COPYRIGHT AND USE OF THIS THESIS

This thesis must be used in accordance with the provisions of the Copyright Act 1968.

Reproduction of material protected by copyright may be an infringement of copyright and copyright owners may be entitled to take legal action against persons who infringe their copyright.

Section 51 (2) of the Copyright Act permits an authorized officer of a university library or archives to provide a copy (by communication or otherwise) of an unpublished thesis kept in the library or archives, to a person who satisfies the authorized officer that he or she requires the reproduction for the purposes of research or study.

The Copyright Act grants the creator of a work a number of moral rights, specifically the right of attribution, the right against false attribution and the right of integrity.

You may infringe the author’s moral rights if you:

- fail to acknowledge the author of this thesis if you quote sections from the work
- attribute this thesis to another author
- subject this thesis to derogatory treatment which may prejudice the author’s reputation

For further information contact the University’s Copyright Service.

sydney.edu.au/copyright
SHIFTING SANDS AND REFUGEE BOATS: THE TRANSFER OF IMMIGRATION CONTROL MEASURES BETWEEN THE UNITED STATES AND AUSTRALIA

DANIEL GHEZELBASH

A THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

FACULTY OF LAW
UNIVERSITY OF SYDNEY

2015
Policy makers are increasingly drawing on practices in other jurisdictions when developing immigration law and policy. This is due in part to the fact that the objectives of governments are converging as they seek to attract what they perceive as ‘good’ migrants, such as skilled workers and investors, and to deter ‘bad’ migrants, such as asylum seekers and irregular arrivals. In this thesis, I examine transfers of law and policy that have the objective of deterrence. I focus on the transfer of three measures between the United States and Australia. These are long-term mandatory detention, maritime interdiction, and extraterritorial processing of asylum claims. I compare and analyse the history and implementation of these measures. Referring to interviews carried out with key policy makers, I argue that the similarities in the way these policies have been implemented in the United States and Australia are the result of a process of legal and policy transfer.

The analysis of these case study transfers is undertaken with a view of developing a deeper understanding of the transfer process and providing lessons for policy makers involved in future transfers. In particular, I examine the factors which contribute to the success or failure of transfers. I focus on the ‘legal dimension’ of success—that is, the ability of transferred law and policy to survive judicial challenges in the receiving jurisdiction.

I also raise general concerns about transfers of restrictive immigration measures. I criticise the opaque nature of the forums in which these transfers occur and question the quality of the information relied upon by policy makers in the transfer process. I argue that at times, transfers of restrictive immigration measures are motivated by competition, as countries seek to outdo the deterrent measures introduced in comparator jurisdictions. This competition has given rise to a ‘race to the bottom’ that has the potential to unravel the international refugee protection regime.
DECLARATION OF ORIGINALITY

I hereby certify that this thesis is entirely my own work and that any material written by others has been acknowledged in the text.

The thesis has not been presented for a degree or for any other purposes at the University of Sydney or at any other university or institution.

The empirical work undertaken for this thesis (interviews, questionnaires and observations) was approved by The University of Sydney Human Research Ethics Committee (HREC).

Research undertaken for this thesis has informed the following publications:


- Daniel Ghezelbash, ‘Policy Transfer in the Migration Field: Implications for Australian Practitioners’ (2012) 2 *Migration Australia* 47 (drawing on Chapter Three, Part 3.2)
ACKNOWLEDGEMENTS

My research has benefited from the support of numerous institutions. First and foremost, I would like to acknowledge the academic and support staff at the University of Sydney and express my gratitude for the generous funds the university provided to facilitate my participation in numerous international conferences and my period of study in the United States. I am grateful to Harvard Law School for hosting me as a Visiting Doctoral Scholar in 2012 and to Brooklyn Law School and New York Law School for each hosting me as a Visiting Scholar in 2013. I also owe a debt of gratitude to my current employer, Macquarie Law School, for providing me with flexibility in my teaching arrangements to facilitate the completion of my thesis.

This thesis would not have been possible without the generous support of my family, friends and colleagues. My mother, Azita, who worked hard to instil in me a passion for learning and scholarship; and who along with my father, Jamal, sacrificed so much to provide me with the opportunity to pursue that passion. My principle supervisor and dear friend, Professor Mary Crock, who sowed the first seeds for this entire endeavour when I was a student in her undergraduate Refugee Law unit, and subsequently spent hundreds of hours nurturing it into fruition. My dear wife, Anna Klauzner, without whose love and support (and countless hours of proof-reading), this project would not have been completed. My associate supervisor, Dr Anna Boucher, for her advice and guidance on the social science aspects of this thesis. Emeritus Professor Ron McCallum, for his invaluable feedback on my penultimate draft. The academics who read and provided feedback on my work during my period of research in the United States, including Professors Gerald Neuman and Holger Spamann at Harvard; Professors Mary Ellen Fullerton and Mark Noferi at Brooklyn Law School; and Professor Lenni Benson at New York Law School. Finally, the friends who generously assisted in the copy-editing process: Nicolette Lorraway, Lena Zak, Michael Joseph, Felicity Bell and Julia Taahi.

I would also like to acknowledge the constructive feedback I received on aspects of this thesis from the participants of the following conferences and workshops: American Society of Comparative Law: Younger Comparativists Committee Conference, 3-5 April 2014, Portland OR; Emerging Immigration Law Scholars and Teachers Conference, 13-14 June 2013, UC Irvine School of Law, Irvine CA; New Directions in Global Thought: IGLP at Five, 3-4 June 2013, Harvard Law School, Institute for Global Law and Policy, Cambridge MA; American Society of Comparative Law: Younger Comparativists Committee Conference, 18-19 April 2013, Indianapolis IN; The International Studies Association Annual Convention, 3-6 April 2013, San Francisco CA; Refugee Law Initiative Postgraduate Workshop on Refugee Law, 5 December 2012, London; and The International Studies Association Annual Convention, 1 March 2012, San Diego CA.
# TABLE OF CONTENTS

ABSTRACT .......................................................................................................................... ii
DECLARATION OF ORIGINALITY .................................................................................. iii
ACKNOWLEDGEMENTS ................................................................................................. iv
TABLE OF CONTENTS ..................................................................................................... v
FIGURES ............................................................................................................................ x
TABLES ............................................................................................................................... xi
ABBREVIATIONS .............................................................................................................. xii

## CHAPTER ONE: INTRODUCTION ............................................................................. 1

1.1 Research Questions ................................................................................................. 4

  Research Question 1: How are transfers used by policy makers to develop restrictive immigration control measures? ......................................................... 5

  Research Question 2: Why do transfers of restrictive immigration control measures succeed or fail? ...................................................................................... 6

1.2 Objectives of the Thesis ......................................................................................... 7

  Objective 1: Initiate an interdisciplinary dialogue on legal and policy transfers ........ 7

  Objective 2: Identify case study transfers between the United States and Australia .......... 9

  Objective 3: Examine factors contributing to the legal success or failure of transferred restrictive immigration measures ......................................................... 9

1.3 Case Study Selection ............................................................................................. 10

  1.3.1 Policies: Interdiction, Extraterritorial Processing and Mandatory Long-Term Detention .. 10

  1.3.2 Jurisdictions: Australia and the United States .......................................................... 12

1.4 Definitions ............................................................................................................. 13

1.5 Chapter Plan .......................................................................................................... 15

## CHAPTER TWO: THE STUDY OF TRANSFERS – CONTRASTING APPROACHES AND LESSONS TO BE LEARNED ............................................................. 19

2.1 Approaches to Studying Legal and Policy Transfer ............................................. 20

  2.1.1 Legal Scholarship on ‘Legal Transfer’ ................................................................. 20

  2.1.2 International Relations Literature on ‘Policy Diffusion’ and ‘Convergence’ ........ 24

  2.1.3 Public Policy Scholarship on ‘Lesson Drawing’ and ‘Policy Transfer’ .............. 26
8.1.3 Comparing the Guantanamo Asylum and Enemy Combatant Cases.................................176

8.2 Australian Case Law ........................................................................................................177

8.2.1 Rights of Detainees on Christmas Island ......................................................................178

8.2.2 Power to Transfer Asylum Seekers to a Third Country ..............................................182

8.3 Comparison of the US and Australian Case Law .............................................................190

8.4 Conclusion ..........................................................................................................................192

CHAPTER NINE: DETERMINANTS OF JUDICIAL DECISION MAKING IN RELATION TO THE RIGHTS OF NON-CITIZENS IN THE UNITED STATES AND AUSTRALIA .................................................................193

9.1 The Nature of Judicial Decision Making .............................................................................194

9.2 National Security and Public Opinion ..............................................................................198

9.2.1 National Security Concerns ..........................................................................................198

9.2.2 Public Opinion ................................................................................................................198

9.3 US Cases ............................................................................................................................200

9.3.1 National Security and the US Cases ..............................................................................200

9.3.2 Public Opinion and the US Cases ..................................................................................205

9.4 Australian Cases ...............................................................................................................208

9.4.1 National Security and the Australian Cases .................................................................208

9.4.2 Public Opinion and the Australia Cases ......................................................................211

9.5 Conclusion: Implications for Predicting Success of Legal Transfers ................................216

CHAPTER TEN: COPYCAT LAW MAKING – TOWARDS A RATIONAL APPROACH ...............217

10.1 The Adoption of the Case Study Policies in Other Jurisdictions .....................................218

10.1.1 The ‘Australian Solution’ as a Model for Europe? .......................................................219

10.1.2 Interdiction and Push-Back Operations in Thailand, Malaysia and Indonesia ............224

10.1.3 Mandatory Detention in Canada and New Zealand .....................................................224

10.2 Implications for Policy Makers Considering Engaging in Transfers of Restrictive Immigration Measures ............................................................................................................................227

10.2.1 Legal Success ................................................................................................................227

10.2.2 Process Success .............................................................................................................230

10.2.3 Programmatic Success ...................................................................................................232

10.2.4 Political Dimension ......................................................................................................234

10.2.5 Ramifications for the International Refugee Protection Regime ...............................235

BIBLIOGRAPHY ......................................................................................................................239
<table>
<thead>
<tr>
<th></th>
<th>Category</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Articles/Books/Reports</td>
<td>239</td>
</tr>
<tr>
<td>2</td>
<td>Cases</td>
<td>264</td>
</tr>
<tr>
<td>3</td>
<td>Bills and Legislation</td>
<td>269</td>
</tr>
<tr>
<td>4</td>
<td>Regulations, Policies and Other Government Documents</td>
<td>272</td>
</tr>
<tr>
<td>5</td>
<td>Treaties</td>
<td>277</td>
</tr>
<tr>
<td>6</td>
<td>Other</td>
<td>279</td>
</tr>
</tbody>
</table>

**APPENDIX A: INTERVIEW METHODOLOGY**                                                                 | 286  |
| A.1| Sample Selection                                                                                  | 286  |
| A.2| Sample Size                                                                                       | 286  |
| A.3| Issues with Reliability                                                                          | 287  |

**APPENDIX B: SUPPLEMENTARY DATA**                                                                 | 289  |
FIGURES

Figure 1: A Framework for Studying Contemporary Legal Transfers...................................................... 31
Figure 2: US Public Opinion on Immigration.......................................................................................... 206
Figure 3: Australian Public Opinion on Immigration............................................................................. 212
TABLES

Table 1: US and Australian Case Law on Long-Term Mandatory Detention, Interdiction and Extraterritorial Processing................................................................. 197
Table 2: Whether Australia Should Turn Back All, Some or None of the Asylum Seekers, 2001-2004 (percentages) ........................................................................................................ 213
Table 3: Whether to Turn Back the Boats Carrying Asylum Seekers, 2001-2014 (percentages)...... 213
Table 4: Support for Complying with the Initial Federal Court Ruling on the Tampa, 12-15 September 2001 .................................................................................................................. 214
Table 5: List of Interview Subjects................................................................................................................................. 287
Table 6: US Coast Guard Migrant Interdiction, 1982-2014........................................................................................... 289
Table 7: Asylum Seeker Boat Arrivals in Australia, 1991-2014 .................................................................................... 291
Table 8: US Public Opinion on Immigration – Gallup Polling Data (percentages) ....................................................... 292
Table 9: Australian Public Opinion on Immigration – Comparable Polling Data, 1954-2014 (percentages) ................................................................................................................... 293
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>APSO</td>
<td>Asylum Pre-Screening Officer</td>
</tr>
<tr>
<td>ASIO</td>
<td>Australian Security Intelligence Organisation</td>
</tr>
<tr>
<td>ATD</td>
<td>Alternatives to Detention</td>
</tr>
<tr>
<td>Cth</td>
<td>Commonwealth</td>
</tr>
<tr>
<td>CIA</td>
<td>Central Intelligence Agency</td>
</tr>
<tr>
<td>CBP</td>
<td>Customs and Border Protection</td>
</tr>
<tr>
<td>DIAC</td>
<td>Department of Immigration and Citizenship</td>
</tr>
<tr>
<td>DIBP</td>
<td>Department of Immigration and Border Protection</td>
</tr>
<tr>
<td>DIEA</td>
<td>Department of Immigration and Ethnic Affairs</td>
</tr>
<tr>
<td>DILGSEA</td>
<td>Department of Immigration, Local Government and Ethnic Affairs</td>
</tr>
<tr>
<td>DIMA</td>
<td>Department of Immigration and Multicultural Affairs</td>
</tr>
<tr>
<td>DIMIA</td>
<td>Department of Immigration and Multicultural and Indigenous Affairs</td>
</tr>
<tr>
<td>DHS</td>
<td>Department of Homeland Security</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>Excomm</td>
<td>Executive Committee of the High Commissioner’s Programme</td>
</tr>
<tr>
<td>FCA</td>
<td>Federal Court of Australia</td>
</tr>
<tr>
<td>FCAFC</td>
<td>Federal Court of Australia Full Court</td>
</tr>
<tr>
<td>FBI</td>
<td>Federal Bureau of Investigation</td>
</tr>
<tr>
<td>HCA</td>
<td>High Court of Australia</td>
</tr>
<tr>
<td>ICE</td>
<td>Immigration and Customs Enforcement</td>
</tr>
<tr>
<td>IGC</td>
<td>Intergovernmental Consultations on Migration, Asylum and Refugees</td>
</tr>
<tr>
<td>IIRIRA</td>
<td><em>Illegal Immigration Reform and Immigrant Responsibility Act</em></td>
</tr>
<tr>
<td>IMR</td>
<td>Independent Merits Review</td>
</tr>
<tr>
<td>Acronym</td>
<td>Full Form</td>
</tr>
<tr>
<td>---------</td>
<td>-----------</td>
</tr>
<tr>
<td>IOM</td>
<td>International Organization for Migration</td>
</tr>
<tr>
<td>INA</td>
<td>Immigration and Nationality Act</td>
</tr>
<tr>
<td>INS</td>
<td>Immigration and Naturalization Service</td>
</tr>
<tr>
<td>MIAC</td>
<td>Minister for Immigration and Citizenship</td>
</tr>
<tr>
<td>MIBP</td>
<td>Minister for Immigration and Border Protection</td>
</tr>
<tr>
<td>MIEA</td>
<td>Minister for Immigration and Ethnic Affairs</td>
</tr>
<tr>
<td>MILGEA</td>
<td>Minister for Immigration, Local Government and Ethnic Affairs</td>
</tr>
<tr>
<td>MIMA</td>
<td>Minister for Immigration and Multicultural Affairs</td>
</tr>
<tr>
<td>MIMIA</td>
<td>Minister for Immigration and Multicultural and Indigenous Affairs</td>
</tr>
<tr>
<td>MOU</td>
<td>Memorandum of Understanding</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-Government Organisation</td>
</tr>
<tr>
<td>OEP</td>
<td>Offshore Entry Person</td>
</tr>
<tr>
<td>PMC</td>
<td>Department of the Prime Minister and Cabinet</td>
</tr>
<tr>
<td>PNG</td>
<td>Papua New Guinea</td>
</tr>
<tr>
<td>RCP</td>
<td>Regional Consultative Process</td>
</tr>
<tr>
<td>Refugee Convention</td>
<td>Convention relating to the Status of Refugees</td>
</tr>
<tr>
<td>Refugee Protocol (or Protocol)</td>
<td>Protocol relating to the Status of Refugees</td>
</tr>
<tr>
<td>RRT</td>
<td>Refugee Review Tribunal</td>
</tr>
<tr>
<td>RSA</td>
<td>Refugee Status Assessment</td>
</tr>
<tr>
<td>UMA</td>
<td>Unauthorised Maritime Arrival</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
</tr>
<tr>
<td>UNTS</td>
<td>United Nations Treaty Series</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>US</td>
<td>United States of America</td>
</tr>
<tr>
<td>USCIS</td>
<td>United States Citizenship and Immigration Services</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization</td>
</tr>
</tbody>
</table>
CHAPTER ONE: INTRODUCTION

Of all the legal changes that occur, perhaps one in a thousand is an original innovation. Moreover, true originality does not usually receive the fanfare that accompanies imitation. One could collect in an anthology of the grotesque the praise for originality and novelty that has accompanied every imitation of legal rules and institutions.

—Rodolfo Sacco

Legal transfers have long been a feature of law reform and the development of legal systems. More than 2300 years ago, Aristotle openly used the different ways in which Greek cities governed themselves as the basis for his theories on politics and social organisation. More recently, Roscoe Pound observed: ‘the history of a system of law is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside the law.’ At a practical level it makes good sense to examine the experiences and policy responses of other jurisdictions. Why reinvent the wheel when there are existing tried and tested models operating elsewhere? The incidence of legal borrowing has been made all the more acute by the process of globalisation. In an increasingly inter-connected world, the diffusion of law, policy and of many other things has become common place. Indeed, it is to be expected.

The regulation of migration is an area of law and policy where governments are particularly concerned about what other jurisdictions are doing. An obvious reason for this lies in the very nature of the migratory process. Changes in the immigration policy of one country almost inevitably have implications for the immigration policy of other nations. As Rogers Brubaker notes: ‘a person cannot be expelled from one territory without being expelled into another, cannot be denied entry into one territory without having to remain in another.’ Lavenex and Uçarer observe that a more permissive policy in one state can lead to a reduction of immigration flows in neighbouring states, while a more restrictive policy may increase the number of migrants seeking entry into other states. This

---

interrelationship motivates the transfer of migration policies in two distinct ways. Transfers are occurring in the immigration policy sphere as the result of cooperation and harmonisation efforts between states. At the same time, transfers are also being driven by competition as states compete for what may be loosely termed ‘desirable immigration outcomes’.

There is a growing realisation among governments that effective policy to control migratory flows depends on multilateral action. Recent years have seen the rapid proliferation of regional and international initiatives, activities and structures dedicated to international migration policy and practice. States have come to recognise that they can benefit from cooperation on migration issues and are increasingly willing to converge in informal, non-binding ways. Implicit in such actions is a realisation of the limits of strictly national or unilateral policies in controlling irregular migration; and the interrelation between migration and other transnational issues.

Somewhat paradoxically, at the same time as governments seek to foster greater cooperation, they also appear to be competing with each other in a bid to secure what they perceive as beneficial migration outcomes. Western developed nations generally have very similar policy objectives: to attract ‘good’ migrants such as skilled workers and investors and to deter ‘bad’ migrants such as asylum seekers and irregular arrivals. In a context where governments are competing to attract or deter, the borrowing of laws that are perceived as successful in other jurisdictions becomes inevitable. The propensity to borrow is even greater in the area of refugee and asylum law, where governments are confined to operating under a single framework created by the 1951 Convention relating to the Status of Refugees and its subsequent Protocol. Ayelet Shachar contends that states are competing to attract the best and brightest migrants. I will argue that there is strong evidence of states observing (and copying) the policies of comparator countries because they are also competing to deter irregular migrants. It is this type of borrowing or transfer that is the focus of this thesis.

Controlling and regulating the flow of irregular migrants has come to dominate the political discourse of both developed and developing states around the world. Even countries that are generally relaxed about large-scale immigration have moved to introduce measures aimed at exerting greater control over their land and sea borders. Australia and the United States, the two countries chosen as comparators in this thesis, have been at the forefront of this trend. Irregular migrants seeking asylum raise particular concerns in this quest for greater control. While sovereignty generally empowers states to exclude or deport irregular migrants, the ability to deal with asylum seekers is complicated by obligations contained in the Refugee Convention and Protocol, and other human rights instruments.

---

7 See, Colleen Thouez and Frédérique Channac, ‘Convergence and Divergence in Migration Policy: The Role of Regional Consultative Processes’ (Global Migration Perspectives No 20, Global Commission on International Migration, January 2005) 3.
In this thesis I examine the approaches adopted in the United States and Australia to circumvent and mitigate obligations owed to refugees and asylum seekers. I study measures taken to maximise the power of the political branches of government to deal with irregular migrants (including asylum seekers) and the extent to which the two states have emulated one another in policy making. I will show that there has been a tendency for successive governments in both countries to introduce similar modes of control and exclusion. For example, both have developed highly complex legislative regimes to regulate the cross-border movement of non-citizens, and have adopted remarkably harsh, even punitive measures to prevent and deter irregular migration.

Three migration control measures implemented in the United States and Australia have been of particular concern due to their human rights implications. These are: long-term mandatory detention; maritime interdiction; and the extraterritorial processing of asylum claims. I compare and analyse the history and implementation of these policies. I argue that the similarities in the way these case study policies have been implemented in the United States and Australia are the results of a process of legal and policy transfer. I contend that policy makers in Australia and the United States have carefully monitored developments in each other's migration control policies and have borrowed laws and policies perceived as being successful.

Of course, policy borrowings have not just occurred between the United States and Australia. Mandatory detention, interdiction and extraterritorial processing have been considered and/or implemented in other jurisdictions in recent years. Canada and New Zealand have adopted mandatory detention regimes modelled on Australian and US practices. In May 2015, European leaders were considering aspects of Australia’s interdiction and offshore processing regime as potential mechanisms to stem asylum seeker flows across the Mediterranean Sea. In that same month, Malaysian, Indonesian and Thai authorities carried out maritime interdiction and push-back operations against vessels carrying Rohingya and Bangladeshi asylum seekers. Acknowledging, if not embracing, its status as regional role model, Australia resolutely refused to criticise the actions taken. When the scale of the unfolding human tragedy ultimately led to countries in the region agreeing to allow boats to land and for asylum claims to be processed, Australia was equally firm in its refusal to participate.

---

11 The term ‘political branches’ is used in this paper to describe the executive and legislative arms of government.
12 Stephen Legomsky has described the US Immigration and Nationality Act (INA) as a ‘hideous creature’ that contains hundreds of pages of ‘highly technical provisions that are often hopelessly intertwined’: Stephen Legomsky, Immigration Law and Policy (Foundation Press, 1st edition, 1992) 1. This observation could equally apply to Australia where the Migration Act 1958 (Cth) (‘Migration Act’) currently contains more than 550 provisions and over 1900 pages of regulations.
13 See Chapter Ten, Part 10.1.3.
14 See Chapter Ten, Part 10.1.1.
The sad reality is that the phenomenon of forced migration shows no signs of abating. If anything, such migration is set to increase in response to new push factors such as crisis events induced by climate change. In this context, it seems inevitable that countries will continue to engage in copycat behaviour when making laws and policies. The analysis of the case study transfers between the United States and Australia in this thesis is undertaken with a view of developing a deeper understanding of the borrowing process and providing lessons for policy makers involved in future transfers.

The legality of the case study policies under international law has been examined at length elsewhere. While acknowledging the criticisms made, it is not my intention to revisit this debate. Rather, the focus is on tracking the spread of these policies between Australia and the United States and exploring the nature, implications and ramifications of the transfer process.

1.1 Research Questions

The transfer of restrictive immigration control measures is occurring in an environment that is under-explored and under-theorised. A number of scholars from various disciplines have observed that ‘borrowing’ is occurring across different areas of migration law and policy. Eytan Meyers cites emulation as one factor explaining the extraordinary similarity between the immigration control polices of industrialised democracies. In similar vein, Patrick Ongley and David Pearson identify interchanges between Australian, Canadian and New Zealand immigration officials as a reason for the historical similarities between the migration policies of those countries. James Walsh observes that aspects of

Canadian and Australian immigration policies have been emulated by a wide variety of states.\(^21\) In the area of skilled migration, Ayelet Shachar argues that leading destination countries attempt to emulate and exceed the skilled migration recruitment efforts of their international counterparts.\(^22\) In the field of refugee law, Lambert, McAdam and Fullerton edit a volume devoted to tracking the impact of European practice on other jurisdictions.\(^23\) This includes a chapter by Jane McAdam examining the impact of European laws in Australia\(^24\) and a chapter by Maryellen Fullerton examining European influence in the United States.\(^25\) In regard to extraterritorial processing, Azadeh Dastyari argues that Australian practices are modelled on US activities in the Caribbean.\(^26\) Finally, in relation to mandatory immigration detention, a recent report by Michael Flynn of the Global Detention Project examines the diffusion of this policy across the globe.\(^27\)

These studies commonly make assertions about the existence of transfers based on anecdotal evidence. The main ‘proof’ offered is the existence of similarities across jurisdictions. McAdam, Fullerton, Shachar, and Flynn probe a little deeper by examining parliamentary materials and/or the pathways facilitating the transfers.\(^28\) However, few have sought to demonstrate and evaluate, in a systematic fashion, the inter-country transfer of migration laws and policies. By relying solely on similarities in law and policy, there has been a failure to exclude other hypotheses, such as the possibility that governments serendipitously devise similar policies to tackle a common problem.\(^29\) Nor have existing works paid sufficient regard to the process underlying transfers\(^30\) and the factors which lead to their success or failure. In this thesis, I seek to fill the gap in the literature by focusing on two central research questions. The first relates to how legal and policy transfers are being utilised by migration policy makers as a tool for developing restrictive immigration control measures. The second asks why some transfers succeed, while others fail.

**Research Question 1: How are transfers used by policy makers to develop restrictive immigration control measures?**

---


\(^{22}\) Shachar, above n 10.


\(^{28}\) See for example, McAdam, above n 24, 50-66; Fullerton, above n 25, 207-10. Shachar, above n 10, 176, 190.

\(^{29}\) In fact, Meyers cites this tendency, rather than emulation, as the primary explanation of convergence in immigration policies: Meyers, above n 19.

\(^{30}\) McAdam, above n 24 and Fullerton, above n 25, are notable exceptions to this.
The lack of scholarly research on the transfer of restrictive immigration control measures means that even the most basic questions on the practice remain unanswered. In four steps, I seek to construct a rich description of how legal and policy transfer is being utilised as a tool for developing restrictive immigration control measures. First, I identify where policy makers are engaging in the transfer of restrictive immigration control measures. Second, I examine the apparent motivations of the actors involved. Third, I explore the forums facilitating the process. Finally, I analyse the information sources policy makers draw on when engaging in transfers.

**Research Question 2: Why do transfers of restrictive immigration control measures succeed or fail?**

The second aim of the thesis is to answer the causal question of why some transfers of restrictive measures succeed, while others fail. I begin with the assumption that transfers can be an effective tool for the development of law and policy. When faced with a problem, it makes sense to examine the practice of comparator jurisdictions. My concern, however, is that states may be adopting migration control measures devised by other countries, without effective evaluation and study of the laws and policies in question.

Any attempt to evaluate transfers or predict success begs the question of what is meant by ‘success’ or ‘failure’. As Bovens, ‘t Hart and Kuipers argue, ‘policy evaluation is an inherently normative act’.31 Success is invariably a subjective and potentially multi-variable concept. Reflecting my background as a legal scholar, my choice is to focus on what I call legal success. This relates to the way an imported law or policy is received by the legal system of the adopting state. As David Nelken observes, ‘the best evidence of success of a legal transfer would be its complete absorption into the legal and political culture which has imported it.’32 At the opposite end of the spectrum, I argue that legal transfers fail when the relevant law or policy is rejected by the legal system of the importing state. This can occur through a judicial finding of unlawfulness, or through a judicial interpretation that frustrates the original intention of the law or policy. This type of legal failure is particularly relevant in the context of restrictive immigration measures. Such policies often push the boundaries of domestic and international legal protections and so are challenged in domestic courts. In this study I use a detailed analysis of the case law challenging mandatory detention, interdiction and extraterritorial processing in the United States and Australia as a vehicle for this exploration. My quest is to articulate the factors that need to be considered when engaging in transfers to ensure relevant measures survive judicial challenges in the receiving legal system.

Of course, legal success is only one perspective from which success can be measured. The public policy literature deals with at least three other dimensions of success: programmatic, political and

---


process. Programmatic success relates to whether a policy achieves its intended outcomes; political success measures whether it is politically popular in the sense that it boosts the government’s approval ratings; and process success relates to the quality and legitimacy of the process underlying the development of the policy. While acknowledging the programmatic and political dimensions of success, measuring these requires complex quantitative analysis that is beyond the remit of my inquiry. As Marsh and McConnell note:

[There are significant methodological difficulties posed by lack of information and the problem of attempting to identify causal effect of a policy, compared to other independent variables, such as overlapping policies, media influences, economic forces, and so on.]

In the course of documenting the case study transfers, I do explore the process dimension of success by critically examining the quality and legitimacy of the actions of the agents involved. This includes a critique of the quality of the information relied upon by officials in the receiving country about the programmatic and political success of the transferred policy in the source jurisdiction.

1.2 Objectives of the Thesis

Objective 1: Initiate an interdisciplinary dialogue on legal and policy transfers

This thesis builds on a growing body of literature that seeks to enhance the discourse on legal transfers by drawing on developments in other fields. Examples of relevant interdisciplinary endeavours include the embrace of sociological literature on diffusion of innovations, sociology of law, economics and anthropological signalling theory. This dissertation augments these studies by drawing on developments in public policy scholarship on policy transfer and international relations scholarship on diffusion. While there have been studies comparing the policy transfer and diffusion

34 Marsh and McConnell, above n 33, 571. This is discussed further in Chapter Two, Part 2.3.
approaches and identifying lessons from each discipline,\textsuperscript{41} to date, the legal scholarship has developed in relative isolation.\textsuperscript{42} Given the close similarity in the subject matter examined, the lack of dialogue is surprising. It is ironic that bodies of literature devoted to studying the transfer of ideas across jurisdictional borders have been resistant to the transfer of ideas across disciplines. This thesis aims to bridge this long-standing interdisciplinary gap.

Legal scholars can learn from policy transfer and diffusion literature by mapping the mechanisms which drive transfers across jurisdictions. They can also profit from the methodologies devised to identify individual instances of transfer. At the same time, I argue that in evaluating success or failure, public policy scholarship has neglected the dimension of legal success, and thus may draw valuable lessons from legal literature.

(a) Constructing a new typology of mechanisms driving inter-jurisdictional legal and policy transfers

To interrogate how policy makers are carrying out transfers of migration control measures, it is important to establish the reasons why they are engaging in such action. Through an interdisciplinary literature review, I draw on policy transfer, diffusion and legal transfer scholarship to develop a typology of the mechanisms and forces driving inter-jurisdictional transfers. I identify five overlapping mechanisms: efficiency, prestige, coercion, cooperation and competition. This provides a broad context for the case study transfers between Australia and the United States that are the focus of this study.

(b) A new method for identifying instances of legal and policy transfer

Identifying legal transfers is not always a straightforward task. While a wholesale verbatim adoption of an entire foreign legal system may be easy to identify, more subtle diffusion of discrete legal rules or mechanisms can be harder to recognise. Transfers cannot be accurately identified through simple comparisons of legislation and other legal instruments. Laws that appear similar on paper may be the result of independent development, rather than transfer. Conversely, laws that appear different may be the result of dynamic transfers, where the legal rule or institution may have undergone changes, both during and after the diffusion process. While these difficulties in determining whether a transfer has taken place have been identified in the legal literature,\textsuperscript{43} no framework has been suggested to


\textsuperscript{42} In fact it is very rare to see legal scholars cite the policy transfer or diffusion literature at all. For a notable exception, see Mathias Siems, Comparative Law (Cambridge University Press, 2014) 193-4 (acknowledging the fact that political scientists are asking very similar questions to legal scholars in regard to inter-jurisdictional transfers).

\textsuperscript{43} Jörg Fedtke, 'Legal Transplants' in Jan Smits (ed), Elgar Encyclopedia of Comparative Law (Elgar, 2006) 434, 436; Michele Graziadei, 'Comparative Law as the Study of Transplants and Receptions' in Mathias Reimann and Reinhard Zimmermann (eds), The Oxford Handbook of Comparative Law (Oxford University Press, 2006) 441, 454 (stating 'Quite often... it is not easy to determine who produced the initial innovation that becomes a model'); Holger Sparmann, 'Contemporary Legal Transplants: Legal
tackle the issue. I propose an original framework for identifying instances of transfer that involves both the detailed legal comparison traditionally carried out by comparative lawyers and more process-oriented analysis inspired by the approach of policy transfer scholars. The framework combines desktop research with interviews carried out with key government officials. The identification of transfers is not seen as an end in itself. Rather, I argue that identification is essential for understanding processes and pathways of exchange; explaining why transfers are occurring; and articulating factors that lead to success or failure.

(c) ‘Legal success’ as a new dimension in evaluating the success or failure of transfers

By focusing on what I call legal success I highlight a dimension of success generally neglected by public policy scholars. As noted, evaluation of success in the public policy literature has focused on three main dimensions of success: programmatic, political and process. None of these dimensions pay sufficient regard to how a law or policy is received by the legal system of the importing state. Legal success clearly has a bearing on the three dimensions of success identified in the public policy literature. Legal failure in the form of a law or policy being struck down by the courts will obviously impact on whether a policy can meet its programmatic goals. Legal failure may also influence public sentiment towards a government and hence impact political success. The quality of the process adopted in developing and implementing the law or policy will have a bearing on the likelihood of legal success or failure. However, the evidence used to assess legal success is very different to evidence examined in the context of assessing programmatic, political and process success. Rather than quantitative data bearing on policy outcomes or political polling, or qualitative data relating to process, assessing legal success requires detailed examination of case law. As such, I argue that it warrants separate analysis.

Objective 2: Identify case study transfers between the United States and Australia

Utilising my original identification framework, I study a number of instances in which the United States and Australia appear to have engaged in legal and policy transfers. I argue that the US policies for the interdiction and extraterritorial processing of maritime asylum seekers at Guantanamo Bay inspired Australia’s use of interdiction and offshore processing known as the ‘Pacific Solution’. In contrast, the development of immigration detention policy in Australia and the United States seems to have been more nuanced. I argue that this process is best characterised as a two-way affair, with Australia and the United States both learning from each other’s experiences.

Objective 3: Examine factors contributing to the legal success or failure of transferred restrictive immigration measures

The case study policies have pushed the boundaries of what is acceptable under both international and domestic law. They have been the subject of numerous judicial challenges in the highest courts in the United States and Australia. I examine the case law to determine the similarities and differences in

the challenges made and the ways in which these have been treated by the respective judicial bodies. Examining curial responses to functionally equivalent policies in different jurisdictions facilitates consideration of how different legal structures and political contexts impact judicial decision making—and consequently affect the legal success or failure of transferred law or policy. I explore the impact of differences in the relevant legal structures between the United States and Australia. These include variations in constitutional design and common law principles of statutory interpretation. I then look at extra-legal political factors and the extent to which these might be influencing judicial responses to the imported policies. In particular, I examine the possible impact of national security concerns, and public opinion towards immigration and asylum seekers.

1.3 Case Study Selection

1.3.1 Policies: Interdiction, Extraterritorial Processing and Mandatory Long-Term Detention

The first of my three case studies concerns the mandatory detention of certain classes of asylum seekers in the United States and Australia. I adopt Michael Flynn’s definition of immigration detention as ‘the deprivation of liberty of non-citizens for reasons related to their [immigration] status.’ The detention of asylum seekers who enter without authorisation is a common policy response to irregular migration, practiced in numerous jurisdictions throughout the world. In most countries where asylum seekers are detained, the period of detention is restricted to the ‘pre-admission’ phase. This is where an asylum seeker’s identity is established and security checks are carried out. My first case study focuses on the more punitive policy of longer-term mandatory detention of asylum seekers beyond the ‘pre-admission’ phase.

In both the United States and Australia, mandatory detention provisions were first introduced as measures targeting specific cohorts of asylum seekers arriving by boat without authorisation. These targeted provisions were later expanded to apply more generally to unauthorised entrants. The United States first introduced mandatory detention in 1981 in response to the arrival of boats carrying Haitian asylum seekers. The policy provided for the detention without parole of all Haitians arriving by boat without documentation. Mandatory detention was expanded and formalised in 1982: regulations were introduced providing for mandatory detention with a presumption against parole for all undocumented immigrants who arrived in the United States. Detention and parole provisions relating to unauthorised arrivals were made more restrictive with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (‘IIRIRA”).


47 Pub L No 104-208, 110 Stat 3009-546.
The introduction of mandatory detention followed a similar pattern in Australia. Provisions initially introduced as temporary and 'exceptional' measures to deal with a particular cohort of boat arrivals, developed into more broadly formalised mandatory detention provisions. The policy was first introduced in 1989, when the Hawke Labor government began detaining 'unauthorised' boat arrivals under existing legislative provisions. 'Turn-around' laws were invoked under which persons arriving by boat suspected of not holding an entry permit, could be detained until returned from whence they came. In 1992, concerns about the legality of these provisions for long-term detention led to targeted provisions authorising the mandatory detention of unauthorised boat arrivals. Reforms in 1994 expanded mandatory detention further, providing simply that all 'unlawful non-citizens' must be detained until either granted a visa or removed from Australia.

The second and third case studies examine the use of maritime interdiction and extraterritorial processing as a means of controlling irregular boat arrivals. Maritime interdiction refers to 'action taken by states to prevent sea-borne migrants from reaching their intended destination.' The United States began interdicting Haitian asylum seeker boats in 1981. Since then interdiction has been used to target boats carrying Cuban migrants in the Straits of Florida and those seeking to travel through the Mona Passage from the Dominican Republic to Puerto Rico. The US Coast Guard has also interdicted vessels travelling from China to Guam, as well as Ecuadorian vessels in the Pacific. At times, the interdiction program has been accompanied by a policy of extraterritorial processing of asylum claims. Extraterritorial processing schemes involve 'the interception and transfer of asylum seekers to a third country where the intercepting state retains exclusive or principal control over refugee status determinations.' Since 1991, some interdicted asylum seekers have been transferred to facilities in Guantanamo Bay, Cuba, for processing of their claims or to be given safe haven. The United States has also entered into agreements with other nations for the establishment of short-lived processing facilities and safe haven camps in various locations in the Caribbean.

Australia introduced a similar policy of maritime interdiction and extraterritorial processing as part of the 'Pacific Solution' in 2001. The scheme involved a maritime interdiction program dubbed 'Operation Relex' that saw sea-borne asylum seekers intercepted on the high seas by Australian naval vessels and escorted back to Indonesian waters where possible. Those that could not be returned, as well as those who evaded interdiction to land at certain prescribed 'excised' offshore territories, were liable for transfer to extraterritorial processing facilities in Papua New Guinea ('PNG') and Nauru. The policy

---

48 See s 88 of the Migration Act, inserted by Migration Legislation Amendment Act 1989 (Cth). Note that these provisions existed as s 36 prior to this amendment. For a detailed history of the use of immigration detention in Australia during this period see Mary Crock, 'A Legal Perspective on the Evolution of Mandatory Detention' in Mary Crock (ed), Protection or Punishment: The Detention of Asylum Seekers in Australia (Federation Press, 1993) 25.
49 Migration Amendment Act 1992 (Cth) inserting the new pt 2 div 4B into the Migration Act.
50 Migration Act, ss 54W, 54ZD, inserted by the Migration Reform Act 1992 (Cth).
52 Francis, above n 18, 273.
53 The scheme is described in detail in Chapter Five, Part 5.2.2.
objective was identical to the US initiative, namely to deter irregular migrants arriving by boat and to bypass migration legislation and judicial oversight of migration control.

In 2008, Australia abandoned its policy of transferring sea-borne asylum seekers to PNG and Nauru. Instead, unauthorised maritime arrivals were processed on the Australian territory of Christmas Island, which was ‘excised’ from the application of regular Australian immigration laws. In effect, the Australian government attempted to create its own version of Guantanamo Bay on the island—a territory over which it exercised full control, but where domestic laws and protections were said not to apply. Extraterritorial processing was reintroduced in 2012. This was followed shortly by a resumption of interdiction and return of sea-borne asylum seekers to their country of departure.

These case studies have been selected because they represent rare examples of transferred immigration policies that have been challenged in the highest courts of review in both donor and recipient nations. There are many other instances of transfers of immigration law and policy, some of which are examined briefly in Chapter Three and Chapter Ten. However, none of these examples have given rise to a comparable body of case law as exists in the United States and Australia in relation to the policies of long-term mandatory detention, interdiction and extraterritorial processing.

1.3.2 Jurisdictions: Australia and the United States

The existence of case law challenging the legality of the policy in both the donor and recipient states provides a unique opportunity to explore the factors which influence successful integration or rejection of an imported law or policy. While the legal systems of Australia and the United States share many commonalities, they also exhibit some significant differences. This study will explore the extent, if any, to which these differences may have affected judicial responses to the case study policies.

Australia and the United States are both democratic, federal, settler states with bicameral legislatures that evolved from British colonial rule. They are frequently grouped together by immigration scholars as classic countries of immigration. They have a common history of population growth through large-scale immigration and part of their national identity stems from being an immigrant nation. Both nations relied heavily on British common law when designing their legal systems. Moreover, Australians drew on the American Constitution of 1787 when devising their own constitution in 1900. The courts in both nations use similar common law logics today. They have federal systems in which immigration policy is dictated at the level of national (rather than state) government. In the past, the immigration policies of both countries have been used to extend protection to displaced people in

---

54 Note that such a characterisation of the processing regime on Christmas Island was roundly rejected in Plaintiff M61/2010E v Commonwealth; Plaintiff M69 of 2010 v Commonwealth (2010) 243 CLR 319; For an analysis of this case, see Chapter Eight, 8.2.1.

55 See Chapter Three, 3.1.2 and Chapter Ten, 10.1

need. The United States and Australia have common histories of generous refugee resettlement, particularly in the post-World War II and post-Vietnam eras.

Despite these similar roots, the two countries have adopted different legal, institutional and political structures that may affect judicial determinations on the legality of immigration control measures. A major distinction between the jurisdictions is the existence of a constitutionally entrenched bill of rights in the United States, and the absence of any equivalent, constitutional or otherwise, in Australia. Another major variation between the jurisdictions is the degree of separation between the executive and the legislature. In the United States, the two are strictly separated. This can be viewed as a deliberate rejection of the untrammeled power of the British King, reflecting the Madisonian concept of checks and balances. In contrast, Australia has a dominant executive resulting from the fusion of the executive and legislative powers that typifies the Westminster system of government. There is also a marked difference in the reception of international law into the national legal systems of the two countries. Australia adopts a dualist approach under which international law and national law are viewed as distinct legal orders. Accordingly, treaties, such as the Refugee Convention and Protocol, have no force in domestic law unless implemented through legislation. In contrast, the United States uses a mixed dualist/monist system under which some international treaties can be deemed automatically to have force in domestic law, without the need for enabling legislation.

Other differences between the United States and Australia are noteworthy. While both countries have land masses of approximately equal size, the fact that Australia is an island nation makes it significantly more geographically isolated. Accordingly, it is able to exercise far greater control over its territorial borders than the United States, which has thousands of kilometres of shared land borders, with Mexico to the south and Canada to the north. These geographies have resulted in a significant divergence in the scale of undocumented migrants seeking entry and/or living in each country. Recent estimates suggest that there are approximately 11.7 million undocumented migrants living in the United States, compared with 62,100 in Australia.

1.4 Definitions

---

57 United States Constitution amendments I-X.
60 See Fullerton, above n 25, 205, n 18 (noting that ‘[a]lthough there are mixed monist and dualist elements in the US legal framework, US law strongly favours domestic legislation to implement international obligations).
In this thesis the terms, ‘unauthorised arrival’, ‘undocumented arrival’ and ‘irregular arrival’ are used interchangeably to denote migrants who have entered or who seek to enter a country without the required legal authority. I refer to irregular entrants who travel by boat as ‘sea-borne asylum seekers’, ‘maritime asylum seekers’, or ‘unauthorised maritime arrivals’. I avoid using the term ‘illegal migrant’. While it may be appropriate to label an action as illegal, the term is both inaccurate and dehumanising when used to brand a person. The terms ‘alien’ and ‘non-citizen’ are used interchangeably. While acknowledging the negative connotations attached to the former, the term is difficult to avoid given that it appears in both the US Immigration and Nationality Act, and the Australian Constitution. The phrases ‘extraterritorial processing’ and ‘offshore processing’ are also used interchangeably to refer to the transfer of asylum seekers to a third country or external territory where the transferring state maintains full or partial responsibility for processing of asylum claims.

It is also important to articulate the nuances in the terms ‘policy’ and ‘law’. As Richard Rose explains, ‘policy’

> can refer to any topic that is a concern of government, such as foreign policy or economic policy; this usage leaves vague what, if anything, government is doing to deal with that concern. Policy can also refer to the end intentions of politicians. An election campaign pledge to introduce a full-employment policy does not specify the means by which this goal is to be achieved. Third, policy can refer to the policy programmes that government uses to realise the policy intention that politicians declare.

When the term ‘policy’ is used in this thesis, it is generally used in the third sense identified by Rose, namely a specific policy program. These programs are prescriptions that direct the major resources of government—such as laws, money, personnel and organisations—towards an identifiable end. Law is one of the strongest means that can be used to implement policy. It creates a set of binding rules that can be implemented by government institutions, including the courts. It includes legislation, regulations and legally binding directives. Binding judicial decisions are also law, in that they provide normative guidance on how policy and legislation must be interpreted and applied. However, case law is qualitatively different from primary enactments, regulations and directives as it emanates from the judiciary, and not the political branches. As such, judicial decisions can modify law in a way that diverges from the intent or will of the country’s elected elites.

For the purposes of this thesis, the phrase ‘legal and policy transfer’ is used in a broad sense. It describe the processes by which knowledge of law, policies, administrative arrangements, institutions and ideas in one political system is used in another political system to develop its policies, administrative arrangements, institutions and ideas. This interpretation is based on David Dolowitz and David Marsh’s definition of policy transfer, but expanded to include the transfer of law as well as

---

63 See, for example, INA § 101(a)(3), defining ‘alien’ as ‘any person not a citizen or national of the United States’.
64 Australian Constitution s 51(xix).
66 Ibid 16.
policy. In this context ‘law’ refers primarily to legal rules created by the political branches, and not judicial decisions. Of course, it is well documented that judges do draw on foreign law in the judicial decision making process. The focus of this thesis is on the cross-jurisdictional transfers of law and policy carried out by the political arms of government.

I have chosen to use the term ‘transfer’ when discussing the cross-jurisdictional movement of law and policy. While the phrase ‘legal transplant’ is used widely in the legal literature, ‘transfer’ has a clearer plain-language meaning and aligns with the language used in the policy transfer and diffusion literature. The phrase ‘migration policy maker’ refers to ‘lawyers, legislators, executive branch officials, academics, and others who contribute to discourse on immigration-related matters and thereby shape public opinion, policy, and law.’ Political branches’ is used to refer collectively to the executive and legislative arms of government. In the context of my case law analysis, the term ‘rights-protecting’ refers to a judicial approach or outcome that upholds the statutory, constitutional or common law rights of a non-citizen litigant. I use the term ‘rights-precluding’ to describe an outcome or approach which upholds the legality of government action, at the cost of the rights of the non-citizen.

Australia’s immigration program is administered by the Department of Immigration and Border Protection, which is overseen by a Minister who is a member of Federal Parliament. The agency has carried many names over the years, with the title of the Minister also changing accordingly. For the sake of consistency, I use the terms ‘Department of Immigration’ to refer to the agency, and ‘Minister for Immigration’ to refer to the Minister throughout my period of analysis. Between 1933 and 2003, the US immigration program was administered by the United States Immigration and Naturalization Service (‘INS’) which was an agency of the Department of Justice. In 2003, INS was abolished, and its functions transferred to the newly created Department of Homeland Security (‘DHS’). The three main entities within DHS which deal with immigration issues are the US Citizenship and Immigration Services (‘USCIS’), US Immigration and Customs Enforcement (‘ICE’), and US Customs and Border Protection (‘CBP’).

1.5 Chapter Plan

Chapter Two examines the various academic approaches to the inter-jurisdictional transfer of law and policy. I compare the approaches adopted in the legal, public policy and international relations scholarship. The primary purpose of the analysis is to identify ways in which the legal scholarship can be enriched by the approaches taken in the other disciplines examined. The approaches taken in each discipline are analysed, identifying relative strengths and weaknesses. Thereafter, I focus on the methodological question of how to identify whether a transfer has taken place. I propose a new

---

70 This terminology is adapted from Rayner Thwaites, The Liberty of Non-Citizens: Indefinite Detention in Commonwealth Countries (Hart, 2014) 15.
71 Where the Department or Minister appears in a citation (whether that be as a party to a case, or as the author of secondary materials), I use the abbreviations set out in the table on page xi-xii.
framework for this task which draws on the policy transfer literature and its focus on the process and agents of transfer. I conclude with an evaluation of the different approaches to measuring success, with a primary focus on the legal dimension of success.

Chapter Three draws on the policy transfer, diffusion and legal transfer scholarship to develop a typology of the mechanisms and forces driving the movement of immigration law and policy across jurisdictions. In this regard, I identify five overlapping mechanisms: efficiency, prestige, coercion, cooperation and competition. This is done with a view to contextualise the case study transfers examined in the subsequent chapters within transfers of immigration law and policy generally. I then examine the main international forums which facilitate the contemporary transfer of migration law and policy.

Chapter Four applies the framework for identifying contemporary legal transfers developed in Chapter Two. I argue that the existence of similar policies relating to long-term mandatory immigration detention of certain irregular arrivals in the United States and Australia is the result of a process of legal and policy borrowing (at least in part). I identify the common policy problem that exists in both the United States and Australia which this policy seeks to address: the desire on the part of the political branches to maximise control over the flow and processing of asylum seekers and irregular migrants. There follows a detailed comparative analysis of the history and development of the policy of long-term mandatory immigration detention in both jurisdictions, with three discreet periods of transfer identified. The chapter concludes with an analysis of the evidence for each period of transfer, drawing on interviews I conducted with key policy makers, as well as documentary evidence on the public record. A similar process of analysis is undertaken in Chapter Five to argue that Australian policy makers drew heavily on US interdiction and extraterritorial practices in the Caribbean when devising and implementing interdiction and extraterritorial processing regimes introduced as part of the Pacific Solution in 2001.

In Chapter Six, I compare and contrast the way the judiciary in the United States and Australia has dealt with challenges to the policy of long-term mandatory immigration detention. The analysis begins with an exploration of the relevant constitutional, common law and statutory legal principles that bear on adjudicating the rights of non-citizens in each jurisdiction. I turn then to the case law, examining two aspects of long-term mandatory detention. On the mandatory nature of detention, I compare the US Supreme Court case of Demore v Kim with the Australian High Court decision in Chu Kheng Lim v MILGEA. In both cases, the respective court adopted a balancing test which weighed the interest of the detainee with the legitimate government interest served by the policy. Both reached a ‘rights-precluding’ outcome, upholding the relevant mandatory detention legislative provisions. In relation to challenges to immigration detention of a potentially indefinite nature, I compare the US Supreme Court decisions in Zadvydas v Davis and Clark v Martinez with the Australian High Court decision

---

In *Al-Kateb v Godwin* ("Al-Kateb"). In these cases, the US Supreme Court and Australian High Court adopted different approaches to construing similar statutory provision, which on face value appeared to authorise indefinite post-removal detention. In *Zadvydas v Davis* and *Clark v Martinez* the US Supreme Court implied a 90-day limit for detention in the subject statutory provisions, reasoning that indefinite detention may raise serious constitutional problems. In *Al-Kateb*, Australia’s High Court construed the relevant enactment to authorise potentially indefinite detention. It concluded that such detention did not raise any constitutional issues. I argue that in each of the cases examined, the outcome adopted was far from obvious: the different legal rules were ambiguous enough to support either a ‘rights-protecting’ or ‘rights-precluding’ approach. As such, I argue that the legal structures in each jurisdiction were not determinative of the divergent judicial outcomes.

In *Chapter Seven*, I undertake a similar analysis of the US and Australian case law on maritime interdiction. I compare the approaches taken by the US Supreme Court *Sale v Haitian Centers Council*, with the decision of the Australian Federal Court in *Ruddock v Vadarlis*, and of the Australian High Court in *CPCF v MIBP*. Despite the different legal frameworks in question, in each of the cases the courts opted for a ‘rights-precluding’ approach. Each affirmed the executive’s broad power to carry out interdiction activities.

In *Chapter Eight*, I compare the judicial response to extraterritorial processing measures in the United States and Australia. The cases on this issue are not as directly comparable as the detention and interdiction cases, dealing with very different issues in each jurisdiction. I begin by examining a number of US Federal Circuit court decisions rejecting constitutional and statutory claims by asylum seekers held at the migrant processing facility in Guantanamo Bay. These cases are contrasted with the more recent US Supreme Court jurisprudence relating to the rights of ‘enemy combatants’ held at the same location. In a series of cases, the US Supreme Court upheld certain statutory and constitutional claims brought on behalf of these people. I argue that these cases are difficult to reconcile with the earlier case law relating to the rights of asylum seekers held at Guantanamo Bay. I suggest that the change in approach highlights the contingency of the asylum seeker cases.

In the Australian context, two lines of cases dealing with the rights of persons subject to extraterritorial processing are considered. I examine the decision in *Plaintiff M61/2010E v Commonwealth* ("Offshore Processing Case"). There, the Australian High Court thwarted an attempt by the Australian government to create its own version of a Guantanamo-like exceptional zone on the Australian territory of Christmas Island. Second, I compare the cases challenging the government’s statutory power to transfer offshore entry persons to third countries. I compare a series of unsuccessful Federal

---

Court cases challenging transfers to Nauru under the Pacific Solution, with the successful High Court challenge in *Plaintiff M70/2011 v MIAC* ('Malaysian Solution Case'). This struck down an attempt by the government to transfer asylum seekers to Malaysia. As in the detention cases, I argue that the relevant legal principles were ambiguous enough to allow for either a 'rights-protecting', or a 'rights-precluding' approach in each case.

*Chapter Nine* explores the ramifications of the contingent nature of the jurisprudence concerning the case study polices examined in *Chapter Six, Seven and Eight*. Given that there was sufficient ambiguity in the relevant legal principles in each case to support either a 'rights-precluding' or 'rights-protecting' approach, I argue that the different legal structures in Australia and the United States may not have determined the outcome of the cases examined. I argue that when faced with alternate reasonable interpretations of a legal principle, extra-legal factors may have influenced judges' choices of which interpretation to adopt. I consider the possible impact of two such factors on judicial determinations on the rights of non-citizens: national security concerns and public sentiment towards immigrants and asylum seekers.

*Chapter Ten* concludes the thesis by documenting the spread of the case study policies to other jurisdictions. Here I examine the adoption of mandatory detention policies in Canada and New Zealand; the use of interdiction in Europe and Asia; and European Union proposals to adopt an extraterritorial processing regime. I conclude by highlighting deficiencies in the way transfers of restrictive immigration measures have been carried out and make a series of recommendations to address these concerns.

---

82 The litigation spanned more than eight years and was comprised of the following cases: *WAJC v MIMIA* [2002] FCA 1631 (claim for interlocutory relief); *P1/2003 v MIMIA* [2003] FCA 1029 (claim for further interlocutory relief); *P1/2003 v MIMIA* [2003] FCA 1370 (application for an extension of motion in which to file and serve a notice of appeal); *Plaintiff P1/2003 v Ruddock* (2007) 157 FCR 518 (application by plaintiff to amend statement of claims); *Sadiqi v Commonwealth* [2008] FCA 1262 (relating to discovery); *Sadiqi v Commonwealth (No 2)* (2009) 181 FCR 1 (determination of preliminary legal questions); *Sadiqi v Commonwealth (No 3)* [2010] FCA 596 (determination of substantive claim).

83 (2011) 244 CLR 144.
CHAPTER TWO:  
THE STUDY OF TRANSFERS – CONTRASTING APPROACHES AND LESSONS TO BE LEARNED

The fate of comparative law will be determined by its ability to function as a connecting field between law and other social sciences.

Ugo Mattei

Over the last four decades, significant scholarship has been devoted to how and why law and policy spread from one governmental unit to another. The literature spans numerous disciplines and has generated many theories. In this chapter, I present a comparative overview of three approaches: legal work on ‘legal transfers’; international relations scholarship on ‘diffusion’; and public policy writings on ‘policy transfer’. The primary purpose of my analysis is to identify ways in which scholars working in each of these disciplines can learn from one another. The work builds on a small (but growing) body of legal literature that draws on developments in other disciplines to update the approach to studying legal transfers.

Part 2.1 provides an overview of the legal transfer, diffusion and policy transfer literature. I examine recent developments, compare and contrast methodological approaches and explore the key theoretical debates in each field. In the remainder of the chapter, I focus on two specific methodological issues. In Part 2.2, I examine the question of how to establish whether a transfer has taken place. I propose a new framework for carrying out that task which takes inspiration from the policy transfer literature which focuses on the process and agents of transfer. This will be applied to my case study transfers in Chapter Four and Five. In Part 2.3, the meaning of ‘success’ is examined in the context of legal and policy transfer. I argue that there has been insufficient interest in what I

---


label legal success. This is the ability of an imported law to survive judicial challenges in domestic courts.

2.1 Approaches to Studying Legal and Policy Transfer

2.1.1 Legal Scholarship on ‘Legal Transfer’

Recent years have seen a wealth of legal scholarship produced on the topic of legal transfers. The sheer volume of work has led some to ask whether study of the phenomenon has reached ‘saturation point’.³ My view is that recent scholarly inquiries have increased the potential for innovative research. First, there is growing recognition of diversity in the transfer phenomenon. The focus of early literature was on formal one-way legal transfers, carried out by government officials and evidenced by the explicit copying of entire legal systems (or large parts thereof). More recent studies have questioned assumptions about the direction, content and agents of the transfer process. Second, scholarship is finally moving on from the somewhat stagnant theoretical debate around the proper construction of the relationship between law and society, and the ramifications of this question, to the viability (or even possibility) of legal transfers.⁴ This theoretical debate was rooted in colonial and post-colonial politics and the context of attempts to transfer entire statutes or legal systems. The recognition of more nuanced forms of transfers adapted to meet local conditions both during and after the transfer process has reduced the relevance of this debate.

Legal scholars examining the transfer of law across jurisdictions have given the process a number of different labels. Alan Watson coined the term ‘legal transplant’ to describe ‘the moving of a rule... from one country to another, or from one people to another’.⁵ Other terms and metaphors used by legal scholars to refer to this phenomenon include ‘diffusion’,⁶ ‘reception’,⁷ ‘circulation’,⁸ ‘transposition’,⁹ ‘borrowing’,¹⁰ ‘migration’,¹¹ ‘transmigration’,¹² ‘translation’,¹³ and ‘transfer’.¹⁴ It is beyond the scope of


⁴ See below nn 83-97 and accompanying text.


this study to engage with the subtle differences in the meanings of these various terms and with the ongoing debate as to which metaphor/term best captures the characteristics of the transfer process. I adopt the term ‘transfer’ to describe the phenomenon as it is comparatively neutral and aligns with the language used in policy transfer and diffusion scholarship.

The early or ‘traditional’ literature on legal transfers was concerned predominantly with the transfer of entire legal systems in colonial and post-colonial environments. Labelling it the ‘naïve’ model of receptions, William Twining describes this early approach as concerned with a paradigm case involving:

[A] bipolar relationship between two countries involving a direct one-way transfer of legal rules or institutions through the agency of governments involving formal enactment or adoption at a particular moment of time (a reception date) without major change… [I]t is commonly assumed that the standard case involves transfer from an advanced (parent) civil or common law system to a less developed one.15

Typical case studies included the imposition of legal systems by colonists in settled states and the more voluntary modernisation efforts of developing nations. Starting in the late 1980s, the focus shifted to the legal reforms of former socialist countries. Much of the work of this period was of a theoretical nature and ‘unconnected to actual projects of legal change.’16

The ‘contemporary’ legal transfer literature has moved beyond many of the assumptions identified by Twining as underpinning the ‘naïve’ model of legal transfers.17 I briefly explore the key areas in which this has happened below. My analysis here is not an attempt at developing a new explanatory theory or typology. Numerous such efforts have already been made.18 Rather, I seek to highlight new developments in the field and the way in which understanding of legal transfers has evolved.

