process that empowered Dr. Haneef's detention illustrates the breadth of discretion in the character test. The limited accountability is in part an outcome of the generalised review options in migration and the personal power of the Immigration Minister, but also results from the management of information in character testing. At the start of this chapter I illustrated how migration's character test integrates broad discretion both through the openness of the text and through the Immigration Minister's power at each stage to depart from standard process and intervene to make a final and non-reviewable decision. The breadth of discretion effectively enables security objectives to be pursued without being labelled as such. It also allows non-security based personnel (such as the Immigration Minister) to enforce their own interpretation on what is needed for security. The fluidity of migration law in accommodating politicised decision making was made especially evident in the cancellation of Dr. Mohamed Haneef's visa, as the detention of Dr. Haneef commenced under the counter-terror legislation and then when that legal authority faltered, his detention continued via migration law. Thus migration control through the character test has the capacity to operate as "high policing", that is, as political policing, in addition to the more mundane "low policing".⁹⁸³

The detention of Dr. Mohamed Haneef

An attempted car bombing of Glasgow airport passenger terminal on 30 June 2007 sparked a series of events in Australia that eventually led to an inquiry into the Australian Federal Police and Immigration Department activities.⁹⁸⁴ Dr. Mohamed Haneef had been working as a doctor at Gold Coast Hospital for less than a year, having travelled to Australia from his country of citizenship, India, for work in September 2006. He became caught up in the Glasgow events because the two men apprehended in connection with the attempted bombing were his second cousins. Mr Kafeel Ahmed was apprehended after driving the burning jeep into the airport and immediately arrested. He had suffered severe burns and died a month later. Dr.

⁹⁸² In any case, such data is not routinely publicly reported. However, one snapshot of those in detention at 7 May 2008 for visa cancellation under s 501 Migration Act is available. It illustrates that, at that time, the dominant types of convictions that prompted character cancellation resulting in detention were, firstly, break and enter and theft related offences (representing 23 of the 25 individuals detained), and assault related offences (22 of the 25 detained). Note that the majority of individuals held multiple convictions: The Parliament of the Commonwealth of Australia Joint Standing Committee on Migration, "Immigration Detention in Australia: A New Beginning, Criteria for release from immigration detention, First report of the inquiry into immigration detention in Australia" (Canberra 2008), 49.

⁹⁸³ Jean-Paul Brodeur, "High Policing and Low Policing: Remarks About the Policing of Political Activities," *Social Problems* 30, no. 5 (1983).

⁹⁸⁴ The facts about the sequence of events was drawn from the following sources: *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273.

Sabeel Ahmed was Kafeel's brother, a medical doctor working in Liverpool. Sabeel pleaded guilty to failing to disclose information that could have prevented an act of terrorism, being an email that Kafeel sent to Sabeel, but the court found that he was not part of any terrorist organisation.⁹⁸⁵

The changing authority for Dr. Haneef's detention

Dr. Haneef became caught up as a suspect in the terrorism investigation in Australia. He was arrested for questioning in relation to the attempted car bombing and arrested for questioning under the first use of the counter terrorism scheme's Preventative Detention Order (PDO) powers. The PDO was extended twice and Dr. Haneef was held for 12 days in total without charge.⁹⁸⁶ Then, when it was clear that the court would not permit further extension of the PDO, on 17 July 2007, Dr. Haneef was charged with intentionally providing resources (being a UK SIM card) to a terrorist organisation, that organisation being persons including the Ahmed brothers, and being reckless as to whether the organisation was a terrorist organisation. Sometime in the past Dr. Haneef had passed on his SIM card when he left after visiting his relatives in the United Kingdom. He remained detained, no longer under the Preventative Detention Order, but pending committal for hearing.

Two days later, the court granted Dr. Haneef bail at \$10,000 pending determination of the terrorism related charges, which would have permitted Dr. Haneef's release. However within three hours the Immigration Minister Kevin Andrews cancelled Dr. Haneef's visa for failure of the character test. The basis of character test failure was his association with the Ahmed brothers who the Minister suspected to be involved in criminal conduct.⁹⁸⁷ The *Migration Act* provides that a person does not pass the character test if "the person has or has had an

⁹⁸⁵ That email sent to Sabeel was accepted as evidence by Justice Calvert-Smith that Sabeel Ahmed had no knowledge of his brother's actions or plans and was not part of any terrorist organisation. This was accepted at Sabeel Ahmed's hearing on 11 April 2008. Thus by 3 July 2007 (before Dr. Haneef was charged, and before his visa was cancelled) the UK Police held information (that was presumably shared with Australian police) that undermines the charges made against Dr. Haneef that he had provided his SIM card to someone part of a terrorist group, and . M.J. Clarke, "Report of the Inquiry into the Case of Dr Mohamed Haneef: Volume One," (Barton A.C.T. 2008). See also Greg Barns, "Questions about the Haneef affair that won't go away," *Crikey* (14 April 2008), www.crikey.com.au/2008/04/14/questions-about-the-haneef-affair-that-wont-go-away.

⁹⁸⁶ "Ruddock defends AFP over Haneef detention," *ABC News* (11 July 2007), www.abc.net.au/news/2007-07-11/ruddock-defends-afp-over-haneef-detention/96772. Note the Australian Federal Police initiated an application to Brisbane Magistrate's Court to seek a third extension of three days for the Preventive Detention Order, but withdrew this application – see "Haneef trial would be prejudiced: lawyers," *ABC News* (14 July 2007), www.abc.net.au/news/2007-07-14/haneef-trial-would-be-prejudiced-lawyers/2502470.

⁹⁸⁷ *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273, at para 115-17.

association with someone else or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct".⁹⁸⁸ The Immigration Minister exercised his discretion to exempt the visa cancellation from procedural rules as he decided the cancellation was in the "national interest".⁹⁸⁹ I argue that the timing of Dr. Haneef's visa cancellation (which empowers detention and removal by the Immigration Department), the power to quarantine information from the non-citizen and the public, and the limited capacity for review of the Immigration Minister's decision, illustrate how the discretion empowered in the character test can function for security purposes with minimal effective oversight.

One of the appeal grounds for Haneef's visa cancellation decision, and the major public political contention about the decision, was the question as to whether Haneef's visa was cancelled for a "proper purpose". In other words, was the Immigration Minister's decision made because Haneef failed the migration character test? Or as popularly believed, was Dr. Haneef's visa cancelled to ensure Haneef remained in state custody, and so frustrate the court's grant of bail?⁹⁹⁰ Before the Federal Court decided Dr. Haneef's review application, the criminal charges against him were withdrawn. Dr. Haneef was permitted to be released from immigration detention and he left Australia for Bangalore, India, the following day.⁹⁹¹

Purpose: a means to an ends and beyond review

The Federal Court is empowered to review the Immigration Minister's visa cancellation (and visa cancellation more generally) not in terms of the merits of the cancellation decision, but on whether the cancellation was made in accordance with the law and within the jurisdiction of the decision maker.⁹⁹² Justice Spender, who presided in the case, found the purported visa cancellation to be invalid for jurisdictional error, as the Minister's cancellation decision relied on an incorrect meaning of "association".⁹⁹³ Thus he reinstated Dr. Haneef's visa. The Immigration Minister had relied on facts that amounted only to Dr. Haneef's innocent

⁹⁸⁸ *Migration Act 1958* (Cth) s501(6)(b)

⁹⁸⁹ *Migration Act 1958* (Cth) s501 (3) and (4).

⁹⁹⁰ This belief was expressed by persons such as John Dowd QC president of the executive committee of the International Commission of Jurists Australia and former NSW Attorney-General, Julian Burnside the president of Liberty Victoria two days after the decision, and Cameron Murphy, president of the NSW Council for Civil Liberties, cited in Phillip Coorey, Joel Gibson, and Craig Skehan, "India raises concern over detention," *Sydney Morning Herald* 18 July 2007.

⁹⁹¹ The charges were withdrawn on 27 July 2007, eleven days after Dr. Haneef's visa was cancelled.

⁹⁹² For migration decisions made by Immigration delegates and review tribunals this means ensuring the decision abides by procedural fairness rules, such as not taking into account irrelevant considerations, taking into account relevant considerations, providing an opportunity to respond to adverse allegations and so on.

⁹⁹³ *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273, at para 296.

association with his second cousin, and that did not entail the bad character of Dr. Haneef. The Immigration Minister had argued that the association ground of the character test did not require that such an association imply bad character and that he held the power to cancel regardless of whether Dr. Haneef knew or suspected criminal activity. But the Federal Court determined otherwise.⁹⁹⁴ The Federal Court's interpretation that association should be more than innocent was heralded by some commentators as a triumph of the rule of law,⁹⁹⁵ but I argue otherwise. Justice Spender pointed out that the Minister could have based his cancellation on the fact that at the time Dr. Haneef was a person of interest to the UK police, and had been charged with a criminal offence in Australia. This would have enabled the Minister to make a factual decision that Dr. Haneef's relationship with his second cousins was more than an "innocent" familial association,⁹⁹⁶ and so had been within the Minister's power, even though these charges were withdrawn just eleven days after his visa cancellation and prior to the Federal Court hearing.

More importantly for my argument, the Federal Court did not find that the Immigration Minister held an improper purpose in cancelling Haneef's visa. The inadequacy of "proper purpose" in enabling review of Ministerial or bureaucratic decisions was illustrated in chapters 4 and 5, and this theme continues to be borne out in the review of Dr. Haneef's visa cancellation.⁹⁹⁷ Justice Spender accepted Dr. Haneef's argument that to support a valid visa cancellation the purpose of visa cancellation must be removal as soon as reasonably practicable.⁹⁹⁸ However in the circumstances, Justice Spender did not infer that purpose was absent.⁹⁹⁹ He took into account the timing of the visa cancellation (immediately after the

⁹⁹⁴ Ibid., per Spender J, 49-56. Haneef overturned the prior authority in *Minister for Immigration and Multicultural Affairs v Kuen Chan* [2001] FCA 1552 per Emmett J.

⁹⁹⁵ See for example: Andrew Lynch, "A triumph for the law," *The Age* (August 2007), www.theage.com.au/news/opinion/a-triumph-for-the-law/2007/08/21/1187462262339.html?page=fullpage.

⁹⁹⁶ Noting that Spender J also noted that at the time of the Federal Court's decision on *Haneef* that these facts were no longer available to base the Minister's decision on, as the charges had been dropped by the Australian Federal Police, and the UK police ceased to have an interest in Dr Haneef: *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273.

⁹⁹⁷ In chapter 4, whether the Immigration Department's action in removing Scott Morrison immediately upon apprehension and delaying notifying him of his impending removal was conducted with "lawful purpose" was considered. In that case, if the Immigration Department's actions in removing Scott Morrison were intended to deprive him of judicial review, then the purpose would have been unlawful. Yet the chapter illustrated the weak accountability that the test of "purpose" imposes. In chapter 5 the "purpose" of Mr. Soh's transfer from immigration detention to prison was held not to be punitive, even though the transfer was in response to Mr. Soh's disruptive activities in detention. Instead, the Immigration Department's purpose was held to be for the purpose of maintenance of good order within detention.

⁹⁹⁸ *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273, at para 296.

⁹⁹⁹ Ibid., at para 300, and paras 297-311.

Brisbane Magistrate's Court granted bail),¹⁰⁰⁰ and the Immigration Minister's expectation that Dr Haneef would *not* have been removed because the Attorney-General would issue a Criminal Justice Stay Certificate to that effect.¹⁰⁰¹ Yet he decided that, although immigration detention was the likely consequence of the Minister's cancellation decision, this was not enough grounds to infer that detention was the Minister's (improper) purpose. Information that has become public since the Federal Court decision may well have prompted a different finding.

Quarantining, selective release, and incorrect information

The selective release of information by policing agencies in the Haneef case has been described as a campaign of misinformation.¹⁰⁰² It underscores how, like policing more generally, the Immigration Department and the Minister manage access to information to reinforce the authority of the policing agent as holding exclusive knowledge, thus limiting review of such decisions. In early 2008 Australian Federal Police Commissioner Mick Keelty provided evidence to the Senate Legal and Constitutional Affairs Estimates Committee of an email that was sent from an AFP counter terrorism officer to an Immigration Department officer. The email talked about "contingencies for containing Mr Haneef" and detaining him under the Migration Act if granted bail. Commissioner Keelty stated:

In Dr Haneef's case there was the potential for him to be kept in custody... There was also a potential for him to be released by the court and allowed to remain free in the community, at which time it would have triggered the immigration policies that might have applied to Dr Haneef....¹⁰⁰³

Commissioner Keelty went on to say that this interaction was not unusual:

If a person who is a subject of interest of both departments is suddenly not put in custody and not released on bail with any conditions but allowed to remain at large, it is up to the department to then apply whatever policies it wants to apply to that person...

So that was a very normal interaction between the officer and the department. It

¹⁰⁰⁰ See *ibid.*, at para 115-16. On 16 July 2007, bail was granted at 11a.m., and the Minister's decision to cancel was made prior to 1.22 p.m. on that day.

¹⁰⁰¹ Note that the Attorney-General issued a Criminal Justice Stay Certificate on 17 July 2007, being the day after the Minister for Immigration's visa cancellation decision.

¹⁰⁰² Stephen Keim SC et al., "Inquiry into the case of Dr Mohamed Haneef: Submission of Maurice Blackburn" (Sydney: Maurice Blackburn Lawyers, 22 May 2007).

¹⁰⁰³ Senate Standing Committee on Legal and Constitutional Affairs Estimates, "Additional Budget Estimates," (Canberra: Parliament of Australia, 18 February 2008), 41-42.

happens on numerous occasions that more than one agency has an interest in an individual.¹⁰⁰⁴

In the Haneef matter, mistakes were amplified as more than one institution relied on incorrect information. For instance, the police submitted an affidavit to the court in Haneef's bail application hearing. It falsely stated that Dr Haneef had said he resided with the Ahmed brothers at a Liverpool address, but this was not supported by the transcript of police interview.¹⁰⁰⁵ This incorrect affidavit formed part of the basis for the Minister's cancellation of Dr. Haneef's visa.¹⁰⁰⁶ The lack of access to the transcript of interview (until it was leaked by Haneef's barrister) made this impossible to test.¹⁰⁰⁷ The Minister also relied on "protected information" from the AFP, as part of the basis of his decision, that was not released either to the defence team or to the Federal Court and gave the impression there was more that might have affected the Minister's suspicions of Haneef's character. Quarantining access to information effectively restricted review of the Minister's purpose.¹⁰⁰⁸ In fact, the Immigration Department's visa cancellation process remains the most obscure process of all the agencies involved in the policing of Haneef. Haneef's lawyers have said that the level of exemptions claimed by the Immigration Department under freedom of information process mean that the released documents "shed almost no light on the subject".¹⁰⁰⁹

¹⁰⁰⁴ Ibid., 42.

¹⁰⁰⁵ These are available at the Indian newspaper: "Transcripts of Australian Police interviews with Dr. Mohammed Haneef," *The Hindu* (3 July 2007), www.hindu.com/nic/0058/haneef.htm. Note the first interview was held on 3 July 2007, and the second on 13 July 2007. See also Dr. Haneef's barrister Stephen Keim's argument that he released this information because of police and government selective leaking and allusions to compelling evidence against Dr Haneef: Dylan Welch and AAP, "Lawyer admits leak," *Brisbane Times* (18 July 2007), www.brisbanetimes.com.au/news/national/pm-condemns-leak/2007/07/18/1184559843421.html.

¹⁰⁰⁶ *Haneef v Minister for Immigration and Citizenship [2007] FCA 1273*, at para 157.

¹⁰⁰⁷ Stephen Keim, "Dr Haneef and me," *Alternative Law Journal* 33, no. 2 (2008); Dylan Welch and AAP, "Lawyer admits leak".

¹⁰⁰⁸ *Haneef v Minister for Immigration and Citizenship [2007] FCA 1273*, at para 326. Justice Spender stated: "There is, nonetheless, a certain piquancy in the present case, in that the Minister has chosen to give a selected part of what is said to be protected information to the public by way of press release, but has not sought to divulge to the Court any part of the protected information under s 503A(3) of the Act." Dr. Haneef's defence team faced difficulties in accessing information informing the criminal charges and visa cancellation: Joel Gibson and Craig Skehan, "Non-citizen Haneef's bumpy legal ride," *Sydney Morning Herald* 19 July 2007.

¹⁰⁰⁹ Stephen Keim SC et al., "Inquiry into the case of Dr Mohamed Haneef: Submission of Maurice Blackburn" 94 (para 9.5). As a sidenote, Stephen Keim faced consequences for his actions. He was investigated for professional misconduct for his release of transcripts of interviews and FOI documents to the public domain. See Connie Levett, "Commission clears Haneef lawyer," *Sydney Morning Herald* (1 February 2008), www.smh.com.au/news/national/commission-clears-haneef-lawyer/2008/02/01/1201801005363.html; Keim, "Dr Haneef and me."

The Haneef case shows that far from operating as a legal requirement of good character, the character test functioned as one of an array of tools that enabled the control and detention of Dr. Haneef as deemed necessary by policing agencies at that time. His character based visa cancellation was not concerned with his immediate exclusion from Australia, but his detention. The Federal Court review of his visa cancellation demonstrates that accountability for such action is to be found in the political arena, not in the courts. These factors show how a control agenda outside of the character test grounds can easily be accommodated without effective accountability within the legal framework.

In the Haneef case, the legal framework of accountability was not what enabled exposure of the control impetus to maintain Dr. Haneef's detention through visa cancellation. It was public opinion and the subsequent questions raised in Parliament and the Clarke inquiry that were critical.¹⁰¹⁰ After the initial public panic that Dr. Haneef might be a terrorist, the leaking of transcripts of police interview garnered extensive public sympathy partly on the basis that Dr. Haneef came across in the public sphere as an unlucky victim of possibly intentional bureaucratic bungling heightened by fears of terrorism. As information was released it was clear that he was an unlikely suspect for terrorism. The transcripts of his interview with the AFP record that the closest he came to knowledge of terrorist activity was his reading of *Yahoo! News* via the free email server.¹⁰¹¹ In the words of his defence lawyer Peter Russo, it was an unusual case where his client's conduct throughout his life was "cleaner" than his own,¹⁰¹² and it allowed the tide of public opinion to turn, but others subjected to the politicised use of the character test might not find such a positive result.

Conclusion

Character evaluation could be accepted as an innocuous if essential decision process in immigration screening. The executive has a mandate to ensure the reception of migrants who meet a range of discriminators, good character being important among these. However, this chapter has shown that its role is not that of individual and universal determination of the enduring moral qualities of an individual, being the common law approach to "good character" discussed in the introduction to the chapter. This chapter has demonstrated that the role of the character test within migration control generally, as well as the structure and legal

¹⁰¹⁰ Clarke, "Report of the Inquiry into the Case of Dr Mohamed Haneef: Volume One."

¹⁰¹¹ Hedley Thomas, "Inside the Haneef sessions," *The Australian* (25 August 2007), www.theaustralian.com.au/news/features/inside-the-haneef-sessions/story-e6frg6z6-1111114262728.

¹⁰¹² Peter Russo (solicitor of Russo Mahon Lawyers), in interview with author, 23 June 2008.

regulation of the character test itself, enables its use to police inclusion and exclusion from the benefits of citizenship.

The structure of the character test empowers the Immigration Department and Immigration Minister to proactively identify those of potential bad character, making character testing inherently discretionary. The use of stereotypes by arguably the most objective of the decision makers in character testing shows that attention to the individual character of applicants is compromised as generalised inferences are drawn from stereotypes. Character testing selectively permits permanent residents who have committed serious crimes to remain in Australia because they are for all intents and purposes Australian citizens, without formal citizenship. It confirms the recurring theme of social citizenship shaping (and being determined by) migration policing practices. For permanent residents with substantial criminal records, it is their social integration in Australia, not their character, which is crucially determined in character testing. Further, the openness of grounds for bad character, together with the lack of effective review of character determination, means that, as in the *Haneef* case, character testing can potentially be utilised for control agendas outside concern about an individual's presence in Australia. As in chapters 4 and 5, the theme of the administrative legality of migration law was shown to be important in facilitating policing discretionary power.

Leading up to this chapter, the thesis has examined several influential discretionary decision situations, determining control relationships, which identify migration control as policing. The character test draws together elements of discretionary power that arose in those prior chapters. It represents a confluence of legislated power, individualised discretionary empowering and concealed control consequences. The character test operates as a policing power not a legal requirement or standard that non-citizens must satisfy. In this way the character test mirrors the policing of raids. Like raids, migration law provides the authority for intervention, but it does not determine the exercise of character test power. The outcome of discretion exercised in the character test differs from the control contexts previously considered because it extends to determining the substantive visa status of non-citizens. Character testing is a mechanism to endorse inclusion into the citizen community, to confirm the exclusive privileges of that community, and to "outlaw" and remove those who not only may be of bad character but who have not been able to successfully resist the adverse exercise of policing discretion. As such, the character test provides a systemic policing power over all migrants that remains open, such that it can sustain changing approaches to the

meaning of "bad character". In this way the character test demonstrates its operation as policing.

Inclusion and exclusion in control determinations is a recurring theme across all the migration control context chapters. It is also bridges migration policing in the nation-state context and beyond through the notion of "global citizenship". The concluding chapter offers suggestions as to how migration policing is not essentially or exclusively a domestic phenomenon. The argument in the following chapter develops the link between a policing interpretation of migration control and considerations of global governance. In part this engages with the notion of global citizenship as constructed by migration policing practices as determinative of individual autonomy over movement. Migration policing is considered within the contemporary context of global securitisation which responds to populations on the move as a threat to be controlled, as much as a humanitarian challenge for inclusion and emancipation.

Part III:

Migration Policing

Beyond Australia

Trails beyond the Nation: Migration Policing and Global Citizenship

Introduction

If, as the findings in Part II of the thesis indicate, the notion of migration policing as “border policing” is a paradox, then does it follow that migration policing operates beyond the nation? Ostensibly, migration control is held to affirm national sovereignty, and solidify the “borders” of the nation. Political discourse asserts this is achieved through practices of national citizenship, through legal mechanisms that determine citizenship and visa status, as well as through visa decision-making policy said to be in the interests of the nation’s citizens. At least rhetorically, “border” policing also enforces the geographical boundaries of Australia though even at the level of rhetoric this is changing with growing popular understanding of migration policing that takes places beyond the Australian geographical space. Yet, in essence, the investigations in Part II of the thesis demonstrate how the common feature of migration policing is not its function of state border protection via control of legal citizenship and territory. Rather the common feature in all expressions of migration policing is that it involves control over movement: between nations, to and from immigration detention, between visa and citizenship statuses, and between social inclusion and exclusion. Thus far, indications of the “borderless” operation of migration policing authority have been developed from the examination of migration policing in the Australian national context. The purpose of this chapter is to consider the durability and operation of an analysis of *migration as policing* outside the national place and political epoch that limited the empirical investigation in Part II of the thesis. This final chapter argues that migration policing practices, via management of individual autonomy over movement (posited to be an essential element of “global citizenship”), constitute global citizenship identity, and thus demonstrates its operation beyond the nation. The chapter begins by setting out the value in assessing the borderless

operating of migration policing through the concept of global citizenship, then introduces some key qualities of global citizenship, and ends by exploring theories of transversal movement and securitisation in terms of how they explain migration policing control of movement as constituting an exercise of "global" power.

Why explore global citizenship to consider whether migration policing operates beyond the nation?

It could be argued that the operation of migration policing *beyond* the nation is quite clearly established by a range of migration policing practices. Migration policing (as examined in this thesis) involves governance that does not maintain a clear distinction between the nation-state and private entities and interests;¹⁰¹³ it involves a range of transnational and multilateral policing arrangements including both formal legal and institutional agreements as well as less formal collaborations; and it involves state and private body engagement in extra territorial pre-emptive measures to prevent breaches of migration law within Australia. In these senses, it would seem quite obvious that migration policing practices *do* move beyond the nation-state. Examining the reach of these migration policing practices empirically is a whole other thesis.¹⁰¹⁴ However exploring migration policing in terms of its production of global citizenship enables a *conceptual exploration* that tests the durability of the findings that migration policing in the national arena operates "beyond" the nation-state. The meaning of "beyond" the nation gradually unfolds in this chapter. It develops the argument that regardless of its territorial location, the operation of migration policing practices can be considered global because by managing movement these practices articulate an individual's social citizenship in relation to other individuals across the globe. This is because of the key impact of migrant movement on social conditions, and also because the management of movement involves considerations that implicate its global framework. Thus unlike the thesis investigation thus far the examination of global citizenship is not empirical. Instead it draws on diverse theoretical

¹⁰¹³ I use the term "global governance" in this chapter to refer in the broadest sense to law, regulation and control at the global level. Thus it encompasses theorisations of global control as supra-national institutions and international laws, as well as disaggregated processes that result in control of movement across the globe.