Perhaps the single most significant development is recognition that the vast majority of contemporary legal transfers concern discrete legal rules (or fragments of such rules) rather than entire legal codes or systems. The early literature focused on relatively large-scale transfers, such as the reception of Roman Law in medieval Europe, the spread of the common law, or the importation of civil codes. More recent literature recognises that in the era of globalisation, legal reforms at the individual state level usually involve the transfer of fragments of rules.19 Margit Cohn observes that

---

14 Graziaidei, above n 7.
16 Graziaidei, above n 7.
17 The term ‘contemporary legal transfer’ is adapted from Holger Spamann, ‘Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law’ (2009) 6 Brigham Young University Law Review 1813.
19 Twining, ‘Social Science and Diffusion of Law’, above n 2, 234; Li-Wen Lin, ‘Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example’ (2009) 57
While classic accounts were concerned with the grafting of complete legal systems under colonially-motivated transfers of law, the modern transplant is usually more limited, concerned with a specific arrangement or a specified area of law.\textsuperscript{20}

The paradigm example of a traditional legal transfer involved a formal act of adoption, for instance by enacting a statute or constitution. Contemporary scholarship is beginning to recognise that formal legal rules are not the only subject matter that can be transferred. Transfers can occur at the level of policy, programs, executive or administrative orders, or judicial decisions. As Mathias Siems notes,

\textit{[i]n the past, there have often been cases where legal transplants purely meant copying or translating a particular foreign legal text. Today, however, the main aim tends to be to transfer a particular policy—be it driven by the transplant or the origin country.}\textsuperscript{21}

There is growing recognition that transferred rules are rarely verbatim copies of the original transposed rules. Contemporary legal transfer literature recognises that laws may be transferred in varying degrees of abstraction. For example, a general idea may be borrowed and implemented using a completely different mechanism.\textsuperscript{22} By the same token, laws that serve similar purposes and aims may be couched in different terms. Change and adaptation of an imported rule can also add an additional layer of abstraction. Law makers in the receiving country may deliberately tweak the imported legal rule to meet local needs and conditions. Changes may also be made inadvertently during the transfer process. For example, law makers may misunderstand the content or operation of the original rule, or meaning may be lost through cross-cultural communication or translation. Maximo Langer proposes a typology of the types of change that can occur in the transfer process. Criticising the transplant metaphor for failing to capture differences between the source law and its implanted form in the receiving state, Langer proposes the adoption of the ‘legal translation’ metaphor instead. His typology is adapted from the language translation literature, identifying three main approaches to translation.\textsuperscript{23} First, ‘Strict Literalism’ refers to a word-by-word matching between the original and translated texts. Second, ‘Faithful but Autonomous Restatement’ refers to situations where the translator still tries to be faithful to the original but composes, at the same time, a text that is equally powerful in the target language. Third, ‘Substantial Recreation, Variations etc’ occurs when the idea of fidelity to the original is weakened or completely disappears, and the focus is on creating a text that is powerful or appealing in the target language. Once the law is transferred, it continues to undergo change as it interacts with local social and legal structures. As Twining has observed, how and to what extent any particular ‘import retains its identity or is accepted, ignored, used, assimilated,
adapted, rooted, resisted, rejected, interpreted, enforced selectively, and so on depends largely on local conditions.\textsuperscript{24}

The contemporary legal transfer scholarship has also moved beyond earlier conception of transfers as standalone or once-only phenomena. It is now recognised that legal transfers are often multi-event interactions with the original and transplanted rules continuing to interact after the initial transfers have taken place. Margit Cohn identifies several models of long-term interaction:

1. the importing system maintains its connection with the exporting system and continues to follow post-transfer changes;
2. gradual divergence where the importer severs its connection with the exporter and independently develops the adopted rule; or
3. a mix of both approaches where the importing system follows certain developments in the source jurisdiction, but also independently develops the adopted rule.\textsuperscript{25}

In a similar vein, writers who draw on autopoietic theory, with its notion of law as a largely ‘closed and self-referential’ system, propose distinguishing between ad hoc contacts, systematic linkages and co-evolution.\textsuperscript{26} In a multi-event context, old assumptions about the mono-directional flow of legal transfers no longer always hold true. The direction of the transfer often shifts, with the original exporting country drawing lessons and implementing developments from the original importing country.\textsuperscript{27}

So it is that the old view of legal transfers as involving only two jurisdictions (usually a single exporting country imposing legal rules on a single importer) has given way to recognition that transfers can often be the product of interactions between several players.\textsuperscript{28} In an era of globalisation, importers may choose fragments of rules from various legal systems and integrate them into a single law.\textsuperscript{29} Esin Örüçü’s culinary metaphors of a mixing bowl, salad bowl, salad plate, and purée are devised to capture the various forms of eclectic multi-source transfers.\textsuperscript{30}

Contemporary transfer literature also challenges assumptions about the direction of transfers. The traditional legal transfer scholarship was almost exclusively concerned with transfers from an imperial or other powerful centre to a colonial, dependent, or less developed periphery. It has become apparent that law makers in powerful, developed nations also import laws from a variety of sources—including other developed states, less developed states, and supra-national law.

The traditional approach viewed legal transfers as occurring exclusively between national municipal legal systems. More recent scholarship recognises that transfers are occurring across levels of legal

\begin{itemize}
\item\textsuperscript{24} Twining, ‘Diffusion of Law: A Global Perspective’, above n 6, 24.
\item\textsuperscript{25} Cohn, above n 3, 601-2.
\item\textsuperscript{27} Twining, ‘Diffusion of Law: A Global Perspective’, above n 6, 20.
\item\textsuperscript{28} Cohn, above n 3, 585.
\item\textsuperscript{29} Lin, above n 19, 712; Tanase, above n 19, 876.
\end{itemize}
ordering. As Twining observes, ‘diffusion may take place between many kinds of legal orders at and across different geographical levels, not just horizontally between municipal legal systems.’ The most common (and studied) variety of cross-level legal transfer is the adoption of international or supra-national legal norms into domestic law. Examples include European harmonisation efforts, and the domestic implementation of the Refugee Convention and Protocol.

Finally, it is now acknowledged that government officials are not the only agents involved in the transfer process. Transfers can be carried out or facilitated by international institutions, such as those that promote legal change on a global scale, international companies, global law firms, and other private actors. As I explore in the following section, many of the developments in legal transfer scholarship are reflected in the policy diffusion and policy transfer literature.

2.1.2 International Relations Literature on ‘Policy Diffusion’ and ‘Convergence’

International relations research on diffusion focuses on how innovations, policies and programs spread from one government entity to another. Diffusion is generally conceptualised as an attribute of interdependence. As Simmons, Dobbin and Garrett observe, ‘International policy diffusion occurs when government policy decisions in a given country are systematically conditioned by prior policy choices made in other countries.’ Diffusion scholarship has its roots in comparative policy analysis in the United States, which focused on the spread of policy innovations within and between particular federal states and cities. Scholars were examining the diffusion of innovations across US states as early as 1940. However, it was Jack Walker’s seminal 1969 study on the innovativeness of US states across 88 programs which established the study of policy diffusion as a standalone discipline.

34 See Lin, above n 19 (on legal transplants through private contracting).
38 McVoy, above n 37.
39 Walker, above n 37.
Building on these early US studies, the international relations literature on diffusion has been described as the study of ‘chronological and geographic patterns of the adoption of a policy innovation across government units’. A central objective of the research is explaining why some states either adopt or adapt policies and practices more readily than others. Examples of relevant factors identified include geographic proximity, the role of policy networks, and political, economic and social characteristics. Convergence is a closely related phenomenon to diffusion. This has been defined as ‘the tendency of societies to grow more alike [and] to develop similarities in structures, processes and performances.’ At a general level, convergence is often explained as a product of the social and economic forces associated with industrialisation. More recently, globalisation has been cited as a factor, defined as ‘the cluster of technological, economic, and political innovations that reduce the barriers to economic, political, and cultural exchange’. A global civil society, intergovernmental organisations, epistemic communities and capital markets have all been identified as aspects of globalisation that have contributed to convergence.

Sharing some of the characteristics of diffusion scholarship, the convergence literature is distinctive in that it is concerned not only with the spread of innovation but also with the increasing similarity between different political systems in terms of policy goals, instruments, styles and outcomes. Whereas diffusion refers to a process, convergence characterises the outcome of that process. The general argument is that as societies adopt a progressively more industrial infrastructure (or become part of an increasingly globalised world), ‘certain determinate processes are set in motion which tend over time to shape social structures, political processes and public policies in the same mould.’

---

43 Walker, above n 37 (identifying the following internal characteristics as facilitating innovation: per capita income; interparty competition; legislative professionalism; and percentage of urban population); Rogers and Shoemaker, above n 42 (emphasising the role of higher education levels, higher literacy rates, and greater upward mobility).
45 Kerr, above n 44, 3.
48 Ibid 841-2.
49 Bennett, above n 46, 218.
50 Ibid 216.
2.1.3 Public Policy Scholarship on ‘Lesson Drawing’ and ‘Policy Transfer’

The public policy literature on ‘lesson-drawing’ and ‘policy transfer’ also has its roots in the work examining the spread of innovations across US states. Lesson-drawing refers to the process by which actors in one time or place learn lessons from another time or place, which are then incorporated into their own policies and practices. This literature was born out of the perception that scholars were ignoring the processes associated with diffusion activities and the content of the transferred/diffused policy. Lesson-drawing theorists focus on the genesis of policy ideas; the factors that motivate actors within a political system to adopt a policy operating elsewhere; and the role of actors and evidence in the process more broadly. The lessons learned may be either positive or negative and, as such, may or may not lead to the transfer of policies or practices. Richard Rose defines a lesson as an ‘action-oriented conclusion about a programme or programmes in operation elsewhere’. He examines key features that encourage or inhibit the process of lesson-drawing, discusses some of the practical steps required for successful lesson-drawing and identifies five alternative methods of lesson-drawing: copying, emulation, hybridisation, synthesis, and inspiration.

Policy transfer literature draws heavily on the lesson-drawing approach, examining the ‘process by which knowledge of policies, administrative arrangements, institutions and ideas in one political system (past or present) is used in the development of policies, administrative arrangements, institutions and ideas in another political system’. The main divergence is based around criticism of the ‘implicit assumption’ present in the lesson-drawing literature that the process is both rational and voluntary. While maintaining a preoccupation with the process by which policy travels, the policy transfer approach acknowledges that diffusion will not always be the result of deliberate and rational policy choices. As such, policy transfer scholars recognise that transfers encompass both ‘voluntary’ and ‘coercive’ forms of practice. The latter can occur when ‘one government or supra-national institution [is] pushing, or even forcing another’ to adopt policy innovations.

51 Simon Bulmer et al, Policy Transfer in European Union Governance: Regulating the Utilities (Routledge, 2007) 12; Dolowitz and Marsh, Who Learns What from Whom’, above n 36.
53 See Bulmer et al, above n 51, 13.
57 Bulmer et al, above n 51, 13.
2.1.4 ‘Policy Transfer’, ‘Diffusion’ and ‘Legal Transfer’ Compared

The terms ‘policy diffusion’, ‘convergence’, ‘lesson-drawing’ and ‘policy transfer’ are sometimes used interchangeably. However, as I have shown, these approaches differ in their analytical focus. The policy transfer approach grew out of the diffusion approach. While both examine the same phenomenon, namely the transfer of policy innovations across jurisdictions, they adopt different methodologies. The diffusion literature focuses primarily on policy outcomes, while generally neglecting the processes by which diffusion/transfer occurs. The focus is on whether a policy was transferred/diffused and what structural elements facilitated or inhibited such diffusion. In contrast, the literature on policy transfer tends to be more process-oriented, focusing on how, when, and why adopters use diffused information, rather than on networks or patterns of diffusion.

The approaches also vary in their approach to sample size and type of data analysed. The diffusion/convergence literature uses quantitative techniques to analyse a large number of case studies to produce generalisations about the reasons for, and the results of, the process. This can be contrasted with the policy transfer literature, which employs small-sample qualitative case studies that focus on a detailed analysis of the transfer of a policy between two, or several, countries.

Both approaches have benefits and drawbacks. The large-sample, highly quantitative studies employed by diffusion scholars allow for generalisations about the causes and consequences of the diffusion process. The downside of the large sample size is that the data is prone to oversimplification. For example, diffusion is generally presented as a dichotomous (‘adopt’/‘not adopt’) variable. The policy transfer approach recognises that there can be many degrees of transfer, with complete transfer being very rare. The small-sample qualitative studies, employed in the lesson-drawing and policy transfer approaches, allow for a far more nuanced examination of reasons for and outcomes of the process. However, findings made utilising such an approach are less generalisable. Finally, the diffusion and convergence literature take for granted the fact that the diffusion process is inevitable and beneficial. In contrast, the lesson-drawing and policy transfer literature recognise the possibility that transfers can result in policy failures and provide frameworks to test prerequisites for good policy making and policy success.

The traditional legal transfer literature dealt with quite distinct phenomena when compared to the policy transfer and diffusion literature. However, the expansion of the subject matter examined in contemporary transfer literature has resulted in a situation where it now looks at essentially the same subject matter as policy transfer and diffusion scholarship. In particular, the acknowledgement that the content of transfers are not just formal law, but a variety of ideas, policies, programs, approaches or innovations has brought the legal transfer approach in line with the policy transfer and diffusion approaches. Contemporary scholars examining legal transfers are asking the same questions that are

---


60 Mossberger and Wolman, above n 40, 429.

61 Bulmer et al, above n 51, 12.
being examined by diffusion and policy transfer scholars: how do you demonstrate that a transfer has taken place; what are the mechanisms driving transfers; and what are the factors that lead to the success or failure of transferred law or policy?

What follows is an in-depth interdisciplinary examination of these questions. In Part 2.2 of this chapter, I explore methodological issues relating to demonstrating that a transfer has taken place. In Part 2.3, I examine approaches to defining and measuring success in the context of legal transfers. In Chapter Three, I examine the mechanisms driving the transfer process in the context of immigration control measures. In each instance, I explore how legal transfer, policy transfer and diffusion scholars have approached the issue, and the strengths and weaknesses of each approach. As we will see, the process-tracing approach used by policy transfer scholars is very useful when trying to identify whether a transfer has taken place. In relation to measuring success, both the policy transfer and diffusion literature appear to neglect the legal dimension of success. In relation to formulating an explanation of the mechanisms driving the transfer process, legal and policy transfer scholarship has much to learn from the diffusion literatures’ focus on the interdependence of policy decisions.

### 2.2 A New Framework for Identifying Transfers of Law and Policy

The recent changes in the focus of the legal transfer literature examined in Part 2.1.1 have made it better equipped to capture the complexity and richness of the transfer phenomenon than the earlier scholarship. However, the acknowledgement of this complexity has given rise to a new challenge that the legal scholarship is yet to grapple with. Transfers that fit the old paradigm ‘naïve’ model of legal transfer, described by Twining above, are easy to identify. However, as the scholarship has moved away from the assumptions which underpinned that model, identifying legal transfers has become more difficult. A framework for identifying legal transfers was not necessary in the context of verbatim transfers of entire legal systems (or large parts thereof). The existence of the transfer in such a context was self-evident. As Holger Spamann has observed ‘[one] cannot but see diffusion in identical statutes.’ However, the identification of more subtle forms of transfers gives rise to evidentiary issues that cannot be overcome by a simple comparison of formal legal instruments and institutions.

Each of the seven other areas, in which the understanding of legal transfers has expanded, contribute to making the identification task more difficult:

- Transfers that occur at the level of policy, programs, or administrative or executive rules can be harder to evidence than those that involve formal legal rules.
- Change and adaptation both during and after the transfer process make transfers harder to identify.
- Multi-event and multi-directional transfers are harder to identify and track than single-event and mono-directional transfers.

---

62 See above n 15 and accompanying text.
63 Spamann, above n 17, 1823.
64 See above nn 17-34 and accompanying text.
Multi-source transfers are harder to identify than single-source transfers.

The reversal of traditional conceptions about the direction of transplants has made them harder to identify.

Cross-level transfers are harder to identify than horizontal transfers.

The involvement of non-state actors in the transfer process adds a new layer of complexity when trying to identify transplants.

The problem of determining whether a transfer has taken place has been identified in contemporary legal transfer literature. For example, Holger Spamann highlights the difficulties in identifying what he refers to as ‘substantive diffusion’.65

Substantive diffusion is invisible: a country can slavishly follow a foreign model without copying a foreign statute or ever explicitly acknowledging, or even being conscious of, a foreign influence. Inversely, a country can develop a policy, totally autonomously, and yet utilise foreign statutory language for technical simplicity or as a decoy.66

Jörg Fedtke observes that:

[Legal transplants are more often than not difficult to identify. There is, of course, no obligation for legislators or judges who use foreign law to disclose intellectual ownership of a legal idea, and the origin of a rule (indeed the fact that it was borrowed at all) will usually remain more or less obscure. In many cases, borrowing will not result in the copying of a specific text but rather in the transplantation of an idea; in others the translation of a foreign provision or subsequent modifications to the text will make it difficult to identify the original. More importantly, ‘undercover’ transplants avoid criticism in the borrowing system based on prejudice against what is often perceived as an imposition of foreign views.67

Similarly, Michele Graziadei states that ‘[q]uite often… it is not easy to determine who produced the initial innovation that becomes the model.’68 Identifying transfers will become more difficult over time, as the policy, law or institution adapts to its new context. In this regard, Patrick Glenn observed that ‘[l]aw drawn from another tradition will originally be identifiable as to its source but the layering of domestic sources over foreign ones will eventually camouflage many distant origins.’69

While the problem of determining whether a transfer has taken place has been identified, to date, no framework has been proposed to tackle the issue. In this section, I draw on the policy transfer literature to propose a framework for measuring the occurrence (or non-occurrence) of contemporary transfers. The identification of specific instances of transfers is not seen as an end in and of itself. Rather such identification is an essential prerequisite for making observations about the processes and pathways of exchange, thereby gaining a deeper understanding of why transfers are occurring and identifying the factors that lead to their success or failure.

---

65 Ibid 1852.
66 Ibid.
67 Fedtke, above n 22, 436.
68 Graziadei, above n 7, 454
From the outset, the policy transfer and legal transfer literature covered many of the same themes. The recent broadening of the contemporary legal transfer approach has brought the subject matter of both disciplines even closer together. In particular, the acknowledgement in legal scholarship that the subject matter of transfers are not limited to formal law, but a variety of ideas, policies, programs or approaches, means that both disciplines are substantially examining the same phenomena. The policy transfer literature has dealt with this broader spectrum of transfers for longer than legal transfer literature. The difficulty in establishing whether or not a transfer has taken place was identified in the early literature, and frameworks have been developed to address the issue.

Dolowitz and Marsh identify five sources through which the existence of policy transfer may be detected: the media, reports, conferences, visits and governmental statements. However, these are presented more as sources of learning, rather than a framework for demonstrating that policy transfer has occurred. Evans and Davies propose a sequence of five steps to guide attempts at identifying the existence, nature and scope of a given instance of transfer:

1. Identify the subject of analysis (eg a claim that policy transfer is occurring or has occurred in the past);
2. Identify the agent(s) of the transfer—who wants it, what do they want from it, how are they going about effecting it, to whose benefit, and why?
3. Is there evidence of non-transfer?
4. What is the evidence offered to support the claim? How good is it?
5. What conclusion can be drawn from the above about the nature and extent of the transfer which has taken place?

While this proposal is a useful guide for structuring inquiries into whether a transfer has occurred, Evans and Davies provide little in the way of specific guidance on how to carry out each step and leave certain questions unanswered. For example, where should we look for evidence of transfer/non-transfer? How do we assess how good the evidence supporting the claim that a transfer has occurred is?

Colin Bennett proposes what is perhaps the most robust framework for determining whether a policy transfer has occurred. Drawing on both policy transfer and diffusion literature, he argues that policy transfer can be substantiated if:

1. It can be demonstrated that idiosyncratic domestic factors are not independently responsible for policy adoption;
2. It can be demonstrated that the adoption is not the result of the effects of similar modernising forces having the same, but separate effects in different states;
3. It can be demonstrated that policy makers are aware of the policy adoptions elsewhere;

4. It can be demonstrated that this overseas evidence was utilised within domestic policy debates.\(^\text{72}\)

The first two steps are important as they involve ruling out the possibility that the similar policies in two jurisdictions are the result of independent forces operating within those jurisdictions. However, in my view, Bennett places the bar far too high. In any instance of transfer, it will be practically impossible to conclusively rule out the influence of independent domestic forces. In fact, in most instances, transfers result from the fact that states are facing similar domestic policy problems.

In Figure 1, I set out a framework for identifying legal transfers which draws on elements of the policy transfer frameworks discussed above, as well as comparative law methods. My framework combines the process-oriented analysis undertaken by policy transfer scholars with detailed comparative analysis of legal materials. The aim of the framework is to identify the existence of a given transfer and hence facilitate an understanding of how and why the transfer occurred. This will then allow an assessment of whether the transfer has had its intended effect.

**Figure 1: A Framework for Studying Contemporary Legal Transfers**

1. Identify a common policy problem (or motive);
2. Undertake a detailed comparative analysis of the suspected transferred law or policy in both the sending and receiving country;
3. Search for physical evidence that a transfer has occurred (evidence of opportunity, and the direct transfer of information);
4. If necessary, identify and carry out interviews with key agents involved in the transfer process.

1 **Identifying a Common Policy Problem**

The first step involves identifying the motive for law makers in the receiving country to engage in legal transfer. The key factor to look for here is the existence of a similar policy problem in the suspected source and importing country. The political climate in which the suspected imported law was introduced in the receiving country may also be a relevant factor. The temptation to engage in legal borrowing may be more prevalent at times of crisis when a policy solution needs to be developed quickly.\(^\text{73}\) The default reaction is usually to look for domestic solutions proposed in law reform commission reports or similar inquiries. Where no such domestic guidance exists, policy makers will often turn to foreign models.


\(^{73}\) See Rose, above n 54, 12 (stating ‘[a]doption is often contingent upon an exogenous crisis generating sufficient dissatisfaction to create a demand for doing something new’).
This step involves a detailed comparative analysis of the suspected source and imported laws or policies. Key documents examined at this stage include legislation, regulations, policy documents and governmental statements. This requires two distinct levels of analysis. The first is a doctrinal comparison of the sources outlined above to ascertain the degree of similarity in drafting and design. The existence of laws that are drafted in similar terms and language raise a presumption that a transfer has taken place. The more alike the laws and policies are in the suspected source and receiving country, the more likely that a transfer has taken place. The second is a functional analysis, where the focus is on examining whether, in practice, the suspected source and imported laws serve the same function in both legal systems. The existence of functionally equivalent laws also raises a presumption that a transfer has taken place. However, the existence of doctrinal or functional similarities are not conclusive evidence of transfer. As recognised in the frameworks for identifying the existence of policy transfer put forward by Bennett, as well as Evans and Davies, two jurisdictions may come up with similar innovations independently as a response to similar domestic pressures. Just as individuals collectively open their umbrellas simultaneously during a rainstorm, governments may decide to adopt the same policy in response to similar policy problems. At the same time, changes to the transferred law or policy, both during and after the transfer process, may make transfers difficult to recognise by means of doctrinal or functional analysis.

3 Analysis of Physical Evidence

The third stage involves examining sources in the receiving state for evidence that a transfer has taken place. The focus here is to find evidence that rebuts the alternate explanation that the doctrinally or functionally similar laws were the result of independent development. Two types of evidence are relevant in this context. The first relates to whether law makers from the suspected source and importing country had an opportunity to transfer information relating to the suspected imported law. Relevant evidence includes the existence of forums, meetings or avenues of communication which could be used to share information relating to the suspected imported rule. The second is direct evidence demonstrating that the source law was consulted, or formed the basis of the suspected imported law. Examples include government statements acknowledging the role the source law played in the development of the imported rule; government press releases or reports acknowledging discussions between the source and receiving country relating the policy area to which the suspected transfer relates; or references to the source law in the parliamentary debates, parliamentary hearings, explanatory memorandum, or policy material relating to the suspected imported law. Key sources to search in relation to the opportunity and direct evidence of transfers

---

74 Bennett, ‘Understanding Ripple Effects’, above n 72.
75 Evans and Davies, above n 71.
76 This analogy is adapted from Holzinger and Knill, above n 44, 786.
include government press releases, media reports, conference proceedings, parliamentary speeches, explanatory memorandum and other parliamentary and departmental reports.  

4 Identifying and Interviewing Key Agents Involved in the Transfer Process

The absence of physical evidence does not always mean that a transfer has not taken place. Interactions between policy makers often occur behind closed doors and are not always publicly acknowledged. Further, in this digital age, law makers can instantly access a wealth of material about the detail and operation of foreign law and practice. Lessons drawn from such materials may not be documented. This stage of analysis goes beyond publicly available sources and involves identifying and interviewing key agents involved in the transfer process. This step takes the policy transfer focus on agents and processes of transfer to its logical conclusion. Transfers cannot occur without agents. Identifying and interviewing these agents provides the richest source of evidence about the existence and degree of the transfer which has occurred. Of course much will depend on the nature of the study being undertaken. Identifying and interviewing the agents of transfer may not be practical where studies involve a transfer across many different jurisdictions. However, for a detailed case study of specific transfers across a limited number of jurisdictions, identifying and carrying out such interviews is more feasible. The rich data collected in the process can make it a worthwhile endeavour.

2.3 Measuring Success

A substantial body of literature exists on the factors that contribute to either the success or failure of transfers. The trouble is that no consensus has emerged on the indicators of success and failure, either within or across legal and policy transfer literature. David Nelken writes that '[s]tudents of legal transfers do often talk confidently about what makes for success or failure. The trouble is that what they are looking for can be quite different.' Indeed, the concepts of success and failure are incontrovertibly subjective. Writing from a public policy perspective, Ingram and Mann note, ‘success and failure are slippery concepts, often highly subjective and reflective of an individual’s perception of need, and perhaps even psychological disposition toward life.’ Before engaging in any assessment of the success or failure of a policy, it is clearly imperative to articulate what type of success we are talking about.

Roger Cotterrell distinguishes three competing dimensions of success in the legal transfer literature. Each reflects a different approach to the way law is conceptualised. For those who view law as ‘culture’, a transfer will be successful when it proves consistent with the legal culture of the receiving

---

77 See Dolowitz and Marsh, 'Learning from Abroad', above n 70, 9.
78 For the consideration of the methodological issues relating to identifying appropriate interview subjects and verifying data collected in the interview process, see Appendix A.
79 David Nelken, ‘Towards a Sociology of Legal Adaptation’ in David Nelken and Johannes Feest (eds), Adapting Legal Cultures (Hart, 2001) 7, 35. See also Nelken, ‘Comparatists and Transferability’, above n 2, 453 (stating that ‘[t]here is no consensus about how to define success, nor about the way it should be measured).
80 Helen Ingram and Dean Mann (eds), Why Policies Succeed or Fail (Sage, 1980) 12.
country. For scholars who view law as positive rules, the simple promulgation of a borrowed law can be viewed as a success, regardless of how it operates in practice. Those who view law as an instrument will only regard a transfer as successful when the law has its intended effect.82

The legal transfer literature on success has been dominated disproportionately by a long-standing debate between proponents of ‘law as culture’ versus advocates of ‘law as positive rules’. At issue is the viability (and even possibility) of legal transfers. At one extreme, Pierre Legrand argues that law is a culturally determined construct that can never be transplanted fully into another culture.83 For Legrand, successful legal transfers are impossible as rules are too laden with historical, epistemological and cultural baggage to be transferred between jurisdictions.84 In essence, the argument here is that law is much more than its enacted rules. Legrand distinguishes between a propositional statement and its invested meaning. While the words that make up the propositional statement can be transported from one culture to another, the invested meaning cannot, as it is culturally specific. The imported form of the words is ascribed a different, local meaning when transported, transforming it to a different rule. In a similar vein, Siedman and Siedman85 take the view that law is a culturally determined artefact that cannot be transferred, and have gone as far as formulating the ‘law of the non-transferability of law’.86

At the other extreme, scholars like Alan Watson advocate the ease and feasibility of legal transfers from one jurisdiction to another.87 Watson argues that legal transfers are socially easy and common in practice, being the most important source of change in the Western legal tradition. Watson’s assertion that laws move easily, and are accepted in other legal systems without great difficulty, rests on a view of law as a set of positive rules that operate quite separate from other social systems. As such, he argues that ‘successful borrowing could be achieved even when nothing [is] known of the political, social or economic context of the foreign law’.88

Occupying the middle ground, Otto Kahn-Freund argues that degrees of transferability are possible, but success depends on a range of variables such as geographical, economic, social and above all,
political factors.\(^89\) John Gillespie summarises Kahn-Freund’s theory on legal transfers into three main hypotheses:

One, all laws have to some extent de-coupled from their socio-political moorings, making legal transplants across socio-political boundaries a theoretical possibility. Two, since laws de-couple to varying degrees, some are more likely to survive the journey than others. Three, socio-political institutional factors determine the degree of coupling between law and society, they are: the ideological role of law, the distribution of state power, and pressure from non-state interest groups.\(^90\)

Kahn-Freund’s general point is that legal phenomena are varied and exist along a continuum of transferability.\(^91\) Technical areas of law, such as contract and commercial law, can be viewed as a neutral set of positive rules that easily lend themselves to transfers. Other areas of law, such as rules designed to allocate power, rule-making and decision making, remain deeply embedded in social institutions and are unlikely to easily transfer.

Building on the work of Kahn-Freund, Gunther Teubner supposes that the ease or difficulty of legal transfer depends on the degree of connection between law and various social contexts.\(^92\) Naming his theory the ‘Legal Irritants’ thesis, Teubner argues that transfers are relatively easy in areas of law that have only loose contact with social processes, but there is greater resistance to change where laws are tightly coupled with other social discourses. However, even where there is loose coupling and transfers are apparently easier, the process is not mechanical: ‘legal transfer is not smooth and simple, but has to be assimilated to the deep structure of the new law, to the social world constructions that are unique to the different legal culture.’\(^93\) Where there is tight coupling, Teubner supposes that not only does the imported rule change, but the foreign rule may cause ‘irritations’ which change the social discourses of the new setting.\(^94\)

The debate between proponents of ‘law as culture’ and ‘law as positive rules’ is centred on the semantics of what we understand as ‘success’, rather than on any profound disagreement about the underlying processes which are occurring. If, like Legrand, we take the strong ‘law as culture’ approach, and limit our view of success to situations where the imported laws reproduce identical meanings and effects to what they produced in the source jurisdiction, then the prospects of success do indeed look grim. If we take the weak ‘law as culture’ approach, and define transfers as a success where the imported laws reproduce similar meanings and effects to what they produced in their source jurisdictions, then the predictions of Kahn-Freund and Teubner—that transfers of certain types of law are more probable to succeed than others—likely ring true. If we take the ‘law as positive

---

\(^92\) Teubner, above n 32.
\(^93\) Ibid 19.
\(^94\) Ibid 21-4.
rules’ approach, and define success as mere introduction of promulgation of a transferred law, then successful transfers seem easy.

The recent scholarship dealing with success in the context of legal transfers appears to take a more pragmatic approach. Scholars now recognise that legal transfers are occurring in almost every area of law. They acknowledge that the close connection between law and society means transferred laws will never operate in exactly the same way in source and receiving systems.\(^{95}\) The recognition of a broader spectrum of more nuanced transfers has made the old ‘law as positive rules’ versus ‘law as culture’ debate less relevant. Contemporary scholars recognise that law makers generally do not want imported law to operate in exactly the same way as it did in the source country. Rather they are interested in more nuanced transfers, where foreign rules are adapted to meet local needs and conditions. This reflects the instrumental view of law, where transfers are judged by whether or not they had their intended effects;\(^{96}\) or as Michal Gal describes it, ‘the ability of the transplanted law to achieve its goals in the transplanting country’.\(^{97}\)

Public policy scholars have developed a robust approach to examining instrumental success of policies from which legal transfer scholarship may glean some lessons. Bovens, ‘t Hart and Peters propose a framework which distinguishes between two primary types of instrumental success: programmatic and political. The programmatic mode of assessment focuses ‘on the effectiveness, efficiency and resilience of the specific policies being evaluated’.\(^{98}\) The political dimension of assessment ‘refers to the way policies and policy-makers become evaluated in the political arena’.\(^{99}\) They go on to explain that:

> Indicators of political failure or success are political upheaval (press coverage, parliamentary investigations, political fatalities, litigation) or lack of it, and changes in generic patterns of political legitimacy (public satisfaction with policy or confidence in authorities and public institutions).\(^{100}\)

Marsh and McConnell propose a third dimension to policy success: process.\(^ {101}\) They define process as the ‘stages of policy making in which issues emerge and are framed, options are explored, interests are consulted and decisions made’.\(^ {102}\) Relevant factors for determining process success include: whether policy was produced through constitutional and quasi-constitutional procedures; whether a strong alliance supportive of the policy was achieved; and most importantly, where a core

---

95 See, for example, Siems, above n 21, 195-200.
96 See above nn 81-2 and accompanying text.
99 Ibid.
100 Ibid 21.
101 Ibid 20.
proposal is successfully implemented as law.\textsuperscript{103} In the context of the legal transfer scholarship, David Nelken also suggests that when dealing with success, different stages of the transfer process warrant separate examination.

The question of success can arise in more than one stage of the transfer of legal rules and institutions. We may be concerned with how a legal adaptation emerges—the choice of law—or with the way it exerts its influence—the results of a given transfer.\textsuperscript{104}

Beyond identifying which dimension of success we wish to measure, there are a number of further impediments to measuring success identified in both the legal transfer and public policy literature that warrant further exploration. One of the primary hurdles to developing criteria for measuring success is that success inevitably lies in the eye of the beholder. In other words, when we talk about success, it is important to define \textit{success for whom}. As Marsh and McConnell observe, ‘[t]he nature of politics, especially in liberal democracies, means that “success” will always be contested to some degree.’\textsuperscript{105} As a result, we should expect a divergence of views between various stakeholders as to whether or not any aspect of a particular policy is successful. Bovens et al note that even in relatively uncontroversial instances, policy evaluations are entwined with processes of accountability and lesson drawing that may have winners and losers. However, technocratic and seemingly innocuous, every policy programme has multiple stakeholders who have an interest in the outcome of an evaluation: decision makers, executive agencies, clients, pressure groups.\textsuperscript{106}

David Nelken makes a similar point in the context of legal transfers:

In all but the most technical of legal transfers there are likely to be conflicting interests at stake, involving different governments or different economic interests, or amongst members of governmental and non-governmental organisations, parliamentarians, judges, lawyers, other professionals—as well as the various parties likely to be most affected by the law.\textsuperscript{107}

Such considerations are very important in the context of transfers of restrictive immigration measures. For example, harsh measures that result in the reduction of irregular boat arrivals could be viewed as a success by governments, while at the same time widely condemned by human rights groups, academics and other observers. As such, it is essential to be clear about which perspective is being assessed.

There are also difficulties around measuring whether a law or policy has succeeded in fulfilling its objectives. The first challenge is to establish the objective of the law or policy. This can be a difficult task given that laws and policies often have multiple objectives. Some can be unstated: for example,

\textsuperscript{103} Marsh and McConnell, above n 102, 572.
\textsuperscript{104} Nelken, ‘Towards a Sociology of Legal Adaptation’, above n 79, 39.
\textsuperscript{105} Marsh and McConnell, above n 102, 575.
securing votes, boosting leadership or appeasing stakeholders. Even where a law's objectives are clear, there is the problem of attempting to identify the causal effect, compared to other independent variables. In order to say that successful outcomes are the product of a particular policy initiative or law, it must be possible to ascertain that the law or policy actually produced the outcomes in question. Marsh and McConnell frame this challenge as the need to isolate and ascertain the effect of the policy on the outcome, controlling for other potential causal factors such as media coverage, the broader economic climate, external shocks, interest group activity, the role of private sector pressure (particularly if public/private partnerships are involved), the actions of other jurisdictions, whether national or international, and even other linked policy sectors.\textsuperscript{108}

The situation is made more difficult by the fact that often the relevant outcome data may not be available. This may be the result of the fact that the data does not exist or is difficult to quantify, or due to the refusal of official sources to release relevant data.

One final issue to note is that there can be varying degrees of success. While it is attractive to conceptualise outcomes in binary terms as either a success or failure, in reality such black and white outcomes are extremely rare. Where a policy has multiple objectives, it may be successful in meeting one objective, but fail to meet others. Even in more straightforward scenarios, where a policy has a single objective with clearly measureable outcomes, problems may still persist. Take the example of a policy which has the goal of reducing infant mortality rates from 15 per cent to five per cent but only manages to reduce mortality to 10 per cent. While not successful in meeting its target, it cannot be said that the policy was a complete failure. Problems also arise when outcomes are compared across the various dimensions of policy success.\textsuperscript{109} Process, programmatic and political success do not always go hand-in-hand. It is possible for a policy to be successful on one of these levels, but to fail on another.\textsuperscript{110}

In this study, I propose an additional dimension to measuring the success of transfers, which has been largely absent from both the legal and policy transfer literature. The primary focus is on what I label as legal success. I define legal success as occurring when an imported law or policy survives judicial challenges in domestic courts. Legal failure occurs when there is a judicial finding that an imported law or policy is unlawful; or where the judiciary adopts an interpretation of the imported provisions which frustrates the original intention of the drafters of the law or policy.

This measure of success captures elements of both the 'law as an instrument' and 'law as culture' approaches identified by Roger Cotterrell.\textsuperscript{111} From a 'law as an instrument' perspective, laws will only be a success if they achieve the purpose for which they were introduced. A finding by a court that a law or policy is unlawful will preclude the law or policy from having such an effect. From a 'law as

\textsuperscript{108} Marsh and McConnell, above n 102, 580-1.
\textsuperscript{109} Bovens, 't Hart and Peters, and Marsh and McConnell acknowledge that their respective frameworks may produce contradicting results: Bovens, 't Hart and Peters, above n 98, 20; Marsh and McConnell, above n 102, 578.
\textsuperscript{110} Marsh and McConnell, above n 102, 569.
\textsuperscript{111} See above nn 81-2 and accompanying text.
culture’ perspective, the judiciary’s response to an imported law sheds light on the degree to which
the imported law is successfully integrated into the legal culture of the receiving country. A finding by
a court that an imported law or policy is unlawful represents perhaps the most clear and explicit
indication of cultural incompatibility.

This approach to measuring success is attractive as it avoids some of the methodological problems
identified in the previous section. In relation to the success for whom question, the focus is clearly on
the perspective of the government officials who introduced the law or policy under challenge. This
measure also has the advantage of being comparatively easy to quantify. Rather than the complex,
and often unavailable, quantitative data required to measure programmatic and political success,
legal success can generally be easily gleaned from publicly available judicial decisions.

The legal dimension has hitherto been neglected in the public policy literature on success. As noted,
evaluation of success in public policy scholarship has focused on three main dimensions of success:
programmatic, political and process. None of these dimensions pay sufficient regard to whether a law
or policy is fully integrated into the legal system of the receiving state. While Bovens et al do include
‘litigation’ as one of the indicators to consider when assessing political success,112 I argue that the
ability of an imported law or policy to withstand judicial scrutiny in domestic courts warrants its own
level of analysis. This is because, as discussed, the evidence used to assess legal success is very
different to evidence examined in the context of assessing programmatic, political and process
success. Rather than quantitative data on policy outcomes or political polling, or qualitative data
relating to process, assessing legal success requires detailed examination of case law.

This is not to deny that legal success has bearing on the three dimensions of success identified in the
public policy literature. Legal failure in the form of a law or policy being struck down by the courts will
obviously impact on whether a policy can meet its programmatic goals. Legal failure may also stir
public sentiment towards a government that influences the political success of the policy. The quality
of the process adopted in developing and implementing the law or policy will have a bearing on the
likelihood on legal success or failure.

This measure of legal success will not be relevant to all instances of legal and policy transfer. Most
transfers are relatively uncontroversial and do not result in legal challenges in the receiving state’s
courts. However, where such challenges occur, the judiciary’s response provides a rich source for
measuring success or failure. This legal dimension of success is particularly relevant to the transfer of
restrictive immigration measures. These laws push the boundaries of domestic and international legal
protections, and as such, have been challenged in the highest courts of both the United States and
Australia.

2.4 Conclusion

In this chapter, I compared three approaches to studying the inter-jurisdictional transfer of law and policy: legal scholarship on ‘legal transfers’; international relations writing on ‘diffusion’ and ‘convergence’; and public policy work on ‘lesson-drawing’ and ‘policy transfer’. The primary purpose was to identify ways in which the legal transfer literature can learn from the approaches taken in other disciplines. In particular, I focused on the methodological questions of how to establish whether a transfer has taken place; and how to define and measure success in the context of legal and policy transfer. In Chapter Three, I build on my interdisciplinary comparison to compile a typology of the various mechanisms driving the transfer of immigration policies across jurisdictions; and explore the key forums facilitating the transfer process. The framework for identifying legal transfers and measuring success developed in this chapter will be utilised in Chapter Four and Five to study the transfer between the United States and Australia of the case study policies of mandatory detention, interdiction and extraterritorial processing. In later chapters, the concept of legal success elucidated here will guide my analysis of the case law on these policies in each jurisdiction.
CHAPTER THREE:
MECHANISMS DRIVING THE TRANSFER PROCESS
AND THE FORUMS FACILITATING THE PRACTICE

In this chapter, I address two questions about how legal and policy transfers are being used by migration policy makers as a tool for developing immigration control measures. These relate to the forces or motivations underlying the transfers, and the forums in which ideas are exchanged. In Part 3.1, I look at what might be motivating the actors involved in the transfer process. Drawing on the policy transfer, diffusion and legal transfer scholarship, I develop a typology of the mechanisms driving the transfer of immigration law and policy across jurisdictions. I identify five overlapping mechanisms: efficiency, prestige, coercion, cooperation and competition. This is done with a view of contextualising the case study transfers examined in the subsequent chapters into the broader context of transfer of immigration law and policy generally. In Part 3.2, I identify the forums that could be facilitating the transfer of immigration control measures.

3.1 What Drives Transfers of Immigration Law and Policy?

In this section, I identify the varying (and sometimes conflicting) motivations of the actors involved in the transfer of immigration law and policy across jurisdictions. I do this with reference to the legal transfer, policy transfer and diffusion literature, as well as a number of brief case studies. The aim is to contextualise the transfer of mandatory detention, interdiction and extraterritorial processing policies between Australia and the United States within the broader spectrum of transfers occurring in the immigration policy area. The analysis begins with a survey of the mechanisms identified in the legal transfer, policy transfer and diffusion literature as driving the transfer of law and policy generally. There is substantial overlap in the motivations identified in each body of literature. I aggregate these into three broad categories: efficiency, prestige and coercion. I then explore additional forces that can drive transfers in contexts where there is interdependence between the policy decisions of governments.

Immigration policy is an area in which governments are particularly concerned about what other jurisdictions are doing. This is because changes in the immigration policy of one country have implications for the immigration policy of other nations. Drawing on the diffusion literature and related scholarship on regulatory theory, I argue that transfers of immigration policy can be driven by cooperative and competitive interdependence. Cooperative interdependence arises where governments benefit from having compatible policies. Governments recognise that effective control of immigration flows requires cooperation with other states. To this end, transfers are occurring as states harmonise their laws as a means of cooperatively dealing with common problems. Competitive interdependence occurs where governments are competing to achieve common outcomes and where
changes in the law and policy of one jurisdiction create flow-on effects for other jurisdictions. States are engaging in transfers of immigration law and policy as they compete with each other to obtain what may loosely be called beneficial immigration outcomes. States are engaging in transfers as they compete to attract the best and brightest migrants, as a means of boosting economic efficiency and growth. In this regard, I briefly examine the transfer of points systems as a mechanism for selecting economic migrants. At the same time, states are engaging in transfers as they compete to deter ‘undesirable’ irregular migration. I argue that the case study transfers between the United States and Australia of laws relating to mandatory detention, interdiction and extraterritorial processing examined in the forthcoming chapters can be viewed as being driven by such consideration. Throughout the analysis, I take note of the different sources of legal transfers in the immigration policy field. Transfers can be sourced in the domestic law of another state, international law or regional instruments. I also explore the interplay between the forces driving a transfer and the source of transfer. In this regard, I argue that cooperative transfers generally involve vertical movement of laws from international or regional sources into domestic legislation. In contrast, competitive transfers are generally horizontal, being both sourced from and imported into domestic legislation.

3.1.1 General Forces Driving Transfers: Efficiency, Prestige and Coercion

A student of the transfer phenomenon has numerous typologies to draw on in regard to the forces and mechanisms driving the transfer of law and policy across jurisdictions. Legal transfer,¹ policy transfer² and diffusion³ scholars have all dealt with this question. Here, I aggregate the mechanisms discussed in the various sub-disciplines into three broad categories: efficiency, prestige and coercion.


(a) Efficiency

The transfer of law and policy across jurisdictions can be driven by a quest for efficiency. Transfers can operate as a means of speeding up the policy development process by acting as a shortcut to problem solving. Transfers can provide a way to deal with problems more quickly and at a lower cost than those associated with devising innovative indigenous responses. Jonathan Miller cites the example of ‘a drafter who when confronted with a new problem pulls a solution from elsewhere off the shelf of the library to save having to think up an original solution’. The temptation to engage in such transfer may be higher at times of crisis, where policy makers are required to respond to a policy problem quickly. Just as importantly, transfers can be a tool for achieving efficient policy outcomes. Lawmakers may look abroad and rationally compare the laws of other countries to choose ‘the best one’. Transfers can be a tool for developing better policies than would be possible if relying solely on domestic innovation. They can be a tool for achieving ‘optimum policy solutions’ or efficient legal institutions.

It is important to note however, that transfers motivated by efficiency will not always have their desired outcomes. Both the quality of information relied on in the transfer process, and differences in institutional and legal structures can result in the ‘failure’ of imported law or policy. At one extreme there can be a complete rejection of the imported rule, institution or program by the receiving legal system—for example through legal challenge in the courts (legal failure). Or, there may be a simple failure to achieve the desired outcomes for which the law or policy was introduced (programmatic failure). In relation to the quality of the information relied upon, diffusion and policy transfer scholars distinguish between learning that is fully rational and learning that is bounded. Fully rational learning occurs where actors ‘choose policies after updating their beliefs about the policy effect by looking at the experience of others, which is then used to update prior beliefs and eventually orientate action’. Bounded learning occurs where actors try to gather relevant information from observation of the behaviour of others, but due to a lack of information or the use of ‘cognitive shortcuts’ they do not reach a strictly rational outcome. Dolowitz and Marsh argue that perfect rationality is very rare and that most learning occurs in the confines of ‘bounded rationality’:

---

4 Miller, above n 1, 845.
6 Mathias Siems, Comparative Law (Cambridge, 2014) 192.
9 See Chapter Two, n 110-12 and accompanying text.
10 See Chapter Two, n 98 and accompanying text.
11 Dolowitz and Marsh, ‘Learning from Abroad’, above n 2, 14; Braun and Gilardi, above n 3, 306.
12 Braun and Gilardi, above n 3, 306.
13 Ibid.
As such transfer may be based upon inaccurate assessment of the ‘real’ situation; in particular, it may be based upon incomplete or mistaken information about the nature of the policy and how it operates in the transferring political system or about the difference between the relevant economic, social and political consequences in the transferring and the borrowing systems.\(^{14}\)

The impact of differences in culture on the efficiency or success of transfers has been the subject of much debate in the legal transplant literature. These arguments were examined in \textit{Chapter Two}, Part 2.3.

\textbf{(b) Prestige}

Transfers are not always based on rational (or even semi-rational) calculations as to which foreign model may best address a domestic policy problem. In many cases, ‘adoption of the proposal merely depends on the prestige of the proposed model or of its proponents.’\(^{15}\) Jonathan Miller refers to such transfers as ‘Legitimacy-Generating Transplants’.\(^{16}\) Alan Watson argues that legal transplants can provide much-needed ‘authority’ for new legal rules.\(^{17}\) In this regard, Watson argues that it may often be difficult for legislators to get new ideas accepted by others, and the prestige of the foreign model can assist in garnering such acceptance. Rodolfo Sacco argues that prestige may be attached to a single institution or an entire legal system.\(^{18}\) Like those driven by efficiency, transfers driven by prestige considerations are largely voluntary. However, rather than being driven by rational considerations, prestige is used as a cognitive shortcut in selecting desirable foreign models. Instead of a rational assessment of the impact of the foreign model, the esteem in which the model, its proponents, or the source jurisdiction is held, is used as the basis for selecting the model as the subject of transfer. In the diffusion literature this form of transfer is described as ‘emulation’, which is defined ‘as the process whereby policies diffuse because of their normative and socially constructed properties instead of their objective characteristics.’\(^{19}\)

\textbf{(c) Coercion or Imposition}

Transfers can involve varying degrees of coercion. In the legal literature, such transfers have been described as ‘externally-dictated transplants’\(^{20}\) or ‘legal imperialism’.\(^{21}\) In their most extreme form, transfers can be forced upon a society as the result of military conquest or expansion. In this regard, Michele Graziadei gives the examples of imposition of western models through the growth of colonial empires in Africa, the Americas, Asia and Oceania; the extension of German law to Austria in 1938;...

\(^{14}\) Dolowitz and Marsh, ‘Learning from Abroad’, above n 2, 14.


\(^{16}\) Miller, above n 1, 854-67. For a further discussion of prestige as a motivation for legal transplants see ibid 110-12.

\(^{17}\) Watson, above n 1, 346.

\(^{18}\) Sacco, above n 1, 399


\(^{20}\) Miller, above n 1, 847.

\(^{21}\) James Gardener, \textit{Legal Imperialism: American Lawyers and Foreign Aid in Latin America} (University of Wisconsin Press, 1980).
the Sovietisation of the law in Central and Eastern Europe after World War II; and the spread of Islamic law through the conquests of Islamic rulers in the Middle Ages.\textsuperscript{22} Coercion can also occur through economic pressures, with a ‘foreign individual, entity or government [indicating] the adoption of a foreign legal model as a condition for doing business or for allowing the dominated country a measure of political autonomy.’\textsuperscript{23} In this broader sense, coercion is at play whenever the acceptance of a transfer is ‘motivated by a desire to please foreign states, individuals or entities—whether in acquiescence of their demands, or to take advantage of opportunities and enticements that they offer.’\textsuperscript{24} Both policy transfer and legal transplant scholars have observed that the distinction between imposed and voluntary transfers is not binary, but that transfers can be viewed as being spread across a spectrum, with completely voluntary transfers at one end, and completely coercive transfers at the other.\textsuperscript{25}

\textbf{3.1.2 Forces Distinct to Interdependent Policy Fields: Cooperation and Competition}

The global nature of migration flows means that immigration policies are inherently interconnected. Changes in the domestic immigration policy of one country can have direct flow on effects for migratory flows in other countries. Rogers Brubaker observes that ‘a person cannot be expelled from one territory without being expelled into another, cannot be denied entry into one territory without having to remain in another’.\textsuperscript{26} In a similar vein, Lavenex and Uçarer argue that a more permissive policy in one state may lead to a reduction of immigration flows in neighbouring states, while a more restrictive policy may increase the number of migrants seeking entry in other states.\textsuperscript{27} This interconnected nature of immigration policy has fuelled somewhat contradictory forces motivating transfers in the immigration policy sphere. On the one hand, states are engaging in cooperative transfers pursuant to which immigration policies are coordinated or harmonised across countries in a bid to secure common goals. At the same time, however, the interconnected nature of migration flows also means that states are increasingly competing with each other in a bid to obtain desired outcomes in their immigration programs. States are competing to attract a particular international cohort of highly skilled workers and wealthy investors. Conversely, they are competing to deter ‘undesirable’ irregular migration. In both contexts, states keep a close eye on policies introduced in competitor jurisdictions, adapting and importing policies viewed as effective.

This interdependence and the resulting transfers resemble the competitive and cooperative interdependence observed by diffusion scholars in economic regulation. Cooperative regulatory interdependence arises where governments benefit from having compatible policies.\textsuperscript{28} In economic
regulation, cooperation delivers increased market access and economies of scale in relation to production costs. Analogous benefits arise in the context of controlling asylum flows and irregular migration generally. Possible gains from harmonisation or cooperation include ‘reducing costs and uncertainty, minimising the deflection of asylum applicants from one destination to another, preserving international security, and the honouring of international obligations such as the 1951 Refugee Convention.’

Competitive interdependence occurs as governments implement measures to attract economic activity to their jurisdiction. In this context, ‘policy choices create externalities for those in the same competition space’. In the same way that the decision of one government to reduce corporate taxes to attract investment may place pressure on other governments to do the same, the introduction of certain immigration policies by one government can create externalities for other governments. For example, the introduction of concessions for highly skilled migrants will place pressure on competitor jurisdictions to follow suit, or experience a reduction in the size and quality of their skilled migration program. At the same time, the adoption of harsh deterrent measures targeting asylum seeker flows will create pressure on comparator jurisdictions to follow suit, or face a possible increase in the number of asylum seekers attempting to enter their territory. In the context of economic regulation policy, Simmons and Elkins argue that competitive interdependence means that ‘[g]overnments’ liberalisation policies will be influenced by the policies of their most important foreign economic competitors.’ I argue that similar interdependence of migration flows leads to a prediction that governments’ immigration policies will be influenced by the policies of their most important competitors for migration flows.

(a) Cooperation: International Refugee Law as a Case Study

One consequence of the interconnectedness of immigration policy is that governments are increasingly aware of the fact that effective management of migration flows often requires the coordination of policy responses across two or more states. Attempts to coordinate or harmonise inherently involve legal transfers. Immigration policies sourced in international law, regional instruments, informal bilateral or regional discussions, or the domestic law of one state, are imported into the domestic legal system of other states.

---

29 Ibid.
32 Braun and Gilardi, above n 3, 308.
33 Simmons and Elkins, above n 31, 173.
34 Note that this is the same assumption that is driving the proliferation of RCPs discussed below at Part 3.2.4.
The 1951 *Refugee Convention* and 1967 *Protocol* are the main instruments underpinning the international refugee protection regime. Their development and subsequent implementation into the domestic law of state parties is one of the largest scale examples of a cooperative transfer of immigration law and policy. The *Refugee Convention* was drafted to deal with problems caused by the mass displacement of persons in Europe at the end of World War II. European nations faced the problem of how best to deal with large numbers of persons who were outside their countries of origin and for whom repatriation was not a reasonable solution. The *Refugee Convention* represented a global coordinated response to this problem. The Eurocentric goal of the *Refugee Convention* is evidenced by the fact that mandatory international protection afforded by the Convention only extended to refugees whose flight was prompted by a pre-1951 event within Europe. These temporal and geographical limitations were removed by the 1967 *Protocol*.

The preamble of the *Refugee Convention* acknowledges that cooperation is essential to dealing with refugee flows:

> the grant of asylum may place an unduly heavy burden on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot therefore be achieved without international cooperation.

The need for a coordinated response to refugee crises is underscored by the recommendation of a background study undertaken by the UN Department of Social Affairs in 1949 on the desirability of a new convention on refugees and stateless persons. The report notes that ‘[n]o Government will be willing to take the first step in this direction for fear of being the only one to improve the status of stateless persons, thus causing an influx of them into its territory.’

Two levels of legal transfer can be identified in relation to the *Refugee Convention*. First, the Convention itself drew heavily on previous treaties on refugees and statelessness as well as on definitions adopted by UN bodies. This represented a horizontal transfer, with international law being both the ‘source’ and ‘destination’ of the legal transfer. The subsequent incorporation of the Convention into the domestic law of state parties represented a ‘vertical’ legal transfer, with the legal rules developed in international law imported into domestic legal systems.

---


37 Article 1(B)(I) of the *Refugee Convention* states that ‘For the purpose of his Convention, the words “events occurring before 1 January 1951” in Article 1, Section A, shall be understood to mean either: (a) “events occurring in Europe before 1 January 1951” or (b) “events occurring in Europe or elsewhere before 1 January 1951” and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention’.

38 United Nations Ad Hoc Committee on Refugees and Stateless Persons, *A Study of Statelessness*, UN Doc E/1112; E/1112/Add.1 (August 1949). Note that in discussion leading up to the 1951 *Refugee Convention*, the term ‘stateless’ was used interchangeable with refugee.
The drafters’ reliance on previous conventions and UN practice is apparent in the definition of ‘refugee’. Article 1A(1) directly incorporates the refugee definitions used in earlier international instruments by stating that anyone considered a refugee under these earlier instruments is to be considered a refugee for the purposes of the Refugee Convention. Article 1A(2) then created a new general category of refugees, defined as any person who

as a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality or membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such a fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such a fear, is unwilling to return to it.

In fact this (ostensibly new) definition drew heavily on the refugee definitions of earlier instruments. The use of the term ‘persecution’, as well as the requirement that the refugee be outside his or her country of nationality or former habitual residence, and be unable or unwilling to avail himself of the protection of the government of his country of nationality or former nationality are all directly sourced from the definition of a refugee contained in the 1946 Constitution of the International Refugee Organization ('IRO'). That is not to say the convention contained nothing new. Previous definitions

---

39 Article 1A(1) of the 1951 Refugee Convention directly incorporates the definitions from the following instruments: Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees, signed 12 May 1926, 89 LTNS 47 (entered into force 5 February 1929); Arrangement relating to the Legal Status of Russian and Armenian Refugees, signed 30 June 1928, 89 LNTS 53 (entered into force 2 May 1929); Convention relating to the International Status of Refugees, signed 28 October 1933, 159 LNTS 199 (entered into force 13 June 1935) and Additional Protocol to the Provisional Arrangement and to the Convention signed at Geneva on July 4th, and February 10th, 1938, respectively, concerning the Status of Refugees coming from Germany, 198 UNTS 141 (signed and entered into force 14 September 1939); United Nations, Constitution of the International Refugee Organization, 15 December 1946, 18 UNTS 3.

40 Refugee Convention, Article 1(A)(2)

had generally only applied to limited categories of persons of particular ethnicity or national origin. The adoption of a general definition of refugee (albeit with a temporal and geographical limitation) represented an important innovation and an important step towards a non-discriminatory definition that came into effect with the 1967 Protocol.

The concept of non-refoulement, considered the cornerstone of the Convention, was also sourced from earlier international instruments. Article 33 of the Refugee Convention stipulates:

1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

These provisions appear to be based on Article 3 of the League of Nations’ 1933 Convention relating to the International Status of Refugees, which states:

Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order.

The incorporation of the Refugee Convention into the domestic law of state parties represents perhaps the most large scale example of the transfer of immigration law or policy. 148 states have ratified the Refugee Convention and/or the Protocol. Like with any other international treaty, the means of implementing these obligations into domestic law depends on the structure of each national legal system. Traditionally, scholars have identified two broad approaches to the reception of international law into domestic national legal systems, characterising countries as either monist or dualist. In monist jurisdictions, international and national law are viewed as being part of a single legal order. As such, international law is directly applicable in the domestic legal sphere. Treaties are immediately effective in domestic law without the need for any domestic implementing legislation. States such as France, the Netherlands, Switzerland, many Latin American countries and Francophone African countries adopt a monist approach. In dualist jurisdictions, international and national law are viewed as distinct legal orders. Accordingly, treaties do not have force in domestic law unless executed or implemented by the legislature. This is the approach followed in most Commonwealth and Scandinavian jurisdictions. For example, in Australia the Refugee Convention subsequently returned to, one of those countries as a result of enemy action, or of war circumstances, and have not yet been firmly resettled therein.’

__Convention relating to the International Status of Refugees__, signed 28 October 1933, 159 LNTS 199 (entered into force 13 June 1935).

As of 7 October 2015, 145 countries have ratified the 1951 Refugee Convention, while 146 have ratified the 1967 Protocol. Madagascar, Saint Kitts and Nevis have only ratified the 1951 Refugee Convention, while Cape Verde, United States, and Venezuelan have only ratified the 1967 Protocol.
and Protocol are implemented in domestic law through the Migration Act 1958 (Cth). As discussed in Chapter One, the United States adopts a mixed monist/dualist approach where some ratified treaties automatically have force domestically, while others do not.44

Differences in the way the Refugee Convention and Protocol have been implemented and interpreted in domestic law provide an instructive example of the inevitability of change and adaptation in the transfer process. Partial implementation, restrictive interpretations and the adoption of different procedures have resulted in great variation in the way the protection afforded in the Refugee Convention and Protocol have been enforced in different jurisdictions. These differences, both between and within national legal systems, have been the subject of much academic criticism.45

(b) Competitive Transfers: The Race for Talent

The transfer of immigration law and policy is also being driven by competition as nations compete for beneficial migration outcomes. In the context of the global race for talent, nations are emulating each other's policies as they compete to attract the best and brightest migrants. In recent decades, governments around the world have come to realise the benefits of attracting highly skilled migrants. There is an increasing recognition that such migrants contribute to economic growth, prevent labour-market shortages and counteract aging demographics.46 There is also a realisation on the part of policy makers that they are competing with other nations to attract migrants from a finite international pool of highly skilled workers. Ayelet Shacher has noted that in this competitive environment, policy emulation is to be expected.47 This is because of an assumption on the part of immigration policy makers that unless they match the conditions of admission and settlement offered by other comparable nations, they will lose out in the global race for talent. Governments engage in transfers as they attempt to copy the success of other nations. In contrast to the cooperative transfers

44 Chapter One, n 60 and accompanying text; See also, Chapter Seven, n 109 and accompanying text.
46 On the benefits of highly skilled migration, see George Borjas, Heaven’s Door: Immigration Policy and the American Economy (Princeton University Press, 1999) 190-1.
discussed earlier, transfer occurs in this context as the result of ‘non-cooperative action taken by fiercely competitive jurisdictions.’

The spread in the use of points systems in selecting economic migrants exemplifies this type of competitive transfer. Points systems are tools used by governments to identify the most desirable migrants from the broader pool of applicants. Under the system, governments articulate individual characteristics that they value most, giving each a weighted numerical value. The more important a factor, the higher the score assigned to that attribute. Applicants must accumulate a minimum number of points to be considered for entry. Early points systems focused on the human capital attributes of applicants that were believed to contribute to economic success and social integration. More recent incarnations of the points system have also incorporated demand-based factors, awarding bonus points for job-offers and for occupations subject to labour shortages.

In the context of the global race for talent, points-based selection criteria are advantageous on a number of fronts. The system’s transparency is attractive for prospective migrants as it allows them to accurately assess their own chances of being accepted. There are obvious benefits for applicants in any system in which outcomes can be predicted. The system also allows for greater mobility for the migrant than market-based selection systems that rely solely on employer nomination. Some points systems provide a direct path to permanent residence. This provides greater certainty for applicants as compared to demand-driven systems, under which the path to permanent residence is linked to maintaining employment with the nominating employer. From the perspective of governments, points systems are attractive as they provide objective criteria against which governments can identify the best and the brightest.

These benefits have driven the transfer of points-based tests across numerous jurisdictions. The original idea is said to have been devised by a Canadian overseas immigration official in the mid-1960s. Canada introduced its first points system in 1967. Australia followed suit in 1979 with the introduction of the Numerical Multifactor Assessment System. New Zealand introduced its own version of the points system in 1992. More recently, the use of the system has spread to traditionally non-settler countries, with the governments of the United Kingdom, Czech Republic, the Netherlands, Denmark, Austria, Singapore and Hong Kong all operating various incarnations of the points system to select highly skilled migrants. The United States and Germany have considered legislative proposals to introduce points systems, but to date none have been implemented into law.

Ibid 156.
50 Ibid.
53 See, for example, Comprehensive Immigration Reform Act of 2007, S 1348, 110th Congress (2007-2008); Border Security, Economic Opportunity, and Immigration Modernization Act, S 744, 113th Congress (2013-2014), subtitle C; Act to Control and Restrict Immigration and to Regulate the
The transfer of points systems across these jurisdictions did not involve a simple mono-directional transfer, with each country adopting the Canadian model. The flexibility of the points system allowed each country to fine tune the system, developing their own criteria and application procedures. Innovations perceived as being successful were then borrowed by other countries. The resulting pattern of transfers is multi-event and multi-directional, with governments switching between the roles of borrowers and innovators. This pattern of transfer is demonstrated by the recent spread of the expression of interest (‘EOI’) model for selecting applicants. New Zealand, which had modelled its original points system on those used in Canada and Australia, pioneered the new system in 2003. The innovation was then adapted by Australia, which introduced a modified EOI system in July 2012. Canada, the original source of the points system, implemented the EOI system in 2015. The Canadian EOI system is based on the New Zealand model, but also incorporates some of the innovations developed by Australian policy makers.

Under the EOI system, prospective immigrants can no longer apply directly for points-tested visa categories. Instead, they fill out an online form indicating their ‘interest’ in going to a host country as a permanent resident. The EOI’s are then assigned scores according to a points system, ranked and entered into a pool. Only candidates that best match a country’s national and regional skills needs are then invited to submit an immigration application. In effect, the EOI form submitted by a prospective immigrant is not an application itself but only a first stage in the assessment of a potential candidate. Not all candidates who file an expression of interest are invited to apply for a permanent resident visa.

The EOI system is designed to address perceived design flaws in points systems. Major backlogs in the processing of applications have been a problem in many countries. Points systems have become victims of their own success, attracting more applications than government officials can process (or accommodate) in a timely manner. By significantly reducing the number of applications that need to be processed, the applications of those invited to apply can be processed much faster. It has also been alleged that points systems are unresponsive to labour market demands. The lack of a direct role for employers, combined with the long delays in processing, have been viewed as leading to a mismatch between the skills of entrants and labour market needs. The EOI system remedies this by creating a greater role for employers (and as already discussed, by reducing processing times). In its original incarnation in New Zealand, this was achieved by giving preference to applicants with job offers in the country when deciding who to invite to make a formal application. Australia adopted a different approach, creating an online database of all EOI applications. The Australian government invites those with the highest scores to apply independently. Then, employers and State and Territory governments are given access to the remaining EOI applicants who did not receive an invitation from the federal government. They can choose to sponsor applicants who best meet their needs, using the

---

54 Residence and Integration of EU Citizens and Foreigners (Immigration Act) (Germany) 20 June 2002, Chapter 4, Part 1.

52
employer or regional sponsorship visa streams. The new Canadian model adopts a very similar mechanism, with the creation of a ‘Job Bank’ which connects candidates with employers in Canada.  

(c) Competitive Transfer: The Race to Deter

At the same time as countries are competing to attract the best and brightest, they also appear to be competing to deter unwanted irregular migrants. Irregular migration flows are becoming increasingly globalised, with migrants more willing to travel beyond their region in search of a better life. The success of carrier sanctions has limited the access of irregular migrants to air travel. The globalisation of flows is instead being driven by increasingly sophisticated and expansive people smuggling networks, as well as an increasing willingness on the part of irregular migrants to undertake longer and more perilous journeys. A Tamil asylum seeker wishing to flee Sri Lanka can choose between a boat journey to Australia or to Canada. A Hazara asylum seeker fleeing Afghanistan can opt between smuggling routes to the United States, Australia or Europe. With globalised irregular migrant flows, it is assumed that irregular migrants consider immigration and settlement outcomes when choosing destination countries. This has fostered a view in certain nations that unless they match or outdo deterrence measures in other comparable jurisdictions, they will be viewed as a ‘soft touch’ and experience an increase in irregular arrivals.

To illustrate this point it may be useful to refer again to an example relating to the interdependence of economic regulatory policies:

The key assumption in the competitive mode of regulatory interdependence is that states care about the competitiveness of their industry and their ability to attract investment on the one hand, and on the other, value reducing the ‘bad’ at which potential regulations are aimed. It is often asserted that this competitive dynamic will result in a ‘race to the bottom’ where states set suboptimal levels of social regulation to attract capital.

In the case of deterrent measures, we have the inverse scenario. Here, states weigh their competitiveness in deterring unwanted immigration against the value of abiding by their obligations under the Refugee Convention. The result is a ‘race to the bottom’ where states introduce increasingly punitive deterrent measures at the cost of protection outcomes for asylum seekers.

This competition to appear tough on irregular arrivals is pitched as much to a domestic audience as it is to potential irregular migrants. The arrival (or threat of arrival) of irregular migrants—and in particular unauthorised maritime arrivals in the Australian case—can be damaging to the re-election prospects of governments. As such, the introduction of many so-called ‘deterrent’ measures have as much to do with reassuring the public that the government is doing something, than actually reducing the number of arrivals. When one introduces a new deterrent measure, pressure mounts for other governments to do the same or risk being viewed as soft by their constituents.

---

57 Ibid.
58 Lazer, above n 28, 475.
59 See Chapter Ten, Part 10.2.5.
The case study transfers of law and policy between the United States and Australia relating to mandatory detention, interdiction and extraterritorial processing exemplify this type of competitive transfer of deterrent measures. The motivations driving these transfers and the dynamics of the transfer process are examined in Chapter Four and Five. These transfers, as opposed to the other examples discussed in this chapter, are chosen for special study because of the rich body of case law in both Australia and the United States challenging these policies. This case law allows for an assessment of the impact of differing legal structures on the successful reception of imported law and policy. Such an assessment would be more difficult with the examples of transfers examined in this chapter, which are not as legally controversial.

3.1.3 Conclusions on the Forces Driving the Transfer of Immigration Law and Policy

I identify five mechanisms driving the transfer of immigration law and policy across jurisdictions: efficiency, prestige, coercion, cooperation and competition. It is important to note that these forces are not mutually exclusive and often operate simultaneously in driving transfers. Efficiency often operates in parallel with both competition and cooperation, with the goal of these types of transfers being the obtainment of optimum policy outcomes. Competition and coercion also overlap, with the policy decisions of one government acting as external constraints on the policy decisions of other governments. As explored in the following chapters, the case study transfers between the United States and Australia in relation to policies of mandatory detention, interdiction and extraterritorial processing appear motivated primarily by efficiency considerations and competitive pressure to implement harsh border control measures.

3.2 Channels of Communication

The transfer of immigration law and policy is facilitated by an ever increasing number of organisations and forums, both formal and informal, in which state representatives meet to discuss, share and coordinate immigration policy and law. These forums create policy networks that facilitate and accelerate the transfer process. These networks can be divided into five main categories: 1) networks operating within international organisations; 2) stand-alone international networks; 3) regional networks operating within non-migration-specific organisations; 4) regional consultative processes; and 5) ad hoc bilateral and multilateral networks.

3.2.1 Networks Operating within International Organisations

Given the inherently global nature of migration, it is surprising that no single multilateral structure has been established to regulate this area of law and policy within the United Nations. A number of UN bodies do deal with specific aspects of migration and facilitate regular intergovernmental meetings on...

---


migration issues. Annual meetings are conducted by the Executive Committee ('ExComm') of the UN agency responsible for refugees and displaced persons—the Office of the UN High Commissioner for Refugees ('UNHCR'). These provide an opportunity for state parties to discuss recent developments and issues relating to the interpretation and implementation of the Refugee Convention. The ExComm develops policies of sorts, in the form of 'Conclusions'. In addition, UNHCR convenes ad hoc forums such as the Global Consultations on International Protection held in 2001 and 2002. The International Labour Organization also convenes regular meetings of state parties to discuss issues relating to labour migration. The drawn-out attempts to develop a binding UN treaty protecting migrant workers, however, illustrate the reluctance of states to cede any sovereignty in their migration control. The 1990 Convention on the Protection of Rights of All Migrant Workers and Members of their Families took ten years for states to negotiate. Another 13 years were needed to secure the necessary ratifications for the Convention to enter into force. By early 2015 no major destination country for migrants was yet a party. Other UN bodies such as the UN Office of Human Rights, UN Population Fund; UN Educational, Scientific and Cultural Organization; UN Development Programme; and the World Health Organization engage increasingly with policy issues related to migration, but have yet to host regular forums on the topic.

Although the UN does not have a general institution devoted to migration, it has held a number of ad hoc forums which facilitate interstate dialogue on migration governance. The first UN High-Level Dialogue ('HLD') on International Migration and Development held in 2006 represented an opportunity for inter-state dialogue on migration at a ministerial level. Delegates from over 130 countries attended to deliver statements in plenary sessions and participate in roundtable discussions. This process produced a consensus that such high-level dialogue should continue both inside and outside the UN system. Follow-up events include the Informal Thematic Debate on International Migration and Development convened by the General Assembly in 2011 and a second HLD held in October 2013. The theme of the 2013 HLD was to identify 'concrete measures to strengthen coherence and cooperation at all levels, with a view to enhancing the benefits of international migration for migrants and countries alike and its important links to development, while reducing its negative impacts.'

The International Organization of Migration ('IOM') is the closest example of a multilateral governance body for migration. Operating outside the UN system, it has no clear mandate provided by the international community, in the way most UN agencies operate under statutes that provide agencies

62 UNHCR was established by the UN General Assembly as a subsidiary organ under Article 22 of the United Nations Charter. See Guy Goodwin-Gill and Jane McAdam, The Refugee in International Law (Oxford University Press, 3rd ed, 2008) 428.
63 See Goodwin-Gill and McAdam, above n 62, 215-17, 429-30 ff.
65 Convention on the Protection of Rights of All Migrant Workers and Members of their Families, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003)
with normative authority. The IOM focuses primarily on the management of irregular migration, but operates first and foremost as a service provider to individual states that pay for its services. Since 2001, the IOM has facilitated informal and non-binding consultative processes through its International Dialogue on Migration. The annual sessions bring together migration policy makers from states around the world and are generally structured around a specific theme. For example, the 2014 Council session was devoted to the theme ‘Human Mobility and Development: Emerging Trends and New Opportunities for Partnerships’. In addition, IOM holds two intersessional workshops a year, which ‘present an opportunity for governmental migration policy makers and practitioners from around the world to have focused technical and policy exchanges on migration issues in a non-binding context.’

Other notable forums on migration related issues hosted by international organisations include the Organisation for Economic Co-operation and Development’s High Level Policy Forum on Migration, and the World Trade Organization (‘WTO’) meetings on the operation of Mode 4 of the General Agreement in Trade in Services (which deals with the entry and stay of natural persons of a WTO member in the territory of another for the purpose of providing service).

### 3.2.2 Stand-Alone International Networks

A number of regular and semi-regular international forums have been convened on migration outside the framework of existing international organisations. With the primary goal of facilitating cooperation on migration management at a global level, these forums also facilitate transfer of policy ideas across jurisdictions. The Berne Initiative developed outside traditional institutional structures as ‘a states-owned consultative process with the goal of obtaining better management of migration at the regional and global level through cooperation between states’. Through a series of regional and international consultations which took place between 2001 and 2004, the Berne Initiative developed an International Agenda for Migration Management (‘IAMM’), a non-binding policy framework aimed at facilitating cooperation and building capacity. The IAMM consists of two main components. First is the set of Common Understandings outlining fundamental shared assumptions and principles underlying migration management. Second, and more importantly in terms of their role in facilitating legal and policy transfer, are the ‘Effective Practices for a Planned, Balanced and Comprehensive Approach to Management of Migration’. These establish a non-binding best practice policy framework that countries can use to develop domestic migration policies and to foster greater international and regional cooperation.

---


71 Ibid.
Developing out of the UN’s HLD discussed above, the Global Forum on Migration and Development (‘GFMD’) operates as the most visible and high profile international forum for inter-state dialogue on migration. An informal, non-binding, voluntary, government-led process, the forum was first convened in 2007 and thereafter has occurred annually. With more than 160 states now participating, the forum focuses on the link between migration and development. It aims to ‘make new policy ideas more widely known, add value to existing regional consultations, and encourage an integrated approach to migration development at both the national and international levels’.\textsuperscript{72} Although operating outside the UN system, the GFMD is linked to the UN through the role of the UN Special Representative of the Secretary General on Migration and Development, who holds responsibility for promoting the forum.\textsuperscript{73}

### 3.2.3 Regional Networks Operating within Non-Migration-Specific Organisations

Migration law and policy has been placed on the agenda of various regional economic, political and security institutions and organisations which address migration issues as one of a broad range of topics. Examples include, but are not limited to, the European Union, the Association of South East Asian Nations, the African Union, the Common Market of the South (MERCOSUR), the South African Development Community, the Organization for Security and Cooperation in Europe, Asia Pacific Economic Cooperation Forum and the G-20 summits.\textsuperscript{74} These many and varied institutions and processes have provided both regular and ad hoc opportunities for states to discuss migration policy— and to exchange ideas.

### 3.2.4 Regional Consultative Processes

Recent years have seen the proliferation of Regional Consultative Processes (‘RCPs’). These are regular, informal, closed-door meetings in which states with similar backgrounds and interests meet to discuss policy for the purpose of exchanging ideas, fostering cooperation, and developing ‘best practice’ models. The term ‘region’ is used loosely here. For example, Australian migration officials meet regularly with their counterparts at the Five Country Conferences. This forum includes the geographically remote, but culturally and experientially close countries of Canada, the United States, the United Kingdom and New Zealand. RCPs vary greatly in composition, history, purpose and organisational frameworks. However, they share the principal goal of facilitating regular meetings for the specific purpose of discussing migration issues and generating informal, non-binding agreements. In this respect they differ from other regional bodies where migration might be but one of many themes for discussion. By design, they are processes that foster the transfer of migration policy and practice. Their role as facilitators of policy learning and transfer is well documented,\textsuperscript{75} and is evident


\textsuperscript{73} Betts, above n 61, 12.

\textsuperscript{74} Randall Hansen, ‘An Assessment of Principal Regional Consultative Processes on Migration’ (Report No 38, IOM Migration Research Series, 2010) 13; Solomon, above n 69, 1.

by one of the often cited goals of these institutions: ‘to build capacity to manage migration.’ Capacity building involves the transfer of knowledge, skills and best practice policies. It occurs at a general level through the sharing, collecting and dissemination of migration information and lessons learned in migration management, and through specific capacity building workshops.

RCPs have now been established in most regions of the world. Examples include: between Europe, North America and Australia through the Intergovernmental Consultations on Asylum; in Northern and Central America through the Puebla Process; in Asia through the Manila Process; within Europe with the Budapest Process and the Mediterranean ‘5 + 5 Dialogue’; and in Africa with the ‘International Dialogue on Migration in West Africa’ and the ‘International Dialogue on Migration in Southern Africa’. Their success at the cost of formal binding international regimes has been explained in terms of the reluctance of states to lose any sovereignty over their migration policies. In this regard, states find the informal, non-binding nature of RCPs preferable as they require no loss of sovereignty or up-front commitments and allow for easy exit.

3.2.5  Ad hoc Bilateral and Multilateral Networks

Government representatives also meet in ad hoc bilateral and multilateral meetings to discuss the relative success and failure of migration policies. Anecdotal evidence suggests that many of the examples of legal and policy transfer in the migration field were preceded by informal bilateral meetings between officials from the source and borrower jurisdiction. The transfer of knowledge is also facilitated through exchange programs and fact-finding visits. Another prominent channel for communication are migration policy attaches (or Immigration Consuls) based in embassies abroad. These officials provide a permanent channel through which policy makers from each country can request information regarding the operation or implementation of migration control policies.

3.3  Conclusion
This chapter set out the broad context in which transfers are occurring in the immigration policy sphere. This background is critical to situating the case study transfers of law and policy between the United States and Australia relating to mandatory detention, interdiction and extraterritorial processing, examined in the chapters that follow. In terms of the mechanisms driving the transfer of immigration law and policy, I identify five overlapping mechanisms: efficiency, prestige, coercion, cooperation and competition. Of these forces, efficiency and competition are the most relevant to the case study transfers between the United States and Australia relating to mandatory detention, interdiction and extraterritorial processing. In terms of the forums facilitating the transfer of immigration law and policy, I identify five main categories: 1) networks operating within international organisations; 2) stand-alone international networks; 3) regional networks operating within non-migration-specific organisations; 4) regional consultative processes; and 5) ad hoc bilateral and multilateral networks. This categorisation will be used as a reference point in my discussion of the evidence demonstrating the existence of case study transfers examined in Chapter Four and Chapter Five. In those chapters, I identify the specific forums in each identified category that were most influential in facilitating the case study transfers.
CHAPTER FOUR:
THE MANDATORY DETENTION OF ASYLUM SEEKERS AND OTHER UNAUTHORISED ARRIVALS

In this chapter, I set out the evidence that long-term mandatory detention measures targeting unauthorised arrivals in the United States and Australia evolved, at least in part, through a mutual process of legal and policy transfer. This is done in reference to the framework for identifying transfers developed in Chapter Two.1 In Part 4.1, I begin by identifying the common policy problem (or motive) behind the suspected transfers. Part 4.2 then examines the history of the use of long-term mandatory detention in each country to demonstrate parallels in the implementation and development of the policy in each jurisdiction. The existence of similar policy problems and resulting similar laws are not enough to establish that a transfer has taken place. The convergence of policies between countries can arise as the result of similar, but independent responses of political actors to similar policy problems. The third step, set out in Part 4.3, dispels this alternate hypotheses. I examine the forums and avenues of dialogue between the United States and Australia that provided an opportunity for transfers to take place. I also explore the direct evidence that supports the conclusion that lawmakers from the United States and Australia had intimate knowledge of policy developments in each other's respective jurisdictions throughout the periods in which the purported transfers were occurring. The analysis here is informed by interviews conducted with key policy makers involved in the development of the policies in each jurisdiction.

4.1 The Common Policy Problem: A Quest for Control

The implementation of restrictive immigration measures in the United States and Australia are part of a wider effort on the part of the political branches in both countries to maximise control over the flow and processing of asylum seekers and irregular migrants. More specifically, they are tools for overcoming impediments to this control: court rulings generated in the judicial review of government action and international legal obligations towards asylum seekers arising out of the Refugee Convention and Protocol.2

The United States and Australia are both countries that are generally relaxed about large-scale immigration. As settler states, a majority of their populations are migrants or descendants of migrants.3 Australia and the United States are unusual among developed nations in that they continue

---

1 See Chapter Two, Part 2.2.
3 UN data from 2013 indicated that proportion of foreign born persons was 24.7% in Australia and 12.1% in the United States: United Nations Population Division, Trends in International Migrant Stock: The 2013 Revision, UN Doc POP/DB/MIG/Stock/Rev.2013 (September 2013) Table 3. In terms of the
to augment their population bases through the conduct of a selective migration program. In both countries, however, elected officials view the ability of the government to exercise effective control over the admission of aliens as essential to the continued acceptance of migrants. Historically, the right to control territorial borders has been the preserve of sovereign states and indeed has been regarded as the 'last major redoubt of unfettered national sovereignty'. This prerogative power to exclude non-citizens from entry was affirmed by the Privy Council in 1881 in *Musgrove v Chun Teeong Toy*. In the 1889 US Supreme Court case of *Chae Chan Ping*, Field J reasoned that the power to exclude aliens 'is an incident of every independent nation... If it could not exclude aliens it would be to that extent subject to the control of another power'. The principle was reiterated three years later in *Nishimura Ekiu v United States*, where the Court stated:

> It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.

A similar view still permeates the contemporary discourse on immigration control in both the United States and Australia. The commitment to the sovereign right to exclude underpinned Australian Prime Minister John Howard’s statement in 2001 that ‘[w]e will decide who comes to this country and the circumstances in which they come.’

The view of successive governments in both Australia and the United States has been that public acceptance of migrants is contingent on a public perception that the government is exercising its sovereignty effectively by securing the nation’s borders. Former Australian Minister for Immigration, Phillip Ruddock, summed up this view with his argument that ‘to maintain public confidence in immigration programs, you need to be able to demonstrate that the people who get here are those who come essentially through the front door and not through the window.’

**Footnotes**


9. Quoted in George Megalogenis, ‘Trivial Pursuit: Leadership and the End of the Reform Era’ (2010) 40 Quarterly Essay 1, 22; See also, see John Hirst, ‘Girt by Sea: Correspondence’ (2002) 6 Quarterly Essay 89, 91 (stating the view that ‘a tough stand on border control increases support for the official migration program’).
evidenced also in Australian polling data. A 2001 study found a direct correlation between an increase in the number of asylum seeker arrivals and a decrease in public support for immigration.\textsuperscript{11}

A similar assumption is evident in the debate surrounding comprehensive immigration reform in the United States. Many Republicans have conditioned their support for a regularisation program for undocumented migrants living in the United States on securing the US-Mexico border. This appears to reflect US public opinion, with a 2014 poll finding that most Americans would support a path to regularisation for undocumented migrants, but only if the border was strengthened to prevent future ‘illegal’ migration.\textsuperscript{12}

Different explanations have been advanced to explain this fixation on border control. For some, sovereign control of state boundaries is equated with the very idea of nationhood. Such a view is apparent in President Ronald Reagan’s reputed statement that ‘a nation that cannot control its borders is not a nation.’\textsuperscript{13} This quest for control over borders has also been justified in terms of national security. For example, in \textit{Chae Chan Ping}, Grey J argued that without the power to exclude aliens, the United States would be unable to defend itself against ‘vast hordes of [a foreign] people crowding in upon us.’\textsuperscript{14} Aleinikoff et al put it this way:

> Foreign powers could send agents provocateurs or suicide bombers to disrupt American institutions; developing nations could send workers to take advantage of American jobs; other countries could seek to solve their problems of overpopulation by exporting people to the United States. Perhaps to lose control over one’s borders is to ‘defeat the venture at hand’ by losing our ability to achieve the objects for which the Constitution was established: ‘to ensure domestic Tranquillity, provide for the common defense, promote the general Welfare.’\textsuperscript{15}

A related explanation views arguments about sovereignty over borders as stemming from xenophobia or racism.\textsuperscript{16} The majority of irregular arrivals in Australia and the United States come from particular ethnic backgrounds. In the United States, most come from Latin American or Caribbean nations. In Australia, the mix has changed over the years, but the vast majority have come from East Asia, the

\textsuperscript{11} Goot and Watson, above n 9, 29.
\textsuperscript{12} Rasmussen Reports, 7% Say Feds Very Likely to Close Border If Immigration Plan Becomes Law (4 February 2014) <http://www.rasmussenreports.com/public_content/politics/current_events/immigration/january_2014/7_say_feds_very_likely_to_close_border_if_immigration_plan_becomes_law>.
\textsuperscript{13} President Ronald Reagan is often credited for having said words to this effect sometime in the 1980s. See Robert Owens, \textit{The Constitution Failed: Dispatches from the History of the Future} (Xulu Press, 2010) 159; Cf, Patrick J Buchanan, \textit{A Republic, Not an Empire: Reclaiming America’s Destiny} (Regnery Publishing, 1999) 373 (quoting the Reagan as having said ‘a country that cannot control its borders isn’t really a country anymore’).
\textsuperscript{14} \textit{Chae Chan Ping v United States}, 130 US 581, 606 (1889).
\textsuperscript{16} See, for example, Stuart Rintoul, “Emerging from the Shadows to Face New “Crisis of Whiteness”: The Australian”, 6 May 2002, 8 (questioning ‘was it border protection or … a deeper racism that underpinned the [recent] closing of Australia’s doors?’).
Middle East, South Asia and Africa. These arrivals have been viewed by some elements of the public as a threat to the US and Australian white Anglo-Saxon identities. As Myron Weiner notes:

In many countries, citizens have become fearful that they are now being invaded not by armies and tanks but by migrants who speak other languages, worship other gods, belong to other cultures, and who, they fear, will take their jobs, occupy their land, live off the welfare system, and threaten their way of live, their environment and even their polity.

4.1.1 Impediments to Control

Putting aside the factors driving public desire for effective control measures, the policy imperative from the perspective of politicians remains the same—to control the flow of unauthorised arrivals, or risk electoral backlash. In both the United States and Australia, the political branches have come up against two primary constraints. First, are the obligations created by the Refugee Convention and Protocol, and other human rights instruments. Second, is each country's judiciary, which at times has been viewed as overly sympathetic to irregular migrants and asylum seekers.

The non-refoulement obligations in the Refugee Convention and Protocol, and other human rights instruments, operate to qualify the otherwise absolute nature of the sovereign power to control immigration. Article 33 of the Refugee Convention requires that state parties refrain from returning a refugee to a country where she or he may face persecution for a Convention reason. Similar non-refoulement provisions in other human rights instruments act as additional constraints on the ability to exclude and/or return non-citizens. Mary Crock, writing in relation to Australia, frames the policy predicament faced by the government in the following way:

---

17 On the ethnic composition of the most recent wave of maritime asylum seekers in Australia see Sara Davies, 'FactCheck: Are Asylum Seekers Really Economic Migrants? The Conversation (2 July 2013) <http://theconversation.com/factcheck-are-asylum-seekers-really-economic-migrants-15601>. Note that the make-up of persons who arrive legally, then over-stay their visas is very different. The highest number of visa overstayers in 2013 came from China (7690), Malaysia (6420), the US (5220) and the UK (3780): DIBP, Australia’s Migration Trends 2012-13 (2014) 78.


20 The validity of this assumption is explored in Chapter Ten, Part 10.2.4.

21 The Refugee Convention and Protocol combine to define a refugee as any person who ‘owing to a well-founded fear of being persecuted for reasons of race, religion, nationality or membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country’. See the Refugee Convention, art 1A(2); and the Protocol, art 1A(2).

22 See, for example, Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 3 (express prohibition against the expulsion, return or extradition of a person to a place where he or she would be in danger of being subjected to torture); International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 6 and 7 (implied prohibition against the expulsion or return of a person to a territory where they face a
For a Parliament used to controlling every aspect of the migration programme, refugee claimants offer a special challenge. Asylum seekers represent a direct threat to the orderly conduct of a migration programme because they come uninvited and yet mandate consideration because of the obligations created by Australia's ratification of the 1951 Convention.23

While irregular migrants can be expelled or returned upon detection, the obligations contained in the Refugee Convention and Protocol mean that asylum seekers cannot be removed until their refugee claim has been considered. In both Australia and the United States, it is no coincidence that public paranoia about loss of border control has been highest at times when these countries have experienced high flows of asylum seekers. Peter Schuck provides the following account of the political fall out in the United States resulting from the arrival of boats carrying more than 150,000 Cuban and Haitian asylum seekers in 1980-124:

The phenomenon of first-asylum claiming dramatized a new, politically explosive fact: the United States was increasingly vulnerable to uncontrollable external forces. Many Americans feared in this vulnerability a diminution—or at least a redefinition—of the nation's sovereignty. The United States, it seemed no longer controlled its own destiny; its fate was now inexorably linked to the rest of the world.25

Public unease with unauthorised asylum seeker arrivals, in particular those making the journey by sea, has created a pattern of harsh policies. Australia and the United States have both introduced punitive measures in direct response to specific cohorts of asylum seeker boat arrivals.

Increasingly, the political branches in both Australia and the United States have come to view the judiciary as undermining effective migration control. The independence and power of the judiciary in the two countries is cemented in the principles of the rule of law and judicial review. As constitutional democracies, the courts in Australia and the United States can declare statutes passed by federal and state legislatures unconstitutional.26 Further, in both countries, the courts are empowered to review administrative action by the executive branch of government. In carrying out this function, US and Australian courts do not remake decisions on their merits. Rather they check for administrative error, such as whether the administrative decision maker has interpreted the relevant legal provisions in the correct way. If there has been an error, the court can quash the decision and refer the matter to the original decision maker for reconsideration according to the proper principles.

real risk of irreparable harm, such as a threat to the right to life or torture or other cruel, inhuman or degrading treatment or punishment); Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 6 and 37 (implied prohibition against the expulsion or return of a child where there are substantial grounds for believing that there is a real risk of irreparable harm).


See below nn 65-8 and accompanying text for further discussion of this incident.


This principle was first established in the US context in Marbury v Madison, 5 US 137 (1803). The Australian High Court often refers to Marbury when discussing the basis of Australian judicial review. For example, in 1951 Justice Fullager stated that ‘in [Australia’s] system the principle of Marbury v Madison is accepted as axiomatic’: Australian Communist Party v The Commonwealth (1951) 83 CLR 1, 262.
In the United States, somewhat conflicting trends can be identified in the judiciary’s approach to reviewing immigration related matters.\textsuperscript{27} By consistently maintaining that Congress has ‘plenary power’ over immigration,\textsuperscript{28} the courts have generally showed deference to Congress when assessing the constitutional validity of immigration laws. The result is that unauthorised arrivals have generally been excluded from claiming constitutional protections in the immigration context. On the other hand, when reviewing the application of immigration statutes, courts have tended to interpret the laws in a manner that favours aliens.\textsuperscript{29} 

Developed by the Supreme Court in the late nineteenth century, the plenary power doctrine affirms ‘Congress’s absolute substantive power to deny aliens entry to the United States or to expel them from its territories, unconstrained by any judicially enforceable constitutional limits.’\textsuperscript{30} Relying on this doctrine, US courts have declined to review federal immigration law for compliance with substantive constitutional restraints. The result has been a line of cases in which the judiciary has upheld immigration provisions that explicitly discriminate against entrants based on factors which have included race, gender and legitimacy.\textsuperscript{31} While the principle has been qualified in more recent years,\textsuperscript{32} it remains rare for the courts to uphold constitutional challenges to decisions concerning the admission or expulsion of aliens.

The approach of the judiciary is starkly different when interpreting the application of immigration laws (as opposed to their validity). Here, the courts have frequently adopted a more critical approach in the interpretation and application of statutes and often do so for ‘policy reasons’.\textsuperscript{33} This ‘alien friendly’ approach to interpreting immigration law has fostered a view in government that judicial review constrains efficient immigration enforcement. This tension between the judiciary and the political branches can be traced as far back as to the approach of the courts in interpreting the Chinese

\textsuperscript{27} See Brian Slocum, ‘Canons, the Plenary Power Doctrine, and Immigration Law’ (2007) 34 Florida State University Law Review 363, 363 (describing the conflicting trends as a ‘fundamental dichotomy’).

\textsuperscript{28} For further analysis of the plenary power doctrine, see Chapter Six, nn 9-20 and accompanying text.

\textsuperscript{29} Slocum, above n 27, 363.


\textsuperscript{32} See Neuman, above n 30, 619 (citing the cases of Fiallo v Bell, 430 US 787 (1977); Kleindienst v Mandel, 408 US 753 (1972)). See also Hiroshi Motomura, ‘Haitian Asylum Seekers: Interdiction and Immigrants’ Rights’ (1993) 26 Cornell International Law Journal 695, 698 (stating that in recent years, the erosion of the plenary power doctrine has taken place primarily on two dimensions: 1) due process challenges; 2) immigrant’s connection to the US).

Exclusion Acts of the late 19th Century. While the US Supreme Court relied on the plenary power doctrine to uphold the validity of what can only be described as racist laws, in many cases federal courts rejected the executive's interpretations of various provisions of the Exclusion Acts, overruling the admission officers. Each time the litigation strategy of a Chinese applicant succeeded, Congress amended the Exclusion Acts to plug the holes. This pattern of 'tit for tat' law making, has persisted in the United States to this day.

A similar pattern is evident in the judicial review of immigration laws in Australia. Given that the Australian Constitution provides little in the way of individual rights protection, immigration legislation is rarely struck down on constitutional grounds. Yet, attempts by the political branches to curtail judicial review of immigration decisions appear to be based on a view that the judiciary is overly sympathetic to immigration applicants when reviewing immigration decisions. Attempts to limit judicial review and curial responses have seen 'a battle royal' develop over the role the courts should play in the review of migration decisions. Unlike in the United States, this friction is relatively new in Australia. Historically, migrants in Australia fared badly because of limitations of the prerogative writs—and the deference shown by the courts to Ministers of the Crown. The situation changed with the creation of the Federal Court of Australia and the passage of the Administrative Decision (Judicial Review) Act in 1977. The new legislation cut through the technicalities of the writ system.
and provided a neat list of the circumstances in which either decisions or conduct engaged in for the purpose of making a decision could be rendered unlawful. The newly appointed Federal Court judges made rulings that had far reaching effects on administrative decision making, preventing deportations and in one case ordering officials to return an individual who it was claimed had been removed from the country illegally. Parliament reacted by passing a series of bills aimed at limiting or completely ousting judicial review. The High Court has responded by striking out or reading down these provisions.

Crock and Berg argue that successive governments ‘have come to see the courts as political subversives which preference the human rights of individuals over the policy objectives of those elected to govern.’ This has been most apparent in the curial review of asylum determinations, where there has been a perception that some judges are searching for loopholes to deliberately ‘undermine the government’s refugee policies.’ The politicians’ desire to ‘regain’ control over immigration was summed up by then Immigration Minister Phillip Ruddock:

> It is the government, not some sectional interests, or loud intolerant individual voices, or ill-defined international interests, or, might I say, the courts that determines who shall and shall not enter this country, and on what terms... [T]he courts have reinterpreted and rewritten Australian law—ignoring the sovereignty of Parliament and will of the Australian peoples.

### 4.2 The Policy Response: Mandatory Detention

The policies of long-term mandatory detention, interdiction and extraterritorial processing of asylum seekers were introduced in the United States and Australia as a direct response to the policy dilemma outlined above. These policies represent attempts by the political branches to exert maximum control over the movement of asylum seekers and side-step or mitigate the impediments imposed by the *Refugee Convention* and by judicial oversight. Policies of interdiction and extraterritorial processing, examined in Chapter Five, express the most extreme manifestation of this quest for control. These measures physically block irregular migrants (including asylum seekers) from accessing state territory. They also purport to deny access to domestic protections such as judicial review. The practice of mandatory detention seeks to maximise control over irregular migrants who manage to enter the state’s territory. While this policy does not necessarily subvert *non-refoulement* obligations, it does seek to exert maximum control over asylum seekers while their status is being determined.

In both the United States and Australia, detention measures have been accompanied by efforts to create zones of exception. Detained persons have been designated, either by geographic location of detention or by mode of entry, to have fewer substantive and procedural rights than immigrants who

---

46 Ibid s 6.
47 Azemoudeh v MIEA (1985) 8 ALD 281.
49 Crock and Berg, above n 39, 342.
51 Phillip Ruddock, Minister for Immigration, Address to the National Press Club, Canberra, 18 March 1998.
enter the country with authorisation. Making detention *mandatory* for certain classes of asylum seekers has the effect of restricting judicial review of the decision to detain. Under a discretionary system, a decision maker must undertake an assessment as to whether detention is authorised or appropriate in a given circumstance. This decision may be subject to judicial review. In a mandatory system, courts can only examine whether a person falls under a category of persons declared subject to mandatory detention. In addition to exerting *direct* physical control over irregular migrants, detention and other restrictive policies also purport to have a strong *indirect* effect. All are designed to act as deterrents to future irregular arrivals. Equally important is the message that these policies convey to the public. They are all highly visible measures that reassure the public that the government is in control of the state's borders.

In the common law tradition inherited by both the United States and Australia, the deprivation of a person’s liberty for punitive purposes can generally occur only by judicial order. The detention of aliens has developed as an uneasy exception to this rule. Governments frame their actions as part of an inherent sovereign power to exclude persons with no right to enter or remain in a country. It is argued that the incarceration of irregular arrivals is not punishment, but a measure justified to preserve the integrity of the border and identity of the nation state.

The administrative detention of immigrants falls into three main categories. First is the incarceration of persons seeking admission pending a determination of their claim to enter. Such detention can be initiated after a person presents at the border or upon detection after unauthorised entry into the territory. The second group of detainees are persons who have been granted admission, but who face removal because of an event or action occurring after entry. This might be due to the violation of an explicit condition on which they were granted entry (temporal or other). It may be the result of criminal or morally questionable conduct. The third category of detention occurs after a final determination that a person is removable. Detention characterised as falling under the first (determining admissibility) and second (pending determination as to deportability) transitions to this third category once a final negative decision relating to admissibility/deportability is made. The discussion in this chapter is primarily concerned with the first category: detention pending determination of eligibility, although incidental reference will also be made to individuals who have had their claim to enter rejected and who have transitioned into the third category.52

4.2.1 United States

United States law has included provisions for the detention of aliens seeking entry since 1891. The *Immigration Act of 1891* empowered officers to ‘inspect all such aliens’ or ‘to order a temporary removal of such aliens for examination at a designated time and place, and then and there detain them until a thorough inspection is made’.53 These provisions lead to the creation of the ‘entry fiction’,

---

52 US detention provisions relating to the second category are discussed in Chapter Six, Part 6.2.
stating that transfer of an alien from a vessel to shore for examination ‘shall not be considered a landing during the pendency of such examination.’ Daniel Wilsher comments:

This was a critical legal (and constitutional) innovation because it meant that those incarcerated must be treated as if they were not there. This was both an attempt to treat the place of detention as if it were simply an extension of being held onboard ship, but also something more serious. The concept of being physically detained within the territorial land-mass of the United States but not being considered legally present was radical. It suggested a type of limbo—with the detention centre constituting perhaps an extra-legal space—putting immigrants beyond the reach of constitutional norms, pending a final executive decision to land or deport them.

In the face of apparent corruption and a softness on the part of federal immigrant inspectors, which was seen to be resulting in the entry of unlawful persons who should have been excluded, the government introduced a stricter detention regime in the Immigration Act of 1893. These provisions confirmed that ‘it shall be the duty of every inspector of arriving alien immigrants to detain for special inquiry… every person who may not appear to him to be clearly and beyond doubt entitled to admission.’ Wilsher explains the importance of the change:

It represents the first time that any legislature had dictated that detention must be used as a mode of procedure in administering the immigration laws. This purported to remove even the discretion to determine the necessity and suitability of detention.

The 1891 and 1893 Acts made two key innovations that have featured strongly in the immigration detention policy of the United States and Australia right through to the present day. The first is the entry fiction. Through the creation of exceptional zones, or designation based on mode of arrival, certain classes of entrants are denied access to normal domestic legal safeguards. The second are attempts to remove independent assessment as to the suitability of detention in a given case by prescribing ‘mandatory’ or ‘automatic’ detention of certain classes of persons. The latter measure serves the same purpose today as in 1893. It precludes the judicial review of assessments that would occur under an individualised assessment model. The only avenue to challenge such detention is by challenging the substantive decision that a person is not authorised to enter.

Between 1891 and 1954, the United States maintained a policy of detaining would-be immigrants upon arrival. The two largest detention facilities were on Ellis Island in New York Harbor and Angel Island in San Francisco Bay. Most immigrants were detained only briefly for medical checks before being either released into the United States or sent back to their country of origin. Others, suspected of being subversives or criminals, or believed likely to become public charges, were detained for longer periods if deportation was impractical. The United States abandoned presumptive detention

---

54 Ibid.
56 Immigration Act of 1893 § 5, ch 206, 27 Stat 569, 570 (emphasis added).
57 Wilsher, above n 55, 15 (emphasis original).
59 Ibid.
in 1954.60 This move coincided with the introduction of a universal visa system that required all non-citizens to hold a visa in order to be admitted.61 Visas were issued by US consuls stationed abroad who would screen prospective immigrants.62

After 1954 the vast majority of unauthorised arrivals were released on parole. Only those deemed likely to flee or those whose freedom of movement could endanger national security or public safety, were detained beyond the initial inspection phase.63 The liberal release policy was explained by the Supreme Court in *Leng May Ma v Barber*:

> The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted… Physical detention of aliens is now the exception, not the rule, and is generally employed only as to security risks and those likely to abscond… Certainly this policy reflects the humane qualities of an enlightened civilisation.64

The arrival of a large number of Haitian and Cuban unauthorised boat arrivals led to a reconsideration of the detention policy in 1980-81. An announcement by then-Cuban President Fidel Castro that those who wished to leave Cuba were free to do so, led to more than 125,000 Cubans making their way to the United States. Cuban asylum seekers had traditionally been treated more favourably than arrivals from other countries, enjoying a special path to permanent residence through the *Cuban Adjustment Act*.65 Given the unprecedented number of arrivals and reports that some of those making the journey had been deliberately released from Cuban jails and mental institutions, the United States government began screening all arrivals before releasing them into the community. These detentions were carried out under the existing detention framework, with persons held pending a decision as to whether they posed a threat to the community. While the majority were quickly released, a small minority, deemed inadmissible, were held in long-term detention.66

While the Cubans were dealt with using the existing detention provisions, the arrival of a comparatively smaller cohort of Haitian asylum seekers triggered a change in detention policy and reversion to a more restrictive parole policy. Haitian asylum seekers fleeing the repressive regime of Jean-Claude ‘Papa Doc’ Duvalier began arriving in southern Florida in the 1960s and their numbers

60 Ibid 355.
61 See INA § 212(a)(7); see also Bernard Ryan, ‘Extraterritorial Immigration Control: What Role of Legal Guarantees’ in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff, 2010) 3, 6. Note that there was, and continues to be, exceptions to this requirement for journeys from certain adjacent countries.
64 357 US 185, 190 (1958).
65 The *Cuban Adjustment Act of 1966*, Pub L No 89-732, 80 Stat 1161 as amended and codified at 8 USC 1255, recognises Cuban nationals as political refugees and allows them to apply for permanent residence one year after entry.
66 See Roger Daniels, *Guarding the Golden Door: American Immigration Policy since 1882* (Hill and Wang, 2004) 205 (stating that four-fifths of the detainees were quickly released; another 22,000 were held for a longer time and then paroled, leaving 1,800 suspected of crime or mental illness. Most of these were later paroled).
slowly increased throughout the 1970s. The number of arrivals peaked in 1980, with 15,093 Haitians interdicted at sea en route to the United States in that year. In May 1981, the administration of President Reagan implemented an informal rule that provided for the mandatory detention of all Haitians arriving by boat without documentation. The new policy was based on recommendations made by the Select Commission on Immigration and Refugee Policy. The Commission recommended ‘that an interagency body be established to develop procedures, including plans for opening and managing federal processing centres, for handling possible asylum emergencies.’ The need for processing centres was justified on the following grounds:

- Ineligible asylum applicants would not be released into communities where they might later evade US efforts to deport them or create costs for local governments;
- A deterrent would be provided for those who might see an asylum claim as a means of circumventing US immigration law. Applicants would not be able to join their families or obtain work while at the processing centre.

The new detention policy was struck down by the courts on a technical point. The government authorities had not followed the required administrative rule making procedures when introducing the rule. In response, a fresh regulation was introduced (this time following the correct procedures) that expanded mandatory detention to apply to all aliens arriving without proper documentation. Section 235(b)(2)(A) of the Immigration and Nationality Act (‘INA’) (which has been in force since 1952) states that an applicant for admission who ‘is not clearly and beyond a doubt entitled to be admitted shall be detained.’ Section 212(d)(5) granted the Attorney General discretion to parole rather than detain any applicant for admission ‘for emergent reasons or reasons deemed strictly in the public interest.’ The 1982 changes amended the regulations implementing this section to provide that ‘[a]ny alien who appears to the inspecting officer to be inadmissible, and who arrives without documents or who arrives with documentation which appears to be false, altered, or otherwise invalid… shall be detained.’ The regulations made it clear that while parole was still available for ‘emergent reasons’

---

70 Ibid 167.
71 Ibid 168.
72 See Louis v Nelson, 544 F Supp 973, 1003 (SD Fla, 1982) holding that the INS had violated the Administrative Procedure Act, 5 USC § 553 (1982) by instituting a new rule without first publishing notice of the proposed change in the Federal Registrar and giving opportunity for interested parties to comment.
73 47 Fed Reg 30044-46 (9 July 1982) (codified at 8 CFR § 212.5 (1982), additional regulations codified at § 235.3 (1997)).
74 INA § 235(b)(2)(A).
75 This section was amended by the Illegal Immigration Reform and Immigrant Responsibility Act 1996 (IIRIRA), Pub L No 104-208, § 602(a), 110 Stat 3009-689, (substituting ‘only on a case-by-case basis for urgent humanitarian reasons or significant public benefit’ with ‘for emergent reasons or for reasons deemed strictly in the public interest’).
76 8 CFR § 235.3(b) (1982).
or on ‘public interest’ grounds, such conditional release was restricted to limited enumerated
circumstance. ‘Emergent reasons’ were defined to exist when the immigrant had a serious medical
condition and continued detention would not be appropriate. Parole was only considered to be
‘strictly in the public interest’ if a person posed ‘neither a security risk nor a risk of absconding’, and
was pregnant, a juvenile, an infant, a beneficiary of an immigrant visa petition filed by a close relative,
or a witness to a judicial, administrative or legislative proceeding.

The detention provisions were justified with reference to their deterrent effect. Incarceration was no
longer framed only in terms of facilitating exclusion or deportation, but was instead used to send a
signal to other aliens attempting to make the journey to the United States. The reasons explaining the
adoption of the new rule published by the Immigration and Nationality Service (‘INS’) in 1982 stated
that ‘[t]he Administration has determined that a large number of Haitian nationals and others are likely
to attempt to enter the United States illegally unless there is in place a detention and parole
regulation.’ Despite the apparent restrictiveness of the regulations dealing with parole, there were
significant fluctuations in the way release decisions were made. This was in part the result of a
shortage of detention facilities. There was simply not enough space to hold all persons that were
liable to incarceration under the new regulations.

In the early 1990’s, a number of initiatives were introduced to ease pressure on detention space and
to encourage more uniform application of parole regulation. The INS implemented a new priority
system in February 1991. The detention of criminal aliens was assigned the highest priority, followed
by unauthorised arrivals. In April 1992, the Asylum Pre-Screening Officer Program (‘APSO’) was
rolled out to screen credible asylum seekers for parole from detention. Factors considered included
whether the applicant’s asylum claim was credible and her identity established, whether they had
community ties, and whether any statutory bar would preclude ultimate grant of asylum. These
policies failed in their goal of bringing more consistency to parole determinations. A 1996 internal

---

77 8 CFR § 212.5(a)(1) (1982).
78 8 CFR § 212.5(a)(2) (1982).
79 47 Fed Reg 30,044 (1982); see also Jean v Nelson, 711 F2d 1455, 1464-65 (SD Fla, 1983); Asim
Varma and Craig Tateronis, The Detention of Asylum Seekers in the USA: A Cruel and Questionable
80 Michele Pistone, ‘Justice Delayed is Justice Denied: A Proposal for Ending the Unnecessary Detention
districts not to follow policy directives from headquarters); See also, Arthur Helton, ‘A Rational Release
Policy for Refugees: Reinvigorating the APSO Program’, Interpreter Releases, 18 May 1998 (stating
‘INS detention and release practices have been inconsistent to the point of whimsy’).
82 Ibid 2, 14.
83 See Memorandum from INS Commissioner, ‘Parole Project for Asylum Seekers at Ports of Entry and in
INS Detention’ (20 April 1992).
84 Ibid. For more information on the APSO program see Pistone, above n 80, 202-3.
evaluation of the APSO program found that it operated ‘inefficiently, inconsistently from district to district’ and ‘unevenly around the country.’

Mandatory immigration detention laws targeting irregular arrivals were expanded in the second half of the 1990s. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (‘IIRIRA’) broadened the classes of arriving aliens subject to mandatory detention and reduced access to parole. It introduced new expedited removal procedures which remain in force today. These allow aliens who arrive in the United States without valid documentation or with false documentation to be ordered removed without further hearings, reviews or appeals. Judicial review of expedited removal decisions is expressly barred. Aliens who indicate an intention to apply for asylum are referred to an asylum officer for a ‘credible fear’ interview. Only if the asylum officer agrees the claim is credible, can the person pursue their application for asylum through regular removal procedures.

All persons subject to expedited removal procedures are to be mandatorily detained. Those awaiting their ‘credible fear’ determination and those found not to hold such a fear have no access to parole. Asylum seekers who establish a ‘credible fear’ of persecution are no longer subject to expedited removal proceedings, but rather regular removal proceedings. As such, they may be eligible for parole under the normal parole criteria. INS policy issued shortly after the new laws were introduced stated that asylum seekers who established a ‘credible fear’ of persecution should normally be released. However, given the continued wide discretion given to individual INS district directors, this policy was not uniformly enforced across the nation, with many reports of asylum seekers being detained for prolonged periods. Under the original regulations, expedited removal only applied to

---

85 Memorandum from INS Offices of General Counsel, Programs and International Affairs, to Commissioner, ‘Asylum Pre-screening Evaluation’ (13 June 1996) 2.
86 Mandatory detention provisions for immigrants convicted of certain criminal activity are discussed in Chapter Six, Part 6.2.1.
87 Pub L No 104-208, 110 Stat 3009.
89 INA § 235(b)(1)(a)(1).
90 INA § 235(b)(1)(B)(v) defines ‘credible fear of persecution’ as a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum as defined in INA § 208.
91 INA § 235(b)(1)(B)(iii)(IV). 8 CFR § 235.3(b)(2)(iii) clarifies that the Attorney General may exercise discretion to allow parole of an otherwise detainable individual only when required to meet a medical emergency or a necessary law enforcement objective.
92 Ibid.
93 INA § 240.
94 INA § 212(5)(A). This criteria is set out above in nn 75-8 and accompanying text. Note the amendment to the wording of the provisions implemented by IIRIRA discussed at n 75.
95 Memorandum from INS Deputy Commissioner, ‘Implementation of Expedited Removal’ (31 March 1997) (stating that once an alien has established a ‘credible fear’ of persecution, release may be considered under normal parole criteria); Memorandum from INS Executive Associate Commissioner for Field Operations, ‘Expedited Removal: Additional Policy Guidance’ (30 December 1997) (stating that parole is a viable option for aliens who have met the ‘credible fear’ standard); Memorandum from INS Executive Associate Commissioner for Field Operations, ‘Detention Guidelines’ (9 October 1998) (stating that it is INS policy to favour release of aliens who have been found to have a ‘credible fear’ of persecution).
96 See statement of Wendy Young, Director of Government Relations and US Programs, Women’s Commission for Refugee Women and Children, in Subcommittee on Immigration of the Committee on
arriving aliens at ports of entry. In November 2002, it was expanded to aliens arriving by sea who are not admitted or paroled. In August 2004, it was further expanded to apply to certain unadmitted aliens found within 100 air miles of the US southwest land border.

A number of policy initiatives removed access to parole for asylum seekers who had met the ‘credible fear’ threshold. The impact on those asylum seekers targeted by these policies was mandatory detention without parole for the entire duration of the status determination procedures. In 2001, the INS Deputy Commissioner implemented a new parole policy targeting Haitian boat arrivals. The policy stated that no Haitian should be paroled from detention except in the most demanding circumstances, and even then, only with approval from Washington. The Justice Department confirmed that the change of detention was needed to ‘prevent against a potential mass migration to the United States’. This policy of detaining Haitian asylum seekers for the entire duration of their status determinations was reinforced by then-Attorney General Ashcroft in April 2003. In the decision issued in Matter of D-J, the Attorney General determined that release on bond pending the determination of the asylum claim of a Haitian man, or ‘similarly situated undocumented seagoing migrants’ was unwarranted due to ‘adverse consequences for national security and sound immigration policy’ that would result from such a release. The express purpose of such detention was the deterrence of future arrivals:

the release of [the] respondent and hundreds of others from the October 29 migrant group would strongly undercut any resultant deterrent effect arising from the [expedited removal] policy. The persistent history of mass migration from Haiti, in the face of concerted statutory and regulatory measures to curtail it, confirms that even sporadic successful entries fuel further attempts.

A similar policy directive was introduced as part of ‘Operation Liberty Shield’ in March 2003, targeting asylum seekers from 33 Arab Muslim countries. The directive stipulated that asylum seekers from the listed countries were to be mandatorily detained, without parole, for the entire duration of their status determination. It was introduced as part of a series of post-9/11 security measures and

---

100 Subcommittee on Immigration of the Committee on the Judiciary, 'The Detention and Treatment of Haitian Asylum Seekers' (United States Senate, 107th Congress, 2002) 1.
101 Ibid 2, 30.
targeted countries where al Qaeda or related terrorist groups were thought to operate. In the face of widespread public criticism, the policy was abandoned after only one month.\[105\]

Beginning in 2005, there was a significant increase in the number of families subject to detention. A 1996 settlement agreement arising out of a class action challenge to the detention of minors stipulated that children in immigration proceedings be placed in the ‘least restrictive setting’.\[106\] This had resulted in a general policy favouring release for all minors, whether unaccompanied or otherwise. This changed in 2005, with the George W Bush administration claiming that the 1996 settlement only applied to unaccompanied minors. As a result, there was a marked increase in the number of children and their mothers detained for the entire duration of their status determination procedures. Most were held at the new T Don Hutto Family Detention Centre in Texas. It was not long before reports of serious mistreatment emerged in relation to this facility. These included claims that described ‘young children forced to wear prison jumpsuits, to live in dormitory housing, to use toilets exposed to public view and to sleep with the lights on… while being denied access to appropriate schooling.’\[107\]

In response to reports of endemic problems in the detention system, including repeated incidents of human rights violations and denial of basic medical care, the administration of President Obama embarked on a program of detention reform.\[108\] A series of changes were announced in 2009 with the purpose of addressing human rights concerns regarding detainees in the immigration detention system.\[109\] Notable initiatives included the reduction of the use of penal facilities for immigration detention purposes; the creation of the independent office of detention oversight to inspect facilities and review complaints; and the expansion of community-based alternatives to detention. While most reforms focused on the conditions of detention, changes were also made to parole policies. As of January 2010, agents were directed to individually assess the suitability of all detained asylum seekers for release. All those found to hold a credible fear of persecution were to be released, provided they could verify their identity, and did not pose a security or flight risk.\[110\] This led to a

---

significant increase in the number of asylum seekers released on parole. The policy of detaining women and children was also scaled-back and the controversial T Don Hutto Family Detention Centre was closed down.

This liberalisation of the parole policy was short-lived. In 2014, there was a significant increase in the number of asylum seekers travelling irregularly to the United States from Honduras, Guatemala, and El Salvador. This surge included a significant number of mothers and their minor children. A reported 61,000 family units, as well as 51,000 unaccompanied minors crossed into the United States in 2014. In response, starting in June 2014, the Department of Homeland Security (‘DHS’) appears to have abandoned the policy of generally releasing asylum seekers who have established a ‘credible fear’. Instead, it adopted a policy of limiting access to parole, particularly for Central American mothers and children, with the aim of deterring potential future migrants. This has been justified in reference to Attorney General Ashcroft’s determination in Matter of D-J. In February 2015, the US District Court for the District of Columbia ordered a preliminary injunction to halt the continued application of the no parole policy, noting the fact that it raised serious constitutional due process issues. Initial reports indicate that the government has been complying with the order, with a marked increase in the number Central American families being released on bond.

4.2.2 Australia

Australian law has provided for the detention of unauthorised non-citizens since shortly after federation. Originally, this was in the form of a criminal sanction. Section 7 of the Immigration Restriction Act 1901 (Cth) provided for the summary conviction and imprisonment for up to six months of anyone deemed to be a ‘prohibited immigrant’. The first administrative immigration detention provisions were introduced in 1925. A new s 8C was inserted into the Immigration Restriction Act 1901 (Cth) authorising the incarceration of any person ordered by the Minister to be removed, ‘pending deportation and until he is placed on board a vessel for deportation from Australia.’ The Migration Act 1958 (Cth) created a new class of persons who could be subject to administrative detention: those arriving in Australia without authorisation. Section 36 introduced the ‘entry fiction’ similar to that operated in the United States, deeming persons arriving in Australia without

---

112 Hylton, above n 107.
113 Note the restructuring which disbanded the INS and created the DHS: see Chapter One, Part 1.4.
114 A recent district court decision found DHS and ICE have been taking deterrence of mass migration into account in making custody determinations, and that such considerations have played a significant role in the large number of Central American families detained since June 2014: RIL-R v Jeh Charles Johnson (DC, Civ No 15-11-JEB, 20 February 2015).
115 In re D-J., 23 I & L Dec 572 (Att’y Gen 2003); see above n 102 and accompanying text.
118 The term ‘Prohibited Migrant’ was defined at s 3 of the Immigration Restriction Act 1901 (Cth). Similar offence provision remained in force until 1994. See Migration Act 1958 (Cth) s 27 (later renumbered to s 77), repealed by s 17 of the Migration Reform Act 1992 (Cth).
119 Inserted by the Immigration Act 1925 (Cth), s 8.
authorisation as not having ‘entered’ Australia. Such persons could be detained pending their removal on the vessel on which they arrived. While detention provisions existed in the law, they were used sparingly until relatively recently.

The catalyst for change was the arrival of sea-borne asylum seekers. The first asylum seeker vessel to arrive in Australia landed at Darwin Harbour in April 1976, carrying five Vietnamese men. Over the next five years, a little over 2,000 Vietnamese nationals fled the war in their homeland, making the journey to Australia by boat. Although the Migration Act contained provisions that would have authorised detention and refusal of entry, these measures were not invoked at first. As the arrivals continued, however, the initial good will faded and both sides of Australian politics began considering harsher measures. It is at this point that we see the first discussions of establishing ‘processing camps’ in Australia. A proposal for such a camp was raised in 1979 in the Cabinet discussions of the ruling Australian Liberal Party, as a possible solution should the unauthorised arrival of boats continue. The proposal called for the construction of a holding centre for persons arriving unauthorised in Australia. Foreshadowing the future development of remote processing centres, it stipulated that

[a]n essential feature of any such centre would be its capacity for secure containment. This would necessitate the choice of remote location with some form of natural protection eg. a remote island or inland centre.

The Labor Party, adopted a similar proposal as their policy platform at their 1979 national conference, which called for the establishment of camps where ‘uninvited refugees’ would be held until another resettlement country could accept them. However, it would be more than a decade until a policy of systematic mandatory detention of unauthorised asylum seekers was introduced.

---

120 *Migration Act 1958 (Cth) (‘Migration Act’), s 36(1).*
121 Janet Phillips and Harriet Spinks, ‘Boat Arrivals in Australia since 1976’ (Research Paper, Parliamentary Library, 23 July 2013). Note that Australia had received asylum flows prior to this date, the most notable of which was the arrival of a large number of West Papuan asylum seekers in Papua New Guinea (‘PNG’) between 1963 and 1973—a time when PNG was an Australian territory: see David Palmer, ‘Between a Rock and Hard Place: The Case of Papuan Asylum-Seekers’ (2006) 52 *Australian Journal of Politics and History* 576.
123 See former ss 35(1), 36, 37 and 38. Writing in 1977, RP Schaffer warns that these provisions could be used to detain Vietnamese boat people: ‘South-East Asian Refugees – The Australian Experience’ (1977) 7 *Australian Year Book of International Law* 200, 226.
125 Ibid.
126 Ibid.
Starting in 1989, successive waves of boats carrying Cambodian nationals, then Sino-Vietnamese and Chinese nationals began arriving in Australia in search of asylum.\textsuperscript{128} Despite their modest numbers, these arrivals provoked a strong reaction from the government and community. Prime Minister Bob Hawke’s Labor government began detaining all unauthorised boat arrivals. Existing ‘turn-around’ laws were invoked under which persons arriving by boat who were suspected of not holding an entry permit could be detained until returned from whence they came.\textsuperscript{129} The decision not to release the Cambodians enjoyed bipartisan support, but ultimately the policy did not sit easily with the Migration Act as it stood at that time. To begin with, the ‘turn-around’ provisions were supposed to operate within a timeframe of 72 hours. A legal challenge brought on behalf of 15 of the detained Cambodians who had been held for more than two years prompted amendments to the legislation. These were pushed through Parliament by the Keating Labor government in less than 48 hours in 1992. The amendments reinforced and formalised the policy of mandatory detention, albeit with a nominal limit of 273 days on the period for which a person could be incarcerated.\textsuperscript{130}

The Migration Reform Act 1992 (Cth), which came into force on 1 September 1994, replaced these provisions with a scheme that provided simply that all ‘unlawful non-citizens’ must be detained until either granted a visa or removed from Australia.\textsuperscript{131} This change broadened mandatory detention provisions, initially introduced as a temporary and ‘exceptional’ measure to deal with a particular cohort of boat arrivals, to apply to all persons who either arrived without a visa or who were in Australia on expired or cancelled visa. Significantly, the 273 day time limit which had applied under the earlier law was omitted.

Unlike the US system, no provisions were made in the Australian laws for release on parole. Instead, a system of bridging visas was introduced which would allow the release of certain ‘unlawful non-citizens’ pending the determination of their claim for a substantive visa. Reflecting the ‘entry fiction’ in the United States, which distinguishes between admitted and non-admitted aliens, eligibility for a bridging visa was made dependent upon ‘immigration clearance’.\textsuperscript{132} Only persons who had been cleared through immigration control and admitted into Australia were eligible for bridging visas.\textsuperscript{133} Unauthorised arrivals, who by definition were not and could not be immigration cleared, could only be released if they belonged to certain ‘prescribed classes’ defined at the Minister for Immigration’s discretion. Hence asylum seekers who arrived irregularly were routinely detained for the entire duration of their status determination procedures. While there have been a number of minor recent reforms, the overall architecture of mandatory detention remains in force in 2015.

\textsuperscript{128} Between November 1989 and January 1992, nine boats carrying a total of 438 Cambodian, Vietnamese and Chinese nationals arrived in Australia: see Phillips and Spinks, above n 121.

\textsuperscript{129} See Migration Act, s 88, inserted by Migration Legislation Amendment Act 1989 (Cth). Note that these provisions existed as s 36 prior to this amendment: see above n 120 and accompanying text.

\textsuperscript{130} Migration Amendment Act 1992 (Cth), inserting the new pt 2 div 4B into the Migration Act. The time limit appeared in s 54Q.