¹⁰¹⁴ Empirical examination of nation-state practices is an important avenue for further research which is being taken up by some scholars. See for example the research conducted by Savitri Taylor and Sandra Gifford of the La Trobe University Refugee Research Centre which examines the impact of Australia's border control cooperation with Indonesia and PNG on the human rights of asylum seekers and host communities in those countries. The final report is anticipated in 2012. Some publications arising from this research include: Savitri Taylor, "Australian Funded Care and Maintenance of Asylum Seekers in Indonesia and PNG: All Care but No Responsibility?," *UNSW Law Journal* 33, no. 2 (2010); Savitri Taylor and Brynna Rafferty-Brown, "Waiting for Life to Begin: The Plight of Asylum Seekers Caught by Australia's Indonesian Solution," *International Journal of Refugee Law* 22, no. 4 (2010).

literature to speculatively grapple with *how* migration policing constitutes the global community and the global citizen.

The approach here to how the global is conceptualised or how activities are controlled by global forms of governance differs from that of many legal accounts of the global or the international arena. Many legal accounts point to global governance as a hierarchical model of supra-national authority through the operation of international institutions, international laws or norms.¹⁰¹⁵ The conceptual exploration of global citizenship in this chapter builds from the notion that the contemporary globe is “liquid”¹⁰¹⁶ and there is no more “outside”.¹⁰¹⁷ From this basis I am specifically interested in how *movement* itself can constitute the global, and thus how migration policing, as control over movement of people, constitutes global citizenship.

There are two key bases to global citizenship that make it a particularly good vehicle through which to consider whether migration policing practices extend beyond the nation. Firstly, global citizenship is constituted by social norms not “law”. There is no central global authority or law that bestows global citizenship. It is an entirely normative concept. Similarly, there is no central law or institutional authority that authorises migratory movement. The generally accepted definition of “international migration law” is not in fact a distinct set of laws, but a heterogeneous set of legal texts derived from both national and international sources.¹⁰¹⁸

“International migration law” is composed of two key norms: human rights principles; and principles derived from nation-state sovereignty (specifically the sovereign right over territory and to protect borders, to confer nationality, to admit and expel foreigners, to act for national security).¹⁰¹⁹ International human rights conventions do have some material influence on nation’s control of migrants; however, these conventions do not positively authorise movement between nations, and provide extremely limited protection to movement without permission, primarily to only those classed as refugees.¹⁰²⁰ Dauvergne’s examination of the *International Convention on Migrant Workers* demonstrates how human rights protection in legal instruments are limited by their character as products of negotiation between state

¹⁰¹⁵ See for example: Jacint Jordana and David Levi-Faur, *The politics of regulation: institutions and regulatory reforms for the age of governance* (Cheltenham: Edward Elgar, 2005).

¹⁰¹⁶ Zygmunt Bauman, *Liquid times: living in an age of uncertainty* (Cambridge: Polity Press, 2007).

¹⁰¹⁷ Michael Hardt and Antonio Negri, *Empire* (Cambridge, Massachusetts; London, England: Harvard University Press, 2000).

¹⁰¹⁸ Brunson McKinley, “Foreword,” in *International migration law: developing paradigms and key challenges*, ed. Ryszard I. Cholewinski, Richard Perruchoud, and Euan Macdonald (The Hague: International Organization for Migration, T.M.C. Asser Press, 2007), ix.

¹⁰¹⁹ *Ibid.*

¹⁰²⁰ See Marie-Bénédicte Dembour and Tobias Kelly, *Are human rights for migrants?: critical reflections on the status of irregular migrants in Europe and the United States* (Abingdon, Oxon; New York: Routledge, 2011).

parties, and do not provide protection when in conflict with nation-state sovereignty.¹⁰²¹ As evident from the thesis, at least in the national arena, norms determining the triggers, operation and effects of the control of movement cannot be reduced to only those derived from nation-state sovereignty. The “social citizenship” of illegal migrants in Australia – their relationships with friends, lovers, their capacity for employment, integration, language skills and so on - has been shown as critical to determining whether migrants are released from detention while awaiting visa decisions¹⁰²², their life on temporary and precarious visas,¹⁰²³ their capacity to obtain work while illegal,¹⁰²⁴ authorities suspicion of them as illegal¹⁰²⁵ and so on. Migration policing practices endorse these norms with the authority of state sovereignty. In this sense, migration policing practices *perform* state sovereignty, but the discretionary exercise of migration policing power is not necessarily triggered by concerns prompted by citizenship and migration laws. The influence of social norms over migration policing is recognised by migration analysis that identifies the tension between the normative political closure established by legal citizenship and social and economic claims that resist such closure.¹⁰²⁶

Secondly, conceptualising migration policing via its role in constituting global citizenship shifts the focal point from migration policing in its negative prohibitive operation to policing in its productive mode, by adopting a framework where migrant illegality is not a critical component of the analysis. In this chapter, references to “migration policing” are not restricted to the policing of undocumented migrants. “Migration policing” refers to migration regulation more generally, that is, what some scholars refer to as “managed migration”.¹⁰²⁷ This includes the policing of illegal migrants, managing adherence to visa conditions, and the development of visa policy itself to control the minute characteristics and skill sets of those permitted to enter and remain in a nation-state.

¹⁰²¹ Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law*, Law in Context (New York: Cambridge University Press, 2008). Note the full name of the Convention is the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*.

¹⁰²² chapter 5

¹⁰²³ chapters 4 and 5

¹⁰²⁴ chapter 3

¹⁰²⁵ chapter 4

¹⁰²⁶ James F. Hollifield, "The Emerging Migration State," *International Migration Review* 38, no. 3 (2004). This is sharply illustrated by the persistent presence of undocumented migrants, and their political claims for recognition of their existence, not for regularisation of their illegal immigration status, see Nicholas De Genova, "The Queer Politics of Migration: Reflections on 'Illegality' and Incurability," *Studies in Social Justice* 4, no. 2 (2010).

¹⁰²⁷ See in particular scholars Frances Webber and Liz Fekete in their writing in the journal *Race and Class*.

Some essential qualities of global citizenship

Much of the scholarship on global citizenship considers it to be more a conceptual aspiration, or at an early stage of development, rather than something that is presently realised.¹⁰²⁸

Accounts of global citizenship select differing qualities as essential indicators of its existence, in even incipient forms. Some accounts explore global citizenship in terms of developing political participation in global institutions,¹⁰²⁹ or argue that participation in international social movements is central to reclaiming citizenship values (such as equality and the right to participate) that are otherwise undermined by neo-liberal processes of globalisation.¹⁰³⁰

Others posit that international human rights conventions signify a universal basis for civil and social rights which set the groundwork for the future development of global political citizenship.¹⁰³¹ More broadly, global citizenship is seen as contingent on the gradual development of a global civil society.¹⁰³²

Discussion is thus focused on flagging elements that are perceived to be precursors to a more fully fledged form of global citizenship. The problem with approaches that treat global citizenship as something that *might* develop in the future is that, in effect, they idealise the concept of global citizenship, by turning a blind eye to the well established fact that the benefits and rights of national citizenship are *never* equal or universal despite formal legal equality. If national legal citizenship need not deliver equal rights to verify its existence, they why should global citizenship be held up to a higher standard?

In any case, the different contexts between national and global citizenship mean that citizenship will necessarily have different characteristics. In the national sphere, citizenship has a strongly established normative meaning. It allocates rights and entitlements through political membership of the nation via law, in particular, the right to vote and to be treated equally under the law, bearing in mind the realisation of such rights are not guaranteed by virtue of

¹⁰²⁸ Brysk and Shafir, "People out of place: globalization, human rights, and the citizenship gap," 3

¹⁰²⁸ Brysk and Shafir, "People out of place: globalization, human rights, and the citizenship gap."

¹⁰²⁹ See Desforges discussion of the critical and compromised role that international non-government organisations play in producing citizenship that is constrained by their professional and institutional agendas: Luke Desforges, "The formation of global citizenship: international non-governmental organisations in Britain," *Political Geography* 23(2004).

¹⁰³⁰ Mikko Kuisma, "Rights or privileges? The challenge of globalization to the values of citizenship," *Citizenship Studies* 12, no. 6 (2008).

¹⁰³¹ Alison Brysk and Gershon Shafir, "People out of place: globalization, human rights, and the citizenship gap." (New York: Routledge, 2004).

¹⁰³² Muetzfeldt and Smith, "Civil Society and Global Governance: The Possibilities for Global Citizenship." These authors examine the role of global governance in facilitating or obstructing the development of a global civil society and thus global citizenship.

legal citizenship.¹⁰³³ The ability to deliver the social rights that make citizenship equal relies on the nation-state controlling a fairly stable citizenry within the nation. In contrast, the capacity to deliver universal social and political rights for individuals across the globe is distant from the present day reality. This chapter argues that these differences do not undermine the potential for the existence of global citizenship. Rather it indicates that the qualities of citizenship cannot simply be translated from the national to the global context, they are unique to the borderless context of the global.

The notion of global citizenship developed in this chapter is not an exhaustive examination of global citizenship. However it is an important examination because it draws its insight from the control over movement, which has some influence over the social experience of all individuals regardless of whether a person resides in a one place or moves repeatedly. Three qualities are posited here as key to any conceptualisation of "global citizenship": individual autonomy over movement, the irrelevance of a citizen/sovereign relationship, and the conferral of global citizenship by authoritative migration policing practices that emerge from plural laws and norms.

Individual autonomy over movement

This chapter argues that the essential element of global citizenship is autonomy over one's movement, as it is this autonomy that frames access and enjoyment of other "citizenship" rights, that is, to other social, economic and political rights.¹⁰³⁴ Autonomy over one's own movement (to move or not move) has more impact over the material conditions of one's life than the types of political participations contemplated by the accounts of global citizenship mentioned above. Unlike the national context,¹⁰³⁵ participation in decisions in apparently global forums hold limited capacity for *creating* or *influencing* particular social conditions of that individual, or across different nations,¹⁰³⁶ at least when considered in comparison to the

¹⁰³³ Brysk and Shafir, "People out of place: globalization, human rights, and the citizenship gap," 3. Aihwa Ong, *Neoliberalism as exception: mutations in citizenship and sovereignty* (Durham, N.C.: Duke University Press, 2006), 15.

¹⁰³⁴ Dembour and Kelly, *Are human rights for migrants?: critical reflections on the status of irregular migrants in Europe and the United States*: 5.

¹⁰³⁵ Voting and freedom of political communication is considered an important quality in national citizenship because, at least in democratic theory, these features allow members of the polity to shape the political decisions made that affect the living conditions of the national polity. Yet I argue it is somewhat different in the global context.

¹⁰³⁶ Note that I am not arguing that international human rights conventions do not influence social, political and economic conditions. International human rights conventions have established a certain hegemonic normative value across the globe, at least as an aspirational value, and the impact of these conventions within nations is important but limited by factors such as practical capacity to enforce human rights.

immediate impact of the access to social, economic and political rights enabled when an individual is free to move.

So much turns on a person's autonomy over their movement. This is evident even within national citizenships, where it demonstrates internal exclusion. In Australia for example, many elements of the so-called protectionist colonial laws in operation up until the late 1970s which controlled where indigenous people lived, worked, their relationships, and forcibly removed children, utilised elements that controlled indigenous people's movement. For example, the forced residence in missions, and in many states documentary control over indigenous people's movement such as via the Aboriginal Passport in Western Australia, was a crucial plank that facilitated the dispossession of indigenous self determination.¹⁰³⁷ In South Africa's apartheid regime, geographical racial segregation limited black South Africans' mobility within the nation through pass laws and the requirement for "pass books".¹⁰³⁸ On the global stage, the problems faced by those persons displaced from their residence because of war or conflict, state persecution, poverty, or even climate change, can be described as the problem of *not* having autonomy over one's own movement. Regardless of the international legal definition attached to their displacement (refugee, stateless, internally displaced person), and regardless of the protections (or lack of protections) that international law provides, the impoverished social, political and economic conditions of displaced persons reflects that lack of autonomy. For example, the power over civil registration, issuing of identification, and entry visas that Israel exercises over the Occupied Palestinian Territories ("OPT") restricts the freedom to move of the entirety of its resident population. This identification control produces statelessness for the entire population, as leaving the OPT does not permit the right of return.¹⁰³⁹ In this way, Palestinians are denied international verification of their identities and thus their global citizenship is constrained.

The significance of autonomy over one's movement (as a feature of global citizenship) is also clear from volume of people it affects. The UN Population Division of the Department of

¹⁰³⁷ *Aborigines Act 1905 (WA)* Note that this Act was repealed in 1963: Jane Doulman and David Lee, *Every Assistance & Protection: a history of the Australian passport* (Leichhardt, N.S.W.: Federation Press, 2008). One "benefit" these allocated was the freedom to enter public buildings such as hotels and restaurants which was otherwise denied. Mobility (or the restriction of mobility) thus is not foreign as a feature that distinguishes the extent of citizenship an individual enjoys.

¹⁰³⁸ Frederick A. Johnstone, *Class, Race, and Gold: a study of class relations and racial discrimination in South Africa* (Lanham, MD Halifax, N.S.: University Press of America; Centre for African Studies Dalhousie University, 1987).

¹⁰³⁹ Jennifer Loewenstein, "Identity and movement control in the Occupied Palestinian Territories," *Forced Migration Review* (2006).

¹⁰³⁹ *ibid.*

Economic and Social Affairs provides the most comprehensive recent studies on the migration practices of the world population. In 2010, 214 million persons (that is 3.1% of the world population) lived outside their country of nationality, more people than ever before.¹⁰⁴⁰ In 2009 there were an estimated 740 million internal migrants world-wide.¹⁰⁴¹ Increasing numbers of people reside in places where they remain migrants not intending to become citizens,¹⁰⁴² also reflecting the global trend in both government policy and migration practices toward temporary rather than permanent migration. At a policy level, the aging population and negative citizen reproductive rate of many liberal states of the global north have influenced support for the entry of temporary migrant workers to meet labour market needs.¹⁰⁴³ Policies that facilitate repeated movement of migrants between their home countries and countries of work, referred to as "circular migration", are increasing in policy popularity with governments as well as being developed "from below" in the transnational practices of migrants themselves.¹⁰⁴⁴ Individual migrant decisions to move influence social conditions through their aggregated effect on both their country of origin and their country of destination. A prime example of this effect is that from the 1990s migrant remittances have become critical to the economics of migrants' country of origin:¹⁰⁴⁵ migrant remittances accounted for 35% of Tajikistan's GDP in 2009, and amounted to USD \$55 billion received by India in 2010.¹⁰⁴⁶ More generally, migratory movement affects the spread of social attitudes, political and cultural movements and so forth.¹⁰⁴⁷ *Temporary* migration exacerbates these effects because its very temporariness increases the volume of migratory movement (for example to meet labour demand), and hastens the speed of that movement. Temporary migration creates new social effects, not least of which is the creation of new notions of how migration affects an individual's identity and national allegiance, as it disrupts the notion that

¹⁰⁴⁰ International Organization for Migration, "World Migration Report 2010: The Future of Migration Building Capacities for Change," (Geneva 2010), 115.

¹⁰⁴¹ *Ibid.*, 117.

¹⁰⁴² Alison Brysk and Gershon Shafir, "People out of place: globalization, human rights, and the citizenship gap." (New York: Routledge, 2004).

¹⁰⁴³ Note however that whether people in fact move from the global south to north to meet the demands created by aging populations involves complex factors in both the countries of origin and destination: Phillippe Fargues, "Emerging Demographic Patterns across the Mediterranean and their Implication for Migration through 2030," (Transatlantic Council on Migration, November 2008).

¹⁰⁴⁴ Steven Vertovec, "Circular Migration: the way forward in global policy?," in *Working papers* (Oxford: International Migration Institute, 2007).

¹⁰⁴⁵ *Ibid.*, 2.

¹⁰⁴⁶ Sanket Mohapatra, Dilip Ratha, and Ani Silwal, "Outlook for Remittance Flows 2011-12: Recovery after the crisis, but risks lie ahead," in *Migration and Development Brief* (Migration and Remittances Unit (World Bank), 2010), 3.

¹⁰⁴⁷ Migration Development Research Centre, "Moving Out of Poverty: Making Migration Work for Poor People," www.migrationdrc.org/publications/other_publications/Moving_Out_of_Poverty.pdf.

the process of migration results in migrants finding a new nationality and belonging in their country of destination.¹⁰⁴⁸ In this way, autonomy over one's movement itself should be considered to be what political participation looks like on the global stage, because migratory movement *creates* the social and political conditions of the world in much the same way as government welfare policies do in the national arena. In the national context, participation in the determination of the rules and conditions of national society might be articulated by voting and standing for election, or participation in civil society or civil institutions. In contrast, in the global context, such participation is contingent on an individual's autonomy over their movement, and thus is essential to the concept of global citizenship developed here. Importantly, acknowledging the social impact migrants have on the social and economic conditions of both their home country and country of destination, also requires recognition that migrant movements, largely at an aggregated level, themselves play a role in determining the law and policing of their own movements.

The absence of a global sovereign body that confers global citizenship

In the national context the sovereign power of nation-states to confer citizenship or naturalise immigrants provides authority for grants of citizenship. However there is no equivalent global sovereign source of power that confers a global citizenship. In the argument developed further below, citizenship is said to be conferred via the authorities of plural legal and policing powers in the global context. The power to control an individual's movement does rely on accepted norms of national sovereignty - the power to admit or expel foreigners, the power to confer citizenship and so on. However, an individual's autonomy over their own movement is not *fully* controlled by a single nation's laws, it is not the sole determining factor. The thesis argument that the operation of migration control functions as policing more than law, invites examination of the relationship between sovereignty and global policing. In his study of transnational policing, James Sheptycki argues that although "...it may be true to say that the public police are representatives of the state's sovereign authority within the territory of a given state, they are not themselves sovereign representatives in the transnational sphere..."¹⁰⁴⁹ An individual's autonomy over their own movement is also not fully controlled by the products of the sovereign power of nation-states; when they act as members of a global

¹⁰⁴⁸ To consider broader theorising as to the effect of speed on control, see Paul Virilio, *Speed and politics: an essay on dromology* (New York, NY: Columbia University, 1986). He suggests that speed has the capacity to change the essential nature of things, and that since control is above all else about circulation, speed can change the control of circulation. Virilio argued that speed turns politics into war by another name, as the possession of territory is achieved not primarily through laws and contracts, but as a matter of movement and circulation.

¹⁰⁴⁹ J. W. E Sheptycki, ed. *Issues in transnational policing* (London; New York: Routledge, 2000), 7.

community to develop and ratify international conventions, form international institutions, and fund capacity for international interventions.¹⁰⁵⁰

The argument about whether migration policing is itself a sovereign exercise of power is of course more complex than that presented here, because of the theoretical debates about the nature and meaning of sovereignty itself. Chapter 1 referred to Hardt and Negri's argument that policing in the global sphere represents a new form of sovereignty – a global imperial sovereignty – that turns on the authority to define and act on hegemonic global consensus and the capacity for diverse functions defined by the particular need for policing.¹⁰⁵¹ For Hardt and Negri, this transforms international interventions into policing interventions, rather than international conflicts between nations. The police in this instance become Storch's "domestic missionaries"¹⁰⁵² but with the international stage as the new domestic space. Further, the arguments of scholars such as Bigo and others discuss biopolitical management through global processes of securitization in terms of a biopolitical "sovereignty".¹⁰⁵³ However, the operation of power in these accounts is not the sovereignty familiar from the nation-state. In any case, for the argument pursued here, these accounts are of interest in terms of what they say about how power relations circulate, but not in terms of whether these practices should be termed "sovereign".

Global citizenship: conferred by migration policing practices

Migration policing is the mechanism common to *both* the perpetuation of national sovereignty and state citizenship through border protection, and to the endorsement of authority that determines social inclusion and exclusion. In the thesis, policing has been modelled as non-institutional, as practices not authorised by a single source of legal authority, but rather as a practice of decision making that recognises and interprets legal and social relationships of power and authority. In the global setting, the term migration policing thus describes all those practices that constrain or facilitate migratory movement, and derive their authority from multiple laws, norms, and institutions, not a single sovereign authority. Without a legal and institutional frame, global citizenship is a stand in for the social citizenship enjoyed by

¹⁰⁵⁰ Ibid.

¹⁰⁵¹ Hardt and Negri, *Empire*.

¹⁰⁵² Robert D. Storch, "The Policeman as Domestic Missionary: Urban Discipline and Popular Culture in Northern England, 1850-1880," *Journal of Social History* 9, no. 4 (1976).

¹⁰⁵³ Didier Bigo, "Globalized (in)Security: the Field and the Ban-opticon" in *Illiberal Practices of Liberal Regimes: (in)security games*, ed. Didier Bigo and Anastassia Tsoukala (Paris: L'Harmattan, 2006)., Miguel de Larrinaga and Marc G. Doucet, "Sovereign Power and the Biopolitics of Human Security," *Security Dialogue* 39, no. 5 (2008).

individuals in a world where social citizenship is at the mercy of an ever changing landscape. Thus, global citizenship is “liquid”.¹⁰⁵⁴ As shown in the thesis investigation, migration policing determines inclusion and exclusion to what could be termed interest-based communities existing across the globe - “communities” of labour, work, cultural, religious and ethnic communities and so on. As discussed above, migration policing decisions are based on the global economic relations that determine the location of labour markets and demand for labour, the transnational personal relationships between family members, spouses, friends and lovers, and assessments of migrant’s credibility, honesty, character and security risk. That is, autonomy over movement or the “freedom” to move is *conditional* – it depends on the reason for movement (for example, work, asylum, relationships, study, tourism etc), the time period of stay (temporary stay might be permitted but not permanent), and migration policing assessment of the character and credibility of the individual. That the freedom to move is *conditional* demonstrates how global citizenship is conferred by authoritative practices. The next part of the chapter will argue why migration policing decisions should be seen as always, in part, “beyond” the nation-state, in that these decisions on movement create a *global* migrant subjectivity, conceived here as “global citizenship”. But first, it is necessary to address why the approach to global citizenship developed here points to its constitution by migration policing practices, rather than a single law, institution or norm.

International migration is not governed by a formal multilateral institutional framework. There is no United Nations international migration organisation. The International Organization for Migration (IOM) is outside the UN framework, and operates primarily to provide services to its donor states, managing particular migration projects.¹⁰⁵⁵ There are some multilateral institutions that engage with migration, namely, the United Nations High Commission on Refugees, the International Civil Aviation Organization, and treaties of the International Labour Organization. However, overall, the framework for international migration control is better described as emerging “bottom-up” through ad hoc forms of multilateral governance as diverse as anti-trafficking arrangements, regional labour migration arrangements, and political co-operation on responses to routes adopted by those seeking asylum. Alexander Betts

¹⁰⁵⁴ Bauman describes the “liquid” phase of modernity as “a condition in which social forms (structures that limit individual choices, institutions that guard repetitions of routines, patterns of acceptable behaviour) can no longer (and are not expected) to keep their shape for long, because they can decompose and melt faster than the time it takes to case them, and once they are cast for them to set.”: Bauman, *Liquid times: living in an age of uncertainty*: 1.

¹⁰⁵⁵ Alexander Betts, “Introduction,” in *Global Migration Governance*, ed. Alexander Betts (Oxford: Oxford University Press, 2011), 12.

describes the picture of global migration governance as “a complex and fragmented tapestry of overlapping, parallel, and nested institutions” and as “relatively incoherent”.¹⁰⁵⁶ That is, migratory movement is not fully controlled by *either* nation state policies, nor by global institutions. Nation-state migration policies, together with the operation of international conventions, have generated growing prohibition norms against illegal migration in the global north,¹⁰⁵⁷ to add to those early global norms against trafficking that emerged from the development of norms against “white slavery”.¹⁰⁵⁸ Yet, given that “illegal” movement is simply movement that is not permitted by positive visa categories; this does not provide a normative theme for migration control. There is also some thematic unity across nations on the exclusion of individuals on the basis of their bad character or security risk.¹⁰⁵⁹ Yet although “security threat” is a strongly hegemonic norm that restricts movement, the discretion in each national law that decides which individuals are a security threat is so highly politicised that the content of the norm does not unify as a prohibition against a specific statistical demographic characteristic or identity.