\textsuperscript{131} Migration Act, ss 54W, 54ZD, inserted by the Migration Reform Act 1992 (Cth).

\textsuperscript{132} Migration Act, s 72(1) (definition of ‘eligible non-citizen’), inserted by the Migration Reform Act 1992 (Cth).

\textsuperscript{133} Migration Act, s 54HS, inserted by the Migration Reform Act 1992 (Cth). Renumbered to s 172 by the Migration Amendment Act 1994 (Cth).
Under pressure of mounting criticism surrounding the wrongful detention of lawful residents and Australian citizens, and concerns about the cost of detention on the mental health of children and detainees, the Liberal/National Coalition government announced a series of immigration detention reforms in June 2005. These included a new community detention program for women and children; the introduction of visas that provided an alternative to indefinite detention for persons who could not be removed from the country; and giving the Commonwealth Ombudsman oversight of persons held in long-term immigration detention. These reforms were extended by the Labor government when it took office in 2007. The new Immigration Minister Chris Evans announced a commitment to using detention as a last resort and for the shortest period of time; and avoiding indefinite detention and the detention of children. In October 2010, the government announced the expansion of the community detention program for women and children. This program was further extended to apply to all vulnerable individuals in November 2011. In the same month, the Labor government announced that eligibility criteria for bridging visas were to be significantly expanded. Asylum seekers entering Australia irregularly became eligible for release, provided they had undergone health, security and identity checks. Reflecting the practice of parole in the United States, reporting conditions could be imposed on those released. It is important to note, however, that a detainee’s access to both bridging visas and community detention are reliant on discretionary powers of the Minister. The Minister does not have a duty to consider exercising these powers, even if requested by a person in immigration detention.

At the time of writing, mandatory detention of asylum seekers and the detention of children remains a reality. A number of recent restrictive policy changes have had ramifications on the country’s immigration detention program. In November 2012, the Labor government introduced a new ‘no advantage’ principle, which stipulated that sea-borne asylum seekers should not receive an ‘advantage’ over refugees from overseas who are waiting to be resettled. The result was the suspension of processing of asylum claims and a resulting major increase in the time spent by persons in immigration detention. With the reintroduction of offshore processing, asylum seekers who arrive by boat are now generally transferred to detention facilities in Nauru and Papua New Guinea.

---


136 See Migration Act, pt 2 div 7 subdiv B – Residence Determinations, inserted by Migration Amendment (Detention Arrangements) Act 2005 (Cth).

137 See Migration Regulations 1994 (Cth) sch 2, subclass 070 - Bridging (Removal Pending).

138 See Migration Act, Part 8C, ss 486L-486Q, inserted by the Migration Amendment (Detention Arrangements) Act 2005 (Cth).

139 See Chris Evans, Minister for Immigration, ‘New Directions in Detention: Restoring Integrity to Australia’s Immigration System’ (Speech delivered at Parliament House, 29 July 2008).


141 For recent data on the number of children in detention, see below n 156 and accompanying text.

The onshore detention program continues to apply to asylum seekers who arrive in Australia by plane, and to sea-borne asylum seekers who arrived in Australia before 19 July 2013.

4.2.3 **US and Australian Practices Compared**

There are clear parallels in the development of policies relating to the detention of unauthorised arrivals (asylum seeker or otherwise) in the United States and Australia. While the use of detention was more prevalent in the United States than in Australia during the late 19th and early 20th century, detention was seldom used in either country from the 1950s to the early 1980s. In both countries, the shift towards a more restrictive detention policy was triggered by the arrival of maritime asylum seekers. In the United States, the arrival of large numbers of Haitian and Cuban asylum seekers in the late 1970s and early 1980s set in motion a series of policy changes. These culminated in the 1982 policy of mandatory detention for all unauthorised arrivals, with limited humanitarian grounds for parole. Over the same period, Australia had its first experience of unauthorised boat arrivals with the arrival of boats carrying Vietnamese asylum seekers. The option of mandatory long-term detention was considered by both sides of politics at this time. However, it was not implemented until 1989, when asylum seeker boats began arriving from Cambodia. Just as in the United States, the change of policy was initially made informally, utilising existing discretionary powers to target a specific cohort of boat arrivals. And just as in the United States, a court challenge resulted in the formalisation of the rule and the extension of its applicability to all unauthorised arrivals (and later to all unlawful non-citizens).

Since then, the United States and Australia have operated similar detention regimes. Both have a system of mandatory detention for persons that arrive without authorisation, pending determination of their claims to a substantive visa. Both have provided grounds of release pending determination for certain classes of persons. In the United States, this is achieved primarily through parole or release on bond, although recent years have also seen the implementation of community-based models of detention. In Australia, release is achieved through temporary bridging visas and community detention arrangements. The policies relating to the use of these mechanisms for the release of asylum seekers pending determination of their case has also developed along similar lines. Three phases can be identified. The first was characterised by a shift towards more restrictive practices which involved limiting the classes of persons eligible for release pending final adjudication of their claims. In the second phase, this approach was reversed and the grounds for release on parole and bridging visas were expanded. The current phase is defined by a move back towards more restrictive measures.

Between 1989 and 2011, asylum seekers who arrived in Australia without authorisation were generally not eligible for bridging visas and hence mandatorily detained for the entire duration of their status determination. In the United States, between 1982 and 1996, parole provisions allowed for the release of certain asylum seekers at any stage of the determination of their claim. A trend towards an Australian approach of limiting release from detention pending final adjudication began with changes implemented by the **IIRIRA** in 1996. The new expedited removal process removed access to parole

---

143 Australia’s offshore processing policy is examined in detail in Chapter Five, Part 5.2.2.
for asylum seekers awaiting ‘credible fear’ determinations. Then certain asylum seekers were barred from accessing parole for the entire duration of their status determination procedures. Such a policy was implemented in 2001 with respect to Haitian asylum seekers arriving by boat. In March 2003, a similar albeit short-lived directive was issued in relation to asylum seekers from certain Arab Muslim countries.

Clear parallels can also be seen in recent reforms to the detention policy in both Australia and the United States. The excesses of the mandatory detention policy gave rise to a similar backlash in both countries. Reports about systematic failings in the detention system and the serious mental health consequences on long-term detainees led to the introduction of a series of reforms. This process started in 2005 in Australia and 2009 in the United States. Similar provisions were introduced in both countries to provide more independent oversight over detention operations; the rules governing the release of certain asylum seekers pending a determination of their claims were relaxed; and community-based alternatives to detention (‘ATD’) were expanded.

The similarities in the ATD models introduced in both jurisdictions are particularly striking. In Australia, the first move towards alternative forms of detention occurred in August 2001 with the introduction of the Residential Housing Project.\textsuperscript{144} Legislative changes in 2005 introduced a more formalised ATD program for women and children under which the Minister could authorise the transfer of such asylum seekers to community-based accommodation.\textsuperscript{145} Section 197AB of the \textit{Migration Act}, gave the Minister a discretionary power to make ‘Residence Determinations’ to define what constituted a place of detention. Unlike the earlier Residential Housing Project, detainees held in community detention were not under guard and were free to move around the community, provided they spent their nights at the designated address. A crucial element of the Australian ATD program has been the use of NGOs to provide case management and support services. The use of community detention has been progressively expanded over the years and is now used for not only women and children, but also any other vulnerable individuals.

In the United States, ATD community-based case management pilot programs were first run in the late 1990s.\textsuperscript{146} Such programs were not rolled out on a large scale until 2004, with the establishment of the Electronic Device Program and the Intensive Supervision Appearance Program (‘ISAP’). However, these programs differed from the earlier pilot programs as they did not include individual case management or risk assessments as to the need for supervision.\textsuperscript{147} Instead, these programs relied on intrusive reporting and electronic tagging to ensure compliance.\textsuperscript{148} As part of the overhaul to the

\textsuperscript{144} International Detention Coalition, ‘Case Management as an Alternative to Detention: The Australian Experience’ (Report, June 2009) 3.

\textsuperscript{145} See \textit{Migration Act}, pt 2 div 7 subdiv B.


detention system initiated in 2009, the ATD program was expanded with the introduction of the Intensive Supervision Appearance Program II (ISAP II). ICE included the presence of a ‘needs-based case management component’ as a requirement for a company to obtain the ISAP II contract. As such, under the current system, participants in the ATD program are provided with case management services such as assistance in understanding the legal process, acquiring travel documents and reminders to attend immigration proceedings.

Australia and the United States have also both moved towards a risk-based model of determining the need and type of detention. In July 2008 Chris Evans, Minister for Immigration, announced a new ‘modern risk management approach’ where the ‘key determinant of the need to detain a person in an immigration detention centre will be risk to the community’. The need for risk analysis in decision making about the appropriateness of immigration detention was first flagged in the United States in 2009. ICE then worked with a number of NGOs to develop a ‘risk assessment tool’, which was rolled out nationally between July 2012 and January 2013. While details of the precise factors considered are not publicly available, the Lutheran Immigration and Refugee Service explains that the risk assessment tool contains objective criteria to guide decision-making regarding whether or not an alien should be detained or released; the alien’s custody classification level, if detained; and the alien’s level of community supervision (to include an ICE ADT program), if released. It includes mathematically weighted factors that should signal the likelihood of threat to the community based on past behaviour as well as of absconding for each and every individual ICE apprehends.

There are also some interesting parallels in the public discourse on the detention of children and families. In Australia, NGOs like ChilOut and GetUp! have run long-standing campaigns to have all children released from immigration detention facilities. These campaigns played a significant role in pressuring successive governments to introduce reforms in this area. Efforts in this regard were assisted by a recent Australian Human Rights Commission report critical of continued detention of children. The campaign to release children and families from detention has been largely successful. As of April 2015, there were only 69 children held in immigration detention in Australia, with an

---

150 US Government Accountability Office, ‘Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness (Report No GAO-15-26, November 2014) 10; Note, however, concerns that the ISAP II program is being used to monitor persons who would otherwise have been released without restrictions, rather than for reducing the incidence of conventional detention: Olsen, above n 148, 484; Lutheran Immigration and Refugee Service, ‘Unlocking Liberty’, n 147, 32.
151 See Evans, above n 139.
152 Dora Schriro, US Department of Homeland Security, Immigration and Customs Enforcement, Immigration Detention Overview and Recommendations (2009) 20-1 (identifying the need for a ‘validated risk assessment instrument specifically calibrated for the US alien population’ to be used to assess suitability for ADT programs).
additional 95 detained in extraterritorial processing facilities in Nauru. In the United States, NGO lobbying played a crucial role in scaling back the detention of families in the late 2000s, which culminated with the closure of the T Don Hutto Family Detention Facility in 2009. With the introduction of the no parole policy for asylum seeker families from Central America in 2014, the NGO community again mobilised. Their efforts resulted in some important victories, including the closure of the controversial family detention centre in Artesia.

In response to a surge in irregular migration, recent years have seen a reversion to more stringent detention provisions. In the United States, this has taken the form of a policy restricting access to parole for asylum seeker women and children from Central American countries. As a result of Australia’s reintroduction of extraterritorial processing, sea-born asylum seekers are now transferred to detention facilities in Nauru or Manus Island in PNG.

4.3 Confirming the Transfer Hypothesis

The implementation of immigration detention policies has followed similar patterns in Australia and the United States. While these similarities raise a presumption that legal and policy transfers have been taking place, they do not rule out the alternate explanation that the parallels are due to independent responses to similar policy problems in both countries. In this section, I set out the evidence against this alternate hypothesis by arguing that policy makers in Australia and the United states had both the opportunity to share information relating to policy developments in each other’s jurisdictions and directly drew on this information in developing domestic law. My analysis is undertaken with reference to both documentary evidence on the public record, and interviews I carried out with policy makers in Australia and the United States.

Before examining the evidence of the knowledge possessed by decision makers involved in the case study transfers, it is important to be clear about the content, direction and timing of the purported legal and policy transfers. The analysis above indicates three distinct phases of possible transfer. Phase one involved Australian law makers drawing on US practice when implementing and formalising the Australian system of mandatory detention between 1989 and 1994. In phase two, which occurred between 1996 and 2005, the direction of the transfers appears to have shifted, with US policy makers drawing lessons from Australia’s stringent parole policies. Phase three, which occurred from 2005 to 2014, involved a two-way transfer process with policy makers from both jurisdictions drawing lessons

---

156 DIBP, Immigration Detention and Community Statistics Summary (30 April 2015) <https://www.immi.gov.au/About/Documents/detention/immigration-detention-statistics-apr2015.pdf>. All those detained in Australia were being held in alternative places of detention, rather than closed detention facilities. This victory, however, came at a significant cost. The recent release of a significant number of children from detention facilities at Christmas Island was the result of a deal between the government and cross-bench senator Ricky Muir. The price for the release of the children was Senator Muir’s crucial support in passing the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth), which implemented a raft of restrictive reforms to Australia’s asylum seeker policy. Some of the changes implemented by this Act are explored in Chapter Five, nn 111-16 and accompanying text.

157 Australia’s offshore processing policy is examined in detail in Chapter Five, Part 5.2.2.

158 For details about my interview methodology, see Appendix A.
from each other regarding attempts at reforming and mitigating some of the excesses of detention practices.

4.3.1 Opportunity: Channels of Communication

US and Australian immigration policy makers regularly meet in numerous formal and informal forums. The existence of these opportunities for exchange provides strong circumstantial evidence to support my transfer hypothesis. In Chapter Three, I provided analysis of the proliferation of such forums, dividing them into five main categories. Here, I focus on the forums identified by my interview subjects as being the most important in terms of facilitating the transfer of immigration detention policies between the United States and Australia.

US and Australian policy makers regularly meet and discuss policy developments in intergovernmental meetings facilitated by formal international institutions. As explored in Chapter Three, these forums include the yearly UNHCR Executive Committee meetings and the yearly IOM International Dialogue on Migration. US and Australian policy makers also gather at ad hoc meetings facilitated by international forums. Prominent examples include the UNHCR Global Consultations on International Protection held in 2001 and 2002; the first UN High-Level Dialogue on International Migration and Development (‘HLD’) held in 2006; the Informal Thematic Debate on International Migration and Development convened by the General Assembly in 2011; and the second HLD held in October 2013.

Feedback from my interview subjects suggested that informal bilateral talks that take place alongside these formal meetings were important forums for the transfer of policy ideas between US and Australian policy makers. As one former senior Australian bureaucrat put it, the most significant form of dialogue were the ‘conversations on the margins in Geneva with the American delegation… We took the opportunities when we were all together at those sorts of meetings to have our own bilaterals [sic] around particular issues.’ Another official reported that the Australians, the Americans and the Canadians would always caucus before a major Geneva meeting and would always discuss what came out of it. There were semi-formalised groups who would meet in Geneva around UNHCR and the Australians, the Canadians and Americans were always at the forefront of that.

Regional Consultative Processes (‘RCPs’) were identified by a number of my interview subjects as the key forums for the diffusion of migration policy ideas. They reported that the two most important RCPs for the transfer of migration policy ideas between the United States and Australia are the Five

---

159 See Chapter Three, Part 3.2.
161 AUB01, AUB19, AUB41.
162 AUB41.
163 AUB19.
164 See Chapter Three, Part 3.2.4.
165 AUB01, AUB77, AUB19.
Country Conference and the Intergovernmental Consultations on Migration, Asylum and Refugees (‘IGC’). The Five Country Conference evolved from the ‘Group of Four’ conferences held between Australia, the United States, the United Kingdom and Canada since the 1980s. With the addition of New Zealand in 2009, the conference was renamed the Five Country Conference. The forum is billed ‘as a way for senior officials to exchange ideas in an off-the-record manner, and for member countries to share information relating to the immigration challenges they were each confronting.’ Interview respondents cited the small number of countries involved; the similar legal systems of participant countries; the similar immigration issues faced by the countries; and the informal nature of the discussions as contributing to making the dialogue one of the most important forums for frank discussion and diffusion of policy ideas.

The IGC was founded within the UNHCR in 1985 to examine asylum issues in Europe. It became an independent state-run consultative process in 1991 and its membership has gradually expanded to include 13 European States, as well as the United States, Australia, Canada and New Zealand. The stated purpose of the consultations include ‘discussion and information exchange on migration policies and their implementation.’ While made up of a somewhat larger cohort of participant countries than the Five Country Conference, the confidential and informal nature of discussions facilitates a full and frank exchange of policy ideas. As one senior Australian bureaucrat I interviewed put it:

[The IGC] was a place where there was opportunity to meet senior officials face to face at a multilateral basis and scan world developments in all fields of migration. In those circumstances, if you feel you have some burning problem and need some inspiration and someone seems to have a good model, then you talk to them about it. [You can ask them] will any of this work for us? Or will it not work for us?

Australian and US immigration policy makers also exchange ideas through bilateral channels. Five of the Australian policy makers interviewed (two former Ministers and three bureaucrats) indicated they had travelled to the United States on fact-finding missions. One Australian politician indicated they had undertaken a period of ‘study leave’ in the United States where they had met with both senior bureaucrats and politicians to learn about US immigration policy. All interview subjects who went on such trips also noted that they used the opportunity to furnish US officials with information about Australian policy developments.

---

166 AUB77, AUB01.
168 AUB01, AUB77, AUB19.
170 Ibid.
171 Ibid.
172 AUB77.
173 AUB01 AUP11, AUB19, AUP35. AUB77, AUB15.
174 AUP11.
Another prominent channel for communication cited by interview subjects involves the immigration representatives (or Immigration Consulers) based at the Australian Embassy in Washington and the US Embassy in Canberra. These officials provide a permanent channel through which policy makers from each country can request information regarding the operation or implementation of migration control policies. As one former senior Australian bureaucrat put it, immigration representatives ‘are your person on the ground. They are the one who can move around an agency and deal with people on a day-to-day basis... Your interest in policy development elsewhere is continuing and is not limited to say one meeting a year.’

4.3.2 Direct Evidence Supporting the Transfer Hypothesis

(a) Detention Phase 1: United States → Australia (1989–1994)

In relation to the introduction and formalisation of the policy of mandatory detention in Australia, there is evidence on the public record indicating that Australian policy makers were well acquainted with the use of the policy in the United States. This fact is evident when one reads the Joint Standing Committee on Migration’s 1994 report ‘Asylum, Border Control and Detention, which immediately preceded the legislative moves to formalise mandatory detention. In that report the committee considers examples of detention practices in comparable countries, including the United States, noting that ‘the issues and problems which Australia is addressing are as relevant to and of crisis proportions amongst developed and developing countries in Europe, North America and Asia.’ During the inquiry, the Committee received evidence from US refugee expert, Arthur Helton, in relation to the parole program used in the United States.

The fact that Australian policy makers were aware of US practice was also evident in interviews undertaken by the author. Six key policy makers intimately involved in developing and implementing the policy of mandatory detention in Australia during this period were interviewed. All agreed that they and others involved in the development of the policy had detailed knowledge of US detention practices. When pressed, all denied that the US policy had been used as a model, claiming instead that the policy was a unique response to Australia’s domestic problems. Four out of the six cited the different approaches to parole in the Australian and US systems as proof of the originality of the Australian policy. However, their acknowledgement that they were aware of and had considered the policies in the United States, demonstrates that some degree of transfer had in fact taken place. One

175 AUB01.
176 AUB01.
178 Ibid 49.
179 Ibid 150 (note that this program was considered and explicitly rejected the relevance of such an approach in Australia).
180 AUB01, AUB19, AUB15 and AUP11, AUB77, AUB41.
181 AUB19, AUB41, AUB14, AUP49.
interview subject put it in the following way: ‘Direct influence? Did we go looking? I don’t think so. Were we influenced? Definitely.’

As discussed in *Chapter Three*, legal and policy transfer rarely involves verbatim copying of laws. Rather, more often foreign practices are drawn upon and adapted to fit local conditions. In this instance the basic model of mandatory detention was adopted. However, the parole system utilised in the United States was deemed to be undesirable. As one interview subject put it, ‘we had reasonable knowledge of parole and it was basically viewed as a broken system. The [US] parole system was basically an entry system, and you might as well issue entry permits, rather than use a parole system.’ The comparatively smaller number of unauthorised arrivals in Australia made it possible to discard the parole system and simply detain all irregular arrivals for the entire duration of their status determination procedures.

(b) *Detention Phase 2: Australia → United States (1996–2005)*

The second phase of transfer involved policy makers in the United States learning from Australian immigration detention policies. Documentary evidence demonstrating this transfer is scarce. My examination of debates, and congressional and departmental reports produced in the United States during this period did not turn up any direct references to Australian detention practices. In relation to Australian sources, the Department of Immigration was on the record during this period as stating that ‘Australia’s border management strategies are increasingly being looked at by other countries as a model on which to base the development of their own programs.’ A number of my Australian interview subjects confirmed the United States was one of the countries looking at Australian detention practices during this period. One senior Australian bureaucrat stated that US officials had expressed great interest in the fact that under Australia’s policy of mandatory detention without parole, detention was automatic and not pursuant to any reviewable decision. The same policy maker revealed he had furnished information regarding the operation and implementation of this policy to US officials in the context of the Five Country Conference meetings during the 1990s. A second senior Australian bureaucrat working in the Department from 1993 to 1996 confirmed that he was in regularly in contact with US policy makers during this period and had discussed immigration detention policy with them: ‘I’m sure it would have been explored. I’m sure they would have known about it and I’m sure we would have swapped perspectives on what each of us were doing.’ Regrettably, none of the US policy makers identified as being directly involved in the development of immigration detention policy during the relevant period agreed to be interviewed. However, a senior US bureaucrat who was working for the INS during this period, but not directly involved in immigration

---

182 AUB15.
183 See *Chapter Two*, nn 21-4 and accompanying text.
184 AUB41.
186 AUB41, AUB19, AUB77, AUB15.
187 AUB19.
188 Ibid.
189 AUB01.
detention policy development, confirmed that his department would have been well acquainted with Australian policies:

When you are in a policy job, when you are faced with large policy issues, unless you are totally oblivious to the rest of the world, you are going to look at how other countries deal with these similar issues. You are going to gather as much information as you can, and you attempt to take, from your perspective, the best policies that exist out there.\(^\text{190}\)

(c) **Detention Phase 3: Australia ↔ United States (2005–2014)**

Interview subjects from both Australia and the United States confirmed that Australian and US officials exchanged ideas on the issue of detention reform.\(^\text{191}\) The NGO working group set up by Obama in 2008 to facilitate detention reform included an Australian representative.\(^\text{192}\) This representative provided information to the Obama administration about Australian detention reform measures.\(^\text{193}\) The Obama administration was purportedly very interested in Australia’s use of alternatives to detention and its use of individualised risk assessments, and the representative reported furnishing detailed policy advice in relation to the operation of these policies in Australia.\(^\text{194}\) Additionally, a number of NGOs directly lobbied the US government to follow the ‘Australian model’ of case managed community detention.\(^\text{195}\)

### 4.4 Conclusion

In this chapter, I identified three phases of transfer of mandatory immigration detention provisions between the United States and Australia. In phase one, Australian policy makers appear to have drawn on US practice when implementing and formalising the Australian system of mandatory detention between 1989 and 1992. In phase two, which occurred between 1996 and 2005, the direction of the transfers appears to have shifted, with US policy makers drawing lessons from Australia in regard to restricting parole. Phase three, which occurred from 2005 to the present, has involved a two-way transfer process in relation to detention reform. In this phase, Australia’s use of case managed community-based detention and risk assessment tools for determining the need and type of detention appear to have been influential on the adoption of similar policies in the United States.

For all three phases, I have identified the motive for transfer, namely a similar policy imperative to deter irregular migration and to maximise executive control over irregular migrants who succeed in

---

\(^{190}\) USB33.  
\(^{191}\) AUO40.  
\(^{192}\) Ibid.  
\(^{193}\) Ibid.  
\(^{194}\) Ibid.  
\(^{195}\) See, for example, National Immigrant Justice Center, ‘Creating “Truly Civil” Immigration Detention in the United States: Lessons from Australia’ (Report, May 2010); National Immigrant Justice Center et al, ‘Year One Report Card: Human Rights & the Obama Administration’s Immigration Detention Reforms’ (Report, 6 October 2010) 9, 18; Detention Watch Network, ‘Community-Based Alternatives to Immigration Detention’ (Policy Brief, August 2010).
reaching the state's territory. I have also described the similarities in the substantive mandatory immigration detention provisions introduced in each phase. With reference to evidence relating to the existence of high level policy forums and through interviews with key policy makers in Australia and the United States, I have argued that in each phase, policy makers had ample opportunity to share and learn from developments in mandatory detention policies in each other's jurisdictions. In relation to direct evidence that legal and policy transfers have occurred, the evidence is strongest in relation to phases one and three. The transfer hypothesis in respect to these phases was supported by my interview subjects, as well as documentary evidence on the public record. The direct evidence for phase two in relation to transfers between Australia and the United States from 1996 and 2005 is somewhat weaker, with no documentary evidence directly supporting the claim. While Australian interview subjects indicated that US officials would have been well aware of Australia's policies during this period, I was unable confirm this with any of the relevant US policy makers. However, the existence of transfers in this phase is supported by circumstantial evidence relating to similarities in the policies adopted, and in relation to the motive and opportunity for transfer.
CHAPTER FIVE: INTERDICTION AND EXTRATERRITORIAL PROCESSING

In this chapter, I examine the use of maritime interdiction and extraterritorial processing as a means of controlling irregular boat arrivals by the United States and Australia. Maritime interdiction refers to ‘action taken by states to prevent sea-borne migrants from reaching their intended destination’. It involves the interception and deflection of boats carrying irregular migrants to their point of departure, a third country or external territory. At times, interdiction programs have been accompanied by the use of extraterritorial processing regimes to assess asylum claims. Asylum seekers processed extraterritorially generally enjoy fewer procedural and substantive rights than those processed under regular ‘mainland’ status determination schemes. Extraterritorial processing has been carried out by the US and Australian government in third countries and external territories, as well as on board Coast Guard and Navy ships in international waters or the territorial sea of third countries. Processing of claims has been conducted by the state carrying out the interdiction policies; or delegated to officials from the third country host or the Office of the United Nations High Commissioner for Refugees (‘UNHCR’).

In what follows, I utilise the framework for identifying legal transfers developed in Chapter Two to argue that the use of similar policies authorising the interdiction and extraterritorial processing of maritime asylum seekers in the United States and Australia is the result of a process of legal and policy transfer. The analysis traces the contours of the processes and motivations underlying the transfers identified. In contrast to the two-way transfer relating to the policy of long-term mandatory detention explored in Chapter Four, the transfer relating to interdiction and extraterritorial processing appears to be mono-directional. I argue that Australian policy makers drew on US interdiction and extraterritorial practices in the Caribbean when devising and implementing the interdiction and extraterritorial processing regime introduced in 2001 as part of the Pacific Solution.

In Part 5.1, I identify the common policy problem (or motive) shared by US and Australian policy makers. In Part 5.2, I highlight the similarities in the development and implementation of the policies of interdiction and extraterritorial processing in the United States and Australia. In Part 5.3, I catalogue both the direct and indirect evidence pointing to the fact that Australian policy makers drew on US practice of interdiction and extraterritorial processing when devising the Pacific Solution. This will be

2 In this context, the term ‘external territory’ is used to describe a territory outside the traditional geographic boundaries of country, over which the country’s government exercises control, but is designated as an area in which regular domestic laws are said not to apply.
The Common Policy Problem: A Quest for Control

The policies of interdiction and extraterritorial processing of maritime asylum seekers are designed to address the same fundamental policy problem as long-term mandatory immigration detention. This dilemma, explored in detail in Chapter Four, is the quest to exert maximum control over unauthorised arrivals and to circumvent the impediments to this control caused by the obligations towards asylum seekers arising out of the Refugee Convention and Protocol, other human rights instruments, and judicial review of immigration decisions.

Interdiction at sea and return of irregular migrants to their point of departure without screening asylum claims represents the most extreme manifestation of governmental quests for control. As noted earlier, interdiction refers to the practice of intercepting irregular migrants on the high seas and physically preventing them from accessing a state’s territory. It has been called the ‘ultimate’ barrier or deterrent. The US Coast Guard notes that ‘[i]nterdicting migrants at sea means they can quickly be returned to their countries of origin without the costly process required if they successfully enter the United States.’ By relying on a view that the Refugee Convention has no extraterritorial effect, its non-refoulement obligations are said not to apply. A similar argument is employed in an attempt to avoid judicial enforcement of constitutional and statutory rights that unauthorised arrivals may enjoy if they enter the nation’s territory. Practical impediments to returning interdicted migrants, concerns over the legality of such an approach under international law, and serious humanitarian concerns mean that this approach of interdiction and return without processing has been used rarely in the United States and Australia.

Interdiction coupled with some form of extraterritorial processing strikes a slightly more balanced approach between control and the rights of asylum seekers. Rather than being summarily returned,

---

3 See Appendix A for an outline of my interview methodology.
4 See Chapter Four, Part 4.1.
6 Note that interception can also be carried out in the country of departure and in the territory of transit countries. An examination of these forms of interdiction is beyond the scope of this paper.
interdicted persons are subject to procedures to identify those who may have an asylum claim. These have taken the form of crude screening measures aboard government vessels on the high seas, as well as more formal status determination procedures in external territories or third countries. This approach adheres to the letter (if not the spirit) of the non-refoulement obligations by providing mechanisms to identify persons who may be refugees and not returning such persons to a place where they may face harm on a convention ground. However, in practice, the procedures are often inadequate and have resulted in refoulement. The extraterritorial nature of these procedures purports to place them beyond the reach of domestic statutory and constitutional protections. Control over access to the territory of the state is also maintained, with those recognised as refugees not automatically granted access to a state’s territory, and instead often held for long periods of time awaiting resettlement in a third country.

5.2 The Policy Response: Interdiction and Extraterritorial Processing

The United States was not the first country to use interdiction as a tool for controlling unauthorised maritime arrivals. Britain carried out a maritime interdiction program against unauthorised Jewish arrivals seeking to enter Palestine in the late 1930s and again between 1945 and 1948. In the earlier phase of the program, those interdicted were taken to detention camps within Palestine. However, from 1946 Britain began to deport detainees to camps in Cyprus. These camps reached capacity in 1947, at which time the British government adopted a policy of refoulement pursuant to which interdicted persons were forcefully returned to their point of departure.

Maritime interdiction was also carried out by a number of Asian countries in response to the flight by boat of Vietnamese asylum seekers escaping the Vietnam War. Singapore, Malaysia and Thailand all carried out interdiction operations during this period, refusing to allow vessels to land, and pushing boats back to international waters. These earlier examples of interdiction, however, can be distinguished from interdiction practices carried out by Australia and the United States, as they were not motivated by a desire to avoid domestic and international legal constraints. The British interdiction program in Palestine was carried out before the Refugee Convention came into existence and none of the states involved in the interdiction of Vietnamese asylum seekers were parties to the Convention.

---

11 For a detailed examination of British interdiction practices during this period see Fritz Liebreich, Britain’s Naval and Political Reaction to the Illegal Immigration of Jews to Palestine, 1945-1948 (Routledge, 2005); Ninian Stewart, The Royal Navy and the Palestine Patrol (Routledge, 2002); Steven Wagner, ‘British Intelligence and the “Fifth” Occupying Power: The Secret Struggle to Prevent Jewish Illegal Immigration to Palestine’ (2014) 29 Intelligence and National Security 698.
12 Wagner, above n 11.
13 Ryan, above n 1, 23.
14 The Refugee Convention was opened for signature 28 July 1951 and entered into force 22 April 1954.
The response of the United States and Australia to the refugee crisis resulting from the Vietnam War stands in contrast to the harsh policies introduced in both countries in later years. At the time, both governments expressed concerns about the *refoulement* resulting from the interdiction and push-back operations carried out by Vietnam’s neighbours. These concerns provided the impetus for US and Australian involvement in devising multilateral management plans to deal with the situation, which came to be known as the Orderly Departure Program (1979-88) and Comprehensive Plan of Action (1989-1996).\(^\text{15}\) Under both these arrangements, the United States, Australia and several other Western nations agreed to resettle large numbers of Vietnamese refugees. This was in return for Vietnam’s neighbours suspending push-back operations and providing temporary asylum.\(^\text{16}\) It is interesting to note that an alternate policy considered at this time involved purchasing an island in Indonesia or the Philippines where Vietnamese refugees could be resettled.\(^\text{17}\) British Prime Minister Margaret Thatcher reportedly asked Australian Prime Minister Malcolm Fraser to help buy such an island in 1979.\(^\text{18}\) This proposal can be distinguished from the extraterritorial processing policies later adopted by the United States and Australia in a number of important ways. Thatcher’s proposal was not motivated by a desire to circumvent the *Refugee Convention*. The UK did not have any obligations towards the Vietnamese under the Convention. These refugees were in third countries over which the UK did not exercise any jurisdiction. Further, the UK was geographically removed from the crisis and as such was not experiencing any direct Vietnamese refugee flows. Nor was the proposal motivated by a desire to avoid judicial scrutiny of asylum determinations. At the time the proposal was made, all Vietnamese asylum seekers were presumed to be refugees.\(^\text{19}\) As such, no issues arose in regard to limiting substantive or procedural rights in respect to asylum determinations. Rather, it appears the main motivation behind the proposal was to avoid having to resettle Vietnamese asylum seekers. Thatcher was reportedly concerned about the social unrest that large-scale resettlement to the UK would cause.\(^\text{20}\)

Attempts at isolating executive actions from judicial oversight have a long history preceding the introduction of extraterritorial processing regimes in the United States and Australia.\(^\text{21}\) There have been attempts by governments to create zones of exception on offshore islands where regular legal protections are said not to apply going back as far as the 17th century. When Charles II was restored

---

\(^{15}\) For an overview of these programs, see Mary Crock and Daniel Ghezelbash, *Do Loose Lips Bring Ships?: The Role of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals* (2010) 19 *Griffith Law Review* 238, 263.


\(^{17}\) Narushima, above n 16.

\(^{18}\) Note that Malcolm Fraser later reported that he had no recollection of such a request ever being made: ibid.

\(^{19}\) See Crock and Ghezelbash, above n 15, 263.

\(^{20}\) Narushima, above n 16.

as King of England in the 1660s, he sought to create a rights-free zone in Jersey and the Isle of Man where he could detain dissidents. Judicial oversight of the detention was denied by the issue of a decree that the royal writ of habeas corpus should not run in these places.\footnote{See Geoffrey Robertson, \textit{The Tyrannicide Brief} (Vintage, 2006) 349; Geoffrey Robertson, ‘Freedom, Soldier’, \textit{New Statesman} (21 May 2007) 55.}

\subsection*{5.2.1 \textit{United States: Interdiction and Extraterritorial Processing on Guantanamo Bay}}

For the most part, US interdiction and extraterritorial processing policies have targeted maritime asylum seekers from Haiti and Cuba. The interdiction of Haitians began in 1981, at around the same time as the mandatory detention provisions discussed in \textit{Chapter Four} were introduced.\footnote{See \textit{Chapter Four}, nn 69-72 and accompanying text.} The Coast Guard was authorised to intercept and search vessels suspected of transporting undocumented Haitians. These early measures included crude extraterritorial processing, with summary screening processes carried out aboard US Coast Guard cutters. Officers from the Immigration and Naturalization Service (‘INS’) assessed interdicted Haitians to determine if any had a credible fear of persecution.\footnote{For a critique of the ‘credible fear’ test, see Bill Frelick, ‘US Refugee Policy in the Caribbean: No Bridge Over Troubled Waters’ (1996) 20 \textit{Fletcher Forum of World Affairs} 67, 72-4.} Those found to have such a fear were transferred to the United States to pursue their claims, while the others were returned to Haiti. The interdiction program and screening procedures aboard US Coast Guard cutters were carried out pursuant to a bilateral treaty between the United States and Haiti,\footnote{Migrants Interdiction Agreement (23 September 1981) US-Haiti, 33 UST 3559, 3560.} INS interdiction Guidelines,\footnote{INS Interdiction Guidelines, ‘INS Role in and Guidelines for Interdiction at Sea (6 October 1981, revised 24 September 1982).} and Executive Order 12,324.\footnote{Executive Order No 12,324 (29 September 1981), 46 Fed Reg 48,109 (1 October 1981).}

Right from the outset, serious concerns were raised about the efficacy of this screening process. A study by the Lawyers Committee for Human Rights (now Human Rights First) found that out of 23,000 Haitians interdicted by the United States between 1981 and 1990, only six passengers were found to have claims strong enough to warrant a full asylum hearing.\footnote{Lawyers Committee for Human Rights, \textit{Refugee Refoulement: The Forced Return of Haitians under the US-Haitian Interdiction Agreement} (1990) 4. Cf Ruth Ellen Wasem, ‘US Immigration Policy on Haitian Migrants’ (Report for Congress, Congressional Research Service, 17 May 2011) 4; Frank Brennan, \textit{Tampering with Asylum: A Universal Humanitarian Problem} (University of Queensland Press, 2003) 77 (both putting the number of interdicted Haitians recognised as refugees during this period at 11).} Stephen Legomsky notes that ‘[g]iven the high incidence of serious human rights violations in Haiti during that period, there was ample reason to worry that the rarity of cases found to justify full hearing said more about the procedural adequacy of interviews than about the merits of the claims.’\footnote{Stephen Legomsky, ‘The USA and the Caribbean Interdiction Program’ (2006) 18 \textit{International Journal of Refugee Law} 677, 679.}

A violent military coup in Haiti in September 1991, which replaced the democratically elected President Jean-Bertrand Aristide with a military junta, caused a modification in the interdiction program. Reports of wide-spread politically motivated violence and the public condemnation of the coup by the US administration made it difficult for the United States to summarily dismiss asylum
claims by interdicted Haitians. At the same time, the administration of George H W Bush was reluctant to admit the large number of arrivals (more than 38,000 Haitians were interdicted in the eight-month period following the coup). Screening continued on the high seas, but those found to have a credible fear were no longer transferred to the United States to pursue their claims. Instead they were held on Coast Guard cutters. The Bush Administration attempted to frame the issue as a regional problem and negotiated with other Caribbean nations to take some of the Haitians held on US ships. On the whole, these efforts were unsuccessful. Although Belize, Honduras, Venezuela, and Trinidad and Tobago agreed to offer temporary shelter to small numbers in UN-administered camps, the combined intake of 550 places was not enough to defuse the crisis. By November 1991, 2,200 Haitians were being held in custody and all available Coast Guard cutters were at capacity.

The Bush administration responded by opening a migrant processing facility on the US controlled territory of Guantanamo Bay in Cuba. Although better known in recent times as an exceptional space created to exclude enemy combatants from the protections of the US justice system, Guantanamo was used first as a holding and processing centre to bar interdicted asylum seekers from accessing these same legal protections. Between November 1991 and May 1992, all interdicted Haitians were taken to Guantanamo for processing. The Bush administration created a special regime for processing refugee claims, procedurally inferior to that available to persons seeking asylum within mainland America. Guantanamo fell outside of the statutory definition of ‘the United States’ under the Immigration and Nationality Act. A similar extraterritorial argument was used to frame the Guantanamo detainees as having no rights under the US Constitution. This left the executive free to streamline the screening process, ‘dispensing with such complications as the assistance of lawyers, administrative appeals, and judicial review’. Those found to have a credible fear of persecution were transferred to the United States to pursue an asylum claim. Those found not to exhibit such a fear were forcibly returned to Haiti. Even these streamlined procedures, however, could not keep up with...

32 Briggs, above n 31, 3.
36 The Eleventh Circuit accepted this view in dicta in Haitian Refugee Center v Baker, 953 F2d 1498, 1513 n8 (11th Cir, 1992), cert denied, 502 US 1122 (1992). This case is examined in Chapter Eight, Part 8.1.1(a).
37 Neuman, above n 35, 1229.
38 Note that persons who were found to have a credible fear, but were HIV positive, were not transferred to the US, but were detained in a special section of the Guantanamo Bay facility. See Chapter Eight, Part 8.1.1(c).
the steady flow of arrivals and the makeshift camp at Guantanamo quickly reached its 12,500 person capacity.

With the facilities at Guantanamo full, President Bush issued the ‘Kennebunkport Order’ on 24 May 1992, revoking the 1981 policy of interdiction with screening. The new policy provided for the interdiction and summary repatriation of all Haitians leaving Haiti by boat. The order expressly declared that US non-refoulement obligations under the Refugee Convention and Protocol did not extend outside US territory. Despite criticising and promising to repeal the policy during the 1992 presidential election, President Clinton maintained the policy of interdiction and return without screening when he came to office. In 1993, in Sale v Haitian Centers Council, the Supreme Court tacitly upheld the no-screening policy. It affirmed the government’s stance that neither the non-refoulement obligations in the Refugee Convention and Protocol, nor the US implementing legislation prohibited the return of refugees intercepted on the high seas.

President Clinton suspended the no-screening policy in May 1994, apparently deciding that Haiti was, in fact, too dangerous a place to return the asylum seekers. Initially, a policy of providing full asylum hearings aboard US ships was introduced (in place of credible fear screenings conducted in 1992). An agreement was reached with Jamaica that allowed for processing to be carried out on board a US ship sitting in Kingston Harbour. A separate agreement was reached with the United Kingdom for processing to be carried out on the Turks and Caicos Islands. The number of Haitians arriving quickly outstripped the processing capabilities, and the refugee adjudication procedures were suspended a little over a month after they had begun.

In July 1994 a new policy was implemented pursuant to which interdicted Haitians would be provided ‘safe haven’ at Guantanamo and other Caribbean Countries. Haitians would not be returned automatically to their country, nor would they be offered the option of entering the United States as refugees or to pursue asylum claims. Just as President Bush had done three years earlier, Clinton sought to supplement capacity on Guantanamo through agreements with countries in the region to provide temporary safe haven in refugee camps. An agreement to establish such a camp in Panama fell through before it was implemented, but Antigua, Grenada, Suriname, St Lucia, and the

---

40 Three months before the election, Bill Clinton said ‘I am appalled by the decision of the Bush administration to pick up fleeing Haitians on the high seas and forcibly return them to Haiti before considering their claim to possible political asylum. This process must not stand’: US Newswire, 29 July 1992, quoted in Brennan, above n 28, 77.
41 509 US 155 (1993); this case is examined in Chapter Seven, Part 7.1.
42 Frelick, above n 24, 67.
44 Memorandum of Understanding between the Government of the United Kingdom, the Government of the Turks and Caicos Islands, and the Government of the United States to Establish in the Turks and Caicos Islands a Processing Facility to Determine the Refugee Status of Boat People from Haiti, entered into force 18 June 1994, KAV 3906, Temp State Dept No 94-158.
45 71 Interpreter Releases 885 (11 July 1994) 885.
Dominican Republic offered to host a total of approximately 11,000 Haitians in UNHCR run camps. Following US military intervention in Haiti in September 1994, the number of boat arrivals from that country reduced significantly. Reinstating a policy of presumptive ineligibility, the United States repatriated nearly all the remaining Haitian asylum seekers held at Guantanamo in January 1995.

In August 1994 the interdiction and extraterritorial processing policy was extended for the first time to Cuban arrivals. For three decades, US policy had presumed all persons fleeing Cuba to be refugees and those that made it to sea had been rescued and brought to the United States. A large spike in the number of Cubans making the journey prompted a rethink of this approach. On 19 August 1994, President Clinton announced that interdicted Cubans would be taken henceforth to the Guantanamo Naval Base. Like the Haitians already there, they were to be held in ‘safe haven’. The Cubans were not subject to any screening procedures, and were told that their only avenue for entering the United States was to return to Cuba to wait in line for processing through the admission programs operating there. At the same time, the United States entered into an agreement with Cuba under which the Cuban government would take measures to prevent irregular boat departures. The United States would admit 20,000 Cubans per year through legal and orderly procedures.

By September 1994, there were more than 32,000 Cubans held at Guantanamo. An alternate safe haven site was set up in the Panama Canal Zone, and 8,000 detainees were transferred there. Once the number of Cuban arrivals began to abate, the policy stance towards those held at Guantanamo was softened. At first, children, the sick and the elderly were offered ‘parole’ to allow them to enter the United States. Eventually, in May 1995, the Clinton Administration announced that most of the remaining Cubans would be brought to the United States. At the same time, a new blanket exclusion policy was introduced. All future arrivals were to be interdicted and returned to Cuba, except those that could show shipboard adjudicators a ‘genuine need for protection; that could not be satisfied by applying for refugee status with the US Interests Section in Havana’. Interdiction has also been used against migrants from other countries. For example, nationals of the Dominican Republic have been regularly intercepted in the Mona Passage en route to Puerto Rico.

\[\text{Frelick, above n 24, 67.}\]
\[\text{Ibid 68. See also, Chapter Four, nn 65-6 and accompanying text.}\]
\[\text{This was precipitated by an announcement by the Cuban government on 6 August 1994 that they would no longer interfere with efforts of those who desired to emigrate to the United States: Thomas David Jones, ‘A Human Rights Tragedy: The Cuban and Haitian Refugee Crises Revisited’ (1995) 9 Georgetown Immigration Law Journal 479, 492; The similarities to the Mariel boat lift in 1981, led some to label the incident as Mariel II: Carlos Verdecia, ‘Wily Castro Again Sends His Problems North’, Christian Science Monitor (12 September 1994) 19. Also see Appendix B, Table 6.}\]
\[\text{Frelick, above n 24, 68.}\]
\[\text{Ibid 71.}\]
\[\text{Ibid.}\]
\[\text{Ibid 72.}\]
\[\text{In the period from 1 April 1995 through to 1 October 1997, over 9,500 migrants were interdicted and forced to turn back: US Coast Guard, Alien Migrant Interdiction: Overview (31 October 2014) <http://www.uscg.mil/hq/cg5/cg531/AMIO/amio.asp#Introduction>.}\]
nationals have also been interdicted attempting to make the journey by sea to Guam or the US mainland.\textsuperscript{55}

Both the practices of interdiction and extraterritorial processing on Guantanamo continue to this day. In the 2014 financial year, there was a total of 3,378 persons interdicted, comprising of 2,059 Cubans, 949 Haitians, 293 Dominicans and 77 persons with other nationalities.\textsuperscript{56} The vast majority were ‘screened-out’ and returned to their point of departure. Up-to-date figures on the number of interdicted asylum seekers transferred to the migrant operations centre at Guantanamo are difficult to ascertain. The most recent statistics, which are from February 2012, indicate that there was a total of only 33 migrants (all Cuban) held there at that time.\textsuperscript{57} The facility remains ready to respond to future mass migration flows, with a surge capacity of up to 10,000 persons.\textsuperscript{58}

Screening procedures are reported to vary depending on the nationality of the arrival. Cubans are subject to individual ‘credible fear’ screening aboard coast guard cutters where they are explicitly asked whether they have a fear of returning to Cuba.\textsuperscript{59} All other interdicted migrants, such as Haitians, are not questioned about whether they fear being returned, but are required to vocalise a ‘manifestation of fear’ independently.\textsuperscript{60} A US Department of State official described this policy as ‘shout and you get an interview’.\textsuperscript{61} Regardless of nationality, when a person is found to have a credible fear, they are transferred to Guantanamo. The Guantanamo migrant operations centre currently operates under the auspices of the Secretary of the Department of Homeland Security. The Secretary is empowered with an unreviewable discretion to detain and carry out status determinations of asylum seekers on the island.\textsuperscript{62} Where a person processed at Guantanamo is found to be a refugee, they are not admitted to the United States. Instead, they are resettled in a third country pursuant to bilateral agreements entered into by the Department of State. From 1996 to 2011, 331 persons were resettled to 21 countries worldwide.\textsuperscript{63} Since 2002, Guantanamo has also been used as

\begin{itemize}
\item[Ibid.]
\item\textsuperscript{56} US Coast Guard, Alien Migration Interdiction: Total Interdictions - Fiscal Year 1982 to Present (1 May 2015) <http://www.uscg.mil/hq/cg5/cg531/amio/FlowStats/FY.asp>.
\item\textsuperscript{57} Dastyari and Effeney, above n 33, 58.
\item\textsuperscript{58} Ibid.
\item\textsuperscript{60} Ibid.
\item\textsuperscript{61} Women’s Commission for Refugee Women and Children, \textit{Refugee Policy Adrift: The United States and Dominican Republic Deny Haitians Protection} (January 2003) 18.
\item\textsuperscript{62} On 15 November 2002, President George W Bush issued Executive Order No 13,276 (15 November 2002), 67 Fed Reg 69,985 (19 November 2002). The order, as amended by Executive Order No 13,286 (28 February 2003), 68 Fed Reg 10,619 (5 March 2003), authorises the Secretary of Homeland Security to maintain custody and conduct screening of any undocumented non-citizens intercepted in the Caribbean region in Guantanamo Bay or any other appropriate location. This in effect provides an unreviewable discretion to the Secretary of Homeland security for the detention and status determination of asylum seekers and refugees in Guantanamo.
\end{itemize}
a military detention facility to house ‘enemy combatants’ captured in the course of the so-called ‘war against terror’. I compare the legal status of enemy combatants and asylum seekers held at Guantanamo in Chapter Eight.64

5.2.2 Australia: The ‘Pacific Solution’ Mark I & II

Australia’s reaction to its first large-scale experience of asylum seeker boat arrivals was relatively restrained. The arrivals from Vietnam, who arrived in Australia from 1976 to 1981, were provided with hostel accommodation and generous settlement services. The main policy aimed at reducing boat arrivals during this period was the Orderly Departure Program discussed earlier.65 The second wave of boat arrivals to reach Australia mostly consisted of Cambodian, Sino-Vietnamese and Chinese nationals, who travelled to Australia from 1989 to 1995. As discussed in Chapter Four, the Australian government’s response to these arrivals was to introduce a system of mandatory immigration detention.66 The introduction of interdiction and extraterritorial processing measures can be seen as a response to a new wave of asylum seekers, dominated by persons from Iraq and later Afghanistan, who began making their way to Australia by boat from Indonesia in the mid-1990s. The immediate trigger for the policy change were events set in motion by the rescue at sea of 433 asylum seekers by a Norwegian registered container ship, MV Tampa, in August of 2001.67 A diplomatic row erupted over where the rescuees should be delivered. Reflecting the climate of public unease with the increasing flow of unauthorised arrivals, Prime Minister John Howard decided to prevent the delivery of the rescuees to Australia. When initial negotiations failed to convince the ship’s captain to change course, Australian Special Air Service troops were deployed to board the vessel and prevent it from entering Australian territorial waters. After a five-day ‘stand-off’, the crisis was resolved when agreements were reached with New Zealand and Nauru for rescuees to be transferred to those countries to have their protection claims assessed.

At that time, the Australian government did not have statutory powers that authorised the interdiction and transfer of sea-borne asylum seekers to third countries. Two years earlier, the Border Protection Legislation Amendment Act 1999 (Cth) inserted provisions into the Migration Act 1958 (Cth) (‘Migration Act’) authorising maritime interdiction activities.68 However, these provisions only allowed interdicted persons to be detained at sea and brought back to Australia. The provisions did not

---

64 See Chapter Eight, Part 8.1.3.
65 See above nn 15-17 and accompanying text. Although proposals for introducing a mandatory detention policy were considered during this period, such policy was not introduced until 1989: see Chapter Four, nn 121-7 and accompanying text.
66 See Chapter Four, nn 128-33.
68 Migration Act, pt 2 div 12A.
authorise transfer to locations outside Australia. Given the absence of a statutory authority for the actions taken against the passengers of the MV Tampa, the government purported to be acting pursuant to the executive’s ‘prerogative power’.

In the immediate aftermath of the Tampa incident, the Australian Parliament enacted a series of legislative reforms that retrospectively validated the executive’s response and introduced new provisions to deprive future unauthorised boat arrivals access to regular Australian asylum procedures. The scheme, which became known as the ‘Pacific Solution’ and later the ‘Pacific Strategy’, involved three initiatives. The first was the ‘excision’ of territories from Australia’s ‘migration zone’ with the effect that the migration legislation pertaining to the mainland (including refugee determination procedures) no longer applied in these places. Initially, only the external territories of Christmas Island, Ashmore Reef, Cartier Island and Cocos Islands were ‘excised’. Later, the excision zone was extended to include all territories outside of mainland Australia. A new category of ‘offshore entry person’ (‘OEP’) was then created to catch all asylum seekers who landed without a valid visa or authority on an excised territory. OEPs were barred from making a valid application for a Protection visa unless the Minister exercised a personal, non-compellable discretion to allow it.

Provisions were also introduced to prohibit OEPs from accessing the Australian courts.

The second initiative involved the power to remove OEPs to a designated country for their claims to be processed. Hasty agreements were reached with Nauru and Papua New Guinea (PNG) for

---

69 See former s 245F(9) of the Migration Act, inserted by the Border Protection Legislation Amendment Act 1999 (Cth).

70 In Ruddock v Vadarlis (2001) 110 FCR 491, the Full Federal Court accepted the government’s assertion that its actions against the MV Tampa were authorised under the prerogative power as incorporated into the Executive power set out in s 61 of the Australian Constitution: see Chapter Seven, Part 7.2.1.

71 Border Protection (Validation and Enforcement Powers) Act 2001 (Cth) ss 5 and 6 (providing that any action taken between 27 August 2001 and 27 September 2001 by the Commonwealth in relation to the MV Tampa and other vessels carrying passengers attempting ‘to enter Australia unlawfully’ and any person who was on board such a vessel ‘is taken for all purposes to have been lawful when it occurred’).

72 Migration Amendment (Excision from Migration Zone) Act 2001 (Cth), amending Migration Act, s 5(1) (definition of ‘migration zone’ and ‘excised offshore place’).

73 Note that the excision regime was overhauled in 2012: see below n 100 and accompanying text.

74 Migration Amendment (Excision from Migration Zone) Act 2001 (Cth), amending Migration Act, s 5(1) (definition of ‘offshore entry person’).

75 Migration Act, s 46A.

76 Migration Act, s 494AA (note that s 494AA(3) provides that the section is not intended to affect the original jurisdiction of the High Court).

77 Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth); inserting s 198A of the Migration Act.


79 A Memorandum of Understanding was signed with PNG on establishing a processing centre on Manus Island on 11 October 2001: John Howard, Prime Minister of Australia, ‘Arrangement with Papua New Guinea to Process Unauthorised Arrivals’ (Media Release, 10 October 2001).
the establishment of offshore detention facilities in their territory to which OEPs could be transferred. Asylum seekers processed on Nauru and Manus Island in PNG did not have access to the refugee status determination procedures applied on the Australian mainland. Depending on where they were held and when they arrived, their claims were processed by either the UNHCR, or by Australian immigration officials applying processes stated to be in accordance with those of the UNHCR. Individuals found to be refugees were not entitled to resettlement in Australia. They were required to await resettlement in a third country. However, in practice over 40 per cent of asylum seekers transferred to the processing centres in Nauru and Manus Island in this first phase of the Pacific Solution were eventually resettled in Australia.\(^{80}\)

The third strategy was an interdiction program dubbed *Operation Relex*, which saw unauthorised boats intercepted on the high seas by Australian Navy boats and escorted back to Indonesia. The so-called ‘push-back’ operations were carried out pursuant to amendments to the *Migration Act* that authorised the transfer of interdicted vessels and their passengers ‘to a place outside Australia’.\(^{81}\) *Operation Relex* represented the first official Australian policy authorising direct action against vessels carrying asylum seekers aimed at preventing them from reaching Australia. The Australian Navy would first attempt to tow or escort unauthorised boats back into Indonesian waters. If these attempts failed, the asylum seekers aboard the vessels were transferred to Manus Island or Nauru for processing of their claims.

In August and November 2001, 12 boats carrying asylum seekers were intercepted by Australian Navy boats. Four boats, with some 600 asylum seekers on board, were intercepted and successfully forced back to Indonesia.\(^{82}\) The other eight were intercepted but could not safely make the journey back to Indonesia, either because they had broken down or because they had been sabotaged by asylum seekers in an attempt to force the Australians to take them on board.\(^{83}\) From those rescued by the *MV Tampa*, and those on board these eight boats, a total of 1,501 asylum seekers were transferred to Manus Island and Nauru for processing.\(^{84}\)

Over the next few years the number of unauthorised boat arrivals dropped off significantly.\(^{85}\) In 2008, the newly elected Labor government announced it would bring the Pacific Solution to an end, describing it as ‘cynical, costly and ultimately unsuccessful exercise’.\(^{86}\) It did not abandon the policy completely, however, maintaining the legislative provisions underpinning the strategy. Australia’s offshore territories remained ‘excised’ from the ‘migration zone’. However, after the February 2008

\(^{80}\) Sara Davies and Alex Reilly, ‘FactCheck: Were 70% of People sent to Nauru under the Pacific Solution Resettled in Australia?’, *The Conversation* (13 August 2013) <http://theconversation.com/factcheck-were-70-of-people-sent-to-nauru-under-the-pacific-solution-resettled-in-australia-16947>.

\(^{81}\) See *Migration Act*, s 245F(9) and (9A), amended by the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth).

\(^{82}\) Manne and Corlett, above n 10, 45.

\(^{83}\) Ibid.

\(^{84}\) Ibid 45-6.

\(^{85}\) See Appendix B, Table 7. Whether this reduction was a result of government policies or changes in ‘push factors’ in sending countries remains the subject of ongoing debate.

\(^{86}\) Chris Evans, Minister for Immigration, ‘Last Refugees Leave Nauru’ (Media Release, 8 February 2008).
resettlement in Australia of the final group of refugees detained on Nauru, the government adopted a policy of not exercising the power to transfer OEPs to third countries. Instead, asylum seekers interdicted at sea were to be held on the Australian territory of Christmas Island pending a decision by the Minister to exercise the non-delegable, non-compellable discretion to allow an application for a Protection visa. As such, OEPs continued to remain barred from mainland status determination procedures and subject to a separate, inferior processing on Christmas Island.87

The scheme was designed to keep status determination procedures beyond the reach of the Australian courts, but in a landmark 2010 case the High Court of Australia decided that OEPs were entitled to limited access to the courts to have their status determinations reviewed to determine whether those decisions were made according to law, including the common law rules of procedural fairness.88 The decision resulted in a surge of litigation by OEPs challenging adverse status determinations. This coincided with a significant increase in the number of people arriving by boat.89 Public opinion began to turn against the government, with a view that the perceived ‘softening’ of Australia’s border protection policies was to blame.90 In response, the Gillard Labor government moved to introduce a number of measures to stem the flow of new arrivals. First, attempts were made to seek agreements for the creation of a regional processing centre. East Timor was flagged as a possible location, but this plan was abandoned after support within the East Timorese government evaporated.91 Second, a bilateral arrangement was negotiated with Malaysia giving rise to what became known as the ‘Malaysian Solution’.92 The arrangement provided that 800 asylum seekers who arrived in Australia by boat would be transferred to Malaysia for the processing of their claims. In return, Australia was to accept 4,000 UNHCR-recognised refugees from Malaysia over four years. Shortly after the deal was announced and before any asylum seekers could be transferred, aspects of

87 Where undocumented asylum seekers who entered mainland Australia (and the ‘migration zone’) were entitled as of right to apply for a Protection visa under section 36 of the Migration Act; those who arrived at an excised offshore place could only apply for a Protection visa if the Minister exercises a non-reviewable, non-compellable discretion under section 46(A)(2) of the Migration Act. A non-statutory Refugee Status Determination (RSD) process was set up to advise the Minister as to whether or not to exercise this discretion. Unlike persons who reach mainland Australia, OEPs had no right to merits review of an unfavourable status determination decision in the Refugee Review Tribunal. Under the ‘Pacific Solution’, OEPs were not afforded any opportunity for merits review of unfavourable decisions. The Rudd government relaxed policies in this area by introducing a non-statutory independent merits review (IMR) carried out by independent contractors.


89 See Appendix B, Table 7.


the arrangement were struck down in the High Court on the grounds that the protections provided in Malaysia were inadequate and did not meet the statutory thresholds required for third country transfer. Relevant to the Court’s assessment was the fact that Malaysia was not, and still is not, party to the Refugee Convention or Protocol.

Following recommendations from a report by an expert panel set up to examine policy options, the Australian Labor government reversed its opposition to extraterritorial processing on Nauru and Manus Island and moved to reopen the facilities at those locations. The ‘Pacific Solution Mark II’ was born. In 2012, legislation was passed to replace the threshold requirements that had been relied on to strike down the Malaysian arrangement, in an attempt to ensure future third country transfer and processing arrangements would not be invalidated by the courts. The government also negotiated new memoranda of understanding with Nauru and PNG to reopen their processing camps. As of 30 April 2015, 677 asylum seekers were being held at the processing centre on Nauru. On 20 November 2012, the first group of asylum seekers were transferred to the Manus Island facility in PNG and as of 20 April 2015, 971 asylum seekers were being held there.

The new extraterritorial processing regime differs from the original ‘Pacific Solution’ in a number of ways. First, amendments to the Migration Act expanded the categories of persons liable for transfer to third countries to include all unauthorised boat arrivals, not just those who arrived at an excised offshore place. Consequently, the term OEP was abandoned and replaced with ‘unauthorised maritime arrival’ (‘UMA’). Second, whereas under the ‘Pacific Solution’ refugee status determinations were carried out by UNHCR or Australian government officials, status determinations under the current regime are carried out pursuant to newly enacted domestic refugee legislation in Nauru and PNG, by officials from those countries. Third, the updated memorandum of understanding signed with PNG, not only allows for the transfer of asylum seekers for processing, but also for the resettlement in

---


95 Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 (Cth), amending the Migration Act by replacing s 198A with a new s 198AA. The new provisions made it clear that the only condition for the exercise of the power to designate a country is that the Minister thinks that it is in the national interest to make such a designation.