In fact, even in interpretation of a single law, what is permitted for one may be prohibited for another person as a result of the multiple institutions involved in determining that prohibition. This is illustrated by a study comparing the legal interpretation of refugee law in the European Union. The study found judges rarely cite decisions from courts in other EU countries when considering common legislation, despite member states agreement to work towards a Common European Asylum System.¹⁰⁶⁰ Alternatively, Dauvergne adopts a broader perspective as to what might constitute normative unity across the national legal systems in her study.¹⁰⁶¹ She argues that supra-national authority can be discerned from a trend towards the rule of law in migration law, as it represents judicial recognition of an ethics of an “existent community of law”.¹⁰⁶² In the case law on security and refugee matters that Dauvergne

¹⁰⁵⁶ Ibid., 2. The book *Global Migration Governance* attempts to map the institutions involved in migration governance at the global level.

¹⁰⁵⁷ Thomas Alexander Aleinikoff and Vincent Chetail, *Migration and international legal norms* (The Hague: T.M.C. Asser, 2003).

¹⁰⁵⁸ Peter Andreas and Ethan Nadelmann, *Policing the globe: criminalization and crime control in international relations* (Oxford ; New York Oxford University Press, 2006).

¹⁰⁵⁹ Aleinikoff and Chetail, *Migration and international legal norms*.

¹⁰⁶⁰ H el ene Lambert and Guy S. Goodwin-Gill, *The limits of transnational law: refugee law, policy harmonization and judicial dialogue in the European Union* (Cambridge, UK ; New York: Cambridge University Press, 2010).

¹⁰⁶¹ Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law*. The countries studied in this text were Australia, New Zealand, the United Kingdom, the United States and Canada.

¹⁰⁶² Ibid. in chapter 3, *Hardt and Negt, Empire*: 16-17.

studied, the judiciary was not required to take into account a particular interpretation of international law that supports a rule of law approach, but did so, she argues, because of a growing shared common sense regarding the role of law and fairness in judicial discourse. Yet neither a growing trend towards the rule of law in migration law, nor themes in supra-national global norms or transnational harmonised norms provide sufficient legibility to anticipate whose movement might be permitted or restricted.

Migration policing arguably has the *capacity* to act on hegemonic universal global values.¹⁰⁶³

Yet the precise values that form the foundations for legitimate global action change in every scenario. The project in this chapter is not to define what those values might be, but rather introduce global citizenship as that which is produced by migration policing practices that derive their authority from multiple laws and norms. Further, the chapter argues, that because of the nature of migration policing as the control over circulation across the globe, control is necessarily based on plural and sometimes conflicting norms, which thus encourage focus on the migrant identity to understand controls, rather than focus on the complex overlapping institutions, law and norms themselves.

The control of movement as a global relationship of power

With this brief discussion of the key qualities of a global citizenship articulated through migration policing practices, I now turn to set out the argument that the control over movement represented by migration policing (and movement itself) builds the *global*. The chapter started by recalling the thesis finding that in the Australian national context the triggers and operation of migration policing are borderless, but has not articulated the conceptual basis for *why* these practices should be considered to operate as a form of global governance beyond the national context. As noted, the approach the chapter seeks to explore is whether migration policing practices can be understood as global governance, through a conceptual approach that does not rely on supra-national or transnational laws and institutions. This does not mean to imply that these supra-national or transnational laws, institutions and norms have no effect on migration policing, as they do. But they do not make unified rules for the global population. The authority for migration policing appears to be completely integrated into the institutions, laws and norms of the nation-state, or transnational or multilateral entities but not completely aligned or accountable to those elements. Given that, can migration policing practices be considered to have global operation,

¹⁰⁶³ This was outlined by Hardt and Negri's account of police as a new form of right in a global imperial sovereignty in chapter 1, Hardt and Negri, *Empire*: 16-17.

and if so, on what basis? The argument put forward here theorises, firstly, that the borderless quality evident from national migration policing is a consequence of its transversal mobility, and secondly, that the theoretical approach to the securitisation of circulation enables a conceptualisation of migration policing that is always global.

Migration policing, as modelled in the thesis, is a process and practice of decision making – bureaucratic decisions made at a distance from migrant applicants, as well as face to face encounters within the nation and extra-territorially. The authority of migration policing thus is *mobile* in that the origin of the authority it relies on moves from one entity to the next even within a single policing decision. For example, a decision on a visa application to Australia might encompass employer nomination in Australia, verification of work history in the US, a criminal history check in the UK, a security assessment with intelligence information from Iraq, and a consular interview held in Turkey. The origin of authority oscillates between private entities, foreign policing and other government agencies, each of which hold the capacity to legitimise visa refusal. Legitimacy for the operation of migration policing thus moves between different legal frameworks with embedded institutions and laws, across national territories. Migration policing draws from multiple sources for legitimacy to empower a single decision.

Tracing the mobile quality of migration policing in a practical manner is more starkly evident through tracing its constitution of the mobile subjectivity of global citizenship. That is, by tracing the positive productive operation of migration policing rather than its negative operation as prohibition. Given the authority and control of migration policing is always in relation to the migrant desire to move or stay, it is created with and moves with the migrant. Adopting the point of view of the migrant to consider the operation of migration policing power through global citizenship enables a method for legal research to explore “globalisation from below”, rather than the more usual examination of laws and institutions which focus on “globalisation from above”.

The mobile subjectivity of global citizenship: learning from regional citizenship

The example of regional European Union (EU) citizenship, established in 1992 provides a practical and analogous example of the legal subjectivity of global citizenship.¹⁰⁶⁴ All those

¹⁰⁶⁴ *Treaty on European Union and Final Act* art 8-8^e, 7 February 1992, O.J. (C 224) (1992), reprinted in 31 I.L.M. 247 (1992) (“the Maastricht Treaty”). It was implemented from 1993, and amendments to the principles of European citizenship were made in 1997: See *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts* arts. 17, 21, Oct. 2, 1997, 1997 O.J. (C 340) (“the Amsterdam Treaty”).

citizens of EU member states are deemed to hold citizenship of the EU region. The nature of EU citizenship as a complement to national citizenship makes its rights quite different to those familiar from national citizenship. EU citizens still vote in national elections, but also have the right to stand and vote in elections for the European Parliament. The key right arising for EU citizens is the freedom of movement within the territory. This freedom of movement is founded on: the right to move and reside freely;¹⁰⁶⁵ non-discrimination on the grounds of nationality generally;¹⁰⁶⁶ and specifically non-discrimination on the grounds of nationality in employment.¹⁰⁶⁷ Despite these explicit rights, freedom of movement is a contested feature of European citizenship, not a settled principle, nor equally enjoyed. Temporary restrictions on the rights to work were imposed on citizens of those Central and Eastern European States that acceded to the EU in 2004. Further, contemporary considerations of reform of the Schengen Agreement may result in the withdrawal of a number of European states from inclusion in free movement within the Schengen area of the European Union. Nevertheless the principles in the *Treaty on the Functioning of the European Union* have been employed to compel host states not to deny equal access to rights of third party nationals. Third party nationals' entitlements to rights are established where denial of the relevant access would be a *disproportionate* restriction on non-discrimination principles because of a third party national's development of a "genuine link" with that member state.¹⁰⁶⁸ Through these rights, European citizenship transfers much of the freedom to determine the social conditions that individual citizens face to the citizen's decision (and capacity) to move themselves.¹⁰⁶⁹ It ties access to benefits ranging from eligibility for government social security benefits, university scholarships, and its employment options and so on with the freedom to move. Thus, European citizenship is mobile because the benefits that citizens are able to access – to realise their citizenship – are contingent on their freedom to move, and thus also contingent on the needs of the individual

¹⁰⁶⁵ *Treaty on the Functioning of the European Union* art 21(1)

¹⁰⁶⁶ *Treaty on the Functioning of the European Union* art 18

¹⁰⁶⁷ *Treaty on the Functioning of the European Union* art 45

¹⁰⁶⁸ See for example the cases of Case C-85/96 Martínez Sala [1998] ECR I-2691a; Case C-184/99 Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve [2001] ECR I-6193. See also Katja Ziegler, (University of Sydney, Law School, Minter Ellison rooms, 26 October 2006); Patrizia Nanz, "Mobility, migrants, and solidarity: towards an emerging European citizenship regime," in *Migrations and mobilities: citizenship, borders, and gender*, ed. Seyla Benhabib and Judith Resnik (New York: New York University Press, 2009); A.P. Van Der Mei, "Union Citizenship and the 'De-Nationalisation' of the Territorial Welfare State: Comments on Case C-456/02 Trojani and Case C-209/03 Bidar," *European Journal of Migration and Law* 7(2005).

¹⁰⁶⁹ Interestingly, Favell et al explain however that despite this freedom to move that there has been no significant change in the numbers of persons resettling within the European Union. With an enlarged regional eligibility for the benefits traditionally associated with national citizenship, the incentive for additional national citizenships diminishes: Adrian Favell, Miriam Feldblum, and Michael Peter Smith, "The Human Face of Global Mobility: A Research Agenda," *Society* 44, no. 2 (2007): 23.

and their desire to move. Free movement insofar as it exists in national and EU citizenship, is permitted only within a demarcated enclosure, whereas in global citizenship, the freedom to move across a collection of self-governing nations is deeply conditional. Despite this, the mobile quality of European citizenship demonstrates the power migrants' movements have to effect broader changes in social conditions, which, like global citizenship, display its "transversal" character.

The transversality of migration policing

Migration policing constitutes a *global* rather than a *transnational* citizenship even though migratory movement is from one nation to another. "Transversality" is a theoretical concept that means something very different to transnational. Transversal movement, even when describing a migrant's movement from one nation to another, is not transnational but global. The prefix "trans" emphasises the operation of power as *across* and *through* multiple terrains, not as a linear movement (from national to global or between nations) but through *transformation* that is not tied to binary delineations.¹⁰⁷⁰ It highlights the way in which power can operate through the same structures and institutions but simultaneously subvert and challenge those established meanings.¹⁰⁷¹ This reflects the potential subversive power illustrated by the persistent presence of undocumented migrants, and their political claims for recognition of their existence as illegal migrants rather than regularisation of their status.¹⁰⁷²

Soguk and Whitehall theorise transversality as a perpetual condition of a "wandering grounds".¹⁰⁷³ This concept explains the mobility that I associate with migration policing, and its production of the subjectivity of global citizenship. They draw on the story of an Iranian national who spent ten years living at a French airport as emblematic of the transversality of migrants and migration, arguing that "transition" is not something that migrants pass through on their way from an origin to a destination, but that it is a constant state that is carried with migrants regardless of their location.

¹⁰⁷⁰ 'trans-', in *The Concise Oxford Dictionary of Current English: based on the Oxford English Dictionary and its supplements*, ed. J.B. Sykes (Oxford: Oxford University Press, 1976).

¹⁰⁷¹ This is evident for example in Sassen's study of how global processes work to destabilise and reconstruct existing articulations of the national: Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton: Princeton University Press, 2006).

¹⁰⁷² De Genova, "The Queer Politics of Migration: Reflections on 'Illegality' and Incurability."

¹⁰⁷³ Nevzat Soguk and Geoffrey Whitehall, "Wandering Grounds: Transversality, Identity, Territoriality, and Movement," *Millennium: Journal of International Studies* 28, no. 3 (1999).