99 DIBP, above n 97, 3.

100 Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2012 (Cth).
PNG of transferees assessed to be refugees. Nauru has made it clear that it cannot offer permanent resettlement. Rather, those recognised as refugees are given five-year visas which allow them to live in Nauru temporarily until a third country can be found to resettle them. In September 2014, Australia signed a memorandum of understanding with Cambodia that allows for the resettlement of some of the recognised refugees from Nauru to Cambodia.¹⁰¹

Upon being elected in 2013, the government led by Prime Minister Tony Abbott launched Operation Sovereign Borders, a military-led initiative to deter and prevent asylum seekers reaching Australia by sea. The policy involves both the continuation and expansion of extraterritorial processing on PNG and Nauru, as well as the reintroduction of a policy of interdicting and returning sea-borne asylum seekers to their point of departure wherever possible. As of January 2015, the Abbott government had intercepted and turned back 15 boats carrying a total of 429 asylum seekers.¹⁰² The majority of these turn-back operations involved the return of asylum seeker boats to Indonesian waters, often without the cooperation of the Indonesian government.¹⁰³ There have also been at least three reports of asylum seeker vessels being intercepted en route to Australia from Sri Lanka and their passengers being handed over to Sri Lankan authorities on the high seas.¹⁰⁴ Whereas the asylum seekers returned to Indonesia have not been subject to any screening process, the Sri Lankan asylum seekers were subject to summary screenings at sea via teleconference. Reports indicate that asylum seekers were asked just four basic questions: their name, their country of origin, where they had come from, and why they had left.¹⁰⁵

¹⁰¹ Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia, relating to the Settlement of Refugees in Cambodia, signed 26 September 2014.
¹⁰³ Ibid.
¹⁰⁵ Sarah Whyte, ‘Immigration Department Officials Screen Asylum Seekers at Sea “via teleconference”’, Sydney Morning Herald (online), 2 July 2014 <www.smh.com.au/federal-politics/political-news/immigration-department-officials-screen-asylum-seekers-at-sea-via-teleconference-20140702-3b837.html>. These procedures are modelled on the ‘enhanced screening’ policy used with respect to unauthorised air and sea arrivals from Sri Lanka since 2012. However, up until this incident, there had not been any reports of ‘enhance screening’ being carried out at sea. Rather the procedures had been used once asylum seekers arrived in, or were transferred to, Australia: see Savitri Taylor, ‘Sri Lankan Boat Arrivals: Enhanced Screening, Diminished Protection’, The Conversation (1 November 2013)
A High Court challenge to Australia’s interdiction practices prompted the Australian government to introduce amendments in 2015 significantly expanding the executive’s powers to interdict, detain and transfer asylum seekers at sea. On 29 June 2014, an Indian-flagged vessel carrying 157 Sri Lankan asylum seekers was intercepted by an Australian Customs vessel in Australia’s contiguous zone. The asylum seekers were transferred to the Customs vessel, where they were detained while diplomatic negotiations were made to return them to India. They were detained aboard the Customs vessel until 27 July 2014 when a decision was made to disembark the passengers to Cocos (Keeling) Island, an Australian territory in the Indian Ocean. In CPCF v MIBP, one of the passengers of the intercepted vessel, a Tamil asylum seeker, sought to challenge the extent of the government’s powers to intercept and detain asylum seekers, and transfer them to third countries. The plaintiff’s central claim was one of false imprisonment, namely that his detention on the Australian vessel was not authorised by law. The Commonwealth’s argument was that their actions were authorised under the Maritime Powers Act 2013 (Cth) (‘MPA’) (or alternatively, under the executive power). The MPA had consolidated the Commonwealth’s existing maritime enforcement powers, including those previously included in the Migration Act, into a single framework. The key relevant provision, s 72(4), stated that where a maritime officer suspects a vessel has been involved in a contravention of Australian law, including the Migration Act:

A maritime officer may detain the person and take the person, or cause the person to be taken:

a) To a place in the migration zone; or
b) To a place outside the migration zone, including a place outside Australia.

By a narrow 4:3 majority, the High Court found that the detention of the plaintiff was authorised under the MPA. The Court’s decision is examined in detail in Chapter Seven.

The outcome was somewhat of a moot point, as before the High Court handed down its decision, the government passed the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth) (‘Legacy Caseload Act’) which included a raft of changes to the MPA that greatly expanded the executive’s powers to interdict, detain and transfer asylum seekers at sea. Most significantly, the amendments stipulate that when carrying out maritime powers, an authorising officer is not required to consider Australia’s international obligations, or the international obligations or domestic law of another country. Additionally, the amendments stipulate that authorisation of maritime powers under the Act are not invalid if inconsistent with Australia’s international obligations. As such, there are no legal safeguards in place to ensure that Australia does not breach its non-refoulement obligations by returning a person to a place where they face persecution.

---

107 See former pt 2 div 12A of the Migration Act.
108 Explanatory Memorandum, Maritime Powers Bill 2012 (Cth) 1.
109 These provisions reflect the former s 245F(9)-(9A) of the Migration Act.
110 See Chapter Seven, Part 7.2.2.
111 Legacy Caseload Act, sch 1.
112 MPA, s 22A(1)(a).
113 MPA, s 22A(1)(c).
contrary to the *Refugee Convention*, or to a situation where they are in danger of death, torture or other mistreatment. Other amendments authorise potentially long-term detention at sea, restrict the application of the rules of natural justice from applying to most maritime powers under the Act, and restrict the capacity of the courts to review government actions at sea in a number of other ways.

### 5.2.3 US and Australian Practices Compared

The clear similarities in US and Australian interdiction and extraterritorial processing policies raise a strong presumption that Australia drew on US experience when devising its policies. In order to fully appreciate the similarities and the possible lessons drawn from US practice, it is important to clearly define the various forms the policies of interdiction and extraterritorial processing have taken in the United States. First, interdiction was combined with some basic screening procedures carried out at sea, where persons ‘screened in’ as having a credible fear of persecution were transferred to the United States for the processing of their claims (1981 - November 1991). Second, interdiction was combined with the transfer of all interdicted persons to Guantanamo for processing (November 1991 - May 1992). Third, interdiction and return to the point of departure was carried out with no screening of asylum claims whatsoever (March 1992 - March 1994). Fourth, interdicted persons were transferred to a third country for processing (brief policy of carrying out processing in Jamaica and the Turks and Caicos Islands, June - July 1994). Fifth, interdiction was combined with the transfer of all persons to Guantanamo or a third country (Caribbean nations such as Panama) for safe haven, where they were protected from *refoulement* but not given access to status determination procedures (1994 - 1995). Sixth, is the current practice under which interdicted persons undergo basic screening at sea and are transferred to Guantanamo for further processing (1995 - present).

The interdiction and extraterritorial processing measures introduced as part of both the Pacific Solution Mark I and II bear the most direct resemblance to the third (interdiction and return with no processing) and fourth (interdiction and processing in a third country) forms of the policy utilised by the United States. The objective, however, was the same as in all six incarnations of the US interdiction and extraterritorial processing programs. This was to control access to the State’s territory and carry out asylum determinations in a discretionary manner outside the framework of domestic legislation and beyond the reach of judicial oversight. Unlike in the United States, where the approaches were used at separate points in time, Australia operated the policies of return without screening and extraterritorial processing concurrently. As part of *Operation Relex*, the Australian Navy was instructed to intercept and return boats to Indonesia wherever possible. Recognising, however, that returns may not always be possible, the Australian government also set up a system of offshore

---

114 The Minister is authorised to detain passengers of an interdicted vessel for as long as a decision is made on where the interdictees should be transferred: *MPA*, s 75A(1)(c).

115 *MPA*, s 22B, which relates to the authorisation powers under pt 2 div 2; and s 75B, which relates to the exercise of powers under section 69, 69A, 71, 72, 72A, 74, 75D, 75F, 75G or 75H.

116 These include exclusion of review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) of certain decisions (see, for example, new s 75D and 75H) and the provisions discussed above which state that the exercise of certain maritime powers are not invalid due to a failure to consider, or inconsistency with, Australia’s international obligations.
processing on Nauru and Manus Island in PNG as an alternative. A similar concurrent system of interdiction and return to point of departure, and interdiction and transfer to offshore processing centres is utilised under the Pacific Solution Mark II. However, it appears that the Abbott government has also adopted elements of the sixth approach (interdiction and basic screening at sea), with reports that the government is now carrying out screening for refugee claims aboard Navy vessels on the high seas in certain circumstances.\textsuperscript{117}

The extraterritorial processing regimes introduced as part of the Pacific Solution Mark I and II share many striking similarities with those utilised by the United States. The US regime involved processing asylum claims in third countries (Turks and Caicos Islands and Jamaica) and in the territory of Guantanamo. The Australian extraterritorial processing facilities are located in Nauru and Manus Island in PNG. Both the US and Australian systems create inferior systems for asylum determination, operating outside domestic legal frameworks. Australian law does not extend to asylum seekers on Nauru or PNG, as these are sovereign nations with their own laws. US law did not extend to Jamaica or Turks and Caicos Islands for the same reason. Guantanamo’s special status puts it beyond the reach of domestic migration legislation,\textsuperscript{118} and until recently, was viewed to be beyond the reach of the US Constitution.\textsuperscript{119} This extraterritoriality has allowed for the adoption of streamlined procedures that dispense with essential features of mainland processing such as access to lawyers, administrative review,\textsuperscript{120} and judicial review.\textsuperscript{121}

The excision of Australia’s offshore islands from Australia’s migration zone may also have been inspired by US practice. In some ways, it is a logical extension of the ‘entry fiction’ introduced in the United States in 1891.\textsuperscript{122} This legal fiction allows for certain aliens to be physically present inside the territory of the United States, but deemed as not present for purposes of immigration law. Under the policy of excision, unauthorised arrivals who reached certain offshore territories were prevented from applying for asylum under domestic Australian law. While possibly inspired by certain US practices, the policy had the effect of expanding the practice of interdiction and extraterritorial processing beyond that which had applied in the United States. Whereas the policy of extraterritorial processing had only been applied in the United States to persons who had been intercepted before they reached US territory, excision as introduced as part of the Pacific Solution extended the applicability of the policy to asylum seekers who made landfall at Australia’s outlying islands. Reforms introduced in

\textsuperscript{117}See above n 105 and accompanying text.
\textsuperscript{118}See above n 35 and accompanying text.
\textsuperscript{119}See above n 36 and accompanying text. See, also, Boumediene v Bush, 553 US 723 (2008) (holding that certain US constitutional protections extend to the territory of Guantanamo Bay). This case is examined in Chapter Eight, Part 8.1.2.
\textsuperscript{120}Asylum seekers processed in the United States have a right of review of their primary refugee determination before an Immigration Judge at the Executive Office for Immigration Review. Likewise, asylum seekers processed in Australia have a right to review at the Refugee Review Tribunal. No such review was available for persons under the extraterritorial regimes at Guantanamo Bay, the Turks and Caicos Islands, Jamaica, Nauru or Manus Island.
\textsuperscript{121}The scope of judicial review afforded to persons processed under the US and Australian extraterritorial processing regimes is examined in Chapter Eight.
\textsuperscript{122}See Chapter Four, nn 53-5 and accompanying text. Similar provisions were in force in Australia until 1989: see Chapter Four, n 120 and accompanying text.
2013 as part of the Pacific Solution Mark II extended extraterritorial processing to all unauthorised boat arrivals, including those who reached mainland Australia.123

The excision policy also took on new significance after the 2008 reforms, which moved the location of extraterritorial processing from Pacific Islands to the excised territory of Christmas Island. The government attempted to rely on the excision laws to create its own Guantanamo on Christmas Island, creating a territory over which it exercised sovereign control, but in which domestic laws and protections were said not to apply. The judiciary rejected this approach in *Plaintiff M61/2010E v Commonwealth* (*Offshore Processing Case*).124 This decision, as well as the failure of other attempts to create a regional solution to the continuing flow of unauthorised maritime arrivals led to a return to third country extraterritorial processing, with the reopening of detention centres in Nauru and Manus Island as part of the Pacific Solution Mark II.

### 5.3 Confirming the Transfer Hypothesis

As the previous section indicates, the policy developments relating to interdiction and extraterritorial processing have followed similar patterns in the United States and Australia. While these similarities raise a strong presumption that legal and policy transfer has occurred, it does not rule out the alternate hypothesis that the similarities are due to *independent* responses to similar policy problems in both countries. In this section, I set out evidence that rules out the possibility of independent development by demonstrating that policy makers in Australia had direct knowledge of US practice in this area and drew upon this information when formulating and implementing the Pacific Solution. The section begins by identifying the instances of purported transfer that have taken place. Next, the evidence supporting the transfer hypothesis will be examined. This will be done with reference to documentary sources and interviews carried with key policy makers from Australia and the United States.

Before examining the evidence of the knowledge possessed by decision makers involved in the case study transfers, it is important to be clear about the content, direction and timing of the purported instances of transfer. In relation to the practice of interdiction and extraterritorial processing, the transfer process appears to have been mono-directional, with Australian policy makers drawing lessons from the United States in the immediate lead-up to the introduction of the original Pacific Solution in August and September 2001. While there is evidence to suggest ongoing dialogue in relation to the operation of offshore detention facilities,125 these do not appear to have materially affected the interdiction and extraterritorial processing policies in either country.

#### 5.3.1 Opportunity: Channels of Communication

The channels of communication that provided the *opportunity* for Australian and US policy makers to meet and share information on interdiction and extraterritorial processing policies are the same as

---

123 See above n 100 and accompanying text.
124 See Chapter Eight, Part 8.2.1.
125 See below n 133-5 and accompanying text.
those examined in Chapter Four in the relation to the transfer of long-term mandatory detention.\textsuperscript{126} The key forums discussed there were networks operating within international organisations (as well as the informal bilateral discussions that occur on the sidelines of these meetings); Regional Consultative Processes such as the Five Country Conferences and the Intergovernmental Consultations on Asylum; and bilateral avenues of communication such as ad hoc meetings, staff exchanges, fact-finding missions and migration policy attachés based in the Australian Embassy in Washington and the US Embassy in Canberra.

5.3.2 Direct Evidence Supporting the Transfer Hypothesis

There is also direct evidence that Australian policy makers drew on US interdiction and extraterritorial processing practices when formulating and implementing the Pacific Solution. The Bill Digest accompanying the Border Protection (Validation and Enforcement Powers) Act 2001 directly refers to the US precedent.\textsuperscript{127} This Act was the first of a series passed in the immediate aftermath of the Tampa incident to retrospectively authorise the actions taken against that vessel and establish the legislative framework underpinning interdiction and offshore processing. The Bills Digest includes a section titled ‘United States Analogy’, which sets out a detailed history of US interdiction and extraterritorial processing.\textsuperscript{128}

The view that Australian officials drew inspiration from US practice was supported by the data collected in my interviews. Two US policy makers interviewed stated that they had provided detailed advice, relating to US experience with interdiction and extraterritorial processing, to Australian policy makers in the immediate lead-up to the introduction of the Pacific Solution.\textsuperscript{129} The first interview subject reported being contacted through the Australian Consular of Immigration based in the Australian Embassy in Washington DC. The second interview subject, who had been one of the key architects of the US extraterritorial processing policies in the Caribbean in the 1990s, reported he had provided detailed policy advice, relating to the US experience with Haitian arrivals, to officials from Australia’s Department of Foreign Affairs and Trade, and Department of Immigration, as well as to the Australian Ambassador in Geneva. The policy maker was based in Geneva at the time the Tampa crisis unfolded, and was consulted on a daily basis by Australian officials in the immediate aftermath of the incident. Both US interview subjects identified specific Australian policy makers with whom they spoke. However, I was not able to secure interviews with any of the individuals named.

Many of the key Australian bureaucrats involved in the formulation and implementation of the Pacific Solution declined my request for an interview. This was in stark contrast to the response I received from Australian policy makers involved in the development of the policy of mandatory detention. The reluctance of policy makers involved in the development of the Pacific Solution may be explained by two factors. First, the Pacific Solution is a more recent policy and, as a result, many of the key players

\textsuperscript{126} See Chapter Four, Part 4.3.1.
\textsuperscript{127} Nathan Hancock, ‘Border Protection (Validation and Enforcement Powers) Bill 2001’ (Bills Digest No 62 2001-02, Department of the Parliamentary Library - Information and Research Services, 2001).
\textsuperscript{128} Ibid.
\textsuperscript{129} USB06, USB19.
are still active in the public service. Some of the key events I examined in relation to mandatory detention occurred in the early 1990s. As such, most of the policy makers involved are now retired or have moved on to the private sector, and were therefore more willing to talk about their experiences. A second and related factor, is that the Pacific Solution was, and remains, a very politically sensitive topic. The politically charged nature of the policy is evident in the fact that it was developed within the Department of the Prime Minister and Cabinet (‘PMC’), rather than the Department of Immigration. The implementation was also overseen by the PMC, which played a key role in coordinating the high-level, intergovernmental committee that became known as the People Smuggling Taskforce. While no bureaucrats directly involved in this taskforce agreed to be interviewed, a senior bureaucrat active in the Department of Immigration during this period had the following to say about the degree to which he and his colleagues may have drawn on US interdiction and extraterritorial processing policies:

Clearly we were aware of [the US precedent], and we paid attention to it because it had some similar characteristics. It didn’t have identical characteristics, but it did have some similar characteristics, so we stayed abreast of developments and if there was anything we didn’t fully understand, we obviously spoke to Americans about it, and asked how do you do this, how do you do that? It was more staying aware of how another country had approached an issue and how other commentators had characterised the US precedent, and what UNHCR’s perspective was on the US model.130

Interviews with Australian politicians involved in the development of the Pacific Solution elicited a similar response. Interview subjects conceded they had knowledge of the US precedent, but denied that US policy was used as a model for Australian interdiction and extraterritorial processing policies.131 Again, it was emphasised that the policies were a response to unique Australian circumstances. Some level of influence was conceded, with one Australia politician stating: ‘It’s inspiration, not copying. We looked at all the various policy options, including what was going on overseas, and used that to update our own ideas.’132

Ongoing dialogue in relation to the operation of extraterritorial processing and interdiction was evident in the ‘refugee swap’ agreement concluded between the United States and Australia in 2007.133 Under a memorandum of understanding entered into on 17 April 2007, the United States was to resettle 200 refugees from the processing centre in Nauru. In return, Australia was to resettle refugees processed in Guantanamo.134 As Azadeh Dastyari has observed, the refugee swap was ‘a reminder of the parallels between US and Australian practices towards refugees and asylum seekers’.135

---

130 AUB77.
131 AUP50, AUP35.
132 AUP49.
134 Note that the decision of the Australian Labor government to abandon offshore processing in 2007 meant that the refugee swap was never actually carried out.
135 Dastyari, above n 133, 93.
5.4 Concluding Remarks on the Transfer of Immigration Control Measures between the United States and Australia

In the preceding two chapters, I have argued that the existence of similar policies relating to long-term mandatory detention of unauthorised arrivals, and the interdiction and extraterritorial processing of maritime asylum seekers in Australia were likely the result of a process of legal and policy transfer. In relation to mandatory detention, three phases of transfer were identified. The first phase involved Australian law makers drawing on US practice when implementing and formalising the Australian system of mandatory detention between 1989 and 1994. In the second phase, which occurred between 1996 and 2005, the direction of the transfer appears to have shifted, with US policy makers drawing lessons from Australia's stringent approach and reducing the grounds for parole. The third phase, which occurred from 2005 to the present, has involved a two-way transfer where policy makers from both jurisdictions have drawn lessons from each other regarding attempts at reforming and mitigating some of the excesses of detention practices. In relation to interdiction and extraterritorial processing, the transfer appears to be a one-off occurrence, with Australian policy makers drawing on US experience when developing the Pacific Solution in 2001. None of these transfers involved verbatim copying of legislative provisions. Rather, in each instance, a policy was adapted at a conceptual level, but implemented through original domestic legislation and regulations. In this concluding section, I explore one final issue I observed in the course of the interviews I carried out with US and Australian policy makers.

An interesting pattern emerged in my interviews: policy makers in both countries were eager to put on the record that their policies were copied by their foreign counterparts, but were reluctant to admit that they themselves had drawn lessons from foreign practice. In this regard, the interactions between Australian and US policy makers fit Jane McAdam's description of the broader 'plagiaristic dialogue' that is occurring in the refugee policy sphere—with states borrowing heavily from each other but without any clear acknowledgement. There are a number of factors that can explain this behaviour. First, a policy maker may genuinely be unaware of the foreign influence. Policy development is a fractured process that includes many different agents. This may explain the fact that Australian policy makers (both bureaucrats and politicians) involved in the development of the Pacific Solution downplayed the influence of US policy in shaping Australia’s response. The advice of US officials was solicited primarily through consular officials posted overseas (who did not respond to my request for an interview). It is likely that by the time the information trickled down to the policy makers I interviewed, the acknowledgement of the US source was omitted. Second, it may be that some interview subjects deliberately or inadvertently misrepresented their own role in the policy development process. As discussed in Appendix A, policy makers may slant their accounts for a variety of reasons. In this case, policy makers, whether politicians or bureaucrats, may be reluctant to admit to engaging in transfers for 'prestige' reasons, as it deflates their role in the policy making

process and portrays them as ‘followers’. Rather, they may attempt to cast themselves as ‘leaders’ by emphasising their role in influencing foreign practices. This tendency is particularly relevant in the United States, which has traditionally viewed itself as an ‘innovator’ rather than an ‘emulator’. As Maryellen Fullerton has observed:

To an extent that may be difficult for outsiders to perceive, the United States views itself as the centre of the current world order. The United States imagines that it exports human rights norms to the rest of the world, not vice versa.\textsuperscript{137}

This self-perception is buttressed by ‘a reflexive American exceptionalism mindset’ that views the United States as somehow qualitatively different from other nations, and a related ‘contemporary public antipathy to reliance on foreign law’.\textsuperscript{138} It is important to bear in mind these tendencies when evaluating the reluctance of US immigration policy makers to admit to drawing on foreign practice, as well as the relative lack of documentary evidence of such transfers.

\textsuperscript{137} Maryellen Fullerton, ‘Stealth Emulation: The United States and European Protection Norms’ in Hélène Lambert, Jane McAdam and Maryellen Fullerton (eds), \textit{The Global Reach of European Refugee Law} (Cambridge University Press, 2013) 201, 201 (emphasis in original).

\textsuperscript{138} Ibid, 202-5, 222.
CHAPTER SIX:
MANDATORY DETENTION – THE CASE LAW

Policies of long-term mandatory detention, interdiction and extraterritorial processing push the boundaries of what is acceptable under domestic and international law. These policies have been the subject of judicial challenges in the highest courts of the United States and Australia. The examination of how the courts have responded to functionally equivalent policies in each jurisdiction provides an opportunity to consider the impact of different legal and extra-legal factors on judicial decision making and the impact of these factors on the success or failure of transfers of law or policy. The focus of my analysis is on what I label as legal success. I define legal success as occurring when an imported law or policy survives judicial challenges in domestic courts.¹ At the same time, I argue that legal transfers fail when there is a judicial finding that an imported law or policy is unlawful, or where the judiciary adopts an interpretation of the imported provisions which frustrates the original intention of the drafters of the law or policy.

Over the next three chapters, I argue that different legal frameworks operating in each jurisdiction have not been determinative of the way courts in the United States and Australia have responded to the case study policies. In each leading case, the judges had a choice between adopting a ‘rights-protecting’ approach, upholding the statutory, constitutional or common law rights of the non-citizen; or a ‘rights-precluding’ approach upholding the legality of government actions.² I make the case that in each instance the law in the United States and Australia contained ample resources to support either approach. As such, the choices made by judges reflect differences in judicial mindset, rather than variations in the legal frameworks in each jurisdiction.³ The relevant judicial mindset relates to the views about the appropriate scope of rights to be afforded to non-citizens who have no right to enter or remain in the country; and differences in opinion as to the appropriate role of the judiciary in interfering with executive and legislative actions. I argue that such views and opinions, in turn, appear to be influenced by extra-legal factors such as national security concerns and public opinion towards immigration. Thus, I contend that these extra-legal considerations may be of more significance in determining legal success or failure than differences in legal structures.

In this chapter, I compare the judicial response to immigration detention laws. I examine the judicial response to interdiction and extraterritorial processing policies in Chapter Seven and Chapter Eight respectively. In the course of my analysis, I identify critical junctures in the reasoning of the judges in each case, which could have led them down either the ‘rights-precluding’ or ‘rights-protecting’ path. In

¹ See Chapter Two, Part 2.3.1.
² This terminology is adapted from Rayner Thwaites, The Liberty of Non-Citizens: Indefinite Detention in Commonwealth Countries (Hart, 2014) 15.
³ Rayner Thwaites makes a similar argument in relation to his comparative analysis of the judicial response to the legality of the potential indefinite post-deportation order detention in Australia, Canada and the United Kingdom: ibid.
Chapter Nine, I examine the potential impact of extra-legal factors on judicial decision making when faced with these junctures. I argue that there is a correlation between heightened national security concerns, negative public sentiment towards immigrants and judicial opinions resulting in a 'rights-precluding' outcome.

Legal challenges to immigration detention policies in the United States and Australia have focused on two primary issues. The first relates to the mandatory nature of detention and whether non-citizens can be detained without individualised assessments of the need for incarceration. The second relates to the duration of detention and whether legislation can authorise the potentially indefinite detention of non-citizens at the discretion of the executive branch of government. The US Supreme Court and the Australian High Court have adopted similar forms of proportionality analysis to uphold the legality of mandatory immigration detention imposed without individualised findings as to the necessity of detention. I question the reasoning relied on to reach this conclusion, arguing that an alternate reasonable construction was available in the leading cases in both jurisdictions that could have supported a finding that such detention was unlawful.

In terms of provisions purporting to provide for indefinite, administrative, post-deportation order detention, courts in the two countries have diverged in their approach. As will be discussed in detail below, the US Supreme Court imposed a presumptive time limit on such detention, while the Australian High Court upheld the validity of potentially indefinite detention. It is tempting to attribute this divergence to differing legal structures in each jurisdiction—most importantly, the existence of a constitutional bill of rights in the United States and the absence of any such protections in Australia. I argue that there are reasons to doubt such a conclusion. The plenary power doctrine in the United States means that the usual constitutional protections do not always apply in immigration related cases. The doctrine has resulted in a fractured application of constitutional protections to non-citizens in immigration proceedings. This has given judges a broad discretion as to when they should (and should not) intervene. At the same time, Australia has the constitutional requirement of the separation of powers between the judiciary and the executive; and the common law presumption in favour of personal liberty. These and other tools of statutory interpretation could have provided enough justification for judges to adopt an interpretation of the statute that precluded indefinite detention.

6.1 United States: Legal Frameworks and Early Case Law

The United States has a federal constitution that limits the power of Congress in two important ways. First, the federal government’s power is generally restricted to those grounds expressly enumerated in the Constitution. This means the government can exercise ‘only the powers granted to it’ and powers ‘necessary and proper’ to the execution of those delegated powers. Second, the Constitution contains explicit limitations that describe specific things that the federal government may not do. The most important of these provisions for present purposes are those aimed at protecting individual rights. Known collectively as the Bill of Rights, these protections appear as the first ten amendments

---

4 McCulloch v Maryland, 17 US 316, 324, 405 (1819).
to the US Constitution. The result of these positive and negative constraints is that ‘federal action will ordinarily be constitutional only if it is authorised in the Constitution and then only if nothing in the Constitution prohibits it.’

The US Constitution does not include any language that expressly grants Congress the power to control immigration. Immigration law therefore stands as an exception to the general rule that the federal government can only legislate with regard to matters expressly enumerated in the Constitution. Congress’s power to control immigration is said to derive from powers inherent in sovereignty. In *Chae Chan Ping v United States* (*Chae Chan Ping*), the Supreme Court held unanimously:

> That the government of the United States… can exclude aliens from its territories is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is part of its independence. If it could not exclude aliens, it would to that extent be subject to the control of another power.

This sovereign power vested in Congress and the executive to control immigration has been understood to extend not only to the removal of non-citizens, but also the detention of such persons pending their removal. In *Wong Wing v United States*, Shiras J stated:

> Proceedings to exclude or expel would be in vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation.

In relation to constitutional protections that may have a bearing on immigration detention, the most directly relevant is the Fifth Amendment Due Process Clause. This provides that ‘[n]o person shall… be deprived of life, liberty, or property, without due process of the law.’ This clause creates a *procedural* due process right pursuant to which individuals are to be afforded certain hearing rights before they are deprived of life, liberty or property. The clause also provides a *substantive due process* right pursuant to which a law or regulation can be challenged for being inherently unfair or arbitrary because it infringes a fundamental right.

The operation of the Due Process Clause and other constitutional protections in immigration decision making is restricted by the plenary power doctrine. The contours of the doctrine have evolved over the years, but in general it declares that the political branches have a broad and largely exclusive authority over immigration. Accordingly, courts have generally declined to review federal immigration statutes and decisions made under those statutes for compliance with constitutional restraints. The

---


6 130 US 581, 603-4 (1889).

7 163 US 228, 235 (1896).

8 *United States Constitution*, amendment V.

9 See Chapter Four, nn 27-38 and accompanying text for further discussion of the plenary power doctrine.
result is that ‘[i]mmigration law is a constitutional oddity’\textsuperscript{10} which has developed in isolation from mainstream American public law. Over the years, the doctrine has attracted a great deal of criticism, and numerous observers have predicted its demise.\textsuperscript{11} However, for now, the doctrine continues to play a significant role in US judicial decision making.

The plenary power doctrine was developed in a line of Supreme Court decisions dealing with challenges to laws designed to exclude and deport Chinese nationals in the latter part of the 19\textsuperscript{th} century. In \textit{Chae Chan Ping}, the US Supreme Court held that the US federal government has the power to pass laws regulating migration and that the plenary power doctrine means that these laws cannot be challenged on substantive due process grounds.\textsuperscript{12} Three years later, in \textit{Nishimura Eiku v United States}, the Court made it clear that the plenary power doctrine extended to bar review on procedural due process grounds as well.\textsuperscript{13} However, by explicitly contrasting the position of excludable aliens (who had no constitutional rights in the immigration context) to that of resident aliens in deportation proceedings, the Court left open the possibility that the latter category may be entitled to at least some degree of constitutional protection. This issue was resolved in the case of \textit{Yamataya v Fisher}, which affirmed the distinction between excludable and deportable aliens.\textsuperscript{14} The majority in that case ruled that deportable aliens could challenge their deportation on procedural due process grounds. Harlan J states in his majority opinion:

\begin{quote}
[I]t is not competent for ... any executive officer... arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all the opportunity to be heard upon the question involving his right to be and remain in the United States.\textsuperscript{15}
\end{quote}

The main contours of the plenary power doctrine were set. Subject to minor exceptions discussed below, the doctrine remains relatively unchanged to this day. The fault line continues to be based on notions of entry and non-entry, with a distinction made between excludable and deportable aliens. Deportable aliens are those who have ‘entered’ into the United States by crossing US borders, either legally or illegally. Excludable aliens are those seeking entry into the United States, but who are stopped at the border awaiting a determination as to their admissibility. Deportable aliens, who are by

\begin{flushright}
\textsuperscript{12} 130 US 581 (1889).
\textsuperscript{13} 142 US 651 (1892).
\textsuperscript{14} 189 US 86 (1903).
\textsuperscript{15} Ibid 101. It is important to note, however, that although recognising the competency of the court to hear constitutional challenges based on due process in deportation proceedings, no procedural due process violation was found to have occurred in this case. This was despite the fact that Ms Yamataya could not speak English, had not received notice of the charges against her, and had not been allowed to consult with a lawyer: 101-2.
\end{flushright}
definition within the United States, can raise limited procedural due process challenges in deportation cases. However, the extent of due process that must be accorded remains unclear. A long line of cases recite the procedural due process requirement, but do not apply it for the alien’s benefit. Recent decisions have also signalled a willingness on the part of the Court to entertain substantive due process challenges brought by deportable aliens. In contrast, excludable aliens do not have any procedural or substantive due process rights during their removal process. The one notable caveat to this rule relates to returning former long-term residents who may in certain circumstances be entitled to limited due process rights.

The US Supreme Court has maintained the distinction between aliens who have ‘entered’ the United States and those who have not, despite Congress abolishing the division between exclusion and deportation proceedings. In 1996, Congress replaced exclusion and deportation proceedings with a single removal procedure. Following the 1996 reforms, the concept of ‘admission’ was adopted as the fundamental distinction in immigration proceedings. Non-citizens placed in removal proceedings who have not been admitted, now have to establish an entitlement to admission regardless of whether they are picked up at the border or inside US territory. Where a person has been admitted, the onus falls on the government to prove deportability. Alexander Aleinikoff explains that ‘the change in law ended the anomaly that a non-citizen seeking initial entry on an immigrant visa received fewer procedural protections than a non-citizen inside the United States who had entered without inspection.’ However, the Supreme Court has to date declined to shift the application of the plenary power doctrine in the direction identified by Congress. As the cases examined below in Part 6.2 demonstrate, it has chosen instead to affirm the border/interior distinction.

In Shaughnessy v United States ex rel Mezei (‘Mezei’), a majority of the US Supreme Court rejected the constitutional claims of an alien who had left the United States and was seeking readmission at Ellis Island. In doing so, the Court upheld the constitutional validity of his continued and potentially indefinite detention. Ignatz Mezei had been admitted lawfully to the United States where he had resided for 25 years. He left the country to visit his dying mother in Romania. Upon his return to the United States he was refused entry on security grounds. The adverse information the government relied on to exclude Mr Mezei was not put to him as it was deemed to be confidential information, the disclosure of which would be prejudicial to the public interest. As no other country would accept him,

16 See, for example, Carlson v Landon, 342 US 524 (1952).
21 345 US 206 (1953).
22 Ibid 208.
23 The power relied upon was the provision in Passport Act of 1918 that allowed the Attorney General, acting for the President, to shut out aliens whose ‘entry would be prejudicial to the interests of the United States’ during times of war or national emergencies. These provisions allowed for exclusion without a hearing when the exclusion was based on confidential information the disclosure of which would be prejudicial to the public interest: see Passport Act of 1918, § 1 ch 81, 40 Stat 559, as amended by the Act of June 21, 1941, ch 210, § 1, 55 Stat 252, 22 USC § 223.
he faced the prospect of indefinite detention on Ellis Island. Mr Mezei petitioned for habeas corpus. The lower courts granted that application, finding that continued detention without any realistic possibility of removal constituted a denial of due process. The Supreme Court reversed the decision. In a 5:4 majority ruling, the Court held that Mr Mezei’s continued and potentially indefinite detention was authorised under law and did not raise any constitutional concerns. Clark J’s lead judgement stands as one of the Court’s strongest statements of the application of the plenary power doctrine. He reasoned that because of Mr Mezei’s status as an excludable alien, no statutory or constitutional basis existed for his release. Clark J recognised that ‘aliens who have once passed through our gates even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.’ But excludable aliens may not assert procedural rights under the Due Process Clause because constitutional protection only extends to persons within the United States territory. This decision affirmed the distinction created in the earlier plenary power doctrine cases between excludable and deportable aliens. Importantly, it also upheld the entry fiction under which an alien may physically be present in US territory, but deemed not to be present for the purposes of immigration law. Mr Mezei had contended that his indefinite detention on Ellis Island strengthened his constitutional claim to a hearing to determine whether he should be excluded. Clark J rejected this argument, reasoning that his detention was merely incidental to his exclusion, deciding that ‘such temporary harborage, an act of legislative grace, bestowed no additional rights.’ While the Supreme Court’s decision gave the green light to the executive to detain Mr Mezei on Ellis Island indefinitely—he was eventually released on parole by the Attorney General.

6.2 United States: Recent Case Law

6.2.1 Indefinite Detention

Recent US Supreme Court decisions on indefinite immigration detention signal a retreat from the position taken in Mezei. While the Supreme Court has been reluctant to make an explicit constitutional finding which expands due process rights to immigration detainees, it has used the doctrine of constitutional avoidance to interpret current statutory detention provisions as not generally authorising such detention. As explored above, aliens who have entered the United States and are subsequently placed in deportation proceedings have generally been afforded substantially more constitutional rights than excludable aliens seeking entry. However, under the current legislative

24 Mezei, 345 US 206, 208-9 (1953); He had twice been sent to Europe and returned by Britain and France. He of his own volition applied to twelve Latin American countries for admission, but had been refused.
26 See Weisselberg, above n 11, 967.
27 Mezei, 345 US 206, 212 (1953).
28 Ibid.
29 See Chapter Four, nn 53-5 and accompanying text.
32 See below Part 6.2.1(a) and nn 197-203 and accompanying text.
regime, post-deportation detention of both classes of removable aliens is governed by a single legislative provision. The unintended result of this has been the extension of protections afforded to deportable aliens to also apply to excludable aliens.

In Chapter Four, I examined the expansion of the use of mandatory detention for excludable/non-admitted aliens. Beginning in the late 1980s, the US government also introduced and progressively expanded provisions relating to the mandatory detention of deportable aliens. In 1988, Congress passed the Anti-Drug Abuse Act, which directed the Attorney General to take into custody any alien convicted of an aggravated felony upon completion of his criminal sentence, and not to release the aggravated felon from custody. The result was that targeted immigrants were to be mandatorily detained throughout deportation proceedings and thereafter until removal, potentially for an indefinite period. In response to concerns that the mandatory detention provisions violated the Due Process Clause, Congress amended the legislation to permit the discretionary release of aliens who had been legally admitted into the United States and could show that they did not pose a flight risk or a danger to the community. This discretionary power to release was again removed in 1996, with the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (‘AEDPA’).

The current regime governing the post-deportation order detention of aliens was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (‘IIRIRA’), introduced six months after the AEDPA. In addition to expanding mandatory detention provisions for excludable aliens, the IIRIRA also amended the Immigration and Nationality Act (‘INA’) to subject a broader category of aliens to mandatory detention during removal proceedings and thereafter until deportation. The amendments provided for the mandatory detention of aliens removable on terrorist grounds, as well as those convicted of crimes of moral turpitude, aggravated felonies, drug related offenses, firearm offenses, and the catchall category of ‘miscellaneous crimes’.

What is significant for the current analysis is that the reforms created a single provision to deal with the post-deportation procedures of both admitted and inadmissible aliens. Deportation and exclusion proceedings were streamlined into a single removal procedure. The provisions stipulated that when an alien is ordered removed, the Attorney General has 90 days to remove the alien from the United

33 See below nn 41-4 and accompanying text.
34 Anti-Drug Abuse Act of 1988, Pub L No 100-690, § 7343(a), 102 Stat 4470 (amending 8 USC 1252(a)(2)). Aggravated felonies were defined as crimes involving murder, drug trafficking, illicit trafficking in firearms or destructive devices, and attempts or conspiracies to commit such crimes in the United States.
36 Pub L No 104-132, 110 Stat 1214 (1996); 8 USC 1252(a)(2), as amended by AEDPA § 440(c), 110 Stat 1277.
37 Pub L No 104-208, 100 Stat 3009-546.
38 See Chapter Four, nn 87-97 and accompanying text.
39 See, generally, INA § 236(c).
40 Ibid. Parole is only available for a very limited subset of detainees: aliens enrolled in witness protection programs who can demonstrate that they do not pose a security or flight risk: see INA § 236(c)(2).
41 INA § 241.
States. Certain classes of inadmissible and criminal aliens must be detained during this period. The Act specifies that if, for whatever reason, an alien cannot be removed, they may be detained beyond the [90-day] period.

(a) Zadvydas: The Indefinite Detention of Admitted Aliens

In Zadvydas v Davis (‘Zadvydas’) the US Supreme Court addressed the question of whether the discretionary power to detain beyond the statutory 90-day period could be used to detain deportable former resident aliens indefinitely. The case concerned the potential indefinite detention of two resident aliens with criminal histories. Kestutis Zadvydas and Kim Ho Ma were issued with removal orders that could not be carried out, as no country could be found to accept them. As a result, both remained in custody past the expiration of the statutory 90-day period. In a 5:4 decision, the Supreme Court avoided ruling directly on the issue of whether the detention provisions violated procedural or substantive constitutional due process rights. Instead, the majority relied on a textual analysis of the INA. It framed the issue as whether INA § 241(a)(6) authorises the Attorney General to detain a removable alien ‘indefinitely beyond the removal period or only for a period reasonably necessary to secure the alien’s removal.’ Breyer J, who wrote the majority opinion, adopted the latter interpretation, reasoning that the alternative would raise ‘serious constitutional concerns.’ As such, his Honour read an ‘implicit limitation’ into the detention authorisation, ruling that:

[T]he statute, read in light of the Constitution’s demands, limits an alien’s post-removal-period detention to a period reasonably necessary to bring about the alien’s removal from the United States. It does not permit indefinite detention.

Breyer J concluded that once ‘removal is no longer reasonably foreseeable,’ continued detention is not authorised by the statute. Six months was the presumptively reasonable period in which to effect removal. After this period, if an alien shows that there is good reason to believe that ‘there is no significant likelihood of removal in the reasonably foreseeable future,’ the onus shifts to the government to produce evidence to rebut that presumption. The Court was careful to note, however, there may be constitutionally permissive grounds to detain aliens beyond this period, stating that the limit may not apply to ‘especially dangerous’ aliens.

---

42 INA § 241(a)(1)(A).
43 INA § 241(a)(2).
44 INA § 241(a)(6) (emphasis added).
46 At the time of the hearing, Zadvydas had been detained for 7 years and Ho Ma for 2 years: ibid 684-5.
47 Ibid 682 (emphasis in original).
48 Ibid 689 (Breyer J, joined by Stevens, O’Connor, Souter and Ginsburg JJ).
49 Ibid.
50 Ibid 699.
51 Breyer J said that the facts did not require the Court to ‘consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to national security’: ibid 696.
The key determining factor was an analysis of the express terms of the statute. Breyer J found no 'clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed.' In the absence of clear congressional intent, the Court was able to avoid any constitutional issues that indefinite detention may pose. In concluding that incarceration in this context would raise constitutional concerns, Breyer J analysed other laws providing for administrative detention. His Honour reasoned that such detention generally had been found to be constitutional only where 'a special justification, such as harm-threatening mental illness, outweighs the individual’s constitutionally protected interest in avoiding physical restraint'. Breyer J concluded that there was no sufficiently strong justification for indefinite civil detention in this case. His Honour expressly rejected the two justifications put forward by the government. The first had been that continued detention of deportable aliens was necessary to ensure that aliens do not abscond from immigration proceedings. The Court found this a weak ground for continued detention when the alien’s removal was nothing more than a ‘remote possibility at best.’ Breyer J reasoned that where the goal of removal is no longer practically attainable, detention no longer ‘bear[s] [a] reasonable relation to the purpose for which the individual [was] committed.’ Second, the government had argued that continued detention was necessary to protect the community from danger. Breyer J responded that preventative detention based on threat has only been upheld when limited to ‘specially dangerous individuals and subject to strong procedural safeguards.’ In contrast, the detention provisions at issue applied to a broad class of persons, including petty criminals. Further, the purely executive review was determined to be an inadequate safeguard.

The Court made no explicit finding on the scope of the constitutional due process rights in issue. Nevertheless, the majority opinion does signal a commitment to strengthening substantive and procedural due process rights for resident aliens. The government had argued that aliens who had been properly admitted and who lost their status while still in the United States were legally equivalent to those seeking admission at the border. It was claimed that the holding in Mezei that excludable aliens were not entitled to any due process rights under the Constitution should also apply to those who had entered and subsequently lost their status. The majority squarely rejected this proposition, reasoning that

---

52 Ibid 697.
54 Ibid 690.
55 Ibid. The Court noted that the INS had made various attempts with respect to both aliens to find a country willing to accept them but was unsuccessful: see 684, 686.
57 Ibid.
58 Ibid 691 citing United States v Salerno, 481 US 739, 740, 750-2 (1987) (allowing pre-trial detention only for the most serious crimes and subject to stringent time limits) and Fouche v Louisiana, 504 US 71, 81-3 (1992) (striking down insanity-related detention that placed the burden on the detainee to prove non-dangerousness).
59 Ibid 691.
once an alien enters the country, the legal circumstances change, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent.60

The Court restricted Mezei to its facts, reasoning that Mr Mezei did not deserve the full extent of Fifth Amendment protections because he was at the border seeking admission.61

The Court avoided procedural due process issues by side-stepping questions as to the constitutionality of the procedural scheme used to decide on detention. Rather, the Court relied on substantive due process grounds:

We believe that an alien’s liberty interest is, at the very least, strong enough to raise a serious question as to whether, irrespective of the procedures used, the Constitution permits detention that is indefinite and potentially permanent.62

This represents a shift away from earlier case law which had held that the plenary power doctrine precluded substantive due process challenges to immigration laws, even by aliens who had been lawfully admitted.63

(b) Clark v Martinez: Indefinite Detention of Inadmissible Aliens

After Zadvydas, it was unclear if the Supreme Court would apply similar reasoning to place a limit on the duration of the post-removal order detention of inadmissible aliens. As discussed above, the majority opinion affirmed the distinction made in Mezei between the constitutional rights of aliens who have entered the United States and those who have not. This distinction was maintained in principle, to the dismay of immigrant advocates and academic commentators.64 The Federal Courts of Appeals took divergent approaches to the question, with some extending the protections laid down in Zadvydas to inadmissible aliens, and others declining to do so.65

In 2005, the Supreme Court resolved the issue in Clark v Martinez.66 The case involved two Cuban men who had arrived in the United States as part of the Mariel Boatlift in 1980.67 Both were initially

---

61 Ibid 693 (noting that his status as an excludable alien ‘made all the difference’).
62 Ibid 696.
63 See, for example, Yamataya v Fisher, 189 US 86 (1903).
64 See Aleinikoff, ‘Detaining Plenary Power’, above n 11, 366 (expressing disappointment that Zadvydas affirmed the distinction between aliens who have entered officially and those who have entered illegally); Linda Bosniak, ‘A Basic Territorial Distinction’ (2002) 16 Georgetown Immigration Law Journal 407, 407 (discussing the Court’s ‘analytical confusion’ and its continuation of distinct categories of aliens, declaring that ‘the [Zadvydas] victory came at a real cost’ because ‘the Court all but reaffirmed the long-deployed decision in Mezei’).
65 The Third, Fifth, Seventh, Eighth, and Eleventh Circuits did not extend Zadvydas’s prohibition on indefinite detention to inadmissible aliens: See Sierra v Romaine, 347 F3d 559 (3rd Cir, 2003); Benitez v Wallis, 337 F3d 1289 (11th Cir, 2003); Borrero v Ajlets, 325 F3d 1003 (8th Cir, 2003); Rios v INS, 324 F3d 296 (5th Cir, 2003); Hoyte-Mesa v Ashcroft, 272 F3d 989 (7th Cir, 2001). In contrast, the Ninth and Sixth Circuits did extend Zadvydas’s prohibition on indefinite detention to inadmissible aliens: see Rosales-Garcia v Holland, 322 F3d 386 (9th Cir, 2003); Xi v INS, 298 F3d 832 (9th Cir, 2002).
67 See Chapter Four, nn 65-6 and accompanying text.
paroled into the United States but had their parole revoked after being convicted of criminal offences. As parole is not regarded as admission, the men retained their status as aliens seeking entry and as such could be removed on the grounds of inadmissibility.\(^{68}\) Both men were placed in removal proceedings, found to be inadmissible and issued with removal orders. However, these orders could not be effectuated, as Cuba would not accept their return. As such, they remained in detention beyond the 90-day removal period with no reasonable prospect of removal.

Writing for a 7:2 majority, Scalia J found that § 241(a)(6) should be interpreted as being constrained by the same time limit that applies to the detention of admitted aliens.\(^{69}\) Inadmissible aliens could be detained, ‘only for a period consistent with the purpose of effectuating removal.’\(^{70}\) As in \textit{Zadvydas}, this was held to be a presumptive period of six months, after which a detainee must be released if there is ‘no significant likelihood of removal in the reasonable future’.\(^{71}\) The majority reached this decision by construing the relevant statutory provision, § 241(a)(6), as not distinguishing between admitted and inadmissible aliens.\(^{72}\) As such, the Court felt bound to follow the earlier statutory interpretation adopted in \textit{Zadvydas} rather than ‘establish within [their] jurisprudence, beyond the power of Congress to remedy, the dangerous principle that judges can give the same statutory text different meanings in different cases’.\(^{73}\) The conclusion was reached despite the fact, explicitly noted by the majority, that indefinite detention of inadmissible aliens would not raise any of the constitutional concerns arising in the context of the indefinite detention of admitted aliens. In this regard, the case affirmed a long line of decisions in which US courts had consistently held that Cubans who came to the United States as part of the Mariel Boatlift could not claim constitutional due process rights.\(^{74}\) However, relying on the approach to statutory construction outlined above, the Court deemed the continued indefinite detention of the plaintiffs unlawful, as it was not authorised by the relevant legislative provisions.

As the ruling was based purely on statutory construction, it does not prevent a legislative amendment providing for the indefinite detention of inadmissible aliens. As Scalia J wrote, ‘[t]he Government fears that the security of our borders will be compromised if it must release into the country inadmissible aliens who cannot be removed. If that is so, Congress can attend to it.’\(^{75}\) The Court noted that following \textit{Zadvydas}, Congress had indeed enacted powers to authorise indefinite detention beyond six months where removable aliens presented national security risks or had been involved in terrorist

\begin{footnotes}
\footnote{68}{See 8 USC § 1182(d)(5)(A) (Supp IV 1992).}
\footnote{69}{\textit{Clark v Martinez}, 543 US 371 (2005). Stevens, O’Conner, Kennedy, Souter, Ginsburg and Breyer JJ joined Scalia J’s opinion, while O’Conner J filed a concurring opinion. Thomas J filed a dissenting opinion in which Rehnquist CJ joined.}
\footnote{70}{Ibid 384.}
\footnote{71}{Ibid 378.}
\footnote{72}{Ibid 378.}
\footnote{73}{Ibid 391.}
\footnote{74}{See, for example, \textit{Barrera-Echavarria v Rison}, 44 F3d 1441 (9th Cir, 1995); \textit{Gisbert v US Attorney General}, 988 F2d 1437 (5th Cir, 1993); and Margaret Taylor, ‘Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine’ (1995) 22 Hastings Constitutional Law Quarterly 1087, 1142-3.}
\footnote{75}{\textit{Clark v Martinez}, 543 US 371, 386 (2005).}
\end{footnotes}
activities. Accordingly, they could pass similar amendments relating to the detention of dangerous inadmissible aliens.

### 6.2.2 Mandatory Detention

While the US courts have been willing to impose certain limits on the duration of post-deportation order detention, attempts to challenge the mandatory nature of detention provisions have been unsuccessful. The leading case in this regard is *Demore v Kim*. There, the Court reviewed the constitutionality of the mandatory detention of criminal aliens while their removal proceedings were pending. Hyunk Joon Kim, a South Korean national and US permanent resident, was facing deportation proceedings as the result of burglary and theft offences. He was detained under *INA* § 236(c) which required that the Attorney General detain, without bail, a subset of deportable criminal aliens pending a determination of their removability. Mr Kim had argued that § 236(c) violated his Fifth Amendment substantive due process rights because the INS had not made an individualised determination that he posed a danger to society or that he was a flight risk. Building on the *Zadvydas* decision, Mr Kim’s counsel argued that if aliens who had been issued with a final deportation order had a liberty interest in being freed, then aliens who have only been charged as deportable have at least as strong an interest. In *Zadvydas*, the majority adopted the position taken in earlier Supreme Court decisions, that detention will violate constitutional substantive due process requirements unless the detention is ordered in a criminal proceeding with adequate procedural protections, or in certain special and ‘narrow’ non-punitive ‘circumstances,’ where a special justification, such as harm-threatening mental illness, outweighs the individual’s constitutionally protected interest in avoiding physical restraint.

There was a strong argument to be made that the detention in *Demore v Kim* did not meet this criteria and so could be challenged on due process grounds. As Alexis Hedman explains, § 236(c) imposed *mandatory* detention on certain criminal aliens pending their deportation proceedings. All are assumed to fall in this category of designated special circumstances, even if they do not. Here, the justification for detention, regardless of whether it is particularised to the alien, is found to automatically outweigh the individual’s liberty interest. As such, the application of [§ 236(c)] seems far more punitive in nature and, subsequently, strays from the ‘narrowness’ prerequisite required by substantive due process protections.

---

76 See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (USA PATRIOT Act’), Pub L No 107-56, § 412(a), 115 Stat 272, 351 (2001), inserting a new § 236A into the *INA*.
This view was adopted by the District Court and the Court of Appeals for the Ninth Circuit when considering Mr Kim’s challenge. Both found § 236(c) to be unconstitutional when applied to lawful permanent residents.\textsuperscript{81} In other cases brought by permanent residents detained under § 236(c), three federal appellate courts reached the same conclusion as the Ninth Circuit.\textsuperscript{82} The Seventh Circuit was the only court to take the ‘rights-precluding’ approach\textsuperscript{83} ultimately upheld by the Supreme Court.

In \textit{Demore v Kim}, the US Supreme Court held that the mandatory detention provisions did not raise any constitutional issues. Rehnquist CJ, who delivered a 5:4 majority opinion on this issue, distinguished \textit{Zadvydas} in two key ways.\textsuperscript{84} First, in \textit{Zadvydas}, removal was no longer likely and so detention did not serve its purported immigration purpose.\textsuperscript{85} In \textit{Demore v Kim} the statutory provisions at issue governed the detention of deportable criminal aliens \textit{pending their removal proceedings}. Rehnquist CJ reasoned that

\begin{quote}
[s]uch detention necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed.\textsuperscript{86}
\end{quote}

Rehnquist CJ relied on the fact that Congress had looked at evidence on absconding rates for those granted bail and concluded that they were sufficiently high to justify mandatory detention.\textsuperscript{87} He also cited evidence showing that in most cases removal proceedings were completed relatively quickly.\textsuperscript{88}

\textit{Zadvydas} was distinguished further on the basis that the period of detention in that case was undefined and potentially permanent.\textsuperscript{89} In \textit{Demore v Kim}, the detention was of a much shorter duration. While these distinctions between the nature of detention in \textit{Zadvydas} and \textit{Demore v Kim}, may be valid, they ignore the underlying constitutional requirement affirmed in \textit{Zadvydas} that detention will only be authorised in ‘special’ and ‘narrow’ non-punitive circumstances.\textsuperscript{90} In the absence of an individual assessment as to whether he posed a flight risk or a danger to the community, it is difficult to see how Mr Kim’s detention met this constitutional requirement.\textsuperscript{91}

\textit{Demore v Kim} dealt with mandatorily detained resident aliens. The constitutionality of similar provisions mandating the detention of certain classes of inadmissible aliens has not yet been

\textsuperscript{81} \textit{Kim v Ziglar}, 276 F3d 523, 526 (9th Cir, 2002).
\textsuperscript{83} \textit{Parra v Perryman}, 172 F3d 954, 958 (7th Cir, 1999).
\textsuperscript{84} On this point, Rehnquist CJ was joined by Kennedy, O'Connor, Scalia and Thomas JJ.
\textsuperscript{85} \textit{Zadvydas}, 533 US 678, 690 (2001).
\textsuperscript{86} \textit{Demore v Kim}, 538 US 510, 528 (2003).
\textsuperscript{87} Ibid. The absconding rates in the studies cited by the Court and considered by Congress were around 20-25 per cent.
\textsuperscript{88} Ibid 529. The figures cited indicated that 85 per cent of cases resulted in a final decision within forty-seven days and the remaining 15 per cent, when appeals were conducted, took four months.
\textsuperscript{89} Ibid 526-9.
\textsuperscript{91} This was the view taken by the dissenting Justices: see \textit{Demore v Kim}, 538 US 510, 548-54 (2003) (Souter J, Stevens and Ginsburg JJ concurring) and 576-9 (Breyer J).
examined by the US Supreme Court. Given that aliens who have entered the United States have generally been afforded far broader constitutional rights than those who have not, it is very unlikely that a challenge brought on behalf of an inadmissible alien who has not entered the United States would succeed. However, the situation of aliens who have entered, even without authorisation, may be different. In this regard, a recent judicial challenge to the Obama Administration’s ‘no parole’ policy for asylum seeker families from Central America, is noteworthy. In February 2015, the US District Court for the District of Columbia ordered a preliminary injunction to halt the continued application of the no parole policy, noting the fact that it raised serious constitutional due process issues. Boasberg J reasoned that the

[plaintiffs in this case were apprehended in the territory of the United States. What is more, they may have legitimate claims to asylum, such that their presence here may become permanent. It is clear, then, that they are entitled to the protection of the Due Process Clause, especially when it comes to deprivations of liberty.]

In terms of the justification for detention, the government stated that continued detention was required for the ‘deterrence of future migration’. Boasberg J found that this did not constitute a valid government interest that could justify detention of asylum seekers who had demonstrated a credible fear of persecution. It will be interesting to see how the superior courts address this issue if the government decides to pursue an appeal.

6.3 Australia: Legal Frameworks and Early Case Law

Australia has shown a long standing interest in learning from the United States. The US Constitution was discussed at length during the Australasian Federal Conventions of the 1890s, the forums in which Australia’s Constitution was drafted. As in the United States, the legislative power of Australia’s federal government is restricted to those heads of power mentioned in the Australian Constitution. Australia’s Constitution is more explicit than its US counterpart in granting the federal government power to legislate with respect to immigration. In this regard, it appears that Australia directly drew on US experience. Speaking shortly after the adoption of the Australian Constitution, in 1901, the Attorney-General Alfred Deakin highlighted the significance of the explicit inclusion of these powers in dealing with the ‘race difficulty’:

\[\text{ina} \text{ } \S235(b)(1)(B)(iii)(IV) \text{ (providing for the mandatory detention of asylum seekers pending their credible fear determination).}\]

\[\text{See Zadvydas, 533 US 678, 693; Sale v Haitian Centers Council, 509 US 155, 175 (1993); Mezei, 345 US 206, 212 (1953) and above nn 12-20, 26-9, 60-1 and accompanying text.}\]

\[\text{This policy is discussed in Chapter Four, nn 112-17 and accompanying text.}\]

\[\text{RIL-R v Jeh Charles Johnson (DC, Civ No 15-11-JEB, 20 February 2015).}\]

\[\text{Ibid 33.}\]

\[\text{Ibid.}\]

\[\text{The Australasian Federal Convention met for three sessions in Adelaide, Sydney and Melbourne in 1897 and 1898. For a detailed analysis of the influence of the US Constitution on Australian constitutional design, see Erling Hunt, \textit{American Precedents in Australian Federation} (Columbia University Press, 1930).}\]
Our Constitution marks a distinct advance upon and difference from that of the United States, in that it contains within itself the amplest powers to deal with this difficulty in all its aspects. It is not merely a question of invasion from the exterior. It may be a question of difficulties within our borders, already created, or a question of possible contamination of another kind. I doubt if there can be found in the list of powers with which this Parliament, on behalf of the people, is endowed—powers of legislation—a cluster more important and more far reaching in their prospect than the provisions contained in subsections [(xxvi) to (xxx)] of section 51, in which the bold outline of the authority of the people of Australia for their self-protection is laid down.99

The two most important powers that have been considered in the context of immigration detention are those relating to naturalisation and aliens,100 and immigration and emigration.101 These will be referred to as the aliens and immigration powers respectively. As I discuss further below, one of the constitutional arguments put forward against both mandatory and potentially indefinite immigration detention is that such detention is beyond the scope of these (and any other) heads of power.

As in the United States, legislation can be struck down as invalid for inconsistency with the Constitution. However, the grounds for constitutional challenge are more limited, as Australia does not have a bill of rights, constitutional or otherwise. While the Australian Constitution includes limited explicit textual provisions for constitutional rights,102 none are relevant to immigration detention. Crock and Berg note that ‘the constitution says little about the relationships (rights or duties) between Australian citizens and their federal government. Instead, the central concern of this document is to set out the relative powers of the machinery of the state.’103

The structure of the Australian Constitution divides the power of the federal government between the Parliament (Chapter I), the Executive (Chapter II) and the Judiciary (Chapter III). The strictest separation is that between executive and judicial power. As Chapter III vests the judicial power of the Commonwealth exclusively with designated Commonwealth Courts, Parliament has no power to make laws which confer judicial power on the executive. This is sometimes referred to as the separation of powers doctrine. One of the implications of this doctrine is that the deprivation of liberty is a judicial power and accordingly, as a general rule, a person can only be detained by an order of a court. However, the administrative detention of non-citizens has emerged as an exception to this rule. The central question explored in relation to this issue in the case law is the scope of this exception.

99 Commonwealth, Parliamentary Debates, House of Representatives, 12 September 1901, 4804 (Alfred Deakin, Attorney General); the relevant powers referred to here are those authorising the government to make laws with respect to (xxvi) the people of any race for whom it is deemed necessary to make special laws; (xxvii) immigration and emigration; (xxviii) the influx of criminals; (xxix) external affairs; (xxx) the relations of the Commonwealth with the islands of the Pacific.

100 Australian Constitution, s 51(xix).

101 Australian Constitution, s 51(xxvii).

102 These are the right to vote (s 41); trial by jury (s 80); freedom of religion (s 116); the rights of out-of-state residents (s 117), freedom of interstate trade and commerce (s 92) and acquisition of property on just terms (s 51(xxxi)).

103 Mary Crock and Laurie Berg, Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia (Federation Press, 2011) 52.
Again, as in the United States, these constitutional restraints on government power manifest themselves in both a direct and indirect fashion. Legislation may be struck down directly as unconstitutional, either for being beyond the enumerated powers or contrary to other provisions (such as the separation of powers doctrine). Constitutional reasoning also has bearing on statutory interpretation: so far as it is possible, statutes must be interpreted consistently with the Constitution. Common law principles of statutory interpretation have also played an important role in the case law challenging immigration detention in Australia. Of most relevance is the ‘principle of legality’, pursuant to which ‘statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.’

This common law principle does not amount to a power to strike down legislation, rather it is a tool of statutory interpretation requiring that when possible, provisions should be interpreted in a way that accommodates common law rights.

The early case law examining the legality of the administrative detention of non-citizens in Australia closely mirrored the early US case law. The aliens and immigration powers were interpreted as creating a plenary power to decide which aliens could enter the Australian community. In the 1906 case of *Robtelmes v Brenan*, Griffith CJ stated that the aliens power

must surely, if it includes anything, include power to determine the conditions under which aliens may be admitted to the country, the conditions under which they may be permitted to remain in the country, and the conditions under which they may be deported from it... [T]he Commonwealth Parliament has under the delegation of power authority to make any laws that it may think fit for that purpose; and it is not for the judicial branch of the Government to review their actions, or to consider whether the means that they have adopted are wise or unwise.