The term transversality seeks to capture the “paradox of being in transit yet being confined to temporary limits”,¹⁰⁷⁴ and the transitory nature embedded in migrant identity. The transitory nature of migrant identity was observed repeatedly in the thesis investigations, specifically as it was created via precarious immigration legal status. Many individuals in the thesis study experienced marginal legal status, either because of extremely short-term bridging visas which permitted migrants to live in the community but provided little benefit other than freedom from detention, or because their visas conditions were such that they were always teetering on the edge of cancellation. For example, Australian student visas permit only 20 hours per week work, which because of the standard seven hour week as well as students’ economic need to work, mean many students work in breach of visa conditions, and thus face the constant potential for visa cancellation and deportation. It is the potential to be deported that creates the conditions of exploitation of transitory identity in this scenario.¹⁰⁷⁵ Another significant example in the Australian context is the now defunct 36 month Temporary Protection Visa (TPV). At the time of its operation, all those seeking refugee protection while illegal within Australia (thus mostly affecting unauthorised boat arrivals) were eligible only for a temporary refugee visa. These TPVs limited the social rights of refugees providing access to only limited social security income, no right to sponsor family to migrate to Australia, and no access to the English language training available to permanent migrants. Depending on their journey to Australia and criminal history, refugees were potentially subject to ongoing temporary visas, creating what some referred to as a permanent “state of limbo”.¹⁰⁷⁶ The thesis also explored circumstances that produced a perpetual temporariness, for example, those recognised by the state as refugees but who fail the character test.¹⁰⁷⁷ Soguk and Whitehall argue that that transversality is not a third or hybrid or other space that exists in between sovereign boundaries, it is a condition prior to sovereignty.¹⁰⁷⁸ They argue that “...transversality is both defined *for* migrants and movements and a space defined *by* migrants and movements.”¹⁰⁷⁹ By linking governance to migrant movement, Soguk and Whitehall refute the international relations image of separate bounded nation-states. They replace the cartographic metaphor used in the legal scale of global map-making to one of the

¹⁰⁷⁴ *Ibid.*, 676.

¹⁰⁷⁵ Nicholas P. De Genova, "Migrant 'Illegality' and Deportability in Everyday Life," *Annual Review of Anthropology* 31(2002).

¹⁰⁷⁶ Sharon Pickering, *Refugees and State Crime* (Annandale NSW: The Federation Press, 2005); Michael Leach and Fethi Mansouri, *Lives in limbo: voices of refugees under temporary protection* (Sydney: University of New South Wales Press, 2004).

¹⁰⁷⁷ See chapter 6

¹⁰⁷⁸ Soguk and Whitehall, "Wandering Grounds: Transversality, Identity, Territoriality, and Movement."

¹⁰⁷⁹ *Ibid.*, 676.

transversality of trail making.¹⁰⁸⁰ Thus while the number of migrants living outside their country of citizenship is equivalent to what would amount to the fifth largest nation in the world,¹⁰⁸¹ their transversal character means this population is best understood as one that cuts multiple trails across the globe, rather than a bounded population with similar social experiences, rights and identity. Within the nation, the transversal identity of migrants speaks of their exclusion despite their inclusion as lawful migrants:

Migrants, as it were, carry the border within them wherever they go, in such a way that they are never entirely inside the embrace of the law on the same terms as the majority population.¹⁰⁸²

The discussion thus far has focused on the power inherent in migrants because of their movements, and the effect of those movements in changing social conditions, and consequently, even on migration policing itself. Theorising on transversality from the migrant perspective encourages that focus. However, although migrants no doubt contribute to the conditions of migration control, it cannot be said that their actions exclusively determine practices of migration policing. Macro level political conditions, whether they are state practices, economic networks or other conditions, go towards determining an individual's freedom to move and their freedom to remain in one place. The transversal movement of migrants operates to produce global citizenship in a similar fashion to European citizenship, but writ large. The borderless operation of migration policing and the absence of migrants' formal legal freedom of movement across the globe, clarify the discourse of global citizenship as one that primarily reveals, not a rhetoric of equality, but the deep disparities between global citizens' autonomy over their movement, which itself serves as an indicator of other social benefits associated with citizenship. Some categories of migrant identity consistently hold limited autonomy over movement, such as refugees, internally displaced persons, stateless persons and forced migrants generally. In any case, for migrants in general, migration policing practices in all their plural norm and legality glory play a definitive role in determining individual's autonomy over their movement and thus the quality of their global citizenship.

¹⁰⁸⁰ This might explain the emphasis of research on transversality in the disciplines of sociology and anthropology; see for example Soguk, "Transversal communication, diaspora, and the Euro-Kurds," ———, "Incarcerating Travels: Travel Stories, Tourist Orders, and the Politics of the "Hawaiian Paradise", *Journal of Tourism and Cultural Change* 1, no. 1 (2003).

¹⁰⁸⁰ Nevzat Soguk, "Transversal communication, diaspora, and the Euro-Kurds," *Review of International Studies* 34(2008): 174.

¹⁰⁸¹ Alcalá, "State of World Population 2006: A Passage to Hope, Women and International Migration," in *State of World Population*: 6.

¹⁰⁸² Dembour and Kelly, *Are human rights for migrants?: critical reflections on the status of irregular migrants in Europe and the United States*: 5.

From transversality as movement to movement that constitutes the global

Theorising transversality lends itself to a focus on the migrant as an individual, cultural production by migrants, and migratory movements that are insensitive to national boundaries.¹⁰⁸³ Transversality focuses on the flows themselves, the trails, rather than the overall context. If the transversal flows of migrants are considered in relation to theories on biopolitical securitisation (that focus on systems and practices that manage circulation), the global framework of migration policing becomes evident. Consequently, this theoretical approach demonstrates the capacity of migration policing to constitute the *global* citizen, beyond the nation, relying on its operation as management of circulation not on a supra-national authority.

Foucault talks about circulation as a technology of power utilised by biopolitical practices of security which involve: "organizing circulation, eliminating its dangers, making a division between good and bad circulation, and maximizing the good circulation by eliminating the bad."¹⁰⁸⁴ "Security", as it is referred to here, does not mean the rhetoric of security politics, it refers to the modality of power introduced by Foucault in his 1978 lecture series *Security, Territory, Population*.¹⁰⁸⁵ In this lecture series Foucault presents security as a form of power additional to sovereign power and discipline introduced in his prior texts. Discipline prescribes a norm which enables identification of the normal and prohibits the abnormal. It regulates everything, no matter how small the detail.¹⁰⁸⁶ Security does not prohibit danger. Security operates by "respond[ing] to a reality in such a way that this response cancels out the reality to which it responds – nullifies it, or limits, or checks, or regulates it."¹⁰⁸⁷ That is, security keeps the extent of danger to a population within acceptable limits. Thus, in the global context, security envisages an overall system that is directed towards finding the perfect equilibrium to foster a species' existence, being the biological mass of the species.

Dillon and Lobo-Guerrero argue that Foucault's approach to the biopolitics of security involves a transformation of the referent object of security. Power ceases to construct belonging in and

¹⁰⁸³ This might explain the emphasis of research on transversality in the disciplines of sociology and anthropology: see for example Soguk, "Transversal communication, diaspora, and the Euro-Kurds."; ———, "Incarcerating Travels: Travel Stories, Tourist Orders, and the Politics of the "Hawai'ian Paradise", "*Journal of Tourism and Cultural Change* 1, no. 1 (2003).

¹⁰⁸⁴ Michel Foucault, *Security, Territory, Population: lectures at the Collège de France, 1977-78*, ed. Michel Senellart, General editors: François Ewald and Alessandro Fontana, and English series editor: Arnold I. Davidson, trans. Graham Burchell (Houndmills, Basingstoke, Hampshire; New York: Palgrave Macmillan, 2007), 18.

¹⁰⁸⁵ *Ibid.*

¹⁰⁸⁶ *Ibid.*, 45.

¹⁰⁸⁷ *Ibid.* at 47

through the juridico-political and cultural notions of belonging such as through national citizenship. Instead, belonging comes to mean being part of the biological mass of the population, that is, the human species.¹⁰⁸⁸ Accordingly, this transforms an understanding of what it means to be a living being, as well as its governmental regulation and mechanisms through which power operates and circulates.¹⁰⁸⁹ These discussions of the operation of security as a mode of power are theoretical, whereas in reality, security operates with other modes of power including sovereign power and discipline, bringing politics, law and norms as well as population based interests into consideration. Evidently, migration policing does not in all instances manage migrant circulation across the globe by determining what produces the best potential to nurture the biological population, otherwise the world might have a very different population distribution.¹⁰⁹⁰ However, the increasing policy popularity of circular migration, which is often deployed on a regional level, arguably securitises temporary labour migration by facilitating repeated labour migration by the same individuals.¹⁰⁹¹ Australian skilled migration visa policy's construction of a global shelf or pool of available labour outside Australia awaiting entry, similarly might be seen as a manifestation of securitisation as it manages the risk of visa overstay connected to onshore visa applications, as well as creates a ready labour supply should employers signal demand.¹⁰⁹² Similarly, the "warehousing" of asylum seekers in Indonesia to prevent or delay their entry into Australia presents another potential interpretation of securitisation of circulation. Further, the technologies employed in migration policing, which themselves are characteristics of contemporary social governance, create the potential and capacity for securitising circulation, which for the purposes of the argument in this chapter, demonstrate the global reach of migration policing. These mechanics are evident from the shift in migration policing function from identification of an individual's citizenship to management of multiple factors (such as demographic details assessed in terms of risk) that construct identity beyond nationality. By conceiving of control practices in their role as management of circulation, not delineation of boundaries, the always global framework of migration policing becomes evident.

¹⁰⁸⁸ Dillon and Lobo-Guerrero, "Biopolitics of security in the 21st century: an introduction," 273-74.

¹⁰⁸⁹ *Ibid.*

¹⁰⁹⁰ Mark Kelly suggests an alternative interpretation of how migration policy might demonstrate Foucault's approach to biopolitics and state racism. Kelly adopts a different referent object as security to the biological security posited by Dillon and Lobo-Guerrero. Kelly argues that the Australian immigration system strengthens the Australian population as a whole not via the genetic, but at the economic: Mark Kelly, "Racism, Nationalism and Biopolitics: Foucault's Society Must Be Defended, 2003," *Contretemps* 4 (2004).

¹⁰⁹¹ Vertovec, "Circular Migration: the way forward in global policy?."

¹⁰⁹² See chapter 3

From citizenship identification to identity management

In their most general sense, passports represent an attempt at universal individualised identification. The reliance on documentary information to identify a person has been described as a shift from “writing on the body” that was associated with marking the deviant body, for example by branding skin to distinguish certain crimes in English society from pre modern times to the 1600s.¹⁰⁹³ Documentary identification, such as passports, aim for universal registration of all individuals, and has been described as “reading off” the body.¹⁰⁹⁴ As a globally recognised and codified form of individual identity verification, passports represent the mechanics for migration control to operate as population management rather than border protection. Yet, as observed by John Torpey, the passport is not a 20th century invention; it emerged over time with the development of the nation-state itself.¹⁰⁹⁵ As a letter of authority, the passport historically developed from a declaration of the sovereign’s protection of the bearer and the desire for that protection to travel with the bearer in respect of the sovereign’s authority and power beyond state borders. In this way authority was bestowed to permit trans-border passage of the king’s peace. At that early time in their development, passports were for peaceful movement rather than to denote national citizenship identity.

In the early stages of documentary control of movement, the passport was essentially the main document that identified a person.¹⁰⁹⁶ In its early forms, identification was by and large limited to that information detailed on the passport, so the potential for control was limited to the information disclosed (name, nationality, place of birth and so on) and testing the authenticity of the document itself.¹⁰⁹⁷ Control activities were thus tied to the place and time a person crossed the border. The control action occurred in the performance at the border by immigration officials determining that the person presenting the passport was the person documented in the passport, and that the passport was genuine. Today, control over movement operates differently, reflecting the operation of control in a “knowledge” or “risk”

¹⁰⁹³ Alan Hunt, *Governance of the Consuming Passions: A History of Sumptuary Law* (New York: St. Martin's Press, 1996), 130-39. “Writing on the body” was literal. As late as 1604 a law was passed empowering “incorrigible rogues” to be branded on their left shoulder with the letter “R” (131). In a broader sense, reliance on appearance to identify criminality through versions of physiognomy was revived in the late 1700s by Johann Kaspar Lavater (139).

¹⁰⁹⁴ Jane Caplan and John C. Torpey, *Documenting individual identity: the development of state practices in the modern world* (Princeton, N.J.; Oxford: Princeton University Press, 2001), 8.

¹⁰⁹⁵ Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State*.

¹⁰⁹⁶ Ibid.

¹⁰⁹⁷ Ibid.

society through hegemonic risk interpretations.¹⁰⁹⁸ It disarticulates individuals as holistic bounded beings, capable of control through disciplinary training, and rearticulates them as a matter of information or "dividual" elements of a person captured as data or activity that can be classified.¹⁰⁹⁹ This occurs alongside policing assessment of risk through "informating" that is, "translating events and objectives into visible information via formats".¹¹⁰⁰ The control challenge posed by information about an individual is assessed through "social sorting"¹¹⁰¹ against coded risk categories.¹¹⁰² These processes involve the circulation of information, data matching, and sorting to categorise persons according to risk classifications, and through that process ascertaining whether the information features of individuals meet the standard or category that is required for authorised access to spaces or communities.

This has been enabled as well by the electronic sharing of information between governments,¹¹⁰³ and the introduction of biometric technologies in passports. The purpose of the biometric passport is to verify claimed identity in "one to one" comparisons of the embodied individual and the data held in the passport. Biometric passports also identify the person in "one to many" comparisons by linking the individual's biometric data with biometric data held in a database, and manage a person's identity by enabling access to all available information about that person, held at least by the Immigration Department.¹¹⁰⁴ That is, biometric information held in the passport provides access from the embodied individual to the collected data of that individual, which thus allows the various components that make up the identity of a person to be managed. Thus, although migration control is deployed to determine whether access to a nation-state is legitimate, it does so by determining whether

¹⁰⁹⁸ See Ericson and Haggerty's development of policing as primarily about risk communication: Ericson and Haggerty, *Policing the Risk Society*: 21.

¹⁰⁹⁹ The term "dividual" was coined by Gilles Deleuze, "Postscript on the Societies of Control," *October* 59 (1992).

¹¹⁰⁰ Richard V Ericson and Kevin D Haggerty, *Policing the Risk Society* (Oxford: Oxford University Press, 1997), 36. The authors argue that in risk management "The focus is on knowledge that allows selection of thresholds that define acceptable risks and on forms of inclusion and exclusion based on this knowledge."

¹¹⁰¹ David Lyon, ed. *Surveillance as Social Sorting: privacy, risk, and digital discrimination* (London ; New York: Routledge, 2003).

¹¹⁰² ———, "Airport screening, surveillance and social sorting: Canadian responses to 9/11 in context," *Canadian Journal of Criminology and Criminal Justice* 48, no. 3 (2006). 404

¹¹⁰³ Malcolm Anderson, *Policing the world: Interpol and the politics of international police co-operation* (Oxford; New York: Clarendon Press; Oxford University Press, 1989). Sheptycki, "Transnational policing and the makings of a postmodern state.,"; James W.E. Sheptycki, *In Search of Transnational Policing: Towards a sociology of global policing*, ed. David Nelken, *Advances in Criminology* (Aldershot, Hampshire, England ; Burlington, VT: Ashgate, 2002); James Sheptycki, "Accountability Across the Policing Field: Towards a General Cartography of Accountability for Post-Modern Policing," *Policing and Society* 12, no. 4 (2002).

¹¹⁰⁴ Department of Immigration and Citizenship, "Identity Matters: Strategic Plan for Identity Management in DIAC 2007-2010," (Canberra: Department of Immigration and Citizenship, 2007), 16.

elements of that person's identity permit or deny access. That is, it engages control over various elements of an individual's identity. Although the outcome is determination of border crossing, the considerations that inform inclusion or exclusion through this process are:

Less concerned with your identity or origin, identity management is preoccupied with discriminating between qualified and disqualified bodies."¹¹⁰⁵

The criteria that determine eligibility to cross borders are contingent on elements that draw in global and transnational normative interpretations of risk and security, skill and labour considerations, family relationships and so on. Borders instead operate as "switch points" in global economic,¹¹⁰⁶ familial, cultural and political circuits, rather than sovereign boundaries that contain and segregate. The shift from identification of individuals to identity management, enhanced by the use of biometric passports, operates as the mechanics that enable the migration policing of circulation across the globe. Whereas the transversal identity of migrants emphasises their individual agency, and the substance of migration policing as always in relation to migrant activities, the circulatory quality of migration policing is founded on the mechanics of identity management in a borderless context. Considered together, the character of migration policing as a relationship of power (as posited in the thesis model of policing) that is mobile, transversal and global is evident. As such, the facilitation and constraint of movement by migration policing constitutes a *global* citizenship.

Conclusion

The thesis started by considering the correlation between four migration control contexts in Australia and the model of policing adopted in the thesis. By considering migration control's function as policing, a broader picture of migration control emerges that challenges key binaries said to guide such control, including that between citizens and non-citizens, legal and illegal immigration status, and between the national and global. The thesis study found that the triggers activating migration policing, factors informing migration policing decisions and the operation of migration policing did not fully conform to migration and citizenship law. Further, in some instances, the deviance of migration policing from migration law was institutionalised through gaps in legal accountability that shape accountability in migration law beyond the particular instances examined. Viewing migration and citizenship law as the architecture of the Australian border, the thesis investigation instead builds a picture of

¹¹⁰⁵ Benjamin J. Muller, "(Dis)Qualified Bodies: Securitization, Citizenship and 'Identity Management'," *Citizenship Studies* 8, no. 3 (2004): 290-91.

¹¹⁰⁶ *Ibid.*

migration policing as borderless. In doing so, the analysis of Australian migration control developed has sought to draw attention to the breadth of discretion in migration policing in areas that are overlooked in existing migration literature, but which are crucial determinants of migratory movement.

Australian migration control is known for its stringent approach world-wide. Thus it is arguable that the finding that migration control operates as policing, informed by dynamics not captured by migration and citizenship law, holds outside the Australian context. It was beyond the scope of the thesis to investigate this empirically. However this final chapter explored the potential operation of migration policing beyond the national context. In the global context of plural laws, institutions and norms, the varied sources of authority for migration policing practices unify in its most basic role: determining the legitimacy of movement by migrants and managing their regulation. The chapter translated the notion of a borderless migration policing from Part II of the thesis to its mobility. It did so by drawing firstly on the thesis policing model that defines policing as a relationship of power (and thus always in relation to the migrant being policed) and secondly, the conceptual argument that migrant identity involves an embedded transversal mobility. By identifying some links between contemporary migration policing practices and theoretical literature that sets up a form of global governance that exercises power through securitising circulation, the chapter argued that the transversal operation of migration policing operates beyond the nation despite the absence of a supra-national authority, global law or unified global norms determining the legitimacy of movement.

The conceptual exploration as to whether the thesis findings are maintained outside the nation yields three key avenues for further research.

First, autonomy over movement is an absolutely crucial quality in the model of global citizenship developed here. This chapter argued that in effect an individual's autonomy over movement is analogous to political participation in the national context. This is because the transversality of migrants means that on an individual level movement can materially affect the conditions of an individual's life, and at an aggregate level such autonomy can also affect the social conditions in both the migrant's country of origin and destination. Conceivably there are other essential characteristics of migration that ground new understandings of the contemporary political membership and participation. Part of what makes autonomy over movement such an important right is the increasing importance of temporary migration. Further research is needed to consider new forms of political participation constructed by

temporary migratory movements, and the challenges that temporary migration poses to the conventional notions of political membership. In particular, what forms and possibilities for accountability do emerging forms of political participation enable? An important task in such research is identifying and addressing gaps in accountability. The significance in terms of social justice is emphasised by the increasingly important role temporary migrants' play in economies of the global north.

Second, tracing policing via its production of global citizen subjectivity can be treated as an example of policing beyond the nation that does not rely on institutional identity, whether multilateral or supra-national. In migration policing, the policing focus is on bestowing or withholding legitimacy specifically over migrant movement across the globe. This approach might equally ground an alternate method for analysis of the qualities of the global operation of policing more generally. The value of this analytical approach is that it shifts focus from the technological and legal infrastructures of global and transnational policing to consideration of policing function as it is transformed in the global context.¹¹⁰⁷

Third, global citizenship offers an analytical perspective to trace practices of securitisation beyond a normative critique. Some scholars say that Foucault's treatment of circulation as a technology of power limits critique of circulation to the effect of political decisions about what constitutes "good" and "bad" circulation.¹¹⁰⁸ Thus, adopting the theoretical framework of securitisation might result in analysis that shows how migration control works to securitise for economic purposes not climate change factors. This reflects a broader critique of the limited utility of theories of biopolitical security for critical analysis of contemporary governance, because the stated theoretical object of biopolitical security is to "let live" and make life productive on a population basis. Yet, I argue, these theoretical approaches enable critique beyond the normative, provided consideration is given to what is included in circulation so as to form part of a securitising dynamic. In fact Foucault envisaged the space of security as including anything that becomes a determining factor of nature (which might for example be labour and production issues, the physical environment and so on)¹¹⁰⁹, that is, those elements

¹¹⁰⁷ James Sheptycki, "The Global Cops Cometh: Reflections on Transnationalization, Knowledge Work and Policing Subculture," *The British Journal of Sociology* 49, no. 1 (1998).

¹¹⁰⁸ Claudia Aradau and Tobias Blanke, "Governing circulation: a critique of the biopolitics of security," in *Security and Global Governmentality: Globalization, governance and the state*, ed. Miguel de Larrinaga and Marc G. Doucet, *PRIO New Security Studies* (London; New York: Routledge, 2010).

¹¹⁰⁹ Foucault, *Security, Territory, Population: lectures at the Collège de France, 1977-78*: 20-21. See in particular the lecture of 11 January 1978 (1-27).

linked by causation even as events unfold at a distance from each other.¹¹¹⁰ This is where the transversality of migrant identity can contribute. It provides a point of view “from below” for the empirical investigation of the securitisation of circulation constructed through migration policing practices, and a way to build on understandings of transversal authority in legal and policing practices through considering transversality in the context of securitisation of circulation. By considering transversal migrant identity, research on how migration policing securitises circulation, rather than manages movement between nations, has the potential to map the emerging causal relationship between temporary migrants and those entities and laws that determine their movement.

In conclusion, despite the language of migration policing as “border policing”, migration policing in the global location is not fully explained by boundary endorsement that is wrapped up in citizenship law and exercises of nation-state power. Global migration policing exhibits an analogous function to the inclusion/exclusion function of national citizenship protection. Whereas national citizenship achieves this through the endorsement of boundaries, global migration policing maintains and develops a global community through its focus on movement and its legitimacy. Migration policing articulates the extent to which individuals hold the benefits of global citizenship, by determining access and inclusion within the global community. National borders are there to be crossed more than to be protected.

Alice (M7), 25 June 2008

Andy (M8), 30 June 2008

John (M9), 26 July 2008

Stephen (M10), 3 August 2008

Rachel (M11), 21 August 2008

Roori (M12), 10 July 2010

¹¹¹⁰ Foucault terms the space in which uncertain events unfold as the milieu, which “...is what is needed to account for action at a distance of one body on another.” It is clear though that Foucault doesn’t see the space of milieu as a physical place, although it involves a series of natural givens (rivers, hills etc) and artificial givens (individuals, houses etc): *ibid.*, 21.

Appendix A:

List of interview participants

19 February 2008

Unnamed migrant interview participants

The names listed below are aliases selected by the interview participants for reference in the thesis.

Ahmed (M1), 28 May 2008 and 2 August 2008

Mohammad (M2), 28 May 2008

Janet Osoi (M3), 30 May 2008

Katarina (M4), 7 June 2008 and 24 July 2008

Katrina (M5), 8 June 2008

Ben (M6), 8 June 2008

Akim (M7), 25 June 2008

Andy (M8), 30 June 2008

John (M9), 26 July 2008

Stephen (M10), 3 August 2008

Rachel (M11), 21 August 2008

Noori (M12), 10 July 2010

A13, 15 August 2008

A14, 10 July 2010

A15, 10 July 2010

Named interview participants

David Manne (Director, Refugee and Immigration Legal Centre, Victoria), 12 June 2007

Alison Davidian (solicitor and migration agent of Refugee Advice and Casework Service, NSW),
19 February 2008

Zoe Anderson (solicitor and migration agent of Refugee Advice and Casework Service, NSW),
19 February 2008

Katie Wrigley (solicitor and migration agent of Refugee Advice and Casework Service, NSW), 19
February 2008

Peter Bollard (solicitor and migration agent of Bollard and Associates, and accredited specialist
in Australian migration law by the Law Society of New South Wales) 19 March 2008

Peter Russo (solicitor of Russo Mahon Lawyers), 23 June 2008

Elena Jeffreys (President, Scarlet Alliance, Australian sex workers' association), 5 August 2008

Maria McMahon (Sex Work Policy Advisor, ACON), 5 August 2008

Unnamed non legal advocates

A6, 26 March 2008

A7, 30 April 2008

A8, 28 May 2008

A9, 29 May 2008

A13, 15 August 2008

A14, 10 July 2010

A15, 10 July 2010

Appendix B:

Themes explored in interviews with research participants

This appendix sets out the key themes explored in the semi-structured interviews of:

- Non-citizens that are living without visas in Australia, or have lived without visas in the past;
- Legal advocates who work with people living without visas in Australia, or those who have lived without visas in the past;
- Non-legal advocates who work with people living without visas in Australia, or those who have lived without visas in the past.