In a similar vein, in referring, inter alia, to the aliens power and the immigration power, Barton J stated:

The powers given are plenary within their ambit, it is within these powers to pass legislation, however harsh and restrictive it may seem, and as to that it is not the province of a Court of Justice to inquire, where the law is clear.

It is interesting to note that the judges in *Robtelmes* explicitly referred to and affirmed the positions taken in the Chinese exclusion cases as applying in Australia. Griffith CJ held that the doctrines stated in those cases ‘may be taken to be the settled law of the British Empire as well as of the United

---


105 (1906) 4 CLR 395, 404. Note that part of this passage was cited with approval by Hayne J in *Al-Kateb* (2004) 219 CLR 562, 632-3 [203]

106 *Robtelmes v Brenan* (1906) 4 CLR 395, 415.

107 Ibid 401-3, 413 (Griffith CJ and Barton J referring to *Fong Yue Ting v United States*, 149 US 698 (1893); *Chae Chan Ping v United States*, 130 US 581 (1889); *Nishimura Ekiu v United States*, 142 US 651 (1892)).
States’. The Court’s decision in Robtelmes in many ways represents the high water-mark of judicial deference in relation to immigration matters in Australia. This is no surprise, given that two of the three justices who sat on the case (Barton J and Griffith CJ) came from the political branches. As such they were inclined to take an expansive view of the newly formed federal government’s legislative and executive powers.

The legality of potentially indefinite immigration detention was considered by the High Court in Koon Wing Lau v Calwell in 1949. That case concerned the constitutional validity of the War-time Refugees Removal Act 1949 (Cth), which authorised the deportation of certain migrants who had sought refuge in the country after the Second World War. Sections 6 and 7 allowed the Minister to make an order to deport these people and to keep them in custody pending such deportation. These detention provisions were held valid as necessary for the removal of deportees and the assessment of applications for an entry permit. As such they could be justified as incidental to the executive’s power to exclude, admit and deport aliens.

One basis for constitutional challenge was that the provisions permitted unlimited imprisonment. The Court unanimously construed the legislative provisions as not authorising such an eventuality. Dixon J read the provision to mean that ‘a deportee may be held in custody for the purpose of fulfilling the obligation to deport him until he is placed on board a vessel’ and that ‘unless within a reasonable time [the person to be deported] is placed on board a vessel he would be entitled to his discharge on habeas’. Although not making a constitutional finding, the reading down of the detention provisions represented a step back from the extreme deference to the political branches shown by the justices in Robtelmes. It also stands in contrast to the US Supreme Court decision in Mezei which was handed down four years later, as well as more recent High Court jurisprudence on the issue.

6.4 Australia: Recent Case Law

6.4.1 Mandatory Detention

---

108 Ibid 403.
109 Glenn Nicholls, Deported: A History of Forced Departures from Australia (UNSW Press, 2007) 35-6. Barton J had been the first Prime Minister of Australia and had introduced the Pacific Island Labourers Act 1901 (Cth) that was being challenged in Robtelmes while in office. Griffith CJ was the former Premier of Queensland.
110 (1949) 80 CLR 533, 555-6.
111 The relevant section provided that ‘A deportee may— (a) pending his deportation and until he is placed on board a vessel for deportation from Australia; (b) on board the vessel until its departure from its last port of call in Australia; and (c) at any port in Australia at which the vessel calls after he has been placed on board, be kept in such custody as the Minister or an officer directs’: War-time Refugees Removal Act 1949 (Cth), s 7(1).
112 Koon Wing Lau v Calwell (1949) 80 CLR 533, 581.
113 Ibid.
Chu Kheng Lim v MILGEA (‘Lim’) concerned the mandatory detention, during the admission process, of a group of mostly Cambodian asylum seekers between 1989 and 1994. Arriving by boat and without authorisation, the detainees were initially held under ‘deemed non-entry’ or ‘turn-around’ provisions. An appeal against their continued detention was lodged in the Federal Court, on the basis that those provisions did not authorise extended detention. Two days before the case was due to be heard by the Federal Court, the government passed amendments to the Migration Act 1958 (Cth) (‘Migration Act’) creating new targeted detention provisions. The detainees were given the title of ‘designated persons’. A ‘designated person’ was to be kept in custody until he or she was removed from Australia or issued an entry permit, although a 273-day time limit was placed on such detention. Provisions also stipulated that no court may order their release.

The main argument advanced by the plaintiffs was that the detention provisions breached the separation of powers doctrine by authorising administrative detention of ‘designated persons’ without giving the judiciary a role in the process. The High Court unanimously rejected this argument, determining that detention of non-citizens for immigration purposes does not necessarily involve an exercise of the judicial power. The majority’s reasoning took as its starting point the notion that detention of a citizen by the state is penal or punitive in character and as such can only be validly carried out by the judicial arm of government. It noted, however, that immigration detention was an accepted exception to this rule, as it serves a protective rather than punitive function. In what I will refer to as the ‘Lim test’, Brennan, Deane and Dawson JJ stated that provisions authorising the detention of unlawful non-citizens pending deportation:

will be valid laws if the detention which they require and authorise is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered… [I]f this detention which [the impugned laws] require and authorise is not so limited … they will be of a punitive nature and contravene Ch. III’s insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates.

The Court made it clear that immigration detention was subject to certain constitutional limits. This was formulated in the form of a test of proportionality. Detention would only be valid to the extent that

---

114 (1992) 176 CLR 1. For a detailed description of the factual background and judicial history of this case, see Mary Crock, ‘The Evolution of Mandatory Detention’ in Mary Crock (ed), Protection or Punishment: The Detention of Asylum Seekers in Australia (Federation Press, 1993) 25.

115 Section 88 of the Migration Act 1958 (Cth) (‘Migration Act’) as it stood at that time provided that a person could be held in detention until the vessel on which they arrived left its last Australian port.

116 The turn-around provisions in question were only supposed to operate within a timeframe of 72 hours. Migration Amendment Act 1992 (Cth), introducing pt 2 div 4B into the Migration Act; renumbered to div 6 by Migration Amendment Act 1994 (Cth).

117 Migration Act, s 54K; renumbered to s 177 by Migration Legislation Amendment Act 1994 (Cth).

118 Ibid s 54L, renumbered to s 178 by Migration Legislation Amendment Act 1994 (Cth).

119 Ibid s 54Q, renumbered to s 182 by Migration Legislation Amendment Act 1994 (Cth).

120 Ibid s 54R, renumbered to s 183 by Migration Legislation Amendment Act 1994 (Cth).

121 Lim (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

122 Ibid 33.
it was connected to, and reasonably necessary for a legitimate immigration purpose, namely the assessment of admission or removal requirements.

The majority in *Lim* determined that the mandatory detention provisions at issue were constitutionally valid as they met this proportionality requirement. Two statutory restrictions placed on detention were central to this finding. First, there were clear restrictions on the duration of detention, which was to be limited to 273 days.\(^\text{124}\) Second, and more importantly, the majority placed great weight on the fact that a detainee was to be removed from Australia as soon as practically possible if the person requested such removal in writing from the Minister.\(^\text{125}\) By conferring the power on a detainee to bring their detention to an end, detention was construed as ultimately voluntary and hence, non-punitive: 'It is only if an alien who is a designated person elects, by failing to make a request under s 54P(1), to remain in the country as an applicant for an entry permit that detention … can continue.'\(^\text{126}\)

The majority’s reasoning that the detention provisions met the proportionality requirement is questionable on two main grounds. First, it is difficult to see how mandatory detention, without any individual assessment as to the need for detention in a given case, can be construed as ‘reasonable’ or ‘necessary’. Belinda Wells questions how such a conclusion could have been reached when

no real attempt was made to consider the question of whether a long period of detention of an alien was in fact likely to be necessary whilst processing an entry application, or in order to secure eventual deportation. There was no mention of other alternative means for securing such ends - such as a modified bail system.\(^\text{127}\)

The reliance of the majority on the ‘voluntary’ nature of the detention to demonstrate the non-punitive nature of the detention provisions is also highly questionable as it ignores the reality of the situation faced by asylum seekers. Mary Crock argues that the Court’s statement

that ‘designated persons’ are free to bring their captivity to an end ignores the central characteristic of most, if not all, people caught by [the detention provisions] of the Act—namely, that they are applicants for refugee status. By definition, genuine refugees cannot go home without placing themselves in some form of jeopardy… Given that the plaintiffs have all applied for recognition as refugees, it is perverse to say that they are free to bring their custody to an end by requesting repatriation.\(^\text{128}\)

The majority, Brennan, Dawson, Deane and Gaudron JJ, did find one aspect of the detention provisions unconstitutional: the direction that no court could order ‘designated persons’ to be released.\(^\text{129}\) This was held to be a clear breach of the separation of powers doctrine and struck down. However, for the purposes of my analysis, *Lim* can still be identified as a case in which the judges

---

124 See former s 54Q of the *Migration Act* (renumbered to s 182; see above n 120).
125 *Migration Act*, s 54P(1), repealed and substituted with s 181(1) by the *Migration Reform Act 1992* (Cth).
129 *Migration Act*, s 54R.
adopted a ‘rights-precluding’ approach, as the majority upheld the validity of the mandatory detention provisions as well as the continued detention of the plaintiffs.
6.4.2 Indefinite Detention

In *Al-Kateb v Godwin* (‘*Al-Kateb’*) the High Court was again called upon to determine the limits of Parliament’s power to legislate in regard to the administrative detention of non-citizens.\(^{130}\) That case concerned the potentially indefinite detention of a stateless Palestinian asylum seeker Ahmad Ali Al-Kateb.\(^{131}\) Mr Al-Kateb arrived in Australia without a visa in search of asylum and was placed in immigration detention. His application for a Protection visa was denied, and after legal appeals failed, he asked to be returned to Kuwait (where he was born) or Gaza. Kuwait refused to accept Mr Al-Kateb as he was not a citizen of that country. Removal to Gaza required cooperation from Israel, which was not forthcoming. As such, the government was unable to effect his removal. Mr Al-Kateb then sought a declaration in the Federal Court that his continued detention was unlawful. Von Doussa J found that removal of Mr Al-Kateb from Australia was not reasonably practicable as there was ‘no real likelihood or prospect of removal in the reasonably foreseeable future’, but nevertheless dismissed the application.\(^{132}\) Mr Al-Kateb appealed to the Full Court of the Federal Court, but the matter was removed to the High Court for determination.\(^{133}\)

The relevant provisions of the *Migration Act* stated that ‘unlawful non-citizens’ were to be held in detention until one of three events occurred: removal from Australia at their own request, deportation, or grant of a visa.\(^{134}\) The provisions also stipulated that a person such as Mr Al-Kateb, who had requested removal, was to be removed ‘as soon as reasonably practicable’.\(^{135}\) The appeal focused on two questions. Did the detention provisions, when properly construed, purport to authorise the potential indefinite detention of non-citizens in circumstances where there were no real prospects of removal? If so, were the provisions constitutionally valid?

The Full Federal Court had addressed these same issues 16 months earlier in *MIMIA v Al Masri* (‘*Al Masri’*).\(^{136}\) In a unanimous decision, the Court found a temporal limitation on detention as a matter of statutory construction. It ruled that a detainee must be released when the purpose of removal is frustrated.\(^{137}\) The Court’s process of statutory construction was primarily informed by the common law principle of legality. However, reference was also made to constitutional considerations. Applying the *Lim* test, the Federal Court reasoned that if a deportee had nowhere to go and there was no ‘real likelihood or prospect of removal in the reasonably foreseeable future’,\(^{138}\) continued detention may ‘not be reasonably capable of being seen as necessary’ for the purpose of removal, and a serious

---

131 Ibid 596 [79] (Gummow J). Despite the fact that Mr Al-Kateb was born in Kuwait, and lived there for most of his life, he was not eligible for citizenship or permanent residence.
133 Pursuant to s 40 of the *Judiciary Act 1903* (Cth).
134 Section 189 (providing for the mandatory detention of unlawful non-citizens). Under s 196(1) of the *Migration Act* as it stood at the time, a person who had qualified for immigration detention had to be kept there until the person was (a) removed from Australia under section 198 or 199; or (b) deported under section 200; or (c) granted a visa.
135 *Migration Act*, s 198.
138 Ibid 73-4 [74].
question of constitutional invalidity would arise.\textsuperscript{139} Although not directly ruling on the constitutionality issue, the process of statutory interpretation was clearly informed by a finding that indefinite detention would violate the separation of powers doctrine. This ‘rights-protecting’ interpretation of the relevant statutory provisions was supported further by reference to Australia’s obligations under international law.\textsuperscript{140}

The majority of the High Court in \textit{Al-Kateb} took a different view. On the issue of statutory construction, McHugh, Hayne, Callinan and Heydon JJ rejected the approach taken in \textit{Al Masri}, finding that the relevant legislative provisions authorised detention until a detainee was removed, deported or given a visa, no matter how long that may take.\textsuperscript{141} This was so, no matter how ‘tragic’ this outcome may be for Mr Al-Kateb.\textsuperscript{142} As the words of the relevant sections were clear,\textsuperscript{143} there was no place to consider interpretive principles such as the principle of legality, or compatibility with international law.\textsuperscript{144}

Having determined that the detention provisions purported to authorise the indefinite detention of non-citizens, even where there was no real prospect of removal, the majority considered the issue of whether such provisions were constitutionally valid. The justices considered two related constitutional questions which together determined the nature and scope of the implied constitutional immunity from administrative detention. The first was whether the scope of the federal legislative power with respect to aliens was broad enough to authorise such detention. The second was whether such detention breached the separation of powers doctrine.

In relation to the first question regarding the scope of the aliens power, the majority took an expansive approach. For Hayne J, the aliens power not only created an authority to subject unlawful non-citizens to administrative detention for the purpose of processing and removal, but also for the purpose of ‘excluding’ or ‘segregating’ such persons from the Australian community.\textsuperscript{145} McHugh J took an even broader view, stating that ‘any law that has aliens as its subject is a law with respect to aliens’.\textsuperscript{146} As discussed below, this represented a significant shift from the majority position in \textit{Lim}.\textsuperscript{147}

The minority held that the relevant legislation was ambiguous in that it did not explicitly address the possibility before them: namely, what should happen when removal is not practically possible.\textsuperscript{148} Adopting differing approaches, all three minority justices concluded that the provisions, properly construed, did not authorise indefinite detention. Gleson CJ (with Gummow J agreeing) resolved the ambiguity in the statute by reference to the principle of legality. This common law principle dictates

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{139} Ibid 73 [71].
\item \textsuperscript{140} Ibid 88-92 [138]-[155].
\item \textsuperscript{141} \textit{Al-Kateb} (2004) 219 CLR 562, 581 [35] (McHugh J), 640 [231] (Hayne J), 661-2 [298] (Callinan J). Note that McHugh, Hayne and Callinan JJ each delivered separate judgements, with Hayden J substantially concurring with Hayne J.
\item \textsuperscript{142} Ibid 580-1 [31] (McHugh J).
\item \textsuperscript{143} Ibid 643 [241] (Hayne J) (words were ‘intractable’ in providing for indefinite detention).
\item \textsuperscript{144} See, for example, ibid 661-2 [298] (Callinan J).
\item \textsuperscript{145} Ibid 648 [255] (Hayne J).
\item \textsuperscript{146} Ibid 583 [41] (McHugh J).
\item \textsuperscript{147} See below nn 169-76 and accompanying text.
\item \textsuperscript{148} \textit{Al-Kateb} (2004) 219 CLR 562, 575 [13]-[14], 577 [20]-[21] (Gleson CJ).
\end{itemize}
\end{footnotesize}
that a court should not impute to the legislature an intention to abrogate or curtail the fundamental right to personal liberty, absent words of necessary intendment.\textsuperscript{149} As the legislature had not expressly addressed the issue of indefinite detention in the Act, Gleeson CJ read down the provisions as authorising detention for only as long as removal is a practical possibility.

Gummow and Kirby JJ both agreed that post-deportation order detention would breach the separation of powers doctrine if removal was no longer a reasonable possibility. To avoid this constitutional issue, the relevant provisions were construed as not providing for such detention. For Kirby J, ‘indefinite detention at the will of the Executive … is alien to Australia’s constitutional arrangements’.\textsuperscript{150} In a reference to \textit{Zadvydas}, Kirby J argued that the High Court ‘should be no less vigilant in defending those arrangements … than the United States Supreme Court has lately been in responding to similar Executive assertions in that country.’\textsuperscript{151} The Australian Constitution does not have an equivalent of the Fifth Amendment Due Process Clause. However, his Honour reasoned that the Constitutional principle that only courts can impose punishment (in exercise of the judicial power) has similar effect.\textsuperscript{152}

The High Court has had the opportunity to revisit its decision in \textit{Al-Kateb} on at least two occasions. In each instance, however, a majority of the Court avoided directly addressing the issue. \textit{Plaintiff M47/2012 v Director-General Security (‘Plaintiff M47’)} was a 2012 challenge to the potentially indefinite detention of a Sri Lankan asylum seeker.\textsuperscript{153} An Immigration Department officer had accepted the plaintiff’s asylum claim, however the officer refused the plaintiff’s visa application on the basis that the applicant did not meet public interest criterion 4002 (‘PIC 4002’). This criterion required that the applicant not be assessed as a risk to security under the \textit{Australian Security Intelligence Organisation (ASIO) Act 1979} (Cth). The plaintiff could not be returned to Sri Lanka because, according to the government’s own determination, he would be subject to persecution there. At the same time, the adverse security assessment meant that the plaintiff could not be released into the Australian community. The result, therefore, was potentially indefinite detention. The majority justices avoided addressing the indefinite detention question. Instead, they found that PIC 4002 was invalid because it was inconsistent with the \textit{Migration Act}. It operated to make the ASIO assessment determinative of the applicant’s visa application where the \textit{Migration Act} vested that task in the Minister. The ruling on the regulation meant that the plaintiff’s Protection visa application had not yet been finally determined. The plaintiff’s continued detention was authorised as it was being done for the purpose of determining admissibility.\textsuperscript{154} The majority justices therefore found it unnecessary to consider whether to reopen the \textit{Al-Kateb} decision.

\textsuperscript{149} Ibid 577 [19] (Gleeson CJ).
\textsuperscript{150} Ibid 615 [146].
\textsuperscript{151} Ibid 615 [147].
\textsuperscript{152} Ibid 617 [153] (citing \textit{Lim} (1992) 176 CLR 1, 33).
\textsuperscript{153} (2012) 251 CLR 1.
\textsuperscript{154} The majority of the High Court struck down PIC 4002 as inconsistent with the \textit{Migration Act}. As the security assessment was found to be invalid, the plaintiff’s Protection visa application became incomplete and he was no longer subject to removal and detention pending removal. For a detailed
Gummow, Heydon and Bell JJ upheld the validity of PIC 4002 in separate minority judgements. As a consequence, each had to directly address the issue of indefinite detention. Gummow and Bell JJ argued that the construction of sections 189, 196 and 198 adopted by the majority in Al-Kateb should not be regarded as binding precedent. They held that the majority had erred in applying the applicable principles of statutory construction in that case. Specifically, the majority failed to apply the established common law presumption against the abrogation of liberty. Gummow and Bell JJ affirmed the approach of Gleeson CJ in Al-Kateb, who read down the relevant detention provisions as only authorising detention as long as removal remains a practical possibility. In contrast, Heydon J found that despite the fact that ‘the dissentients’ arguments had obvious force’, the majority’s approach in Al-Kateb was to be preferred.

The High Court had another opportunity to reconsider Al-Kateb in 2013 in Plaintiff M76/2013 v MIMAC (‘Plaintiff M76’). That case involved a similar fact scenario to Plaintiff M47. The main difference was that the plaintiff had been deemed an ‘offshore entry person’ and was thus being processed under the non-statutory Refugee Status Assessment (‘RSA’) process. An Immigration Department official found that the plaintiff engaged Australia’s protection obligations. However, an adverse security assessment led to a determination that the plaintiff would not satisfy PIC 4002. The officer thus decided not to refer the plaintiff’s case to the Minister to consider whether to lift the statutory bar (placed on all offshore entry persons) on applying for a Protection visa. As in Plaintiff M47, the plaintiff faced potentially indefinite detention as she could neither be returned home nor released into the Australian community. All members of the Court found that there had been an error of law in the manner in which the RSA process was carried out. As PIC 4002 had been held to be invalid in Plaintiff M47, the decision of the officer to rely on PIC 4002 when deciding not to refer the plaintiff’s case to the Minister constituted an error of law. Because the RSA had to be conducted according to law, the Minister had not yet decided whether to allow the plaintiff to apply for a visa and detention continued to be authorised for the purpose of carrying out such assessment. In relation to the question of whether Al-Kateb should be reconsidered, French CJ, Crennan, Bell and Gageler JJ declined to do so, finding that the facts before them did not strictly require that issue to be

---

155 Plaintiff M47 (2012) 251 CLR 1, 60-1 [119]-[120] (Gummow J, stating ‘[t]he justification for not following an earlier decision of the court construing a statute, particularly a decision reached by a majority, is that the earlier decision appears to have erred in a significant respect in the applicable principles of statutory construction); 193 [532] (Bell J, stating that ‘the reasoning of two members of the majority [in Al-Kateb] is weakened by the absence of discussion of the principle of legality in the context of a conclusion that the scheme abrogates fundamental rights in this degree’).

156 Ibid.

157 Ibid 61 [120] (Gummow J); 193 [534] (Bell J).

158 Ibid 138 [351].

159 (2013) 251 CLR 322.

160 For a discussion of the features of the RSA process, see Chapter Eight, 8.2.1.

161 See Migration Act, s 46A(2); Chapter Five, n 75 and accompanying text.

considered.\textsuperscript{163} In doing so, they left open the possibility of reconsidering \textit{Al-Kateb} if faced with a case with more suitable facts. In contrast Hayne, Kiefel and Keane JJ expressly affirmed the majority approach in \textit{Al-Kateb}. Hayne J, the only remaining justice who sat in \textit{Al-Kateb} affirmed his approach in that case.\textsuperscript{164} Kiefel and Keane JJ undertook extensive analysis of the issue, engaging with and dismissing Gleeson CJ’s reliance on the principle of legality in his Honour’s dissenting judgement in \textit{Al-Kateb}.\textsuperscript{165} It will be interesting to see how the Court will respond to this issue in the future. As of April 2015, Bell J is the only current sitting member of the Court who has indicated a willingness to overrule \textit{Al-Kateb}.\textsuperscript{166} Kiefel, Hayne and Keane JJ have indicated that they will not reopen \textit{Al-Kateb}. French CJ, Gageler J and recent appointee Nettle J are yet to express a view on the issue. With Hayne J due to retire in July 2015, there will be a fourth undeclared vote in the mix: that of Hayne J’s wife, Justice Michelle Gordon who will replace him on the Court.

The response of the High Court to any future case in which they are called upon directly to reconsider \textit{Al-Kateb} will be influenced by the opinion of the Court on the continued relevance of the \textit{Lim} test. In \textit{Lim}, Brennan, Deane and Dawson JJ declared ‘a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth.’\textsuperscript{167} However, they carved out an exception to this rule for immigration detention, provided that detention ‘is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered.’\textsuperscript{168}

In \textit{Al-Kateb}, Hayne and McHugh JJ appeared to retreat from the position taken in \textit{Lim} that detention will ordinarily be punitive and therefore an incident of judicial power.\textsuperscript{169} Even if the separation of powers doctrine did supply constitutional immunity from administrative detention, they reasoned that their broad reading of the aliens power created a general exception for immigration detention. By making such a determination, they arguably expanded the non-punitive purposes identified in \textit{Lim} that would sustain administrative detention of non-citizens. In \textit{Lim}, the majority held that immigration detention of unlawful non-citizens was only constitutionally valid if it was ‘reasonably capable of being seen as necessary for the purpose of facilitating admission and removal’.\textsuperscript{170} Hayne and McHugh JJ expand this test to include all detention that has the purpose excluding persons from the Australian community.\textsuperscript{171} Hayne J expressly acknowledged that this was a broader expression of the power of

\begin{footnotes}
\item[164] Ibid 345 [34]-[36], 365-7 [125]-[127].
\item[165] Ibid 379-81 [179]-[190].
\item[166] See above nn 155-7 and accompanying text.
\item[167] \textit{Lim} (1992) 176 CLR 1, 28-9 (Brennan, Deane and Dawson JJ).
\item[168] Ibid 33.
\item[169] \textit{Al-Kateb} (2004) 219 CLR 562, 648-9 [257]-[261] (Hayne J); 584-5 [44]-[46] (McHugh J).
\item[170] \textit{Lim} (1992) 176 CLR 1, 33.
\item[171] \textit{Al-Kateb} (2004) 219 CLR 562, 648 [255] (Hayne J); 583 [41] (McHugh J); 662 [303] (Heydon J concurring with Hayne J’s analysis on this point). Callinan J, the fourth member of the majority, did not directly address the question.
\end{footnotes}
detention articulated in Lim.\textsuperscript{172} McHugh J made comments to a similar effect in his judgement in \textit{Re Woolley; Ex parte M276/2003}.\textsuperscript{173} There, McHugh J noted that the majority in \textit{Al-Kateb} overturned two principles set out in Lim. They rejected both the claim that there is a general constitutional immunity from administrative detention;\textsuperscript{174} and the use of the \textit{Lim} test for determining whether the purpose of detention is non-punitive.\textsuperscript{175} However, McHugh J may have been premature in declaring the demise of the \textit{Lim} test in \textit{Woolley}. Gleeson CJ, Gummow, Kirby and Callinan JJ all endorsed the test in that very same case.\textsuperscript{176} The continued relevance of the \textit{Lim} test has been demonstrated in subsequent cases. In \textit{Plaintiff M76}, for example, Crennan, Bell and Gageler JJ apply and affirm the test in the course of their majority judgement.\textsuperscript{177} Moreover, the \textit{Lim} test featured front and centre in the reasoning of the High Court’s recent unanimous decision in \textit{Plaintiff S4/2014 v MIBP} (‘\textit{Plaintiff S4}’).\textsuperscript{178}

\textit{Plaintiff S4} concerned a challenge to the validity of the Minister’s grant of a restricted temporary visa. The plaintiff was a stateless asylum seeker from Myanmar who had arrived in Australia by boat and had been designated as an ‘offshore entry person’ (a term later replaced by ‘unauthorised maritime arrival’).\textsuperscript{179} As such, the applicant was subject to the non-statutory RSA asylum processing procedures set up to inform the Minister on whether to lift the bar prohibiting the plaintiff from applying for a Protection visa.\textsuperscript{180} After two years in immigration detention, the plaintiff was assessed as engaging Australia’s protection obligations under the \textit{Refugee Convention}.\textsuperscript{181} However, the Minister decided not to grant a Protection visa, and instead issued two temporary permits. The combined effect of these permits was that the plaintiff could remain in Australia for three years, but was barred from applying for a permanent visa.\textsuperscript{182} In finding the grant of these visas invalid, the High Court focused on the character and purpose of the plaintiff’s detention.

In a unanimous judgement, the Court expressly affirmed and applied the \textit{Lim} test, holding that detention provisions in the \textit{Migration Act} are only valid to the extent that they are ‘reasonably capable of being seen as necessary’ to achieve three limited purposes. These were

\begin{itemize}
  \item \textit{Al-Kateb} (2004) 219 CLR 562, 648 [255].
  \item (2004) 225 CLR 1.
  \item Ibid 24–7 [56]–[62].
  \item Ibid 30–1 [71]–[72].
  \item Ibid 13–14 [21] (Gleeson CJ); 51–2 [133]–[134] (Gummow J); 84–5 [257], [260] (Callinan J); 63 [175] (Kirby J).
  \item \textit{Plaintiff M76} (2013) 251 CLR 322, 369–370 [137]–[140].
  \item (2014) 312 ALR 537.
  \item See Chapter Five, nn 72–6, 100 and accompanying text.
  \item For a description of these procedures, see Chapter Eight, 8.2.1.
  \item \textit{Convention relating to the Status of Refugees}, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) (‘\textit{Refugee Convention}’).
  \item The first visa was a Temporary Safe Haven visa valid for seven days. This visa was subject to a legislative bar that prevented an applicant from applying for a permanent visa: see \textit{Migration Act}, s 91K.
  \item The second visa was a Temporary Humanitarian Concern visa valid for three years.
\end{itemize}
the purpose of removal from Australia; the purpose of receiving, investigating and determining an application for a visa permitting the alien to enter and remain in Australia; or, in a case such as the present, the purpose of determining whether to permit a valid application for a visa.\footnote{Plaintiff S4 (2014) 312 ALR 537, 543 [26].}

As detention in this case was for the purpose of determining whether to permit a valid Protection visa application to made, it was not lawful for the Minister to then grant a different visa which effectively prevented the plaintiff from applying for a Protection visa. The Court reasoned that

\[
\text{[w]hen a person’s detention is prolonged for the purpose of considering the exercise of the power to permit the detainee to make a valid application for a visa, [the relevant provision] does not give power to the minister to grant a visa which, in effect, forbids the very thing which was the subject of uncompleted consideration warranting prolongation of the period of detention.}\footnote{Ibid 547 [47].}
\]

Not only did the Court affirm the continued relevance of the \textit{Lim} test, but it also went on to spell out the implications of this test for the permitted duration of detention:

The duration of any form of detention, and thus its lawfulness, must be capable of being determined at any time and from time to time. Otherwise, the lawfulness of the detention could not be determined and enforced by the courts, and, ultimately, by this Court. And because immigration detention is not discretionary, but is an incident of the execution of particular powers of the Executive, it must serve the purposes of the [Migration] Act and its duration must be fixed by reference to what is both necessary and incidental to the execution of those powers and the fulfilment of those purposes. These criteria, against which the lawfulness of detention is to be judged, are set at the start of the detention.\footnote{Ibid 543 [29] (footnotes omitted).}

Although the Court did not cite Gummow J’s dissenting judgement in \textit{Al-Kateb}, the requirement of a temporal limitation to the detention powers in question echoes his Honour’s sentiment on this point. In \textit{Al-Kateb}, Gummow J emphasised the constitutional requirement that administrative detention have a duration capable of ascertainment at any time, so as to allow the Court to determine that detention is serving a constitutional purpose. His Honour stated:

The continued viability of the purpose of deportation or expulsion cannot be treated by the legislature as a matter purely for the opinion of the executive government. The reason is that it cannot be for the executive government to determine the placing from time to time of that boundary line which marks off a category of deprivation of liberty from the reach of Ch III. The location of that boundary line itself is a question arising under the Constitution or involving its interpretation.\footnote{Al-Kateb (2004) 219 CLR 562, 613 [140].}

Although not directly overturning \textit{Al-Kateb}, the High Court’s decision in \textit{Plaintiff S4} does signal a willingness of the current Court to place both \textit{purposive} and \textit{temporal} limits on the scope of the executive’s detention powers. In terms of \textit{purpose}, it is important to note that ‘exclusion’ and ‘segregation’ which Hayne and McHugh JJ viewed as being constitutionally valid purposes for
detaining non-citizens in *Al-Kateb* are absent from the list of permitted purposes articulated in *Plaintiff S4*. In terms of the temporal limitation, *Plaintiff S4* imposed a requirement that the duration of any form of detention must be capable of being determined at any time and from time to time. It will be interesting to see how this will be applied to any future assessment of the lawfulness of the detention of persons in an analogous position to Mr Al-Kateb.

### 6.5 US and Australian Case Law Compared

#### 6.5.1 Mandatory Detention

On the issue of mandatory detention, the Australian and US jurisprudence is largely in agreement. The US Supreme Court and Australian High Court have both adopted similar proportionality tests when assessing the constitutional validity of the relevant detention provisions. Both courts have upheld the constitutional validity of mandatory detention, without individualised assessment, of certain classes of non-citizens. In *Demore v Kim*, the Court relied on the argument that mandatory detention of an alien, due to criminal conviction, was a constitutionally valid aspect of the deportation process. This was because it served the legitimate government purpose of preventing flight of criminal aliens while their removal proceedings were underway. Although not explicitly referencing the principle, the Court essentially applied the balancing test put forward in *Mathews v Eldridge*, which states that due process generally requires that administrative procedures balance the governmental and private interests at stake. In *Demore v Kim*, the Court determined that the government purpose of preventing flight and the resulting danger to the community by the release of a convicted criminal, justified mandatory temporary deprivation of liberty in that case. The US Supreme Court has not considered the legality of mandatory detention provisions targeting inadmissible aliens (asylum seekers or otherwise). As discussed, any such challenge on behalf of aliens who are deemed as not having entered the United States will likely fail as a result of the plenary power doctrine. The situation may be different, however, for inadmissible aliens who have entered the United States, even without authorisation. A recent decision of the US District Court for the District of Columbia extended constitutional due process rights to asylum seekers in this category who had demonstrated a credible fear of persecution.

In *Lim*, the Australian High Court used a proportionality test to uphold the legality of the detention of the asylum seeker plaintiff. In that case, the mandatory temporary deprivation of liberty faced by the plaintiff was determined to be valid as it was reasonably capable of being seen as necessary for the legitimate purpose of carrying out the assessment of admission or removal. While the substance of tests applied in *Demore v Kim* and *Lim* are similar, their source is different. In the United States, the

---

187 Heydon J concurred with Hayne and McHugh JJ, endorsing the power to legislate to segregate aliens from the community: Ibid 584 [45]. Callinan J, the fourth member of the majority, did not directly address the question.
balancing act between the interests of the government and the individual's right to liberty is grounded in the Due Process Clause of the US Constitution. As discussed above in Part 6.3, the Australian Constitution does not contain an equivalent right. Instead, the test of proportionality expounded in Lim is sourced in the Australian Constitution’s Chapter III requirement of the separation of judicial and legislative power, and a construction of the scope of the Constitution’s aliens power.

Despite the similar approaches and conclusion reached in Demore v Kim and Lim, the outcome in those cases was far from inevitable. As discussed in Parts 6.2.2 and 6.4.1 above, there are serious concerns about the manner in which the proportionality assessment of detention was carried out in each case. In both cases, it would have been reasonably open to the Court to construe the mandatory detention of a broad class of non-citizens, without any determination as to the need for detention in a given case, as not being proportional to a legitimate government purpose.

6.5.2 Indefinite Detention

The US Supreme Court and Australian High Court have adopted divergent approaches when examining challenges to statutory provisions that appeared to authorise the indefinite post-deportation order detention of non-citizens. The decisions in both Zadvydas and Al-Kateb ultimately turned on a question of statutory interpretation. As the strong dissenting judgements in those cases indicate, reasonable minds may differ on questions of statutory construction. In Zadvydas, the US Supreme Court adopted a ‘rights-protecting’ approach, interpreting the relevant statutory provisions as including an implicit presumptive 90-day limit on post-removal order detention. The majority’s process of statutory interpretation relied on the principle of constitutional avoidance and a view that indefinite detention would raise serious constitutional issues under the Due Process Clause. In Al-Kateb, the Australian High Court adopted a ‘rights-precluding’ approach when interpreting similarly framed statutory detention provisions. The provisions were interpreted as authorising potentially indefinite detention, and such detention was viewed as not raising any constitutional issues.

What explains the divergent approaches? It is tempting to attribute them to the different legal structures operating in the United States and Australia—in particular, the existence of a constitutional right to due process in the United States and the absence of a comparable right in Australia. Such a view appears to be supported by statements made by a number of the majority justices in Al-Kateb. Callinan J, for example, refers to the decision in Zadvydas but dismisses its applicability in the Australian case by reasoning that Australia does not have the constitutional ‘complication’ of the US Fifth Amendment. McHugh J also distinguished Zadvydas on the basis that it dealt with constitutional due process considerations that do not exist in Australia. The argument that the differing approaches, taken by the US Supreme Court in Zadvydas and the Australian High Court in Al-Kateb, were the result of differing legal frameworks is further supported by the commentary made in the aftermath of the Al-Kateb decision. A number of academics have argued that the outcome in

---

191 This point is expressly acknowledged by Heydon and Bell JJ in Plaintiff M47 (2012) 251 CLR 1, 138 [351] (Heydon J); 193 [532] (Bell J).


193 Ibid 587 [52].
that case would have been different if Australia had a bill of rights.\textsuperscript{194} Such a view was also advanced by the Australian Democrats, the Greens, and the Federal President of the Labor Party who, in response to the \textit{Al-Kateb} decision, called for the introduction of a bill of rights to override the \textit{Migration Act}.\textsuperscript{195}

For current purposes, it is not necessary to assess the claims as to whether the outcome in \textit{Al-Kateb} would have been different if Australia had a bill of rights (constitutional or otherwise). Any analysis of such a claim would need to consider the nature and exact wording of any such provisions. It is my contention that the absence of a bill of rights in Australia did not necessarily preclude the High Court from adopting a ‘rights-protecting’ approach. Nor did the existence of the constitutional Due Process Clause in the United States necessarily prevent the US Supreme Court from adopting a ‘rights-precluding’ approach. In both \textit{Zadvydas} and \textit{Al-Kateb}, there was sufficient ambiguity in the relevant statutory provisions, principles of statutory construction, as well as the relevant constitutional considerations, to give the Court in each of those cases enough leeway to adopt either approach.

Neither the Australian, nor the US detention provisions address directly the issue of whether continued detention is authorised once it becomes clear that removal is not practicable. In Australia, s 196(1) of the \textit{Migration Act} provides that a person who has qualified for immigration detention must be kept there until the person is (a) removed from Australia; or (b) deported; or (c) granted a visa. Further, at the relevant time s 198 stipulated that a person who had requested removal was to be removed ‘as soon as reasonably practicable’. In the United States, \textit{INA} § 241(a)(1)(A) stipulates that when an alien is ordered removed, the Attorney General generally has 90 days to remove the alien from the United States. However, § 241(a)(6) goes on to stipulate that inadmissible or removable aliens who have been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, ‘may be detained beyond the removal period’. A strict literal reading would likely conclude, that although neither the Australian nor the US provisions directly address the possibility of indefinite detention, such detention is authorised. However, the established principles of statutory interpretation in both Australia and the United States dictate that the literal meaning of a legislative provision is not always the correct construction. In the United States, the relevant principle is the presumption that Congress intends statutes to be read in a way that avoids constitutional concerns.\textsuperscript{196} Given that indefinite detention may violate the Due Process Clause, the majority in \textit{Zadvydas} read an implicit limit into the post-removal order detention provisions at issue. Detention was limited to the period that is reasonably necessary to effectuate the alien’s removal from the United States. The majority settled on a presumptive time limit of six months, which had no basis in

\textsuperscript{194} See, for example, Alice Rolls, ‘Avoiding Tragedy: Would the decision of the High Court in Al-Kateb have been any different if Australia had a Bill of Rights like Victoria?’ (2007) 18 \textit{Public Law Review} 119; Hon Justice John Basten, ‘Book Review: The Ultimate Rule of Law by David M Beatty’ (2005) 29 \textit{Melbourne University Law Review} 930, 938.


\textsuperscript{196} For a critique of this principle, see Aleinikoff, ‘Detaining Plenary Power’, above n 11, 367.
the statutory text. This outcome was far from obvious, based on a reading of the statutory provisions and relevant constitutional protections.

The decision of the majority of the US Supreme Court to rely on the principle of constitutional avoidance was based on two assumptions that may be open to challenge. The first was that the relevant statutory provisions were sufficiently ambiguous to warrant the application of the principle in the first place. The four dissenting justices strongly disagreed with such an assertion. Kennedy J, with whom Rehnquist, Thomas and Scalia JJ joined, argued that the statute is ‘straightforward,’ and not susceptible to two meanings. The second, questionable, assertion related to whether an interpretation of the statute authorising indefinite detention would raise any constitutional concerns. The majority was of the opinion that such a construction would breach Zadvydas’s substantive due process rights. However, Zadvydas’s entitlement to constitutional due process was by no means obvious. As discussed in Part 6.1, the plenary power doctrine means that in many circumstances, non-citizens in immigration related proceedings are precluded from constitutional protections. While it was generally accepted that aliens who had entered the United States were entitled to limited constitutional rights, prior to Zadvydas there was a question as to whether those rights were extinguished once an alien was deemed to be removable. US Federal Circuit Courts had split on the issue. The US Court of Appeals for the Fifth Circuit decision adopted a restrictive interpretation that precluded Zadvydas from relying on constitutional due process protection. There, the Court reasoned that aliens finally ordered removed were in the same position, for constitutional purposes, as aliens seeking initial entry. Both had no right to claim that they should be allowed into the United States, and therefore, the Fifth Circuit reasoned, no constitutional rights. The Ninth Circuit disagreed, ruling that serious constitutional concerns would be raised by interpreting the immigration law to permit indefinite detention.

While the majority of the Supreme Court in Zadvydas adopted the approach taken by the Ninth Circuit, at least two of the four dissenting judges favoured the Fifth Circuit approach. Scalia J, with whom Thomas J concurred, accepted the government’s arguments that as deportable aliens have no right of entry into the United States, they stand on equal footing with inadmissible aliens and as such are not protected by the Due Process Clause. Academic commentary in the aftermath of the Supreme Court decision supports the proposition that the Zadvydas decision had at least in part eroded the plenary power doctrine. This suggests that if the Court had applied the plenary power doctrine in the same manner as it had been applied up until then, the outcome may have been different. In particular, the statutory interpretation adopted by the majority was based on an

---

197 Thomas and Scalia JJ only joined in Part I of Kennedy's dissent.
199 Zadvydas v Underdown, 185 F3d 279, 289 (5th Cir, 1999).
200 Ma v Reno, 208 F3d 815, 830-1 (9th Cir, 2000).
201 Zadvydas v Davis, 533 US 678, 704.
understanding that an alternate construction authorising indefinite detention may breach constitutional substantive due process rights. However, as discussed in Part 6.1, before Zadvydas the Supreme Court had generally only extended procedural, rather than substantive, due process rights to excludable long-term residents. The contingency of the outcome in Zadvydas is further evidenced by subsequent division in the Supreme Court as to the validity of the majority’s reasoning. In Clark v Martinez, decided almost four years later, Thomas J maintained that Zadvydas had been wrongly decided, stating that the majority ‘was wrong in both its statutory and its constitutional analysis for the reasons expressed well by the dissent in that case. I continue to adhere to those views.’

It is also important to again stress the fact that Zadvydas concerned the indefinite detention of a US resident. In Zadvydas and Clark v Martinez, the Court made it clear that the detention of inadmissible aliens seeking entry into the United States would not give rise to any comparable constitutional concerns. The presumptive time limit was only applied to the detention of such aliens because they were being detained under the same statutory provision that applied to resident aliens. As such, a person in the analogous position of Mr Al-Kateb in the United States, that is, an inadmissible alien seeking entry, falls outside the protections of the constitution, including the Due Process Clause.

Similarly, the High Court decision in Al-Kateb could easily have been decided differently. The decision was by the narrowest of majorities, with a 4:3 split. Only three of the majority judges provided substantive reasons, and there were strong minority judgements, including from the Chief Justice. Arguably, the adoption of a ‘rights-protecting’ approach when interpreting the relevant detention provisions would have been more in line with constitutional precedent and established principles of statutory interpretation. The Full Federal Court had adopted such an approach in Al-Masri 16 months earlier when examining the same statutory provisions, concluding that they did not authorise indefinite detention.

As explored above, the Australian High Court had a number of principles of statutory interpretation that it could have relied upon to reach a ‘rights-protecting’ outcome. These included the common law principle of legality and the rule that legislation should be read so as to avoid constitutional issues. The decision of the majority of the High Court not to apply these principles to read down the detention provisions at issue relied on two questionable assertions. The first was that the provisions were not sufficiently ambiguous for the interpretive principles to apply. The Full Federal Court in Al-Masri took the opposite view, finding the text provided enough lee-way to apply both the common law principle of legality and the constitutional avoidance doctrine. The dissenting justices in Al-Kateb agreed, with Gleeson CJ, Gummow J and Kirby J all finding sufficient ambiguity to apply one or both of the principles. This point continues to be hotly contested, with differing viewpoints being expressed on the issue by various justices over recent years.

This point is forcefully made by Thwaites, above n 3, ch 3 and 4; and Matthew Zagor, ‘Uncertainty and Exclusion: Detention of Aliens and the High Court’ (2006) 34 Federal Law Review 127.
Al Masri (2003) 126 FCR 54; see above nn 136-140 and accompanying text.
See above nn 155-7, 164-6 and accompanying text.
In relation to the constitutional avoidance argument, the relevant issue was whether indefinite administrative detention by the executive would breach the constitutional separation of powers doctrine once the detention is no longer for the objective purpose of facilitating removal. The Full Bench of the Federal Court in *Al-Masri* indicated that such detention may be in breach of the separation of powers doctrine. Kirby and Gummow JJ also agreed with such a conclusion in their dissenting judgements in *Al-Kateb*. As discussed, there is a strong argument to be made that the dissenting approach was more in line with the High Court’s earlier decision in *Lim*.207 On this point, Matthew Zagor has observed that:

the [majority] reasoning [in *Al-Kateb*] is not inconsistent with *Lim* insofar as it recognises the capacity for Ch III to protect against punitive legislation. However, almost everything that follows represents a strategic retreat, and the creation of a new, narrower, approach to the operation of Ch III.208

Similarly, Rayner Thwaites noted:

Without expressly overruling *Lim*, the majority undermined the substantive limits on immigration detention central to the decision, derived from the separation of powers. They questioned the very existence of a constitutional immunity from executive detention and expanded the scope of the immigration exception to it. The shift from *Lim* to *Al-Kateb* reflects a shift in weight, from the protections derived from the separation of powers on the one hand, to the power conferred by the aliens power on the other.209

In *Lim*, constitutional validity of immigration detention provisions was dependent on whether they were reasonably capable of being seen as necessary for the legitimate purpose of carrying out the assessment of *admission or removal*. Post-deportation detention in circumstances where there is no reasonable likelihood of removal being carried out in the near future cannot be connected to either of those legitimate purposes. Assessment of admission has already been finally determined and detention cannot be said to be for the purpose of removal where it is clear removal is not possible. The majority justices in *Al-Kateb* were well aware of this issue. Accordingly, they expanded the *Lim* test by adding an additional legitimate purpose authorising constitutionally valid immigration detention: namely, exclusion from the community. This new ‘catch-all’ justification had no precedent in constitutional jurisprudence. As such, the ruling represented a significant shift away from *Lim* and other existing case law. The retreat from such a position and the reaffirmation of the *Lim* test in recent jurisprudence,210 as well as the continued disagreement on the Court about whether *Al-Kateb* should be reopened,211 further demonstrates the contingency of the Court’s decision in that case.

### 6.6 Conclusion

---

207 See above nn 169-75 and accompanying text.
208 Zagor, above n 204, 138.
209 Thwaites, above n 3, 72.
210 See Plaintiff S4 (2014) 312 ALR 537, see above nn 179-87 and accompanying text.
211 See above nn 155-7, 164-6 and accompanying text.
My analysis of the recent case law challenging the long-term mandatory detention of non-citizens in the United States and Australia suggests that the outcome in these cases was far from obvious. In relation to detention of a mandatory nature, courts in both jurisdictions adopted a similar ‘rights-precluding’ approach. In doing so, they upheld the blanket mandatory detention measures by weighing up the interest of detainees in avoiding detention with legitimate government interests. However, it is arguable that this proportionality test could have supported the opposite outcome, as the government’s legitimate interests could have been achieved with more tailored detention measures. In relation to the legality of detention of an indefinite nature, the US Supreme Court and the Australian High Court reached divergent outcomes. Like the cases on mandatory detention, I contend that these cases were highly contingent and could have easily been decided in a different manner. That is not to say that the relevant law in both countries is indeterminate. Rather, in the course of their analysis, individual justices came to a number of interpretive junctures where they had to choose between alternate reasonable and compelling approaches that could have led to either a ‘rights-protecting’ or ‘rights-precluding’ approach. These interpretive junctures related to constitutional questions as well as general principles of statutory interpretation. In the following two chapters, I argue that much of the case law on interdiction and extraterritorial processing in Australia and the United States is similarly contingent.
In this chapter, I examine the judicial response to maritime interdiction policies in the United States and Australia. Like policies of long-term mandatory detention, maritime interdiction activities targeting asylum seekers can be contentious under international, US and Australian law. As such, the legality of interdiction operations has been challenged in the highest courts of both jurisdictions. The existence of this body of comparative case law provides an opportunity to examine the impact of the different legal frameworks operating in the United States and Australia on the judicial response to maritime interdiction policies. I argue this case law supports my hypothesis that different legal structures have not been determinative on the outcome of judicial challenges to transferred immigration control policies in the United States and Australia. Rather, I argue that the relevant legal principles were ambiguous enough for the judges in each case to reasonably adopt a 'rights-protecting' or a 'rights-precluding' approach. I highlight the junctures in each case which could have led judges down either path, as well as other factors that demonstrate this contingency.

7.1 US Case Law

The leading Supreme Court case on the legality of the US migrant interdiction program is Sale v Haitian Centers Council (‘Sale’). The case involved a challenge to President George H W Bush’s ‘Kennebunkport Order’ of 24 May 1992, which authorised the interdiction and repatriation of all Haitians attempting to reach the United States by boat without any screening for asylum claims. Prior to the Supreme Court’s decision in Sale, several circuit courts had considered similar issues in the context of the Haitian interdiction program. The District of Columbia and Eleventh Circuit found that the US government’s non-refoulement obligations under the Refugee Convention or § 243(h) of the Immigration and Nationality Act (‘INA’) only extended to aliens who were physically present in the United States when the Convention was signed. The Supreme Court’s decision in Sale, several circuit courts had considered similar issues in the context of the Haitian interdiction program. The District of Columbia and Eleventh Circuit found that the US government’s non-refoulement obligations under the Refugee Convention and the INA only extended to aliens who were physically present in the United States when the Convention was signed.

---

2 See Chapter Five, n 39 and accompanying text.
3 Convention relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) (‘Refugee Convention’); Note that the United States is not party to the Convention but in effect assumed the obligations under it when it acceded to Protocol relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (‘Protocol’).
4 In 1996, Congress repealed § 243(h) and inserted similar provisions in § 241(b)(3) of the INA: See Illegal Immigration Reform and Immigrant Responsibility Act, Pub L No 104-208, 100 Stat 3009-546.
States. The Second Circuit took the contrary view, interpreting Article 33 and the relevant legislative provisions as having extraterritorial effect.

In *Sale*, the US Supreme Court adopted the approach taken by the District of Columbia and Eleventh Circuit, finding that the *non-refoulement* obligations contained in the *INA* and the *Refugee Convention* did not have extraterritorial effect. Stevens J, writing for the majority, first examined the meaning of the relevant provisions of the *INA*. Section 243(h) provided, subject to a number of enumerated exceptions, that

\[
\text{the Attorney General shall not deport or return any alien... to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership of a particular social group, or political opinion.}
\]

Through an examination of the language and legislative history of this provision, the Court interpreted two main restrictions to its operation. First, as the language only referred to the Attorney General, it could not be interpreted as placing any limitations on the President's authority to repatriate aliens interdicted in international waters. Second, the majority read in a geographical limitation. The provision was construed as only applying to activities of the Attorney General authorised by other sections of the Act. The Act authorised the Attorney General to conduct deportation or exclusion proceedings within the United States. Stevens J reasoned, therefore, that '[s]ince there is no provision in the statute for the conduct of such proceedings outside the United States ... we cannot reasonably construe §243(h) to limit the Attorney General’s actions in geographic areas where she has not been authorised to conduct such proceedings'. His Honour also relied on the presumption that Acts of Congress do not ordinarily apply outside US borders to support the interpretation of §243(h) as only applying within United States territory.

Having rejected the proposition that the *INA* created any extraterritorial *non-refoulement* obligations, Stevens J turned his attention to the possibility that the *Refugee Convention* may create such an obligation. If that were the case, under the Supremacy Clause of the US Constitution, the broader treaty obligation might provide the controlling rule of law. The Court decided, however, that neither a textual analysis nor the negotiating history of the treaty supported the position that Article 33 is applicable on the high seas or extraterritorially.

Article 33 of the *Refugee Convention* states:

---

5 *Haitian Refugee Center v Gracey*, 809 F2d 794 (DC Cir, 1987); *Haitian Refugee Center v Baker*, 949 F2d 1109 (11th Cir, 1991); *Haitian Refugee Center v Baker*, 953 F2d 1498 (11th Cir, 1992).
10 Ibid 173.
11 Ibid 173.
12 Ibid 178.
1. No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.\(^\text{13}\)

Steven J’s first textual argument stemmed from the geographic limitation included in the Article 33(2). The effect of that provision is that a refugee cannot claim the benefit of the non-refoulement obligation if he poses a threat to the country in which he is located. His Honour reasoned that

\[\text{[i]f the first paragraph did not apply to the high seas, no nation could invoke the second paragraph’s exception with respect to an alien there: An alien intercepted on the high seas is in no country at all. If Article 33.1 applied extraterritorially, therefore, Article 33.2 would create an absurd anomaly: Dangerous aliens on the high seas would be entitled to the benefits of 33.1 while those residing in the country that sought to expel them would not.}\(^\text{14}\)

Steven J’s second textual argument related to the meanings of the terms ‘expel’ and ‘return’ in Article 33(1). The Court ruled that these terms paralleled the phrase ‘deport or return’ found in §243(h)(1) of the INA. ‘Expel’ was interpreted as having the same meaning as ‘deport’, referring to the deportation or expulsion of an alien who is already present in the host country. The term ‘return’ (‘refouler’) was interpreted as being limited to the exclusion of aliens who are ‘on the threshold of initial entry’.\(^\text{15}\) The Court reasoned that the inclusion of the term ‘refouler’ following ‘return’ narrows the meaning of the term as ‘refouler’ is not a synonym for ‘return’.\(^\text{16}\) Stevens J referred to two English-French dictionaries translating ‘refouler’ as ‘repulse’, ‘drive back’ or ‘expel’. His Honour concluded that these translations imply that in the context of Article 33(1) “‘return’ means a defensive act of resistance or exclusion at the border rather than an act of transporting someone to a particular destination.”\(^\text{17}\) The Court also found that this interpretation of the terms ‘expel’ and ‘return’ (as applying only to refugees who have entered the host country) was also supported by the travaux préparatoires of the Refugee Convention. The Court cited statements by the Swiss and Dutch delegates supporting such an interpretation.\(^\text{18}\) Thus, the Supreme Court held that Article 33 does not have extraterritorial effect.

Blackmun J delivered a powerful dissent, finding that the duty of non-refoulement in both the Refugee Convention and the INA applied extraterritorially. In relation to Article 33 of the Refugee Convention, Blackmun’s starting point was the principle that a treaty must be construed according to its ‘ordinary meaning’.\(^\text{19}\) The majority’s attempt to give the term ‘return’ a more narrow legal meaning was...

\(^{\text{13}}\) Refugee Convention, art 33 (emphasis added).


\(^{\text{15}}\) Ibid 180, quoting Shaughnessy v United States ex rel Mezei, 345 US 206, 212 (1953).

\(^{\text{16}}\) Ibid.

\(^{\text{17}}\) Ibid 182.

\(^{\text{18}}\) Ibid 184-7.

inconsistent with this accepted canon of statutory interpretation. Blackmun J found that the ordinary meaning of ‘return’ is ‘to bring, send, or put (a person or thing) back to or in a former position’, and that was exactly what the US government was doing to the Haitians.\textsuperscript{20} His Honour was critical of the majority’s attempt to construe the term \textit{refouler} in the text of Article 33(2) as somehow limiting the meaning of ‘return’ in that provision. Blackmun J, noted that even if the majority’s translation of \textit{refouler} as ‘repulse’, ‘repel’ and ‘drive back’ was accepted, none of these terms necessitated the conclusion that the term should be read down to only mean exclusion at the border. A person can be repulsed, repelled, or driven back on the high seas.

Next, Blackmun J dismissed the majority’s argument relating to the inclusion of the geographical limitation in Article 33(2). For his Honour, the fact that the drafters of the Convention decided to allow nations to deport criminal aliens who have entered their territory hardly suggested an intent to permit the apprehension and return of non-criminal aliens who have not entered their territory.\textsuperscript{21} Blackmun J was also very critical of the majority’s reliance on the \textit{travaux préparatoires}, and in particular the oral statements of Swiss and Dutch delegates. Such reference, he argued, should only be made as a last resort when there is ambiguity in the language.\textsuperscript{22} They could not be used to change the plain meaning of the text. Moreover, there is no evidence that the statements relied upon reflected the views of other delegates as they were not ‘agreed to’ or ‘adopted’ as official amendments to the Convention.\textsuperscript{23}

In relation to § 243(h) of the \textit{INA}, Blackmun J reasoned that the provisions are both syntactically and grammatically unambiguous in their extraterritorial effect. His Honour argued that such an interpretation was supported by a correct reading of the legislative history. Further, he criticised the majority’s reliance on the presumption against the extraterritorial applicability of US law. The presumption, he argued, only operates where congressional intent is ‘unexpressed’. The language of the provisions in this case clearly expressed an extraterritorial effect. Even if the congressional intent was unexpressed, the international subject matter of the legislation (immigration, nationalities and refugees) created a presumption of extraterritorial applicability. Blackmun J also dismissed the argument that as §243(h) only purports to constrain the actions of the Attorney General, the provision did not apply to the Haitian interdiction program as it was carried out pursuant to a Presidential Order. His Honour concluded that ‘there can be no doubt that the Coast Guard is acting as the Attorney General’s agent when it seizes and returns undocumented aliens’.\textsuperscript{24}

The overwhelming weight of academic opinion backs Blackmun J’s dissent. The majority’s reasoning in \textit{Sale} is subject to almost universal criticism by both US\textsuperscript{25} and international legal scholars.\textsuperscript{26} The Executive Committee of UNHCR was also quick to condemn the outcome of the case:

\textsuperscript{20} Ibid.
\textsuperscript{21} Ibid 193.
\textsuperscript{22} Ibid 194-5.
\textsuperscript{23} Ibid 197.
\textsuperscript{24} Ibid 201.
\textsuperscript{25} See, for example, Thomas David Jones, ‘Sale v. Haitian Centers Council, Inc’ (1994) 88 \textit{American Journal of International Law} 114; Harold Hongju Koh, ‘Reflections on \textit{Refoulement} and \textit{Haitian Centers
UNHCR considers the Court’s decision a setback to modern international refugee law which has been developing for more than forty years, since the end of World War II. It renders the work of the Office of the High Commissioner in its global refugee protection role more difficult and sets a very unfortunate example.27

A similar view was affirmed by the Inter-American Commission on Human Rights when it was called upon to determine the legality of the US Haitian interdiction program. The Commission rejected the Supreme Court’s approach in Sale, interpreting Article 33 of the Refugee Convention as operating extraterritorially in the context of migrant interdiction on the high seas.28 The outcome also directly contradicts advice provided to the government by its own Office of Legal Counsel back in 1981 when the Haitian interdiction program was established. This advice concluded that even on the high seas, Article 33 created an obligation for the United States to ensure that interdicted Haitians ‘who claim they will be persecuted… must be given an opportunity to substantiate their claims.’29

The widespread criticism of the legal reasoning adopted in the case, the fact that the outcome contradicted the government’s earlier legal advice, and the plausibility of the construction put forward in Blackmun J’s dissent, indicate that the alternate interpretation recognising the extraterritorial effect of the non-refoulement obligations under the Refugee Convention and INA was at the very least open to the judges in Sale. Such a proposition is further supported by the fact that the Circuit Courts were divided on the issue. Why then did the majority judges adopt the restrictive approach that in the words of one commentator, relied on ‘analysis that [was] flawed in numerous respects’?30 The answer lies in the political context surrounding the case, which will be explored further in Chapter Nine.


30 Jones, above n 25, 122.
In the immediate aftermath of the Supreme Court’s decision in *Sale*, concerns were raised that it would provide a green light for other nations to engage in push-back operations. *The New York Times* queried whether

this ruling by one of the most influential courts in the world set a tempting precedent, particularly for developing nations? If the United States, with the imprimatur of its highest court, appears to put the protection of its borders above its responsibilities under international law, will others be enticed to follow suit?31

This concern turned out to be well-founded. However, it is interesting to note that the *New York Times* was wrong to single out ‘developing nations’, with the influence of the US interdiction practices having the most direct influence on developed liberal democracies such as Australia and nations in Europe.32

### 7.2 Australian Case Law

#### 7.2.1 Ruddock v Vadarlis

In Chapter Five, I argued that Australia’s interdiction regime introduced after the *Tampa* incident was inspired by the US Caribbean interdiction program. Parallels can also be found in the way the judiciary in each country responded to the interdiction policy. In both countries, public interest advocates came forward to challenge the policies and practices adopted.33 The US Supreme Court dismissed the challenge to the Haitian interdiction program in *Sale*. In *Ruddock v Vadarlis*, the Full Bench of the Federal Court of Australia did the same with respect to the challenge to the interdiction activities of the Australian government.34 While the cases dealt with different fact scenarios and different legal questions, the outcome was the same: a ‘rights-precluding’ approach upholding the legality of the governments’ interdiction activities.

The *Tampa* incident is examined in detail in Chapter Five, Part 5.2.2. For present purposes a summary account of the events that led up to the court challenge will suffice. A Norwegian container vessel, the *MV Tampa*, responded to a request by Australian authorities to rescue 433 asylum seekers aboard a sinking vessel in the Indian Ocean. When the *Tampa* attempted to land the rescued asylum seekers at Christmas Island, the Australian government ordered the vessel to stay outside Australian territorial waters. Concerned about the health and welfare of the rescuees and his crew, the ship’s captain defied Australian authorities and headed towards the Australian territory of Christmas Island. The Australian government responded by deploying Special Armed Service troops, who boarded and took control of the vessel.