Themes explored in interviews of people living without visas in Australia or who have lived without visas in the past

These interviews were conducted face to face, sometimes with the assistance of interpreters. In some interviews the participant had provided the researcher with their Immigration Department immigration history file prior to interview. In other instances, this was provided following the interview or was only partially available or was not available. The experiences of interview participants varied widely. Thus while certain key themes structured interview discussions, the relevance of exploration of the themes noted below varied across interviews:

Background details The interview participant's immigration history including: the date and reasons for travel to Australia and whether travel was alone or with others; present immigration status and anticipated future migration related plans.

Experiences living without a visa in Australia Account of the factors that led to living without a visa in Australia and experiences of living without a visa in Australia including: the period and duration of illegality; survival during the period of illegality (work, health, home, education, financial support, family and relationships etc); practical issues in obtaining and maintaining aspects of social life including identity documents, driver's license and taxation; difficulties and

challenges within this period; issues with regards to seeking assistance (of any kind); perception of issues with regards to the participant's contact with others and the impact of illegality on a sense of community belonging (ethno/cultural, religious, family, friends, and Australian authorities such as police); stories with regards to the participant's disclosure (or non-disclosure) of illegal status; fears and concerns and reflections on how these fears affected the participant's work and social activities and relationships; influential experiences during this period; reflections as to the affect of this period on the participant's life journey; perceptions of the legal impact of illegal status; identification of personal barriers in regularising immigration status; account of factors that led to legal immigration status.

• Bridging Visa E applications and their grant including: date of first application; number of
Apprehension as illegal This focused on a detailed account of apprehension including: whether apprehension was by state police, Immigration Department officers or others or as a result of self-reporting; the date and time of apprehension; the location of apprehension; the number of officers involved; the number of people apprehended at the same time; the process of apprehension; officers identification of themselves; the process of verification of migrant identity and privacy in identity verification; interaction with officers and details of any requests made by migrants and questioning of migrants by officers; presence of any interpreters and details of any communication issues; opportunity to contact someone at the time of apprehension; perception of the reason for apprehension at that time and place; feelings about the experience and treatment by officers; use of force; action upon apprehension (transfer to detention or issue of visa), direct transfer to detention or opportunity to retrieve items from residence or arrange for care of pets and so on; and later arrangements with regards to retrieval of possessions from residence and so on.

Further, in particular with regards to apprehension on the street/public place, interviews explored the perception of reasons for apprehension at that time and place and basis for that perception. With regards to apprehension in a workplace, interviews also explored: the existence and details of any search warrant; organisation of the raid in the physical space; organisation of questioning of staff and others (including whether all persons in the workplace were questioned including clients, customers etc); perceptions of how officers selected particular individuals to arrest (for example, individuals were identified and specified prior to arrival in the workplace, or all persons in the workplace were subject to identity verification) details of any announcements made by officers; details of obtaining employment and employer's verification of an individual's work rights; and the issue of payment by employers

after apprehension. In addition, with regards to apprehension at home, interviews also explored: the existence and details of any search warrant; the number of persons apprehended at the same time; and perception of reasons for apprehension at that time and place.

Release from detention on a Bridging Visa E The interviews explored a detailed account of the following themes:

- Initial intake into detention including details of the intake interview, period and duration of detention.
- *Bridging Visa E* applications and their grant including: date of first application; number of applications prior to grant; reasons for lodging/not lodging applications; date of release; required conditions for release; perceptions of the predictability and parity in any conditions imposed on release.
- Any sponsorship requirement for release, description of relationship with the sponsor including length of time of acquaintance, nature of relationship and initiation of sponsorship arrangement.
- Any bond requirement, the amount of bond required, perceptions of the comparative equity in bond requirements, details of who provided this bond, the relationship between those providing bond amounts and the released detainee, perceptions about the effect of bond provision on that relationship, difficulties in obtaining the return of bond and impact of any delay in its return.
- Any residential sponsorship arrangement, including: the relationship between the residential sponsor and released detainee; its initiation; any change in that relationship over time; feelings and experiences of the benefits and challenges of residential sponsorship; support sought of, and provided by, sponsors.
- The provision or denial of work permission on release on a *Bridging Visa E* including: difficulties in obtaining work permission on a *Bridging Visa E*; perception of why work permission was granted at a particular time, experiences of barriers in finding work while holding a *Bridging Visa E*.
- Frequency of required reporting to the Immigration Department on release, the experience of reporting to the Immigration Department, the ease of visa renewal, and the period of time approved for new *Bridging Visa E* grants.
- Major challenges experienced while living on a *Bridging Visa E* including: sources of support during this period; key needs during this period; any issues with regards to

disclosure of status; and the effect of *Bridging Visa E* conditions on the released detainee's relationship with their sponsor.

- Any experiences of acting as a sponsor for others including: the initiation of relationship with the released detainee; changes in that relationship arising from the challenges of *Bridging Visa E* conditions; the effect of the sponsorship on that relationship; perception of the reasons for the characteristics of the relationship between the participant and the released detainee; and the relationship between the sponsor and the Immigration Department, and detention centre management.
- Any attendance at the Migration Review Tribunal (MRT) in relation to obtaining a *Bridging Visa E* including: the participant's perception of the influence of their presentation, documentation, witnesses, or attendees (including guards) on the MRT's decision, and the perception of the reasons for the MRT's decision.

In each interview, other issues might arise at the initiation of the participant, from perusal of documents, or from the interview discussion.

Themes explored in interviews of legal advocates working with people living without visas, or who have lived without visas in the past

These interviews were conducted face to face. In some instances, interviews focused on the legal advocate's involvement in particular cases. Generally, interviews sought to learn about the law in action, particularly the manner in which immigration procedures influence and shape discretionary power, and the conduct of migration control practices, such as apprehension, that are otherwise minimally documented in public reports. The experiences of interview participants varied widely. Thus while certain key themes structured interview discussions, the relevance of exploration of the themes noted below varied across the interviews that were conducted:

Background details The legal advocate's professional details including: their role; workplace; period and duration of time working with people who arrived without or have lived without immigration authorisation; the extent to which working with people who arrived without or have lived without immigration authorisation forms part of their work.

Advice provided to clients with regards to illegal immigration status prior to and after apprehension as illegal Details of advice including: that provided to clients on the likelihood of detention if the illegal migrant reports themselves to the Immigration Department; that provided to clients with regards to the relevant considerations for the Immigration Department in determining detention or the issue of a bridging visa; that provided to clients that feel that the Immigration Department or others have apprehended them in breach of the law (for example by excessive use of force or search activities outside the scope of a search warrant); factors highlighted to clients for consideration prior to determining any action on perceived breach of law by authorities; the approach taken to considering issues for advice to clients who have been detained, in particular whether the method and grounds of apprehension are discussed; and the perception of the importance of procedural requirements on the Immigration Department and police for their conduct in the apprehension of illegal migrants.

Matters that bring illegal migrants to the attention of authorities Reflections on the factors that draw illegal migrants to the attention of authorities including consideration of: everyday activities such as travel on public transport and presence in public space; employment and the particular industry of employment; education activities; the issue of "dob-ins"; compliance with other laws such as taxation and criminal laws and so on.

Character and security based visa refusals and cancellations Reflections about the Immigration Minister and Immigration Department's approach to character and security issues including: the kinds of activities that attract concern about character; reflections on matters that the advocate would have anticipated to prompt character concern but did not; the selection of legal options to enforce character and security laws by the Immigration Department/Immigration Minister; consideration of the reasons that particular legal grounds are pursued as opposed to other options; any differences in the standards imposed to meet character and security requirements for onshore and offshore visa applications; any differences in the standards imposed to meet character and security requirements for different visa applications; the key issues and problems that arise for clients from the requirement of security clearance; observation of trends in the Immigration Minister and Department's treatment of the requirement for security clearances; reflections on the relationship between the Australian Security Intelligence Organisation and the Immigration

Department with regards to security clearances; and reflections on the purpose of the security clearance process.

Particular cases represented by the legal advocate Details of the case; the process of the case from inception to finish; any relevant extra-legal details of that process; reflection on the significance of that case; and any particular issues relevant to that case.

Themes explored in interviews of non-legal advocates working with people living without visas, or who have lived without visas in the past

These interviews were conducted face to face. The experiences of interview participants varied widely. Some provided residential sponsorship for release from detention, other community members were designated as temporary guards and thus able to accompany detainees on day trips out of detention, others provided specialised training to the Immigration Department on their community organisation clientele. Almost all undertook these activities in a voluntary capacity, and none were employed specifically for their advocacy of illegal migrants. Thus while certain key themes structured interview discussions, the relevance of exploration of the themes noted below varied across the interviews that were conducted:

Background details The history of the interview participant's support of asylum seekers/refugees/people living without visas including: their motivations for this involvement; the main forms of their support and advocacy over time; whether the support the participant provided changed over time and if so, the reasons for that change.

Support or sponsorship of non-citizen holders of Bridging Visa E

- Description of the roles adopted in support of persons holding a *Bridging Visa E* including: the form of assistance (assistance in obtaining release, provision of residential accommodation, bond organisation or financial support and so on); discussion as to whether and why the kind of support provided has changed over time; whether support was provided by the advocate as an individual or as part of a group and perceptions of the relative benefits and detriments of those approaches; reasons for the provision of assistance to those the advocate has supported and factors that influence the decision to support; reflections on the relationship with the person

holding a *Bridging Visa E* over time and its continuation in the instance that the non-citizen departed Australia.

- Specific exploration of the experience of provision of residential accommodation including: reflections on the experience of sharing accommodation with the migrant; relationship with the migrant and how that relationship commenced and how it changed over time; perceptions of how sponsorship or other assistance has impacted on that relationship; any differences in relationships generated with various persons the non-legal advocate has worked with or sponsored, and reflection on the reason for any differences.
- Reflections on the support or advice asked of the advocate by Bridging Visa holders including: what support is most needed; any conflicts this prompts; feelings as to the participant's personal capacity to provide such support; reflections as to whether and how the advocate feels their role assists the Bridging Visa E holder in their interactions with government and non-government organisations or others; reflections on the challenges of non-legal advocacy for migrants in these situations; and perceptions of the importance of maintaining confidentiality of migrant's circumstances to the relationship between the advocate and migrant.
- Reflections on the participant's experiences as a sponsor or support person at the MRT for review of a Bridging Visa E decision, in particular, the participant's perception of the MRT's view on their importance with regards to a positive release decision, as well as the detainee's compliance with any visa conditions if released.

The Bridging Visa E system Perceptions of the system including: its advantages and disadvantages for visa holders and for sponsors; its value in comparison to detention; the consistency of the Immigration Department's release decisions and the conditions of release; the effect of residential detention on the grant of release from detention on a Bridging Visa E; and challenges in obtaining a lodged bond back from the bank/Immigration Department.

The impact of non-legal advocacy support on the Immigration Department activities in relation to persons living without visas or holding bridging visas Perceptions of the impact of non-legal support for persons on Immigration Department activities including: those at the time of apprehension; in any reporting requirements to the Immigration Department; in applications

for changes to bridging visa conditions; in decisions to issue a bridging visa rather than detain; the comparative impact between personal attendance by the non-legal advocate at the Immigration Department and solely providing assistance in the preparation of documents for renewal of any bridging visa.

Community non-legal advocate's role as "designated persons" (that is, temporary designation as a guard) for alternative detention arrangements Details on how that designation came about including: the criteria required for that designation; perception of the basis that permitted the individual advocate to be designated as a temporary guard; reflections on those traits generally required for such a designation; perception of the legal responsibilities connected to this role; any requirements for reporting and/or ongoing contact with the Immigration Department; method through which the participant gained knowledge about these responsibilities; the participant's perception of any conflict between their accountability to the Immigration Department and to detainees; feelings about the role; and, perception of the impact of this role on the advocate's relationship with the Immigration Department and the Immigration Minister in other areas of advocacy.

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