---


32 On the use of interdiction and return in Europe, see Chapter Ten, Part 10.1.1.

33 In the US, the *Sale* litigation was brought by Haitian Centers Council. The government’s response to the *MV Tampa* incident was challenged by a concerned Melbourne lawyer, Eric Vadarlis, the Victorian Council for Civil Liberties, and the Human Rights and Equal Opportunity Commission.

Eric Vadarlis and the Victorian Council for Civil Liberties commenced proceedings in the Federal Court against the Minister for Immigration and a number of other Commonwealth officers. The first hurdle the public advocates had to overcome was the issue of standing. While the lawyers had received a letter from the ‘rescuees’, they were unable to obtain direct instructions for the purpose of mounting a legal challenge under the Migration Act 1958 (Cth) (‘Migration Act’). Given the lack of direct instructions from the rescuees, the public advocates only had standing to seek an order in the nature of habeas corpus, requiring the respondents to bring the rescuees to Australia. Two requirements had to be met for the writ to issue. First, the rescuees had to be ‘detained’ by the government. This required a determination that the government was imposing total restraint on the movement of the rescuees. Second, it needed to be shown that this detention was not authorised by law. The government admitted to acting outside of the statutory regime set up by the Migration Act. This was because if this Act was to apply, the rescuees would have to be transferred into immigration detention in Australia and afforded an opportunity to claim asylum. Instead, the government argued that the executive had a ‘prerogative power’ which authorised its actions, outside the statutory provisions. The determinative question in this regard was whether such a power existed.

The trial judge, North J, held that the circumstances amounted to a total restraint on the freedom of the rescuees attributable to the government. On the second question, North J concluded that there was no non-statutory prerogative power to detain non-citizens for the purpose of expulsion. If there ever had been such a power, North J reasoned that it was extinguished by the comprehensive provisions contained in the Migration Act dealing with the subject. Detention could only be authorised if it was pursuant to the Migration Act, and to the extent that the government purported to be acting outside the Act, detention was unlawful. Accordingly, orders were made directing the Commonwealth to bring ashore and release the asylum seekers.

36 Vadarlis argued that s 245F(9), which confers on officers the power to board ships, applies to the rescuees and requires the government to bring the rescuees to mainland Australia. He contended further that the mandatory detention provisions contained in s 189 of the Act applied to the rescuees and required the respondents to take the rescuees into detention. The application for mandamus to compel the respondents to perform these statutory duties was dismissed on the grounds that Vadarlis did not have standing: VCCL (2001) 110 FCR 452, 467-68 [45]-[48] (North J); Ruddock v Vadarlis (2001) 110 FCR 491, 529-530 [151]-[152] (French J). Vadarlis also claimed that the government’s refusal to give him access to the rescuees constituted a breach of his implied constitutional right to freedom of communication. He unsuccessfully sought an injunction and mandamus to allow him to give legal advice to the rescuees: VCCL (2001) 100 FCR 452, 489-90 [162]-[168] (North J).
37 VCCL (2001) 110 FCR 452, 469 [56] (North J); Ruddock v Vadarlis (2001) 110 FCR 491, 509 [66] (Black CJ); 518 [108] (Beaumont J). The Federal Court of Australia Act 1976 (Cth), which sets out the powers of the Federal Court, does not explicitly mention the writ of habeas corpus. This has led to divided opinions as to whether the court has the power to issue such a writ: see David Clark, ‘Jurisdiction and Power: Habeas Corpus and the Federal Court’ (2006) 32 Monash University Law Review 275 (arguing that the Federal Court judges have been incorrect in their conclusion that they do not have the power to issue habeas corpus writs). It is accepted, however, that the Court has the power to issue a writ in the nature of habeas corpus, which is essentially a mandatory injunction: Ruddock v Vadarlis (2001) 110 FCR 491, 518 [107] (Beaumont J). See above n 36.
In *Ruddock v Vadarlis*, the Full Federal Court overturned the primary judge’s ruling in a 2:1 majority decision. Black CJ, in dissent, would have dismissed the appeal on similar grounds relied upon in the primary decision. French J, with whom Beaumont J agreed, disagreed with North J’s and Black CJ’s analysis of the two key questions. On the first question of whether the rescuees were being detained by the government, French J invoked the ‘three walled prison’ concept constructed by the High Court in *Chu Kheng Lim v MILGEA* (*Lim*). His Honour reasoned that the rescuees were not being detained as they were free to travel anywhere they wished, except to Australia. French J went on to conclude that even if the rescuees were being detained, such detention would be authorised pursuant to the government’s executive power conferred by s 61 of the Australian Constitution. His Honour distinguished between the old royal prerogative powers and the constitutional executive power, finding that the former had been subsumed by the latter upon the creation of the Australian Constitution. The executive power authorises the executive to prevent the entry of non-citizens and to do all things necessary to effect such exclusion (including detention). Whereas the old prerogative power could be superseded by legislation which operates in the same area, the executive power could only be displaced by clear and unambiguous legislative intention. This is particularly so in cases where the executive power is of great significance to national sovereignty. While detailed and comprehensive, the provisions of the *Migration Act* dealing with the entry and removal of non-citizens were construed as not demonstrating an intention to override the executive of its non-statutory power to prevent the entry of non-citizens into Australian waters. Vadarlis sought leave to appeal to the High Court. However, the Court declined to entertain the appeal, as by that stage, the rescuees had been transferred to Nauru and New Zealand to have their claims for refugee status assessed.

Much like the *Sale* decision in the United States, the majority’s decision in *Ruddock v Vadarlis* has been the subject of intense academic criticism. In reaching the conclusion that the rescuees were not detained as they were free to go anywhere other than Australia, French J relied on the High Court’s decision in *Lim*. As Mary Crock points out, however, that characterisation of immigration

---

40 *Chu Kheng Lim v MILGEA* (*Lim*) (1992) 176 CLR 1; See Chapter Six, Part 6.4.1.
42 Section 61 of the *Australian Constitution* provides that ‘the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General’.
43 *Ruddock v Vadarlis* (2001) 110 FCR 491, 540-1 [183]-[185], 545-6 [204] (French J).
44 Ibid 543 [193], 545 [202] (French J).
detention in *Lim* had been repeatedly and roundly rejected by the UN Human Rights Committee and by the European Court of Human Rights.\(^\text{48}\) This point is also made by Black CJ in his dissenting opinion.\(^\text{49}\)

The majority's broad construction of the executive power has been the subject of harsh criticism. The two main steps in French J’s reasoning have both been attacked. The first line of criticism targets French J’s assertion that the boundaries of the Commonwealth executive power should not be determined with reference to the content of the prerogative power. This conclusion has been criticised on the grounds that it deviates from previous precedent determining the nature and scope of the executive power,\(^\text{50}\) and the context of imperial and colonial history in which the constitutional provision was drafted.\(^\text{51}\) George Winterton argues that French J’s approach involves abandoning the long-standing principle that the common law should be used to interpret both statutes and constitutions.\(^\text{52}\) For Winterton, the prerogative, despite its uncertainty, ‘constitutes a substantial body of principles, rules and precedents, established over hundreds of years’.\(^\text{53}\) Such principles provide clearer guidance than vague notions of sovereignty and what is ‘appropriate’ for national governments.

The second line of criticism targets French J’s conclusion that the executive power to prevent the entry of non-citizens had not been abrogated by the passage of the *Migration Act*.\(^\text{54}\) Again, this conclusion is not derived from any precedent\(^\text{55}\) and ‘ignores the history of the executive power since the 17th century [which] demonstrates progressive constitutionalisation, moderation, and republicanisation.’\(^\text{56}\) This history supports the conclusion that even if the executive power encompassed a power to detain non-citizens for the purpose of exclusion at federation, this power was abrogated by the legislative action of passing the relevant provisions on interdiction and exclusion contained in the *Migration Act*. Simon Evans argues that this position is correct when one considers the legislative intention behind the passage of those provisions, querying whether it is realistic to imagine that the Parliament intended to enact in clear and general terms that a person attempting to enter Australia unlawfully must be taken into immigration detention by an officer, but to


\(^{49}\) *Ruddock v Vadarlis* (2001) 110 FCR 491, 510 [73].

\(^{50}\) Selway, above n 47, 501, referring to the High Court decision in *Re Residential Tenancies Tribunal (NSW): Ex parte Defence Housing Authority* (1997) 190 CLR 410, 438 as authority for this point. There, Dawson, Toohey and Gaudron JJ held that the power conferred by s 61 included ‘the prerogative of the Crown because the setting in which the Crown is invested with the executive power is that of the common law and the prerogatives of the Crown are those rights, powers, privileges and immunities it possesses at common law.’ See also, Winterton, above n 47, 35; Gerangalos, above n 47, 116 (noting that *Vadarlis* ‘constitutes a decisive step beyond what may have been suggested in earlier cases’).

\(^{51}\) Selway, above n 47, 505. See also, Evans, above n 47, 97.

\(^{52}\) Winterton, above n 47.

\(^{53}\) Ibid 35.

\(^{54}\) See *Ruddock v Vadarlis* (2001) 110 FCR 491, 540 [183].

\(^{55}\) Winterton, above n 47, 47 (arguing that ‘it may be doubted whether the cases upon which French J relied upon [to reach this conclusion] represent current Australian authority.’)

\(^{56}\) Evans, above n 47, 98.
leave open to the officer an alternative non-statutory option with none of the safeguards of immigration detention? \(^{57}\)

This criticism, combined with the fact that two out of the four judges who heard the case at trial and appeal upheld the habeas challenge (including the most senior judge of the group, Black CJ), at the very least, demonstrates the contingency of the Full Federal Court’s decision.

### 7.2.2 CPCF v MIBP

The High Court had an opportunity to examine some of the issues raised in *Ruddock v Vadarlis* in its 2015 decision in *CPCF v MIBP* (‘CPCF’).\(^{58}\) The case concerned a challenge to the detention at sea of one of a group of 157 Sri Lankan asylum seekers interdicted en route to Australia. The Indian-flagged vessel on which the group was travelling was intercepted on 29 June 2014 by an Australian Customs vessel in Australia’s contiguous zone. The asylum seekers were transferred to the Australian vessel where they were detained while diplomatic negotiations were undertaken to return them to India. They remained aboard the Customs vessel until 27 July 2014 when a decision was made to disembark the passengers to Cocos (Keeling) Island, an Australian territory in the Indian Ocean. Subsequently, the asylum seekers were moved to the offshore processing facility on Nauru.

The key legal issue was that of wrongful imprisonment, namely whether the detention of the plaintiff for almost one month on the Australian vessel was lawful. The Commonwealth’s argument was that their actions were authorised under the *Maritime Powers Act 2013* (Cth) (‘MPA’). The MPA had consolidated the Commonwealth’s various existing maritime enforcement powers, including those introduced into the *Migration Act* in the aftermath of the *MV Tampa* incident,\(^{59}\) into a single framework.\(^{60}\)

The key relevant provision of the MPA, s 72(4), provided that where a maritime officer suspects a vessel had been involved in a contravention of an Australian law (including the *Migration Act*),\(^{61}\)

\[
\text{A maritime officer may detain the person and take the person, or cause the person to be taken:}
\]

\(\text{(a) To a place in the migration zone; or}\)
\(\text{(b) To a place outside the migration zone, including a place outside Australia.}\)

In the alternative, the Commonwealth argued that detention was authorised by the non-statutory executive power of the Commonwealth derived from s 61 of the Australian Constitution. This drew on the Majority’s reasoning in *Ruddock v Vadarlis*, where French J noted that the Commonwealth

---

\(^{57}\) Ibid.


\(^{59}\) See former div 12A of the *Migration Act 1958* (Cth) (‘*Migration Act*’).

\(^{60}\) Explanatory Memorandum, Maritime Powers Bill 2012 (Cth) 1; See Chapter Five, nn 107-8 and accompanying text.


\(^{62}\) These provisions reflect the former s 245F(9)-(9A) of the *Migration Act*. 
executive power included the power ‘to prevent the entry of non-citizens and to do such things as necessary to effect such exclusion.’\(^63\)

The plaintiff argued that his detention was not authorised by the MPA as the decision to take him to India was invalid. He contended that detention was unlawful because there was no assurance he would be allowed to disembark in India. The plaintiff sought to rely on the High Court’s ruling in Lim that a Commonwealth statute authorising executive detention must limit the duration of incarceration to what is reasonably capable of being seen as necessary to effect an identified statutory purpose which is reasonably capable of being achieved.\(^64\) The lack of agreement with India for disembarkation created uncertainty in the possible duration of detention. It was argued that this took the duration of the plaintiff’s detention beyond something reasonably capable of being seen as necessary to effect removal. The plaintiff’s second argument relied on the fact that there was no legal guarantee of non-refoulement by India. Finally, the plaintiff contended that the majority’s ruling on the executive power in Ruddock v Vadarlis was incorrect, arguing that even if an executive power to detain on the high seas had ever existed, it was extinguished by the MPA.\(^65\)

By a narrow 4:3 majority, the High Court found that the detention of the plaintiff was authorised under s 72(4) of the MPA. Almost all the judges cited with approval the constitutional principle in Lim. That is, statutory detention provisions must be limited to what is reasonably capable of being seen to be necessary to effect an identified statutory purpose which is reasonably capable of being achieved.\(^66\) However, they split on how this principle should be applied to the facts before them. The majority consisted of four separate judgements delivered by French CJ and Crennan, Kean and Gageler JJ. All rejected the plaintiff’s argument that Lim created an implicit requirement in s 72(4) that detention be authorised only where the detainee has an existing right to disembark in the destination country. French CJ noted that the statute could not be construed as authorising ‘futile or entirely speculative taking’. However, it did authorise detention where there is knowledge or reasonable belief that the destination country would allow the person to enter its territory.\(^67\) The ongoing diplomatic negotiations between Australian and Indian officials were sufficient to support this requisite reasonable belief. Crennan J found that while removal must be to a reasonable place and within a reasonable time, s 72(4) did not require certainty of disembarkation at a specific destination.\(^68\) Gageler J adopted a

---

\(^{63}\) Ruddock v Vadarlis (2001) 110 FCR 491, 543 [193].

\(^{64}\) Lim (1992) 176 CLR 1, 33-4 (Brennan, Deane and Dawson JJ); CPCF v MIBP ('CPCF') [2015] HCA 1 (28 January 2015) [196] (Crennan J).

\(^{65}\) A third argument alleged that the maritime officer responsible for detaining him and taking him towards India made the decision to do so at the dictation of the National Security Committee without exercising independent discretion as to where he should be taken. This argument was dismissed by all members of the Court and is beyond the scope of the present analysis.

\(^{66}\) See, for example, CPCF [2015] HCA 1 (28 January 2015) [196], [215]-[216] (Crennan J); [273] (Kiefel J); [374] (Gageler J).

\(^{67}\) Ibid [46]-[50].

\(^{68}\) Ibid [205]-[207].
similar approach, finding that the only limitation on the power was that it be exercised reasonably, in
good faith and in accordance with the objects of the Act.\textsuperscript{69}

The fourth member of the majority, Keane J, took a slightly different approach, but reached a similar
conclusion. For Keane J, the decision to take the plaintiff and the other passengers to India was not
made under the Act. Keane J interpreted s 72(4) as authorising only actions taken by a maritime
officer. The decision to take the plaintiff to India was made by the Minister in consultation with the
National Security Committee (‘NSC’), not the maritime officer aboard the Australian customs vessel.
As s 72(4) was not a source of the decision making power exercised by the executive, it was not a
source of constraint on the power of the executive.\textsuperscript{70}

Instead, Keane J found the decision of the Minister and the NCP to take the plaintiff to India was
authorised under the executive powers conferred by ss 61 and 64 of the Australian Constitution.\textsuperscript{71} His
Honour did stipulate, however, that the implementation of that decision was ‘subject to such
constraints as are expressed by, or necessarily implicit in, s 72(4)’.\textsuperscript{72} This included requirements that
the power be exercised with reference to the scope and purpose of the Act, and that ‘taking’ under s
72(4) be carried out in a reasonable time.\textsuperscript{73} His Honour concluded that these constraints had not been
breached in this case.

The minority held that s 72(4) of the \textit{MPA} only authorised the removal of a person to a destination,
when at the time the destination is chosen, the person taken has a right or permission to enter.\textsuperscript{74} In
addition to the \textit{Lim} principle discussed above, Hayne and Bell JJ (in a joint judgement) and Kiefel J
referred to the High Court’s ruling in \textit{Plaintiff S4/2014 v MIBP} (‘\textit{Plaintiff S4}’).\textsuperscript{75} There, the Court said

\begin{quote}
[\textit{The duration of any form of detention, and thus its lawfulness, must be capable of being determined at
any time and from time to time. Otherwise, the lawfulness of the detention could not be determined and
enforced by the courts, and, ultimately by this Court.}]\textsuperscript{76}
\end{quote}

Hayne and Bell JJ reasoned that the duration of detention was not capable of determination where
uncertainty surrounds a person’s right to enter a place chosen for the purposes of s 72(4). In such
circumstances:

the length of detention would depend upon the particular (unconstrained) decision to choose as the
destination to which a person subject to s 72 of the [\textit{MPA}] should be taken a place (or succession of
places) which that person has no right or permission to enter.\textsuperscript{77}

\begin{itemize}
\item \textsuperscript{69} Ibid [360]-[361].
\item \textsuperscript{70} Ibid [450] (Keane J).
\item \textsuperscript{71} Ibid [423].
\item \textsuperscript{72} Ibid [450].
\item \textsuperscript{73} Ibid [450]-[453].
\item \textsuperscript{74} Ibid [71], [92], [99] and [123], [135] (Hayne and Bell JJ); [318] (Kiefel J).
\item \textsuperscript{75} Ibid [97] (Hayne and Bell JJ); [321] (Kiefel J).
\item \textsuperscript{76} \textit{Plaintiff S4} (2014) 312 ALR 537, 543 [29]; See Chapter Six, nn 179-87 and accompanying text.
\item \textsuperscript{77} CPCF [2015] HCA 1 (28 January 2015) [99].
\end{itemize}
They go on to reason that a construction of the statute that would authorise detention where there is a hope that a person may be allowed to land would raise serious concerns:

How is a court (and ultimately this Court) to judge whether that hope has been explored with sufficient diligence to make the consequential detention not unduly, and thus not unlawfully prolonged? If neither a right to land nor an existing permission to do so is required, and hope of landing will do, what level of hope must exist?78

The difficulties in answering these questions make it impossible for a court to determine whether the person has been detained longer than reasonably necessary to be taken to his or her destination.

Kiefel J agreed that the valid exercise of the detention power under s 72(4) required certainty about the choice of place to which the plaintiff would be removed. A decision under s 72(4) must be ‘limited to one place, which is identified at the time the decision is made as one where it is known that the detained person may be disembarked.’79 To hold otherwise would result in a situation where the length of a person’s detention is unknown. Such detention would fall foul of the principles from Lim and Plaintiff S4 discussed above.

On the facts before them, most of the justices found it unnecessary to address the question of whether the power to detain and transfer a person under s 72(4) was constrained by the non-refoulement provisions of the Refugee Convention and other human rights treaties. This was because there was no evidence before the Court that the plaintiff faced any risk of refoulement if returned to India. Nevertheless, the justices provided some hints about how they would approach this question if the fact scenario was different.

French CJ and Keane and Gageler JJ all indicated that there was no basis for adopting a construction that limited the power conferred by s 72(4) by reference to Australia’s non-refoulement obligations.80 Given the dualist nature of Australia’s legal system, international law does not form part of Australian law until it has been enacted in legislation. However, it is an accepted principle of statutory construction that ‘a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law.’81 French CJ and Keane and Gageler JJ all indicated that this principle does not assist the plaintiff in this case as both the text of the relevant provisions, as well as the scope and purpose of the Act are clear and unambiguous.82

The judgements of Kiefel and Crennan JJ and the joint judgement delivered by Hayne and Bell JJ all leave open the possibility that the power under s 72(4) may be limited by Australia’s non-refoulement obligations. Interestingly, it was Crennan J, who formed part of the majority in upholding the legality of the detention of the plaintiff, who gave the strongest indication that Australia’s non-refoulement obligations may limit the power to transfer detainees under s 72(4). Her Honour stated that

78 Ibid [101].
79 Ibid [318].
The Refugees Convention is part of the context of the Act, considered widely. If the s 72(4)(b) power had been invoked to return the plaintiff to Sri Lanka or to take the plaintiff to a place outside the migration zone which was not safe questions might have arisen about an interpretation of s 72(4)(b) consistent with Australia’s obligation under the Refugees Convention.\footnote{Ibid [219].}

A number of the justices also noted that statutory protections included in the MPA impose similar protections to the non-refoulement obligations of the Refugee Convention and other human rights instruments. The power to detain and transfer a person under s 72(4) is limited by s 74 of the MPA, which provides that ‘[a] maritime officer must not place … a person in a place, unless the officer is satisfied, on reasonable grounds that it is safe for the person to be in that place’. For Hayne and Bell JJ, this safeguard provides a similar scope of protection as found in the Refugee Convention:

The reference in s 74 to a person being ‘safe’ in a place must be read as meaning safe from risk of physical harm. A decision-maker who considers whether he or she is satisfied, on reasonable grounds, that it is safe for a person to be in a place must ask and answer a different question from that inferentially imposed by the Refugees Convention. But there is a very considerable factual overlap between the two inquiries. Many who fear persecution for a Convention reason fear for their personal safety in their country of nationality.\footnote{Ibid [109].}

French CJ makes a similar observation, stating

\[\text{[t]he content of the term ‘safe for the person to be in that place’ in s 74 may be evaluative and involve a risk assessment on the part of those directing or advising the relevant maritime officers. A place which presents a substantial risk that the person, if taken there, will be exposed to persecution or torture would be unlikely to meet the criterion ‘that it is safe for the person to be in that place’. The constraint imposed by s 74 embraces risks of the kind to which the non-refoulement obligations under the Refugees Convention and Convention against Torture are directed. The existence of such risks may therefore amount to a mandatory relevant consideration in the exercise of the power under s 72(4) because they enliven the limit on that power which is imposed by s 74 at the point of discharge in the country to which the person is taken.}\footnote{Ibid [12].}

Kiefel J took a slightly different approach, finding that s 74 only required that a point of disembarkation for a person is, ‘in its immediate physical aspects… safe’.\footnote{Ibid [296].} It does not require that a maritime officer be satisfied that place is one in which the person will not face a real risk of harm more generally. Meeting such an obligation would involve wider considerations than what is necessary to a decision under s 72(4).\footnote{Ibid.}

Only four out of the seven justices in the case addressed the question of whether the executive power in s 61 of the Constitution extended to detention and removal of non-citizens seeking to enter Australia without authorisation. Having found that the detention of the plaintiff was authorised under the MPA, French CJ and Crennan and Gageler JJ indicated that it was not necessary to address this
question. The fourth member of the majority, Keane J agreed that it was not strictly necessary to answer this question. However, his Honour went on to do so at length in obiter dictum. Keane J endorsed the approach of the majority in *Ruddock v Vadarlis*. He found that the Commonwealth had a non-statutory executive power to prevent non-citizens from entering Australia and to detain them for that purpose. This power had not been abrogated by the *MPA* or the *Migration Act*. Finally, this power to detain and remove was not constrained by Australia’s *non-refoulement* obligations, nor the requirement of certainty of destination.

The minority took the contrary approach on the executive power question. Having found that the detention of the plaintiff was not authorised under *MPA*, the three justices rejected the government’s contention that the detention was authorised under the non-statutory executive power of the Commonwealth. Kiefel J adopted similar reasoning to Black CJ’s dissent in *Ruddock v Vadarlis*. Her Honour found it doubtful that such a power ever existed in Australia, but even if it did, it had since been displaced by the *MPA*. Hayne and Bell JJ rejected the need to analyse the broad historical questions of whether the government has the inherent power to regulate who enters the nation’s territory and to repel those who seek to do so without authority. Even if such a power is conceded, such considerations “do not answer the questions about the scope of the power and the organ or organs of government which must exercise it.” Instead, their Honours asked more narrowly whether the “executive power of the Commonwealth of itself provides legal authority for an officer of the Commonwealth to detain a person and thus commit a trespass?” In answering this question in the negative, Hayne and Bell JJ relied on the following passage from the High Court’s decision in *Lim*:

> Neither public official nor private person can lawfully detain [an alien who is within this country, whether lawfully or unlawfully] or deal with his or her property except under and in accordance with some positive authority conferred by the law. Since the common law knows neither letter de cachet nor the other executive warrant authorising arbitrary arrest or detention, any officer of the Commonwealth Executive who purports to authorise or enforce the detention in custody of such an alien without judicial mandate will be acting lawfully only to the extent that his or her conduct is justified by valid statutory provisions.

Hayne and Bell JJ reasoned that although the comments of the Court in *Lim* dealt with the exercise of power within Australia, there is no reason to doubt that the same rule should apply to actions taken by

---

88 Ibid [42] (French CJ), [229] (Crennan J) and [392] (Gageler J).
89 Ibid [476].
90 Keane J quotes passages from French J’s in judgement *Ruddock v Vadarlis* (2001) 110 FCR 491 with approval at ibid [482] and [489].
91 CPCF [2015] HCA 1 (28 January 2015) [478]-[487].
92 Ibid [488]-[492].
93 Ibid [493]-[495].
94 Ibid [271].
95 Ibid [277], [280].
96 Ibid [143] (footnotes omitted) (Hayne and Bell JJ).
97 Ibid [147].
98 *Lim* (1992) 176 CLR 1, 19 (Brennan, Deane and Dawson JJ) (footnotes omitted), cited at ibid [148].
the government extraterritorially: '[t]o hold that the Executive can act outside Australia's borders in a way that it cannot lawfully act within Australia would stand legal principle on its head.'

The contingent nature of the outcome in CPCF is demonstrated by the very tight 4:3 majority by which it was decided and the lack of a uniform approach amongst the majority justices. The majority consisted of four separate judgements. Keane J adopted a construction of the power conferred by the relevant statutory provisions that was significantly different from the other majority judges. French CJ, Gageler and Crennan JJ construed s 72(4) as the relevant source of power for both the maritime officers involved and the NSC that gave the order for removal. Keane J construed s 72(4) as only authorising actions of the maritime officers, finding that the decision of the NSC was made under the executive’s non-statutory powers. There was also no clear ratio on the relevance of the non-refoulement obligations under the Refugee Convention and other Human Rights instruments; nor on the scope of the executive’s non-statutory powers. On this last point, it remains unclear how the High Court would address the executive power issue if called upon to do so directly. As discussed, Keane J was the only justice in CPCF to rule that non-statutory executive power extends to intercepting, detaining and removing non-citizens who attempt to enter Australia without authorisation. Although not addressing this point in CPCF, this position is likely to be supported by French CJ, as it is in line with the approach his Honour took as a Federal Court judge in Ruddock v Vadarlis. Kiefel, Hayne and Bell JJ all found that the executive does not possess any non-statutory powers that would authorise detention and removal extraterritorially. The outcome of a future High Court challenge on this point could thus be determined by Gageler J; Nettle J, who replaced Crennan J on the High Court bench in February 2015; and Justice Michelle Gordon who will replace her husband Hayne J in June 2015.

7.3 Comparison of Australian and US Case Law

Although the cases considered very different legal issues, there are some similarities in the approach of the majority of the Full Federal Court in Ruddock v Vadarlis, the High Court majority in CPCF and the majority of the US Supreme Court in Sale. In all three cases, it was held that the executive had broad powers to intercept and deflect asylum seekers attempting to enter their respective jurisdictions without authorisation. In the US case of Sale, the interdiction program was explicitly authorised in an executive order issued by the President.\(^{100}\) The power to make the executive order came from INA § 212(f). This confers authority on the President to suspend the entry of any class of aliens, or to impose on the entry of aliens any restrictions that the President may deem appropriate. In Ruddock v Vadarlis, the government’s authority to carry out the interdiction program was less explicit. The majority accepted the government’s claims that its activities were authorised under the executive power in s 61 of the Australian Constitution. Moreover, in both cases, the executive power was found not to be subject to the constraints of domestic statutory law. Both the INA and the Migration Act afforded certain protections for asylum seekers. In both cases, it was found that those protections did

---

\(^{99}\) CPCF [2015] HCA 1 (28 January 2015) [150].

\(^{100}\) Executive Order No 12,807 (24 May 1992), 57 Fed Reg 23,133 (1 June 1992).
not apply to the interdicted asylum seekers.\textsuperscript{101} By the time the High Court was called upon to determine the legality of interdiction activities in \textit{CPCF}, the Australian government had introduced a statutory regime for carrying out such activities. By a narrow majority, the High Court found that the interdiction and detention at sea carried out in that case were authorised under this statutory framework. The \textit{MPA} contained certain protections for interdicted persons, the most significant being that these people could be disembarked only at a ‘safe’ place.\textsuperscript{102} As discussed in Chapter Five, the Abbott government responded to the challenge to its interdiction activities in \textit{CPCF} with legislation strengthening its interdiction powers under the \textit{MPA}.\textsuperscript{103} However, the requirement that a person must not be taken to a place which is unsafe remains. No such limitations were read into the executive powers to interdict, detain and remove as construed by the US Supreme Court in \textit{Sale} or by the Full Bench of the Australian Federal Court in \textit{Ruddock v Vadaris}.

There are also parallels in the way the US Supreme Court and the Australian Federal and High Court dealt with the issue of international law. In all three cases, a majority of the justices indicated that nothing in international law constrained the actions of the executive. On this point, the approach taken in the Australian cases is more understandable. As discussed, Australia adheres to a dualist system of international law where international treaties ratified by the executive do not become binding at a domestic level unless translated through Parliament or legislation.\textsuperscript{104} As Parliament had not directly enacted the terms of the \textit{Refugee Convention},\textsuperscript{105} the Court was not called upon to determine the compatibility of the government’s actions with the Convention. The only scope for considering Australia’s obligations under the \textit{Refugee Convention} was in the course of applying the accepted principle of statutory construction that ‘a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law’.\textsuperscript{106} However, neither the Federal Court in \textit{Ruddock v Vadaris} nor the High Court in \textit{CPCF} addressed this point as the facts before them did not give rise to any non-refoulement considerations. In \textit{Ruddock v Vadaris}, French J found that ‘nothing done by the Executive on the face of it amounts to a breach of Australia’s obligations in respect of non-refoulement under the Convention’.\textsuperscript{107} This was because the rescuees were not being returned to their home countries. Rather, the Australian government had concluded agreements with New Zealand and Papua New Guinea to transfer the asylum seekers to

\textsuperscript{101} Note that in \textit{Ruddock v Vadaris}, this question was not dealt with directly as there was no standing to bring claims under the \textit{Migration Act}.

\textsuperscript{102} MPA, s 74.

\textsuperscript{103} See Chapter Five, nn 111-16 and accompanying text.

\textsuperscript{104} See above nn 80-2 and accompanying text; and Chapter One, n 59 and accompanying text.

\textsuperscript{105} At the time \textit{Ruddock v Vadaris} and \textit{CPCF} were decided, the \textit{Migration Act} incorporated the Convention definition of a refugee into s 36 of the Act (stating ‘a person is qualified for a Protection visa if they are one to whom Australia owes obligations under the Convention’); the Act did not incorporate the remainder of the Convention. The reference to the \textit{Refugee Convention} in s 36 of the \textit{Migration Act} was removed with the passage of the \textit{Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014} (Cth), which came into effect on 18 April 2015.


\textsuperscript{107} \textit{Ruddock v Vadaris} (2001) 110 FCR 491, 545 [203]; Beaumont J echoed a similar sentiment, referencing the non-refoulement obligation of the \textit{Refugee Convention}, but noting that international law imposes no obligation to settle those who are rescued: 521 [126].
those countries for the processing of their claims. In CPCF, the challenge related to the legality of attempts by Australian officials to take the plaintiff to India and there was no evidence before the Court indicating risk of harm or secondary *refoulement*. In this regard, the decision in *Sale* is of greater concern. There, the intercepted asylum seekers faced summary return to Haiti without any consideration of their protection needs. Further, the Court assumed that the Convention’s *non-refoulement* provisions had the force of law in the US domestic legal system. Nevertheless, the Court concluded that the actions of the executive were not constrained by the *Refugee Convention*. This was thanks to a somewhat questionable interpretation of the *non-refoulement* provision as having no extraterritorial effect.

The Full Federal Court in *Ruddock v Vadarlis* and the High Court in *CPCF* did not have to directly deal with the question of whether the *Refugee Convention* constrained the power of the executive when carrying out interdiction activities. Accordingly, they avoided the question of whether the Convention’s *non-refoulement* obligations had extraterritorial effect. French CJ and Keane J did address the issue briefly in *CPCF*. Their Honours noted that there is judicial authority in Australia, the United Kingdom and the United States supporting the proposition that the Convention’s *non-refoulement* obligation only extend to refugees within a state’s territory. *Sale* is the US authority cited by both justices and as discussed, that case clearly supports such an interpretation. The Australian and UK cases cited for the proposition by the two justices are more problematic. Both French CJ and Keane J refer to comments by McHugh and Gummow JJ in *MIMIA v Khawar* (‘*Khawar*’) as Australian authority supporting the lack of extraterritorial applicability of the *Refugee Convention*’s *non-refoulement* obligations. However, this case did not deal with any issues of extraterritoriality. The comments relied upon were made in the context of a general introduction to the *Refugee Convention*. In that case McHugh and Gummow JJ stated:

> The term ‘asylum’ does not appear in the main body of the text of the Convention; the Convention does not impose an obligation upon Contracting States to grant asylum or a right to settle in those States to refugees arriving at their borders. Nor does the Convention specify what constitutes entry into the territory of a Contracting State so as to then be in a position to have the benefits conferred by the Convention. Rather the protection obligations imposed by the Convention upon Contracting States concern the status and civil rights to be afforded to refugees who are within Contracting States.

---

109 US courts have distinguished between ‘self-executing’ treaties and ‘non-self-executing treaties’. Whereas the former have automatic domestic effect, the latter must be enacted through implementing legislation to have effect domestically. While before the decision in *Sale* there had been some debate as to which provisions, if any, of *Refugee Convention* were self-executing, the Supreme Court appears to have assumed that Article 33 did have domestic legal affect: *Sale*, 509 US 155, 178 (1993).
110 *CPCF* [2015] HCA 1 (28 January 2015) [10] (French CJ) (note that French CJ does go on to note the contrary position put forward by UNHCR in their amicus curiae brief); [461] (Keane J).
112 Rather, the main issue related to the meaning of the term ‘particular social group’ in the Convention definition of the term ‘refugee’ and whether it could encompass victims of domestic violence in certain cases.
Nothing here indicates that the non-refoulement obligations in Refugee Convention do not apply extraterritorially. Rather the claim relates to the absence of an obligation to provide asylum. The provision of asylum is qualitatively different to non-refoulement protection. The grant of asylum allows a person to stay in the receiving country’s territory. Non-refoulement does not necessarily require this. All that is required is that the person is not sent back to a place where they will be subject to certain prescribed harms. French CJ also cites Gummow J’s comments in MIMA v Haji Ibrahim (‘Ibrahim’) as Australian authority for the fact that the Convention’s non-refoulement obligations have no extraterritorial effect. His Honour appears to be relying on Gummow J’s statement that ‘the right of asylum is a right of States, not of the individual; no individual, including those seeking asylum, may assert a right to enter the territory of a State of which that individual is not a national.’114 An interpretation of this statement as indicating a lack of extraterritorial applicability of the Refugee Convention’s non-refoulement obligations again misconstrues the distinction between non-refoulement and the act of granting asylum.

There are also concerns with French CJ and Keane J’s reference to the House of Lords decision in R (European Roma Rights Centre) v Immigration Officer at Prague Airport as UK authority for the non-extraterritorial applicability of the Convention’s non-refoulement obligations.115 That case challenged the practice of stationing UK immigration officials at Prague Airport to ‘pre-clear’ passengers before they boarded flights to the United Kingdom. Lord Bingham of Cornhill delivered the lead judgement on the issue of whether this practice was in contravention of the Refugee Convention. The key determining factor in finding that the policy in question did not violate the Refugee Convention, was that the would-be asylum seekers had not left their country of origin or habitual residence. Hence they could not meet the Article 1A definition of a refugee.116 This was a very different situation to what occurred in Sale, Vadarlis and CPCF where the asylum seekers were intercepted on the high seas or in the contiguous zone of the intercepting state. Lord Bingham does, however, cite a number of authorities supporting the view that the non-refoulement obligations of the Refugee Convention do not apply extraterritorially. Interestingly, Lord Bingham’s analysis on this point makes repeated references to the Australian High Court’s decisions in Khawar and Ibrahim.117 Again, as discussed, these cases are not sound authority for the non-extraterritorial applicability of Article 33(2). It appears that in CPCF, French CJ and Keane J may have relied on Lord Bingham’s reference to Khawar and Ibrahim, when citing these cases as authority for the lack of extraterritorial applicability of Article 33. This represents an interesting example of the mischief that can be caused by the use of foreign case law, and in particular, foreign interpretations of domestic case law.

Another interesting parallel between the US and Australian case law relates to the way in which each jurisdiction deals with the issue of whether the scope of rights afforded to non-citizens changes based

114 Ibrahim (2000) 204 CLR 1, 45 [137] (footnotes omitted).
116 R (European Roma Rights Centre) v Immigration Officer at Prague Airport [2005] 2 AC 1, 29-30, 33 (Lord Bingham).
117 Ibid 30, 31, 38 (Lord Bingham).
on whether they are inside or outside the state’s territory. US law has long tied constitutional protections to the degree of connection a non-citizen has with the United States. As discussed in Chapter Six, the plenary power doctrine provides for differentiated treatment of non-citizens seeking entry into the United States and non-citizens who have effectuated entry and are subsequently being removed.\footnote{Chapter Six, nn 9-20 and accompanying text.} While the former has no constitutional rights, the latter may have limited recourse to such protections. Given that even non-citizens physically present in the United States seeking entry cannot avail themselves to constitutional protections, it is no surprise that interdicted asylum seekers, who are outside US territory, are similarly excluded.

Australian law on this point is not as clear cut. Three justices directly addressed this issue in \textit{CPCF} in the context of whether the constitutional limitations contained in \textit{Lim} in regard to the detention of non-citizens inside Australia should also apply to non-citizens detained outside Australia’s territorial boundaries. Keane J appears sympathetic to the US approach, explicitly limiting the applicability of the constitutional holding in \textit{Lim} to non-citizens within Australia.\footnote{\textit{CPCF} [2015] HCA 1 (28 January 2015) [483].} Hayne and Bell JJ take a different approach stating that while there is

\begin{quote}
[no] doubt the passage quoted from [\textit{Lim}] focused upon the exercise of power within Australia. This case concerns actions taken beyond Australia’s borders. But why should some different rule apply there, to provide an answer to a claim made in an Australian court which must be determined according to Australian law?\footnote{Ibid [149].}
\end{quote}

This is an issue that will no doubt further be explored in future cases dealing with the rights of non-citizens detained by Australian officials extraterritorially.

### 7.4 Conclusion

All three cases examined in this chapter upheld the validity of the government’s interdiction activities. I have argued that the Court’s decision in each case was contingent, in the sense that there were compelling arguments to support a ‘rights-protecting’ outcome, over the ‘rights-precluding’ outcome ultimately adopted. Despite the fact that \textit{Sale} was decided by an 8:1 majority, there are some serious short-comings in the majority’s legal analysis in that case.\footnote{See above nn 19-31 and accompanying text.} The decision was met with almost universal condemnation from academic commentators for misconstruing the extraterritorial effect of both the \textit{Refugee Convention} and \textit{INA}. The preponderance of academic opinion supported the approach taken in Blackmun J’s dissenting opinion, which construed the \textit{non-refoulement} obligations contained in the Convention and \textit{INA} as having extraterritorial effect. The decision of the Full Federal Court in \textit{Vadarlis} was by a narrower, 2:1 majority. Again, the majority approach was met with widespread academic criticism. In particular, the broad interpretation of the scope of the executive power in s 61 of the constitution is seen as having no grounding in precedent. This interpretation was
rejected by three out of four of the High Court justices who considered this issue in *CPCF.* The Court's decision in that case in relation to the scope of the government's statutory authority to detain interdictees on the high seas was also decided on a narrow 4:3 majority. Further, there was little in the way of a clear ratio, with the majority justices diverging on a number of key issues. In *Chapter Six,* I argued that a similar degree of contingency is apparent in the US and Australian case law challenging long-term mandatory detention laws. I make a similar argument in relation to the case law on extraterritorial processing in *Chapter Eight.* In *Chapter Nine,* I turn my attention to potential factors that may have influenced the judicial decision making process in the face of such contingency. I then examine the implications of my findings for predicting the success or failure of transfers of restrictive immigration control measures.

See above nn 88-99 and accompanying text.
CHAPTER EIGHT:
EXTRATERRITORIAL PROCESSING – THE CASE LAW

In this chapter, I examine the judicial response to extraterritorial processing policies in the United States and Australia. In Chapter Five, I examined the history of the use of extraterritorial processing in Australia and the United States. I argued that the existence of similar policies in those countries was the result of a process of legal and policy transfer. Like the policies of mandatory long-term detention and interdiction examined in the previous two chapters, extraterritorial processing policies push the boundaries of international, US and Australian law. This has given rise to a rich body of jurisprudence examining the legality of extraterritorial processing, and the scope of rights which ought to be afforded to asylum seekers subjected to the policy. The existence of this comparative case law provides an opportunity to again test my hypothesis relating to the impact of differing legal structures on immigration control policies transferred between the United States and Australia. I argue that the different legal structures in the two countries have not determined the outcome of leading cases challenging these policies.

The case law on extraterritorial processing measures in the United States and Australia is not as directly comparable as the case law relating to long-term mandatory immigration detention and interdiction. The cases deal with different issues and legal questions in each jurisdiction. Nevertheless, just as in the cases examined in Chapter Six and Seven, the justices in each instance had a choice between adopting either a ‘rights-protecting’, or a ‘rights-precluding’ approach. Again, the relevant legal principles were ambiguous enough to allow for either approach. In this chapter, I examine the junctures at which judges were faced with alternate interpretations that could have led to different outcomes.

8.1 US Case Law

My analysis begins with an examination of a number of US Federal Court decisions rejecting constitutional and statutory claims brought by asylum seekers held at the migrant processing facility in Guantanamo Bay.1 I contrast these cases with the more recent US Supreme Court jurisprudence upholding certain statutory and constitutional claims brought on behalf of enemy combatants detained on the territory.2 I argue that these cases are difficult to reconcile with the earlier case law relating to the rights of asylum seekers. I suggest that the change in approach highlights the contingency of both the migrant and enemy combatant cases.

1 Haitian Refugee Center v Baker, 953 F2d 1498 (11th Cir, 1992); Cuban American Bar Association v Christopher, 43 F3d 1412 (11th Cir, 1995).
Guantanamo Bay is a territory nominally owned by Cuba, but controlled by the US government.\(^3\) The United States first occupied Guantanamo in 1898, during the Spanish-American war, for the purpose of establishing a naval base. Its control over the territory was formalised by a lease agreement entered into with the Cuban government in 1903. This agreement recognised ‘the continuance of the ultimate sovereignty of the Republic of Cuba’. However, it went on to stipulate that the ‘United States shall exercise complete jurisdiction and control’ over the territory.\(^4\) A subsequent treaty in 1934 renewed the lease agreement ‘[u]ntil the two contracting parties agree to the modification or abrogation of the stipulations’.\(^5\) The effect was to give the United States a perpetual lease over Guantanamo. The arrangement has given rise to jurisdictional ambiguities in the context of rights protection, with the territory described as an ‘anomalous legal zone’,\(^6\) and a ‘legal black hole’.\(^7\)

### 8.1.1 Asylum Seekers Detained at Guantanamo Bay and Other Facilities

In a series of cases decided between 1992 and 1995, a number of US Federal District and Circuit Courts dealt with the question of whether the Haitian and Cuban asylum seekers held on Guantanamo could claim any rights under the US Constitution or statutory law. All the decisions with any precedential value squarely rejected such claims.

(a) **Haitian Refugee Center v Baker (‘Baker’)**\(^8\)

*Baker* involved a challenge to the interdiction policy that existed prior to George H W Bush’s ‘Kennebunkport Order’, under which interdicted Haitians had access to asylum procedures at Guantanamo.\(^9\) The Haitian Refugee Center (‘HRC’) initiated litigation in the Eleventh Circuit against US government officials in an attempt to block the practice of returning ‘screened-out’ Haitians without

---


\(^4\) *Agreement between the United States of America and the Republic of Cuba for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations*, TS No 418 (signed and entered into force 23 February 1903) (emphasis added).

\(^5\) *Treaty between the United States of America and Cuba Defining their Relations*, signed 29 May 1934, TS No 866 (entered into force 9 June 1934).


\(^8\) 953 F2d 1498 (11\(^{th}\) Cir, 1992).

\(^9\) See *Chapter Five*, nn 30-8 and accompanying text.
sufficient process. ‘Screened-out’ Haitians were those who, upon initial inspection, were found not to possess a credible fear of persecution.

The relevant constitutional claim asserted was a First Amendment right on the part of attorneys seeking to provide pro bono representation to ‘screened-out’ Haitian asylum applicants at Guantanamo. With little analysis, the Court concluded that Guantanamo was ‘outside the United States’ and rejected the argument that aliens located there have extraterritorial constitutional rights. The finding that Haitians outside the United States had no cognisable rights under US law meant that it would be ‘nonsensical to find that HRC possesses a right to access to the interdicted Haitians for the purpose of advising them of their legal rights’. The HRC appealed to the Supreme Court but was denied certiorari. Thomas J, in concurring with the decision to deny certiorari, expressed deep concern about the treatment of Haitians returned to Haiti, but reasoned that the matter should be dealt with by the political branches.

(b) Haitian Centers Council v McNary (‘McNary’)

The McNary litigation involved similar issues raised in the Baker litigation, but concerned ‘screened-in’ asylum seekers. ‘Screened-in’ Haitians were those found to possess a credible fear of persecution and who were, according to policy, to be brought to the United States to apply for asylum. In March 1992, the INS had decided that they would no longer transfer ‘screened-in’ Haitians to the United States for processing. Instead, full asylum interviews would be carried out at Guantanamo. When the litigation was initiated, some 3,000 ‘screened-in’ Haitians were being held at Guantanamo. A challenge was brought on behalf of the Haitian asylum seekers and several Haitian service organisations. The asylum seeker plaintiffs asserted a due process right to counsel before being returned to persecution, while the Haitian service organisations asserted a reciprocal First Amendment right of access to Guantanamo for the purpose of providing legal advice to the Haitian detainees. The District Court for the Eastern District of New York granted a preliminary injunction based on both the First Amendment and due process claims. The Second Circuit affirmed the preliminary injunction, finding that there were serious questions going to the merits of the claim that Haitian refugees held on Guantanamo were protected by the Due Process Clause. The Court found

---

10 953 F2d 1498, 1503 (11th Cir, 1992). The relevant part of the First Amendment states that ‘Congress shall make no law... abridging the freedom of speech, or of the press; or the right of the people to peaceably to assemble, and to petition the Government for redress of grievances’: United States Constitution, Amend I.

11 953 F2d 1498, 1513 (11th Cir, 1992).

12 Ibid.


14 Ibid 1123. Blackmun J, in dissent, argued that the issues raised in the case were difficult and susceptible to competing interpretations, as evidenced by the different approaches adopted by the four federal judges who considered the claims: at 1123.

15 969 F2d 1326 (2nd Cir, 1992).

16 McNary, 969 F2d 1326, 1332-3 (2nd Cir, 1992).


19 McNary, 969 F2d 1326 (2nd Cir, 1992).
that the Guantanamo Naval Base was under the jurisdiction of the United States, making protections of the Due Process Clause applicable to aliens held there. The litigation was subsumed by the subsequent challenge to the change of policy which saw Haitians interdicted at sea and returned to Haiti without any screening procedures. This was ultimately resolved by the Supreme Court in the *Sale v Haitian Centers Council* (*Sale*) and the Second Circuit’s injunction was vacated.

(c) Haitian Centers Council v Sale (*Haitian HIV case*)

Following Bush’s ‘Kennebunkport Order’ in May 1992, directing the return of all Haitians interdicted on the high seas without screening, the *McNary* litigation was broken up. *Sale* became the venue for the Supreme Court’s consideration of whether Haitian interdictees subject to the ‘Kennebunkport Order’ were covered by the non-refoulement provisions of the *Refugee Convention* or § 243(h) of the *Immigration and Nationality Act* (*INA*). The question of the rights of ‘screened in’ asylum seekers still held at Guantanamo was returned to the District Court for consideration and permanent relief. By this stage, there were still around 300 Haitian men, women and children held at Guantanamo who had been ‘screened in’ as having a ‘credible fear’ of return to Haiti. They had been barred from entering the United States because they had tested positive to human immunodeficiency virus (‘HIV’).

The refugees’ claims were reformulated to focus on the illegality of the HIV detention camp, rather than on their original right-to-counsel claim. In a scathing opinion, Judge Sterling Johnson Jr issued a permanent injunction, ordering the Guantanamo Haitians immediately released and declaring their confinement illegal. Johnson J reasoned that the US Naval Base at Guantanamo is ‘subject to the exclusive jurisdiction and control of the United States where the criminal and civil laws of the United States apply’. The plaintiffs were held to have constitutional due process rights. These included a right to counsel during status determination interviews, access to adequate medical care, and a liberty interest in not being arbitrarily or indefinitely detained. For Johnson J, to hold otherwise would be unacceptable:

> If the Due Process Clause does not apply to the detainees at Guantanamo, Defendants would have discretion deliberately to starve or beat them, to deprive them of medical attention, to return them without process to their persecutors, or to discriminate among them based on the color of their skin.

---

20 Ibid 1347.
21 McNary, 969 F2d 1350 (2nd Cir, 1992).
28 Ibid 1041 (citations omitted).
29 Ibid 1042.
Further, Johnson J rejected the government’s contention that status determination procedures on Guantanamo were undertaken pursuant to executive authority and operated outside the *INA*. As such, the plaintiffs were held to possess the same statutory rights as those processed on the US mainland. The government decided to settle, rather than appeal the decision.\(^\text{30}\) The settlement allowed the asylum seekers to enter the United States, but resulted in the District Court decision being vacated.\(^\text{31}\)

\((d)\) *Cuban American Bar Association v Christopher* (*CABA*)\(^\text{32}\)

The *CABA* litigation examined the rights of Haitian and Cuban asylum seekers granted ‘safe haven’ status on Guantanamo and US military facilities in Panama pursuant to a new policy introduced by President Clinton in July 1994.\(^\text{33}\) The initial class action was brought on behalf of a group of Cuban asylum seekers and Cuban refugee service organisations (*CRSOs*).\(^\text{34}\) The plaintiffs claimed that the US government was violating both the Cuban refugees’ and the *CRSOs*’ First and Fifth Amendment rights. The *CRSOs* contended that they had a right to associate with refugee clients at Guantanamo and that the Cuban refugees had a correlative right to counsel. The District Court was sympathetic to these arguments, and issued a temporary restraining order compelling the government to give *CRSOs* access to their refugee clients on Guantanamo and prohibiting further involuntary repatriation of refugee plaintiffs to Cuba prior to reasonable access to their lawyers.\(^\text{35}\) The Court ruled that the government’s complete control and jurisdiction over Guantanamo, effectively made it a US territory. Hence asylum seekers detained there could avail themselves of US constitutional protections. The US Supreme Court’s decision in *Sale* was distinguished as the Haitian plaintiffs in that case were interdicted by US Coast Guard vessels on the high seas and as such were ‘not already within the United States territory, [and] not yet admitted’. Subsequent to its original ruling, the District Court provisionally allowed the Haitian Refugee Center to intervene in the case.

The US Court of Appeals for the Eleventh Circuit reversed the District Court decision. The Court reasoned that jurisdiction and control over Guantanamo were not synonymous with the concept of state sovereignty. As the United States did not exercise sovereignty over Guantanamo, asylum seekers held there had no legally cognisable rights under the *INA* or the *Refugee Convention*. This in effect affirmed the Court’s earlier approach to this question in *Baker*. It also ruled that the *CRSOs* had no First Amendment right of association with the asylum seekers. As the Haitian and Cuban migrants had no legal rights under domestic or international law, the legal organisations could not have a right

---

\(^{30}\) The plaintiff’s agreed to have the trial orders vacated in return for the freedom of the Haitians held at Guantanamo, a government decision not to appeal, and a compensatory award of fees and costs totalling $643,100. See *Haitian Centers Council v Meissner*, No 92-1258 (SJ) (ED NY, 22 February 1994); Koh, ‘Refugees, the Courts, and the New World Order’, above n 17, 1011.

\(^{31}\) Ibid.

\(^{32}\) 43 F3d 1412 (11th Cir, 1995).

\(^{33}\) See *Chapter Five*, nn 45-52 and accompanying text.

\(^{34}\) The two *CRSO*s involved in the litigation were the Cuban American Bar Association and the Cuban Legal Alliance and Due Process, Inc.

\(^{35}\) *Cuban American Bar Association v Christopher*, No 94-2183 (SD Fla, 24 October 1994); Order Granting Plaintiff’s Emergency Motion for TRO (31 October 1994).
of association for the purpose of counselling them. The plaintiffs appealed to the US Supreme Court, but the Court denied their petition for writ of certiorari.\(^{36}\)

Accordingly, the only decisions of any precedential value resulting from the asylum seeker litigation in the 1990s, \textit{Baker} and \textit{CABA}, clearly affirm the proposition that non-citizens held at Guantanamo were outside the reach of international law, and US statutory and constitutional protections.

\section{8.1.2 ‘Enemy Combatants’ Detained at Guantanamo Bay}

Beginning in 2002, some 660 persons captured by US and allied forces in the course of military operations against the Taliban regime in Afghanistan were transferred to military prisons in Guantanamo. In the aftermath of the events which occurred on 11 September 2001, the US Congress passed the \textit{Authorization for the Use of Military Force} (‘\textit{AUMF}’). This gave the President the power to use all appropriate force against those ‘nations, organizations, or persons (who) planned, authorized, committed or aided the terrorist attacks… or harbored such organizations and persons.’\(^{37}\) The \textit{AUMF} was used as the legal basis for the military operations of US and allied forces against the Taliban regime in Afghanistan in October 2001. The \textit{AUMF} also authorised the President to detain ‘enemy combatants’ engaged in hostilities against the United States.\(^{38}\) An ‘enemy combatant’ was defined as:

\begin{quote}
 an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.\(^{39}\)
\end{quote}

During the operations in Afghanistan, hundreds of alleged ‘enemy combatants’ were captured by US and Coalition forces. US authorities were faced with the question of where to detain these prisoners. Sites in several foreign countries, locations within the United States, other locations within external US territories, and the US Naval Station at Guantanamo were considered as options.\(^{40}\) Ultimately, Guantanamo was selected for the same reasons that had informed the decision to use it as a location to hold interdicted asylum seekers: it was under the complete jurisdiction and control of the US government, but purportedly beyond the reach of US courts.\(^{41}\)

In selecting Guantanamo, US authorities relied on legal advice that Federal District Courts would likely not have jurisdiction to entertain a petition for a writ of habeas corpus filed on behalf of enemy...


\(^{39}\) Memorandum from the Deputy Secretary of Defense to the Secretary of the Navy, ‘\textit{Order Establishing Combatant Status Review Tribunal}’ (7 July 2004) 1.


\(^{41}\) McCallum cites seven factors that were considered by US officials when decided where to detain the enemy combatants: 1) Impact on US Foreign Relations; 2) Impact on Domestic Security; 3) Facility Security; 4) Facility Size; 5) Remoteness of the Locations; 6) Litigation Risks; and 7) Logistics: Ibid.
combatants transferred there. In the World War II era case of Johnson v Eisentrager, the Supreme Court held that federal courts did not have authority to entertain an application for habeas corpus relief filed by an enemy alien who had been seized and held outside the territory of the United States. The relevant question, therefore, was whether Guantanamo was sovereign territory of the United States. The legal advice provided to US authorities relied on the Eleventh Circuit's decision in CABA to predict that the courts would answer this question in the negative.

The right of enemy combatants to habeas corpus relief was the subject of a number of US Supreme Court rulings. The outcome of these cases contradicted the advice that federal courts would not have jurisdiction to entertain habeas corpus petitions brought on behalf of Guantanamo detainees. What follows is a brief examination of the two leading Supreme Court cases: Rasul v Bush (‘Rasul’) which affirmed a statutory right to habeas corpus for Guantanamo detainees; and Boumediene v Bush (‘Boumediene’) which held that the US Constitution's Suspension Clause applied to Guantanamo detainees.

Rasul dealt with the question of whether US courts had jurisdiction to consider statutory challenges to the legality of the detention of enemy combatants detained at Guantanamo. The majority of the US Supreme Court answered this question in the affirmative. Federal statutory habeas corpus provisions granted Federal District Courts, ‘within their respective jurisdictions,’ the authority to hear applications for habeas corpus by any person who claims to be held ‘in custody in violation of the Constitution or laws or treaties of the United States’. The respondents had argued that these legislative provisions did not apply in Guantanamo because of the presumption that congressional legislation does not have extraterritorial application, unless such intent is clearly manifested. The majority of the Court rejected this argument, reasoning that:

[w]hatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas corpus statute with respect to persons detained within ‘the territorial jurisdiction’ of the United States … The United States exercises ‘complete jurisdiction and control’ over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.

See Deputy Assistant Attorney Generals Patrick Philbin and John Yoo, ‘Memo 3 - Memorandum for William J. Haynes II, General Counsel, Department of Defense: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba’ (28 December 2001) reproduced in Karen Greenberg and Joshua Dratel (eds), The Torture Papers: The Road to Abu Ghraib (Cambridge University Press, 2005) 29; McCallum, above n 40, 6.

Philbin and Yoo, above n 42, 4.


49 The majority opinion was penned by Stevens J, who was joined by O’Connor, Souter, Ginsburg, and Breyer, JJ, with Scalia and Thomas JJ and Rehnquist CJ in dissent.

50 28 USC §§ 2241(a), (c)(3).


52 Ibid 480-1 (references omitted).
Following the Supreme Court’s decision in *Rasul*, Congress introduced statutory amendments that purported to strip federal courts of jurisdiction to hear habeas corpus petitions from Guantanamo detainees. In *Hamdan v Rumsfeld*, the Supreme Court, through a process of statutory interpretation, found that these jurisdiction-stripping provisions did not apply to pending cases. Congress reacted by passing the *Military Commissions Act of 2006* (‘MCA’), which clarified that Congress in fact intended to remove federal court jurisdiction over habeas corpus petitions for pending cases.

In *Boumediene v Bush*, the Supreme Court examined the constitutionality of the jurisdiction-stripping provisions of the *MCA*. The Suspension Clause of the United States Constitution states that the ‘Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it’. The central question was whether this constitutional privilege could be claimed by aliens designated by the government as enemy combatants and held at Guantanamo. Relying on the premise that the common law writ ran only in territories over which the Crown was sovereign, the government contended that the Suspension Clause afforded the petitioners no rights. This was because the United States did not claim sovereignty over the place of detention. In effect, the government was making the same arguments accepted in the asylum seeker cases: that Guantanamo is outside US territory and as such US constitutional protections do not apply there. In a narrow 5:4 decision, the Supreme Court rejected this contention. While conceding that the US government did not exercise *de jure* sovereignty over Guantanamo, the fact that it exercised complete jurisdiction and control meant that it had *de facto* sovereignty over the territory. The Court reasoned that this *de facto* sovereignty was sufficient to extend the application of the Constitution’s Suspension Clause to the territory. To hold otherwise would mean that the political branches could surrender formal sovereignty over any unincorporated territory to a third country, enter into a lease that grants total control back to the United States and ‘govern without legal constraint’.

---


57 *United States Constitution* art I § 9 cl 2.


59 Kennedy J wrote the majority opinion, which Stevens, Souter, Ginsburg and Breyer JJ joined. Justice Scalia wrote the primary dissenting opinion dealing with the characterisation of Guantanamo, in which Roberts CJ, and Thomas and Alito JJ joined. Roberts CJ also filed a separate dissenting opinion in which Scalia, Thomas and Alito JJ joined.


61 Ibid 765.
Comparing the Guantanamo Asylum and Enemy Combatant Cases

The asylum cases and the enemy combatant cases differ in the way the courts dealt with the status of Guantanamo and the implications for the application of constitutional protections. In *Baker*, without any detailed analysis, the Eleventh Circuit concluded that Guantanamo was 'outside the United States' and rejected the argument that aliens there have extraterritorial constitutional rights.62 When it returned to the question two years later in *CABA*, that Court again found that the complete jurisdiction and control exercised by the United States over Guantanamo did not make it 'functionally equivalent' to land within US territorial borders.63 As such, the Court reasoned that Cuban and Haitian migrants held at Guantanamo would only have statutory or constitutional rights if the relevant provisions could be construed as operating extraterritorially. Finding no provisions with such application, the Court held that the migrants could not claim constitutional or other statutory protections to challenge their detention.64 The Supreme Court’s denial of certiorari in both *Baker* and *CABA* implicitly approved the Eleventh Circuit’s classification of Guantanamo as beyond the reach of US statutory and constitutional protections.65

In *Boumediene*, the majority of the Supreme Court agreed with the government's position (as well as the construction of the judges in *Baker* and *CABA*) that Cuba, not the United States, had sovereignty, in the technical sense of the term, over Guantanamo.66 However, they reached a different conclusion as to the implications of this lack of formal sovereignty. The majority adopted a 'functional approach' to the reach of the US Constitution. It found the fact that the United States exercised 'complete jurisdiction and control' over Guantanamo was sufficient to extend constitutional protection to certain non-citizens detained there. The Court reached this conclusion by distinguishing between *de jure* sovereignty, which was retained by Cuba, and *de facto* sovereignty, held by the United States. The 'absolute' and 'indefinite'67 control exercised by the United States over the territory was more important in deciding the scope of the constitutional protection than considerations of 'legal and technical' sovereignty.

What explains this change in approach? Christina Frohock argues that *CABA* can be reconciled with *Boumediene* when one considers the different status of the petitioners in each case.68 In *CABA*, the Eleventh Circuit labelled the Cuban petitioners as 'migrants' seeking freedom in the United States who were 'temporarily provided safe haven'.69 This can be contrasted with the more recent Supreme Court jurisprudence which conferred US statutory and constitutional rights on Guantanamo detainees. There, the plaintiffs were labelled ‘enemy combatants’ forcibly ‘detained’ in military prisons. Frohock

---

63 43 F3d 1412, 1425 (11th Cir, 1995).
64 Ibid, 1428-9.
67 Ibid 768.
69 43 F3d 1412, 1417 (11th Cir, 1995) (Birch J).
draws parallels with the criminal system, where the more serious the misconduct and resulting punishment, the more extensive the substantive and procedural safeguards afforded. However, Frohock’s analysis does not consider the Eleventh Circuit’s earlier decision of Baker. In Baker, the petitioners arguably had just as much at stake as the enemy combatants. Unlike the Cubans who were held in temporary safe haven in CABA, the Haitian and Cuban petitioners in Baker had been ‘screened-out’ as not engaging the United States’ protection obligations pursuant to rudimentary and questionable screening processes. They faced the prospect of continued detention at Guantanamo, or forced repatriation to their home countries and resulting possible persecution.

Azadeh Dastyari argues that the divergent approaches taken in the migrant and enemy combatant cases are better explained by the different constitutional rights being claimed in each case. Dastyari criticises Frohock’s analysis as conflating the right to habeas corpus (claimed in Boumediene) with rights under the First and Fifth Amendments of the United States Constitution (claimed in CABA). She writes:

[Frohock] does not address whether the Court’s differing treatment of detainees in the ‘war on terror’ and the refugee population may have been due to the privileged status the Court gave the writ of habeas corpus over rights under the First and Fifth Amendments of the United States Constitution. That is, Frohock does not offer enough legal evidence to support her contention that the difference between the treatment of enemy combatants and the refugee population is due to their status rather than the remedies they sought.

Without further guidance from the Supreme Court on this issue, it is difficult to determine the influence of the status of the plaintiffs or the different constitutional provisions considered, on the differing outcomes in the asylum seeker and enemy combatant cases. In Chapter Nine, I explore an alternate explanation, examining the extra-legal or political considerations that may have influenced the divergent approaches.

### 8.2 Australian Case Law

The Australian High Court has considered challenges to a number of aspects of Australia’s extraterritorial processing policies. In Plaintiff M61/2010E v Commonwealth (‘Offshore Processing Case’), the Court considered the scope of rights to be afforded to asylum seekers processed on the Australian offshore territory of Christmas Island. In a separate line of cases, the Court has considered the power of the government to transfer asylum seekers to the third countries. In Plaintiff M70/2011 v MIAC (‘Malaysian Solution Case’), the Court struck down a deal to transfer asylum seekers to Malaysia on the ground that conditions in that country did not meet the minimum statutory

---

70 INS officials were carrying out credible fear determinations based on five minute interviews on Coast Guard cutters, conducted in public, at a time when Haitians were physically and mentally exhausted and in no condition to answer questions: See Haitian Refugee Center v Baker, 789 F Supp 1552, 1577 (SD Fla, 1991).

71 Dastyari, above n 3, 291.

requirements. I argue that this case is difficult to reconcile with earlier Federal Court cases that upheld third country transfers to Nauru under the same statutory framework. My analysis of the Australian case law concludes with an examination of the High Court’s 2014 decision in Plaintiff S156/2013 v MIBP (‘Plaintiff S156’) which upheld the legality of third country transfers to Papua New Guinea (‘PNG’) pursuant to a new legislative regime introduced in response to the Malaysian Solution Case.

### 8.2.1 Rights of Detainees on Christmas Island

In Plaintiff M61/2010E v Commonwealth; Plaintiff M69 of 2010 v Commonwealth (‘Offshore Processing Case’) the Australian High Court considered the attempt by the Australian government to create its own version of Guantanamo on the Australian territory of Christmas Island—a place where status determination procedures could be carried out without interference from Australian courts. As discussed in detail in Chapter Five, the Australian government first introduced an extraterritorial processing regime in 2001. Legislation was passed to declare certain Australian Islands to be ‘excised offshore places’. The islands in question remained Australian territories, but the intent was to create spaces where statutory protections and other aspects of Australian law would not apply. A new category of ‘offshore entry person’ (‘OEP’) was created to catch all asylum seekers landing on an excised territory without a valid visa or other authority. OEPs were barred from making a valid application for a Protection visa unless the Minister exercised a personal, non-compellable discretion to allow them to do so. Those designated as OEPs became liable to be transferred to a ‘declared country’—initially Nauru or PNG.

In 2011, when the Offshore Processing Case was decided, this legislative framework remained unchanged. However, upon coming to office in 2007, the Labor government had decided to stop exercising the s 198A power to transfer OEPs to third countries. Instead, asylum seekers interdicted at sea were held on Christmas Island pending a decision by the Minister to exercise the non-delegable, non-compellable discretion under s 46A(2) to allow an application for a Protection visa—and admission to the Australian mainland.

A non-statutory system was established to process claims for refugee status made by persons taken to Christmas Island. New processes were introduced to allow for Refugee Status Assessment (‘RSA’) and Independent Merits Review (‘IMR’) of negative rulings. The government purported that these procedures operated outside of the Migration Act 1958 (Cth) (‘Migration Act’). The RSA process

---

73 (2011) 244 CLR 144.
76 Chapter Five, Part 5.2.2.
77 Migration Amendment (Excision from Migration Zone) Act 2001 (Cth), amending Migration Act 1958 (Cth) (‘Migration Act’), s 5(1) (definition of ‘migration zone’ and ‘excised offshore place’).
78 Ibid (definition of ‘offshore entry person’).
79 Ibid, inserting s 46A Migration Act.
80 Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth); inserting s 198A of Migration Act.
allowed an OEP, on request, to be assessed to determine whether he or she was a person with respect to whom Australia had protection obligations under the Refugee Convention. The RSA was carried out by an officer of the Department of Immigration, while IMR was conducted by reviewers employed by a private contractor, Wizard People Pty Ltd. Where an asylum seeker was assessed by the officer or independent reviewer to be a refugee, a submission was made recommending that the Minister consider exercising the power conferred by s 46A(2) of the Act. This section allowed the Minister to lift the statutory bar on applying for a Protection visa, or alternatively, to exercise the related non-compellable discretion under s 195A to grant a Protection visa to an OEP held in detention. In practice, a recommendation by an RSA or IMR officer to ‘lift the s 46A bar’ was always followed by a decision by the Minister to exercise the discretion contained in s 46A(2) and grant a Protection visa in accordance with s 195A.

The effect was the creation of a parallel system of refugee status determination for persons processed on Christmas Island. The processes were inferior to those that applied to onshore determinations in a number of respects. Most importantly for current analysis, as the process purported to be non-statutory, the protections of the Migration Act, Migration Regulations 1994 (Cth) and Australian case law interpreting Australia’s obligations under the Refugee Convention were seen as not being binding on either the RSA officer or independent reviewer. The result was that there was purportedly no enforceable criteria in place to ensure claims were ‘assessed in accordance with, or even taking into account, Australia’s international protection obligations’. Also concerning was the fact that the regime operated in a completely discretionary manner. Even when an OEP was found to engage Australia’s protection obligations through the RSA or IMR process, the applicant’s access to a Protection visa was reliant on the exercise of the Minister’s discretionary power.

The offshore processing regime operating on Christmas Island was challenged by two Tamil asylum seekers, given the codenames M61 and M69. The plaintiffs had arrived by boat and claimed refugee status on the basis that they feared persecution from the Sri Lankan army and paramilitary groups, due to their alleged support for the Tamil Tigers separatist movement. Their protection claims had been rejected at both the RSA and IMR stages. Each plaintiff instituted proceedings in the original jurisdiction of the High Court, naming the Commonwealth, the Minister and others as defendants. The plaintiffs made two main claims. First, they alleged they were not afforded procedural fairness during either the original RSA assessment or the subsequent IMR review. Second, each claimed the decision makers who undertook the assessment and the relevant review made errors of law by not treating themselves as bound by relevant provisions of the Migration Act and case law interpreting these provisions.

---

82 Ibid 593.
83 Plaintiff M69 made a further constitutional claim that s 46A of the Migration Act was invalid as the provision had the effect of precluding judicial oversight. This argument was rejected by the court. For analysis of this issue, see Mary Crock and Daniel Ghezelbash, ‘Due Process and Rule of Law as
The government sought to rely on the Full Federal Court decision in *Vadarlis* in arguing that the RSA and IMR regimes were undertaken in exercise of a non-statutory executive power under s 61 of the Australian Constitution. This power, it was submitted, was a prerogative executive power to inquire. While capable of informing the government and shaping the course of executive decisions, the exercise of the power did not in itself directly determine rights. As the inquiry was said to neither affect legal rights nor interests, there was no obligation to afford procedural fairness in conducting the RSA and IMR processes. Nor were the decision makers undertaking the inquiry bound by certain provisions of the *Migration Act* and associated case law.

The High Court unanimously rejected the government’s characterisation of the power exercised by the RSA and IMR decision makers. Instead the Court accepted submissions made by the plaintiffs that the power being exercised was statutory, being tied to the Minister’s consideration of whether to exercise his discretion under s 46A or s 195A(2) of the *Migration Act*. The Court found that the Minister’s practice and the published policies governing the RSA and IMR processes indicated that the Minister had made a decision to tie the non-reviewable, non-compellable discretions conferred by ss 46A and 195A to the assessment and review outcomes.

A key factor in the Court’s reasoning was the fact that the *Migration Act* required the detention of an OEP for the duration of RSA and IMR processes. The Court expressed a reluctance to accept that a statutory power to detain a person could permit the continuation of that detention at the unconstrained discretion of the executive. Such detention, the Court found, could only be lawful if the relevant assessment and review had some sort of statutory footing.

The Court held that RSA and IMR determinations had to be carried out in accordance with the *Migration Act*. The relevant inquiries were made pursuant to the power to lift the bar under s 46A and permit a claimant to make a valid claim for a Protection visa. The Court determined that the

\[\text{exercise of that power on the footing that Australia owed protection obligations to the plaintiff would be pointless unless the determination was made according to the criteria and principles identified in the *Migration Act*, as construed by the courts of Australia.}\]

It followed that the reviewer had made an error of law by treating the *Migration Act* and decided cases as no more than guides to decision making. The decision did not strike down any aspect of the scheme for processing OEPs. Rather, the impact of the decision was to overturn one of the fundamental assumptions underlying the scheme. Whereas the government believed its assessment process was ‘non-statutory’ and thus unreviewable, the Court found that the process was in fact statutory and as such decisions could be reviewed by the courts for compliance with relevant statutory provisions and on procedural fairness grounds.

---


84 This case is examined in Chapter Seven, Part 7.2.1.

85 See *Migration Act*, s 189.

86 *Offshore Processing Case* (2010) 243 CLR 319, 348 [63]-[64].

87 Ibid 356 [88].
The fact that the decision in the *Offshore Processing Case* was delivered as a single unanimous judgment by the High Court may give the impression that the case involved an uncontroversial application of the relevant legal rules and precedent, and that the outcome was not contingent in the same way as some of the other decisions examined in this study. However, the decision appears to diverge from previous High Court jurisprudence in its analysis of two key issues. First, the Court’s attitude appears to have shifted in regard to the significance placed on a ‘non-citizen’s liberty interest’ when determining the scope of the rights that they should be afforded.88 The decision to link the right to procedural fairness with the plaintiff’s continued detention rested on a view that ‘[i]t is not readily to be supposed that a statutory power to detain a person permits continuation of that detention at the unconstrained discretion of the Executive.’89 However, as Rayner Thwaites has noted, such a view as to the undesirability of unconstrained discretionary executive detention generates a dissonance with the majority reasoning in *Al-Kateb*:

In the *Offshore Processing Case*, the High Court lambasted the idea that a person can continue in detention ‘at the unconstrained discretion of the executive’. There were two components to this characterisation of the government’s position by the Court in the *Offshore Processing Case*: the means of obtaining release were completely within the control of the executive; and no predictions could be made as to whether, or when, those means would be utilised by the government. These components also served to characterise the power of detention pending removal given legal sanction in *Al-Kateb*. There is the distinction that, in *Al-Kateb*, the ability to effect a detainee’s removal from Australia is not ‘wholly within the control of the [Australian] executive’. It is dependent on the cooperation of foreign governments. But in a situation where the Australian government cannot effect removal, *Al-Kateb* illustrated that the detainee may be entirely dependent on the government to obtain release. Absent removal, *Al-Kateb* means that any remaining prospect of the detainees’ release is ‘wholly within the control of the executive’.90

Second, the reasoning of the Court appears to represent a shift in approach to the relevance of international law to the statutory construction of the *Migration Act*. In the *Offshore Processing Case*, the Court stated:

> read as a whole, the *Migration Act* contains an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention and the Refugees Protocol.91

This is a clear departure from earlier case law which had drawn a much more limited link between the *Migration Act* and the *Refugee Convention*. For example, in *MIMIA v QAAH*, the Court expressed the view that the *Migration Act* should not be construed as an attempt to implement the entirety of the *Refugee Convention* into Australian law.92 The Court noted that only s 36 of the *Migration Act* related

---

89 *Offshore Processing Case* (2010) 243 CLR 319, 348 [64].
90 Thwaites, above n 88, 107 (footnotes omitted).
91 (2010) 243 CLR 319, 339 [27].
to the *Refugee Convention*, and then only to use its article 1 definition of ‘refugee’.\(^\text{93}\) As such, the Court was able to uphold the lawfulness of the Temporary Protection visa program operating at that time, despite concerns about the regime’s compatibility with the *Refugee Convention*. Gummow ACJ, Callinan, Heydon, and Crennan JJ stated that ‘it is the law of Australia which prevails in case of any conflict between it and the [Refugee] Convention. It is the law of Australia which must first be identified’.\(^\text{94}\)

### 8.2.2 Power to Transfer Asylum Seekers to a Third Country

A separate line of cases in Australia have targeted another aspect of the extraterritorial processing regime: the government’s statutory power to transfer asylum seekers to third countries. As discussed above, one of the features of the legislative regime implemented in the aftermath of the *Tampa* incident was s 198A of the *Migration Act* that enabled the transfer of OEPs to a ‘declared’ country. Section 198A(3)(a) set out the conditions necessary to designate a ‘declared’ country:

The Minister may declare in writing that a specified country:

(i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and

(ii) provides protection for persons seeking asylum, pending determination of their refugee status; and

(iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country, and

(iv) meets relevant human rights standards in providing that protection.\(^\text{95}\)

A declaration made by the Minister under this section triggered a corresponding power of removal under s 198A(1) of the *Migration Act*. That power authorised the Department to remove an OEP to a country which is the subject of the declaration.

The Australian government has sought to rely on s 198A to transfer OEPs to third countries during two separate periods. Between 2001 and 2007, OEPs were transferred to Nauru and PNG as part of the Pacific Solution. The Labor government abandoned this policy shortly after being elected in 2007, utilising the Australian territory of Christmas Island as the primary location for the processing of OEPs.\(^\text{96}\) The government reverted back to a policy platform of transferring OEPs to third countries in 2011, with the announcement that it planned to send OEPs to Malaysia.\(^\text{97}\)

---

\(^{93}\) Ibid 14 [34].

\(^{94}\) Ibid. It is a well-established principle in Australian law that statute law takes precedent over international law. See, for example, *Polites v The Commonwealth* (1945) 70 CLR 60, 69 (Latham CJ stating that ‘courts are bound by the statute law of their country, even if the law should violate a rule of international law’).

\(^{95}\) Note that this provision was repealed by the *Migration Legislation Amendment (Regional Processing and Other Measures)* Act 2012 (Cth), which amending the *Migration Act 1958* (Cth) by replacing s 198A with a new s 198AA. See below nn 132-7 and accompanying text.

\(^{96}\) See above nn 80-1 and accompanying text; Chapter Five, nn 86-88 and accompanying text.

\(^{97}\) See Chapter Five, nn 92-9 and accompanying text.
The offshore transfers of OEPs carried out between 2001 and 2007 were made pursuant to declarations made by the Minister under s 198A(3)(a) that Nauru and PNG satisfied the relevant protections set out in that section. A similar declaration was made pursuant to s 198A(3)(a) in regard to Malaysia in 2011. The validity of the 2001 declaration in relation to Nauru was upheld in a line of cases initiated in 2002.\(^9\) The High Court determined that the declaration in relation to Malaysia was invalid in *Plaintiff M70/2011 v MIAC ('Malaysian Solution Case').*\(^9\) I argue that the divergent outcomes were not due to differing objective assessments of the protections available in Nauru and Malaysia. Rather the decisions turned on different approaches to the question of whether courts could review the Minister’s decision to designate a country. Following the *Malaysian Solution Case*, the Rudd government replaced s 198A with new legislative provisions that sought to remove the safeguards that were relied upon to strike down the declaration in that case. In 2014, the Australian High Court upheld the validity of a declaration made in respect of PNG under these new provisions in *Plaintiff S156/2013 v MIBP ('Plaintiff S156').*\(^1\)

(a) **Challenging the Designation of Nauru under s 198A**

The validity of the Minister’s 2001 declaration in respect of Nauru was challenged in a line of cases brought on behalf of a young Afghani asylum seeker, Ali Reza Sadiqi. Mr Sadiqi had attempted to enter Australia by boat shortly after the new extraterritorial processing regime was introduced in 2001. The boat he travelled on had caught fire and sunk subsequent to its interception by Australian Customs. Two passengers had died in the incident. Mr Sadiqi was initially transferred to Nauru pursuant to s 198A. His legal challenge only came about when he was brought back to Australia in 2002 to testify at a coronial inquest.

Mr Sadiqi claimed that the Minister’s decision to remove him to Nauru in 2001 was unlawful and that any attempt to transfer him there again would be similarly unlawful. The litigation involved a number of complex claims which are beyond the scope of analysis here.\(^1\) These included an argument about the constitutional validity of s 198A; allegations that the Minister had breached the *Immigration (Guardianship of Children) ('IGOC') Act 1946* (Cth); a series of claims about the lawfulness of his detention; misfeasance of the Minister’s public office; and claims for compensatory aggravated and exemplary damages.\(^2\) Here, I focus only on the arguments raised in relation to the validity of the Minister’s declaration in regard to Nauru. These arguments turned on the proper construction of the criteria for making that declaration set out in s 198A(3)(a). The government had contended that all

---

9. See below n 101.
99. (2011) 244 CLR 144.
100. (2014) 309 A LR 29.
101. The litigation spanned more than eight years and was comprised of the following cases: *WAJC v MIMA [2002] FCA 1631* (claim for interlocutory relief); *P1/2003 v MIMA [2003] FCA 1029* (claim for further interlocutory relief); *P1/2003 v MIMA [2003] FCA 1370* (application for an extension of motion in which to file and serve a notice of appeal); *Plaintiff P1/2003 v Ruddock [2007] 157 FCR 518* (application by plaintiff to amend statement of claims); *Sadiqi v Commonwealth [2008] FCA 1262* (relating to discovery); *Sadiqi v Commonwealth (No 2) [2009] 181 FCR 1* (determination of preliminary legal questions); *Sadiqi v Commonwealth (No 3) [2010] FCA 596* (determination of substantive claim).
102. For analysis of the IGOC argument, see Mary Crock and Mary Anne Kenny, ‘Rethinking the Guardianship of Refugee Children after the Malaysian Solution’ (2012) 34 *Sydney Law Review* 437.
that was required for the valid exercise of the power was that the Minister ‘declare in writing’ that a specified country meets the four identified criteria. On this reading, the objective existence of any facts relating to those criteria was not required as a precondition for the exercise of this power.

Mr Sadiqi’s counsel proposed an alternate interpretation of s 198A(3)(a) as constituting jurisdictional facts, such that proof of their existence was essential to the valid exercise of the jurisdiction conferred by s 198A upon the Minister. Put simply, a declaration would be invalid if made in respect of a country that did not objectively meet the criteria enumerated in s 198A(3)(a). Mr Sadiqi’s counsel argued that upon such a reading, the declaration in respect to Nauru was invalid, as Nauru was not a party to the Refugee Convention and did not meet any of the requirements in s 198A(3)(a).

All three Federal Court judges who addressed this question at various stages of the litigation, rejected the argument that the criteria of s 198A(3)(a) should be construed as constituting jurisdictional facts. French J was the first to consider the question in the course of his determination of the plaintiff’s claim for an injunction prohibiting the government from removing Mr Sadiqi from Australia while his litigation was pending. French J found that there was no seriously arguable case and refused to grant the injunction. On the issue of the construction of s 198A(3), his Honour reasoned:

The form of that subsection does not in its terms condition the power to make a declaration upon satisfaction of the standards which are its subject matter. The form of the section suggests a legislative intention that the subject matter of the declaration is for ministerial judgment. It does not appear to provide a basis upon which a court could determine whether the standards to which it refers are met. Their very character is evaluative and polycentric and not readily amenable to judicial review. That is not to say that such a declaration might not be valid if a case of bad faith or jurisdictional error could be made out. In my opinion however, the argument against the validity of the declaration face a significant threshold difficulty. It does not support the view that there is a seriously arguable case… [T]he case against validity [of the declaration] is, at this stage, so insubstantial that it would not justify making an order to restrain the removal of the plaintiff from Australia.

Nicholson J cited French J’s reasoning on this point with approval in his subsequent decision not to allow an application by Mr Sadiqi for an extension of time to file and serve a notice of appeal. McKerracher J determined the question in a similar manner, siding squarely with the government:

the criteria contained in s 198A(3) are not criteria which admit of answers by reference to indisputable fact … Debates even about what evidence may be relevant in order to prove the existence or absence of such criteria would be substantial. It is improbable that Parliament would have intended that Australian courts should without clear legislative imprimatur make judgments with public effect about whether other countries meet relevant human rights standards. The criteria in s 198A(3)(a), in my view, are iconically the province of the Executive... The broad ranging and subjective nature of the considerations involved

---

103 Sadiqi (No 2) (2009) 181 FCR 1, 47 [218].
104 Ibid 46 [215].
106 [2003] FCA 1370, [14]. However, note that in Plaintiff P1/2003 v Ruddock (2007) 157 FCR 518, 537 [70], which considered an application by Mr Sadiqi to amend the statement of claim, Nicholson J states that the argument that criteria in s 198A(3) are jurisdictional facts is ‘arguable’. 

184
in the criteria and the fact that opinions for and against could be so varied make it clear that the criteria do not set out straightforward objective standards.\textsuperscript{107}

It is important to note this litigation did not make it beyond the Federal Court. Neither the validity of the declaration in respect of Nauru, nor any other aspects of the third country processing arrangements during the Pacific Solution, were considered by the Australian High Court.

\textbf{(b) Challenging the Designation of Malaysia under s 198A}

It was not until 2011 that the High Court was called upon to consider the validity of a ministerial declaration made under s 198A. The \textit{Malaysian Solution Case}\textsuperscript{108} was a challenge to a declaration made under s 198A in respect of Malaysia.\textsuperscript{109} This declaration had been issued by the Minister shortly after the government entered into an ‘arrangement’ with Malaysia that involved sending 800 OEPs to that country in exchange for Australia resettling 4,000 refugees from Malaysia (‘Malaysia Arrangement’).\textsuperscript{110}

A challenge was brought on behalf of two asylum seekers from Afghanistan who were part of the first cohort of OEPs scheduled to be transferred to Malaysia. The plaintiffs sought an injunction against their removal from Australia. Their argument focused on the fact that there were no binding international or domestic legal protections for asylum seekers or refugees in Malaysia. The absence of such protections, it was argued, meant that the criteria in s 198A(3) were not met. As a result, the Minister’s declaration under that section was outside the power conferred on the Minister by the Act, and thus invalid.

The main legal issue considered by the Court, was the same question of statutory construction considered in the \textit{Sadiqi} litigation: what was the relationship between the objective existence of the criteria set out in s 198A(3)(a) and the Minister’s power to issue a declaration. The plaintiffs argued two alternative constructions of the provisions. First, they made the same argument put forward by Mr Sadiqi’s counsel a decade earlier, contending that the criteria in s 198A(3)(a) constituted ‘jurisdictional facts’ for the exercise of the power to make the declaration. On this construction, the Court had the power to find the declaration invalid if the criteria were not, as a matter of fact, satisfied.\textsuperscript{111} In the alternative, the plaintiffs put forward a new argument that as a minimum, s 198A(3) required the Minister to be satisfied of the s 198A(3) criteria, and that whether the Minister had properly reached a state of satisfaction was also judicially reviewable by reference to jurisdictional error.\textsuperscript{112}

\begin{flushright}
\textsuperscript{107} \textit{Sadiqi (No 2)} (2009) 181 FCR 1, 49 [223]-[225] (McKerracher J) (although note that these comments are obiter as his Honour rejected the claim on other grounds: at 46 [214]).
\textsuperscript{108} (2011) 244 CLR 144.
\textsuperscript{110} \textit{Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement}, signed 25 July 2011. For discussion of the details and motivations behind the arrangement, see Chapter Five, nn 92-9 and accompanying text.
\textsuperscript{111} \textit{Malaysian Solution Case} (2011) 244 CLR 144, 193 [105].
\textsuperscript{112} Ibid 194 [107].
\end{flushright}
The government’s submissions were essentially the same as those accepted by the Federal Court in the Sadiqi litigation—namely that the objective fulfillment of the criteria in s 198A(3) was not a prerequisite for the exercise of the Minister’s power. All that was required, it was contended, was that the power be ‘exercised in good faith and within the scope and for the purpose of the statute.’ The government’s submission on this point cited the Sadiqi litigation as authority for their position. The outcome of the Sadiqi litigation also appears to have played an important role in shaping the legal advice given to the government by the Solicitor-General, which stated that the proposed ‘Malaysian Solution’ would withstand judicial scrutiny.

The majority of the High Court rejected the government’s submissions and in doing so took a different approach to that taken by the Federal Court judges who considered the issue in the Sadiqi litigation. Five of the seven judges determined that the objective satisfaction of the criteria set out in s 198A(3)(a) were jurisdictional facts. In a joint judgment, Gummow, Hayne, Crennan and Bell JJ reasoned that to determine otherwise would ‘pay insufficient regard to [s 198A(3)(a)’s] text, context and evident purpose.’ In reaching this conclusion, the joint judgment affirmed the position taken in the Offshore Processing Case as to the relevance of the Refugee Convention in establishing the context and purpose of the Migration Act. The majority reasoned that safeguards included in s 198A(3)(a) ‘are to be seen as reflecting a legislative intention to adhere to the understanding of Australia’s obligations under the Refugee Convention and Refugees Protocol that informed other provisions made by the Act.’ Kiefel J concurred with the joint judgment’s finding on this point.

In a separate judgment, French CJ (who was involved in the Sadiqi litigation in his previous role as Federal Court judge) rejected the notion that the objective fulfillment of the criteria in s 198A(3)(a) were ‘jurisdictional facts’. His Honour, however, accepted the alternate construction put forward by the plaintiffs: namely that the Minister must be satisfied of the s 198A(3)(a) criteria, and that whether the Minister had properly reached a state of satisfaction was a jurisdictional fact. This conclusion was not technically at odds with his decision in the Sadiqi litigation. There he had rejected the plaintiff’s argument that the objective fulfillment of the criteria in s 198A(3)(a) were jurisdictional facts. However,
he had left open the possibility that a declaration might be invalid in the case of bad faith or jurisdictional error.122

All six of the concurring judges concluded that, for the criteria in s 198A(3)(a) to be met, the protections contained in that section must exist as a matter of law.123 For the majority, the agreed fact that no such legal protections existed in Malaysia under domestic or international law meant that the relevant jurisdictional facts under s 198A(3)(a) were not met. As such the Minister’s declaration was invalid.124 For French CJ, the Minister’s failure to consider whether such legal protections existed meant that a jurisdictional error had occurred.125

Heydon J, in dissent, was the only justice to refer directly to the Sadiqi litigation.126 He cited with approval the separate pronouncements by the three Federal Court judges that the subjective nature of the criteria set out in s 198A, evidences a legislative intention that the subject matter of the declaration is for ministerial satisfaction.127 Heydon J cautioned against adopting a different approach to the Federal Court:

The largest single part of the Federal Court of Australia’s work is migration law. It has incomparably greater experience in migration law than this Court. These pronouncements in the Federal Court of Australia suggest that questions as to whether the conditions actually exist are not apt for resolution by a process of adjudication and are not thrown up by s 198A(3)(a).128

For Heydon J, all that was required for a valid declaration was that the Minister consider the criteria in s 198A(3)(a) and assert that they exist as a matter of fact. His Honour construed the criteria as requiring practical protections and not legal obligations.129 The consideration by the Minister of the practical protections enshrined in the Malaysia Arrangement and its Operational Guidelines,130 was sufficient to form the basis of a valid declaration under s 198A(3).131

(c) The New Statutory Provisions and the Challenge to the Designation of PNG

Following the High Court’s decision in the Malaysian Solution Case, the Rudd government introduced a new legislative framework for transferring asylum seekers arriving by boat without authorisation to third countries.132 Section 198A of the Migration Act was replaced by a new subdivision titled

---

123 Malaysian Solution Case (2011) 244 CLR 144, 195 [116] (Gummow, Hayne, Crennan and Bell JJ); 182-3 [64]-[66] (French CJ); 244 [244] (Kiefel J).
124 201-2 [135]-[136] (Gummow, Hayne, Crennan and Bell JJ); 236-7 [255]-[256] (Kiefel J).
125 Ibid 182 [65].
126 Ibid 208-10 [161]-[164].
128 Ibid 210 [164].
129 Ibid 208-9 [162].
131 Malaysian Solution Case (2011) 244 CLR 144, 208-9 [162].
132 See Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 (Cth).
'Regional Processing'. The statement of intent included in that subdivision made it clear that the purpose of the changes was to side-step the High Court's decision in the *Malaysian Solution Case*:

(i) people smuggling, and its undesirable consequences including the resulting loss of life at sea, are major regional problems which need to be addressed;
(ii) offshore entry persons, including offshore entry persons in respect of whom Australia has or may have protection obligations under the Refugees Convention as amended by the Refugee Protocol, should be able to be taken to any country designated to be a regional processing country;
(iii) it is a matter for the Minister and Parliament to decide which countries should be designated as regional processing countries; and
(iv) the designation of a country to be a regional processing country need not be determined by reference to the international obligations or domestic law of that country.

The subdivision included s 198AB that set out a new process by which the Minister can issue a legislative instrument designating a country as a ‘regional processing country’. The only express condition for the exercise of this power is that ‘the Minister thinks that it is in the national interest’. In considering the national interest, the Minister is to take into account whether there are assurances in place that persons transferred to that country will not be subject to *refoulement*; and whether the country has processes in place to carry out refugee status determinations. Such assurances need not be legally binding.

*Plaintiff S156* concerned a challenge to the designation of PNG as a ‘regional processing country’ under the new legislative framework outlined above. The plaintiff was an Iranian asylum seeker who had been transferred to Manus Island in PNG. He sought to challenge the Minister’s designation on both constitutional and statutory grounds. The High Court dismissed the challenge in a short unanimous judgement.

The constitutional argument was that the new statutory framework for third country transfer was invalid as it was not supported by the aliens power or any other of the Commonwealth government’s legislative heads of power. The plaintiff acknowledged that legislation excluding or deporting non-citizens falls under the aliens power. However, it was claimed that the regional processing regime goes much further than this by imposing subsequent control, including detention, over the non-citizen in a regional processing country for purposes unconnected to the determination of status or entry under Australian law.

---

133 Migration Act, div 8, subdiv B, inserted by *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth).
134 Migration Act, s 198AA. This intent was also confirmed in the Revised Explanatory Memorandum to the *Migration Amendment (Regional Processing and Other Measures Act 2012 (Cth)*.
135 Migration Act, s 198AB(2).
136 Ibid s 198AB(3)(a).
137 Ibid s 198AB(4).
139 *Australian Constitution*, s 51(xix).
140 In particular, the immigration power (s 51(xxvii)) or the external affairs power (s 51(xxix)).
141 *Plaintiff S156* (2014) 309 ALR 29, 35 [26].
The plaintiff sought to rely on the High Court’s decision in *Chu Kheng Lim v MILGEA* (‘Lim’) as imposing a ‘proportionality’ test when determining whether a law is authorised under the aliens power. Reference was made to Gaudron J’s comments that laws ‘imposing special obligations or special disabilities on aliens… which are unconnected with their entitlement to remain in Australia and which are not appropriate and adapted to regulating entry or facilitating departure’ are not supported by the aliens power. Reference was also made to comments of the majority in *Lim* about the limits placed on executive detention by the exclusive nature of the judicial power in Chapter III of the Australian Constitution. Specifically, the plaintiff sought to rely on the majority’s finding that laws authorising executive detention would be valid only if incarceration could be seen as ‘reasonably capable of being seen as necessary for the purposes of deportation or… an application for an entry permit to be made and considered’. The High Court rejected the relevance of these proportionality considerations by construing the relevant provisions as dealing only with removal, a purpose clearly authorised by the aliens power. The legislation made no provisions for control beyond deportation. As such, any detention imposed on the non-citizen after removal was not relevant to determining constitutional validity of the removal provisions.

In the alternative to the constitutional argument, the plaintiff challenged the validity of the Minister’s declaration of PNG as a ‘regional processing country’ on the grounds that the Minister had failed to take into account a number of relevant considerations. Section 198AB stated that the Minister ‘must’ only consider Australia’s national interest when deciding whether to designate a country. However, the plaintiff argued that other mandatory considerations could be implied. These included the potential breach of Australia’s international law obligations; the potential for arbitrary and indefinite detention; and the capacity of PNG to implement its international legal obligations. In support of such a construction, the plaintiffs cited the pronouncement in the *Offshore Processing Case*—affirmed in the *Malaysian Solution Case*—that the *Migration Act*, read as a whole, contains an ‘elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention and Refugees Protocol.’

The Court rejected this argument out of hand. The justices pointed to the unambiguous language of the Act. They ruled that in exercising discretion, the Minister is obliged only to consider the matters listed in s 198AB(3)(a). In reaching this conclusion, the Court appears to have retreated from the statements made in respect to the relevance of the *Refugee Convention* to construing the *Migration Act* in the *Offshore Processing and Malaysian Solution Cases*. It acknowledged that ‘[t]here may be some doubt’ whether the new legislative framework for third country transfers, which was introduced

143 Ibid 57.
144 Ibid 33 (per Brennan, Deane and Dawson JJ).
145 Plaintiff S156 (2014) 309 ALR 29, 36-7 [32]-[33], 38 [38].
147 Plaintiff S156 (2014) 309 ALR 29, 38 [40].

189
after those cases, ‘can be said to respond to Australia’s obligations under the Refugees Convention.’

The case is significant for current purposes because it illustrates that some judicial decisions relating to the rights of non-citizens are more predictable than others. The clarity of the legal principles at play in *Plaintiff S156* made it difficult for the judges in that case to reasonably adopt a ‘rights-protecting’ approach. On the constitutional question, the provisions authorising third country transfer clearly fell under the aliens power, as they did not authorise anything more than removal of non-citizens who had no right to remain in Australia. On the statutory interpretation question, the legislature had used the High Court’s reasoning in the *Malaysian Solution Case* as a blueprint for drafting new legislative provisions that placed the offshore processing regime beyond judicial scrutiny. Parliament had gone to great lengths to express its intent to limit the considerations that the Minister must take into account when designating a country to only those expressly enumerated in s 198AB(3)(a). In the face of such clear legislative intent, the presumption that the legislative purpose behind the *Migration Act* was to implement Australia’s obligations under the *Refugee Convention* was clearly rebutted and could not be relied upon to reach a ‘rights-protecting’ interpretation of the relevant legislative provisions. The case also demonstrates the precarious status of ‘rights-protecting’ judicial decisions based on statutory interpretation, highlighting the fact that the protections afforded by such decisions can be overturned by the legislature with clear words of necessary intendment.

### 8.3 Comparison of the US and Australian Case Law

The case law on extraterritorial processing in the United States and Australia has dealt with very different legal issues. The litigation in the United States dealt primarily with a constitutional question: namely, whether asylum seekers held on the territory of Guantanamo could avail themselves of constitutional protections. A series of cases heard in the early 1990s determined this question in the negative. In *Baker*, the Court of Appeals for the Eleventh Circuit rejected a First Amendment claim to legal counsel brought on behalf of Haitians screened-out on Guantanamo and facing repatriation to Haiti. In *CABA*, the same court determined that asylum seekers held in ‘safe haven’ at Guantanamo and other extraterritorial facilities were not entitled to First Amendment rights to legal counsel, or Fifth Amendment due process rights. In both cases, the decisions were based on a view that Guantanamo was ‘outside the United States’ and that aliens did not have extraterritorial constitutional rights. The contingency of this outcome is apparent when one considers the litigation concerning enemy combatants held at Guantanamo. In *Boumediene*, the Supreme Court determined that an enemy combatant detained at Guantanamo was entitled to the protection of the Constitution’s Habeas Suspension Clause. In reaching this conclusion, the Court adopted a different approach to construing the status of Guantanamo and the impact of this status on the question of whether constitutional rights extended there. Adopting a functional approach to the reach of the US Constitution, the majority in that case viewed the fact that the United States had complete jurisdiction and control over Guantanamo as sufficient for some constitutional protections to apply there. *Boumediene* dealt with
the Habeas Suspension Clause, rather than First and Fifth Amendment rights considered in Baker and CABA. Nevertheless, the case appears to signify a shift in approach to construing the reach of constitutional protections to non-citizens in Guantanamo.

In contrast to the constitutional focus of the US litigation, the Australian cases challenging extraterritorial processing measures generally turned on narrow questions of statutory interpretation. The Offshore Processing Case dealt with the attempt made by the Australian government to create a Guantanamo-like zone on Christmas Island, where the domestic legal framework for status determination was said not to apply. The legal and factual issues considered in that case were very different to those considered in the US context. Christmas Island was clearly Australian sovereign territory and the reach of Australian constitutional protections there was never contested. The case turned upon the reach of the statutory provisions contained in the Migration Act. The Court rejected the government’s attempt to characterise refugee status determinations carried out on Christmas Island as a discretionary non-statutory process. Rather, the Court found that the power being exercised was a statutory one, and accordingly, the criteria applied in the process should be informed by relevant provisions of the Migration Act. The Court also construed the rights at stake in a way that gave rise to a duty of procedural fairness. Although the judgment was a unanimous one, it was by no means an obvious outcome. The Court’s decision hinged on contestable assumptions relating to the relationship between the Migration Act and the Refugee Convention, as well as a view as to the undesirability of unconstrained executive discretionary detention that appeared to be at odds with the decision in Al-Kateb.

The second line of Australian cases involved statutory challenges to the Minister’s power to transfer a person to an extraterritorial processing location. No analogous issue arose in the US extraterritorial processing regime. The US regime only ever applied to asylum seekers interdicted at sea. The usual destination for extraterritorial processing has been on board coast guard cutters, or the US controlled territory of Guantanamo. Where third country processing has been used, the Presidential executive orders authorising such action did not contain safeguards about the conditions which needed to be met in the third country to which the asylum seekers were transferred. These safeguards were presumably thought to be unnecessary, given the US government’s view that the Refugee Convention does not apply to its extraterritorial actions. In Australia, certain asylum seekers have been liable to third country transfer even after reaching Australian territory. The extraterritorial processing regime under the original Pacific Solution applied to asylum seekers who made landfall at certain excised offshore places. The offshore processing arrangements introduced in 2012 extended third country transfers to apply to all unauthorised boat arrivals, regardless of their point of arrival. The fact that the asylum seekers have reached Australian territory means that Australia clearly owes them protection obligations under the Refugee Convention.

The Malaysian Solution and Sadiqi litigation dealt with the proper construction of statutory provisions aimed at ensuring that third country transfers did not contravene these obligations. Section s

---

149 This view was upheld by the US Supreme Court in Sale: See Chapter Seven, Part 7.1.
198A(3)(a) of the *Migration Act* set out the criteria which the Minister had to consider when designating a country as a destination for third country transfers. In the *Sadiqi* litigation challenging the declaration made in respect of Nauru, the Federal Court repeatedly adopted a ‘rights-precluding’ approach, refusing to treat the existence of the protections set out in s 198A(3)(a) as jurisdiction facts. In the *Malaysian Solution Case*, the High Court took a different approach when considering a declaration made in respect of Malaysia. By construing the existence of the criteria set out in s 198A(3)(a) as jurisdictional facts, the majority found the declaration invalid as the relevant protections did not exist in Malaysia as a matter of law. The different approaches evident in the judicial reasoning undertaken by the Federal Court judges in the *Sadiqi* litigation and the justices of the High Court in the *Malaysian Solution Case*, illustrate the contingency of the outcomes in those cases. This contingency is further demonstrated by the advice given by the Solicitor-General to the government in the lead-up to the case, stating that the Malaysian Solution would survive judicial challenge. In response to this decision, Parliament introduced a new legislative regime for declaring a country a ‘regional processing country’. This new regime was challenged in *Plaintiff S156*, where the High Court adopted a ‘rights-precluding’ approach to construing the relevant legislative provisions, citing the clear and unambiguous legislative intent supporting such an outcome.

8.4 Conclusion

The analysis in this chapter of the case law dealing with challenges to extraterritorial processing policies in Australia and the United States suggests, that in most cases, the relevant legal principles were sufficiently ambiguous to allow for judges to reasonably adopt either a ‘rights-protecting’ or ‘rights-precluding’ approach when determining the scope of rights to be afforded to the non-citizen plaintiffs. The one exception may be the High Court of Australia’s decision in *Plaintiff S156*, where the legislature had intervened to ensure a ‘rights-precluding’ outcome. In the other cases examined in this chapter, contingency is evidenced by shifts in judicial approach to the same legal issues over time; ongoing scholarly disagreement about the validity of the judicial reasoning adopted; and/or narrow judicial majorities. Such contingency is apparent in cases dealing with the scope of constitutional as well as statutory protections. I have sought to identify the junctures in judicial decision making in each case that could have led judges to either a ‘rights-protecting’ or ‘rights-precluding’ outcome. In Chapter Nine, I turn my attention to potential factors that may have influenced the judicial decision making process in the face of such contingency and the implications for predicting the success or failure of transfers of restrictive immigration control measures.
CHAPTER NINE:
DETERMINANTS OF JUDICIAL DECISION MAKING
IN RELATION TO THE RIGHTS OF NON-CITIZENS IN
THE UNITED STATES AND AUSTRALIA

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

—Justice Oliver Wendell Holmes

The case law dealing with challenges to the policies of long-term mandatory detention, interdiction and extraterritorial processing in the United States and Australia examined in the preceding three chapters dealt with a variety of different statutory and constitutional questions. Despite the different legal issues at play, the judges in each case were called upon to deal with the same fundamental question: what is the content and scope of the rights which are to be afforded to non-citizen litigants in immigration related proceedings? In each case, judges had to decide between a 'rights-protecting' or 'rights-precluding' interpretation of the relevant legal principles. I have argued that in the vast majority of the cases examined, judges faced junctures in the interpretive process where they were required to choose between alternate reasonable readings of the relevant law that could have led them down different paths. As such, the decision by judges in those cases to adopt a 'rights-protecting' or 'rights-precluding' approach was far from obvious.

In this chapter, I examine the ramifications of this uncertainty. When faced with interpretive junctures, I argue that judges’ decisions to select one path over another may have been influenced by extra-judicial considerations. In this regard, the subject rulings may indeed be regarded as ‘great cases’ of the type identified by Justice Holmes. I explore the impact of two extra-judicial factors: national security concerns and public opinion. The possible impact of these factors is considered by juxtaposing the signature cases examined earlier with key contemporary events and data measuring public opinion towards immigration and asylum seekers. I concede that such a correlative approach does not provide enough evidence to demonstrate causation. Rather, my analysis in this chapter intends to identify possible relationships that can be further explored in future research.

1 Northern Securities Co v United States, 193 US 197, 400-1 (1904) (Holmes J, dissenting).
2 Ibid.
The conclusions drawn in this chapter hold significant ramifications for the study of transfers. If extra-legal factors are determinative of divergences in judicial approaches to the case study policies, it may be that these factors are more important to the legal success or failure of transferred law and policy than differences in legal structures between the jurisdictions.

9.1 The Nature of Judicial Decision Making

The influence of extra-legal factors on judicial decision making has been the subject of long-standing and vigorous academic debate. The central question examined has been the degree to which law constrains the results reached by adjudicators in legal disputes. Traditionally, scholars have fallen into two broad camps. Exponents of Legal Formalism, which was prominent in the late 19th century, view judicial decision making as an autonomous and fully rational process in which judges carefully apply legal rules to the facts of each case. Such an approach is evident in Ronald Dworkin’s ‘right answer’ thesis. He posits that even in hard cases, where competing rights are asserted by the parties and judges disagree on the legal outcome, there is a correct answer as to the rights of the parties ‘discoverable’ through the adjudication process. Proponents of Legal Realism, which was developed in the United States in the 1920s and 1930s, assert that legal materials such as statutes and case law do not always determine the outcome of legal disputes. On this view, law is indeterminate, filled with gaps and contradictions. As such, judges can rely on extra-legal considerations to reach a conclusion, which can then later be rationalised with deliberative reasoning. Both the formalist and realist perspectives have been criticised as oversimplifying the adjudicative process. A number of scholars have proposed a middle road that recognises the subjective aspects of the judicial process, while acknowledging the fact that by and large, judges follow the law in a predictable way.

The jurist Julius Stone offers what is perhaps the most eloquent reconciliation of the subjectivity of legal realism with the formalist dedication to legal principle. Stone argued that appellate court judges generally have ‘leeways of choice’ when making their decisions. This is in spite of the fact that judges often state they are bound by a particular precedent. Stone states that it is a rather self-evident but also often overlooked truth, that, where the applicable law is seriously in dispute, appellate judgement always requires the court to choose between more than one legally and/or logically

---


5 The beginning of the legal realism movement is sometimes traced to the publication of Oliver Wendell Holmes, Jr, The Common Law (American Bar Association, 1881). However, legal realism did not emerge as an intellectual force until the 1920s and 1930s. Key texts associated to the movement during this period include Benjamin Cardoza, The Nature of the Judicial Process (Yale University Press, 1921); Karl Llewellyn, ‘A Realistic Jurisprudence: The Next Step’ (1930) 30 Columbia Law Review 431; Karl Llewellyn, ‘Some Realism about Realism: Responding to Dean Pound’ (1931) 44 Harvard Law Review 1222.


7 See, for example, Tamanaha, above n 3; Guthrie, Rachlinski and Wistrich, above n 3.
available alternatives. The law being disputed, the pre-existing law cannot *ex hypothesi* compel. Equally, in such a situation, neither can logic compel: for it is common ground among lawyers that conclusions, even if drawn with logical validity from an indubitably applicable legal precept, are not necessarily binding legal conclusions. And since in the situation supposed the law is disputed, no legal precept may in any case be available as a major premise which can be said to be *indubitably* applicable.\(^8\)

Stone articulates a number of common logical fallacies, which he refers to as ‘categories of illusory reference’;\(^9\) that judges use to ground their decision making in precedent. Stone describes these as ‘certain patterned features of legal materials—which means, of course, language patterned features of legal materials—which, whenever we find them, signal that leeways exist for choice by courts which seek to use them as the basis for decision.’\(^10\) These leeways allow for ‘the entry of judicial experience of life, and judicially recognised social values, into the common law of successive generations.’\(^11\)

Nevertheless, Stone emphasises that this does not mean the law is indeterminate:

> It is necessary... to stress that to assert the availability of judicial choices is not the same as to assert judicial arbitrariness in decision, or even judicial ‘legislative power’ in the sense in which we attribute this to the legislature. The effect of the exercise of the judicial duty to choose within the leeways left by *stare decisis* is, of course, to produce new law, and control and guide its growth. In this sense it may be called ‘creative’ or even ‘legislative’. But unlike that of the parliamentary legislator, the judicial choice is usually between alternative decisions and modes of reaching them presented to the judge by the authoritative materials of the law. These materials do, of course, include areas of settled rules which it would require parliamentary action to overcome. But they also present (especially at the appellate level) guide posts to alternative solutions which remain legally open, beyond the settled areas.\(^12\)

More recently, Brian Tamanaha has described judicial decision making as comprising both determined and undetermined aspects. Tamanaha describes his approach, which he labels ‘balanced realism,’ as having two integrally conjoined aspects—a sceptical aspect and a rule-bound aspect. It refers to an awareness of the flaws, limitations, and openness of law, an awareness that judges sometimes make choices, that they can manipulate legal rules and precedents, and that they sometimes are influenced by their political and moral views and their personal biases (the sceptical aspect). Yet it conditions this sceptical awareness with the understanding that legal rules nonetheless work; that judges abide by and apply the law; that there are practice-related, social, and institutional factors that constrain judges; and that judges render generally predicable decisions consistent with the law (rule-bound aspects). The rule-bound aspect of judging can function reliably notwithstanding the challenges presented by the scepticism-

---

10 Ibid 281.
12 Stone, *Legal System and Lawyers’ Reasonings*, above n 9, 276.
inducing aspects, although this is an achievement that must be earned, is never perfectly achieved, and never guaranteed.\textsuperscript{13}

According to this approach, most judicial decision making involves formalistic application of the relevant legal principles to the facts of the case. However, where legal ambiguity arises, extra-legal factors can play a role in determining the judicial outcome. The approaches of both Stone and Tamanaha recognise the importance of extra-legal factors such as political considerations, without discrediting the judicial process as being wholly subjective.

I argue that the ambiguities of the legal principles in the United States and Australia regulating the scope of rights afforded to non-citizens in immigration related proceedings give judges a broad ambit for importing subjective values into the judicial process. In the US context, the impact of the plenary power doctrine has meant that immigration law has developed outside the confines of mainstream constitutional jurisprudence.\textsuperscript{14} Unbound by regular constitutional precedents and developments, the courts have had a wide degree of discretion in interpreting the scope of constitutional protection that is to be afforded to non-citizens in the immigration context. This is evidenced through the shifting boundaries and selective application of the plenary power doctrine over the years.\textsuperscript{15} The constitutional principles that determine the scope of the rights of non-citizens in immigration proceedings in Australia are similarly ill-defined.\textsuperscript{16} In the 1906 case of \textit{Robtelmes v Brenan}, Barton J stated:

\begin{quote}
[t]he [constitutional] powers given are plenary within their ambit, it is within these powers to pass legislation, however harsh and restrictive it may seem, and as to that it is not the province of a Court of Justice to inquire, where the law is clear.\textsuperscript{17}
\end{quote}

While Australian jurisprudence did not go on to develop a formal plenary power doctrine equivalent to that found in the United States, the aliens power in s 51(xix) of the Constitution has been relied upon to create a similar form of immigration exceptionalism. The Australian High Court has affirmed repeatedly that this power authorises restrictions on the rights of non-citizens that would be unlawful if targeted at citizens.\textsuperscript{18} The ill-defined scope of this exception has given judges broad discretion in determining the nature of the rights to be afforded non-citizens. The boundaries of exactly what is authorised has waxed and waned over the years.

These constitutional considerations can affect statutory interpretation indirectly through the principle of constitutional avoidance. This ‘requires a court to adopt a plausible—but not necessarily the most

\begin{footnotesize}
\begin{enumerate}
\item Tamanaha, above n 3; Guthrie, Rachlinski and Wistrich, above n 3, 103 (proposing a middle ground between realism and formalism which they label ‘realistic formalism’).
\item See Chapter Four, nn 27-38 and accompanying text; \textit{Chapter Six}, nn 9-20 and accompanying text.
\item Ibid. See also, \textit{Chapter Six}, nn 201-3 and accompanying text.
\item See the discussion relating to the scope of the s 51(xix) and (xxvii) of the \textit{Australian Constitution} in \textit{Chapter Six}, Part 6.3.
\item (1906) 4 CLR 395, 415. See \textit{Chapter Six}, nn 105-9 and accompanying text.
\item See, for example, the comments of Brennan, Deane, Dawson JJ in \textit{Chu Kheng Lim v Minister for Immigration} (1992) 176 CLR 1, 29 (stating that one of the important differences between the rights of Australian citizens and aliens is the latter’s vulnerability to exclusion or deportation. The effect of this vulnerability is to significantly ‘diminish the protection which Ch III of the Constitution provides, in the case of a citizen, against imprisonment otherwise than pursuant to judicial process’).
\end{enumerate}
\end{footnotesize}
persuasive—interpretation of a statute in order to avoid serious constitutional issues." In Australia, the principle of constitutional avoidance is complemented by the principle of legality. This creates a rebuttable presumption, for the purposes of statutory interpretation, that parliament does not intend to override fundamental rights. Even in cases that do not raise constitutional issues (or engage the principle of legality), ambiguous statutory language and conflicting principles of statutory interpretation can often provide sufficient leeway for compelling and reasonable alternate interpretations of legislative provisions. These constitutional and statutory ambiguities were demonstrated by the conflicting approaches adopted by the judges in the cases examined in Chapter Six, Seven and Eight.

Given these ambiguities, immigration law is an area particularly prone to the ‘sceptical aspect’ of judicial decision making identified by Tamanaha. Adopting Stone’s formulation, the ambiguities identified can be said to provide ample leeway for recourse by judges to the categories of illusory reference. In the remainder of this chapter, I examine whether, in the face of this ambiguity, judicial decision making in the leading US and Australian cases on mandatory detention, interdiction and extraterritorial processing was influenced by extra-legal factors. Specifically, I test the hypothesis that we can expect ‘rights-precluding’ decisions at times of heightened national security concerns and negative public opinion towards immigration. Table 1 lists the case universe by country and issue area. It colour-codes the outcome of interest, the approach that judges took in each case.

### Table 1: US and Australian Case Law on Long-Term Mandatory Detention, Interdiction and Extraterritorial Processing

<table>
<thead>
<tr>
<th>Policy</th>
<th>United States</th>
<th>Australia</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Cuban American Bar Association v Christopher 43 F3d 1412 (11th Cir, 1995) (&quot;CABA&quot;)</td>
<td>Plaintiff M70/2011 (2011) 244 CLR 144 (&quot;Malaysian Solution Case&quot;)</td>
</tr>
</tbody>
</table>


9.2 National Security and Public Opinion

In this section, I examine the impact of national security concerns and public opinion towards immigration on the judicial decision making process. In Part 9.2.1 and 9.2.2, I explore the possible linkages between these factors and judicial decision making generally. In Part 9.3, I examine the national security climate in which the US cases were decided. I then explore whether there is a correlation between heightened national security concerns and the adoption of a ‘rights-precluding’ approach by the judiciary. I also compare the US cases with polling data on public attitudes towards immigration. In Part 9.4, I undertake a similar analysis with regard to the Australian case law.

9.2.1 National Security Concerns

National security concerns are often cited as having significant impact on judicial decision making. It is intuitive to believe that at times of heightened national security concerns, there will be an increase in judicial deference to the political branches and a decrease in respect for constitutional and human rights.\(^{21}\) Judicial deference to the executive is at its strongest at times of war. As former US Supreme Court Chief Justice Rehnquist states: ‘in times of war the laws are silent’.\(^{22}\) Similarly, Mark Tushnet argues that law historically remains silent concerning government actions in response to often-exaggerated national security concerns during wartime, which can often result in substantial restrictions of civil liberties.\(^{23}\) These concerns are amplified in the context of judicial decision making involving the rights of aliens. When a nation faces a threat from the outside, it is understandable that judges are reluctant to frustrate the actions of the political branches by upholding the rights of outsiders. On this view, we can expect to see the courts more likely to adopt a ‘rights-precluding’ approach when determining the scope of rights to be afforded to non-citizens at times of heightened national security concerns, and a ‘rights-protecting’ approach at times of relative peace and security.

9.2.2 Public Opinion

A second related factor that may have influenced decision makers in the cases studied is public opinion. When faced with plausible alternative interpretations of the law, judges may be influenced by the public mood or \textit{zeitgeist} in making their decisions. In the US context, this view is supported by a growing number of empirical studies that have shown that Supreme Court decision making coincides with prevailing public sentiment.\(^{24}\) This has been explained through \textit{direct} and \textit{indirect} linkages


between public opinion and judicial decision making. The *indirect* linkage is said to arise out of the process of appointing new Supreme Court justices. As Giles, Blackstone and Vining explain, '[p]ublic opinion influences the selection of presidents, and presidents, in turn, select Supreme Court justices'.\(^{25}\) This ‘replacement’ mechanism is said to realign the Supreme Court to shifts in public opinion.\(^{26}\)

The correlation between Supreme Court decisions and public opinion has also been explained with reference to two possible *direct* linkages between the decision making of Supreme Court justices and public opinion. First, the ‘strategic behaviour’ explanation posits that justices respond strategically to public opinion to protect the Supreme Court’s legitimacy.\(^{27}\) As McGuire and Stimson argue,

>a Court that cares about its perceived legitimacy must rationally anticipate whether its preferred outcomes will be respected and faithfully followed by relevant publics. Consequently, a Court that strays too far from the broad boundaries imposed by public mood risks having its decisions rejected. Naturally, in individual cases, the justices can and do buck the trends of public sentiment. In the aggregate, however, popular opinion should still shape the broad contours of judicial policymaking.\(^{28}\)

According to this explanation, justices do not change their attitudes or preferences, but rather strategically alter their behaviour to avoid negative public reaction and protect the institutional integrity of the court.

The ‘attitudinal change’ explanation posits that justices are influenced by the same forces that act to shift the opinion of the general public.\(^{29}\) Writing in 1921, eminent legal scholar and future Supreme Court Justice, Benjamin Cardoza recognised the fact that shifts in judicial attitude may reflect the influence of wider social forces:

>I do not doubt the grandeur of the conception which lifts [judges] into the realm of pure reason, above and beyond the sweep of perturbing and deflecting forces. None the less, if there is anything of reality in my analysis of the judicial process, they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judge by.\(^{30}\)

The theory here is that judges are influenced by the same events and ideas that shape public opinion. The direct linkage between public opinion and the behaviour of judges is explained as arising ‘from the force of mutually experienced events and ideas in shaping and reshaping preferences of both the public and justices.’\(^{31}\)

\(^{25}\) Giles, Blackstone and Vining, above n 24, 302.
\(^{26}\) Ibid.
\(^{27}\) Ibid 294-5; 303.
\(^{28}\) McGuire and Stimson, above n 24, 1019.
\(^{29}\) Giles, Blackstone and Vining, above n 24, 295, 303.
\(^{30}\) Cardoza, above n 5, 167-78, quoted in Giles, Blackstone and Vining, above n 24, 295.
\(^{31}\) Giles, Blackstone and Vining, above n 24, 295.
Proponents of this view do not claim that the impact of public opinion is immediate in the sense ‘that
the decisions of justices on pending cases are influenced by relevant public opinion polls seen in the
morning paper.’ Rather,

[a] more realistic assumption is that public opinion, if it is important, influences the Court as a result of
gradual almost imperceptible changes in the attitudes and beliefs of individual justices as they adapt,
consciously or not, to long-term, fundamental trends in the ideological temper of the public.

My analysis focuses on exploring the possible relationship between shifts in public opinion and judicial
decision making. The relevant public opinion I examine includes public attitudes towards immigration
generally and where relevant, more specific attitudes to particular cohorts of asylum seekers. It is
important to note that public opinion on these issues is closely related to national security concerns
discussed earlier. One can expect public support for immigration to be at its lowest at times of
heightened danger, and support to increase at times of relative peace and security.

9.3 US Cases

The cases upholding the legality of interdiction and extraterritorial processing measures in the United
States were all decided at a time of heightened national security concerns and relatively negative
public sentiment towards migrants. In contrast, the US Supreme Court’s decision in 2008 in
Boumediene to extend certain constitutional protections to non-citizens held at Guantanamo Bay was
handed down in a climate of relative peace and security. Moreover, this ruling was delivered at a time
when US public opinion was turning against the government’s treatment of enemy combatant
detainees. In relation to long-term mandatory immigration detention, the context of the decision to limit
the duration of post-deportation order detention in Zadvydas stands in stark contrast to that
surrounding the decision upholding mandatory detention of criminal aliens in Demore v Kim.
Zadvydas was decided in the months before the September 11 2001 terrorist attacks, in a context of
record high public support for immigration. Demore v Kim was handed down in the post-September 11
context of heightened security concerns and a relatively low support for immigration.

9.3.1 National Security and the US Cases

In the early 1990s, the unprecedented number of maritime asylum seekers, combined with the threat
of foreign terrorism on US soil, may have influenced the courts’ decisions to adopt ‘rights-precluding’
approaches in the case study rulings. In a series of cases between 1992 and 1995, US appellate
courts upheld government interdiction activities (Sale, 1993), and determined that asylum seekers
processed extraterritorially on Guantanamo could not avail themselves of US constitutional or
statutory protections (Baker, 1992; CABA, 1995). These cases were decided against the background
of record numbers of maritime arrivals from Haiti. Boat arrivals, particularly those carrying Haitians,
have always caused great anxiety in the United States. The significant increase in arrivals during this period led to what one commentator labelled a ‘moral panic’. The situation may have been severe enough to categorise the increase in arrivals as a ‘mass influx situation’. While the term has no precise legal definition, the two necessary factors are the size of the influx and the suddenness of arrivals.

In 1992, when Baker was decided, the US Coast Guard interdicted more people in that year alone, than the total number of persons interdicted in the 10 years since the migrant interdiction program had been introduced. Interdictions jumped from 4,990 in 1991 to 40,627 in 1992.

Concerns about continued arrivals were further exacerbated by the fact that Guantanamo’s capacity of 12,500 was reached in May 1992.

By the time the decision in Sale was handed down on 22 June 1993, the number of arrivals had begun to ease. Nevertheless, the 10,584 interdictions carried out in the fiscal year ending in July 1993 remained high by historical standards. That year also saw the United States’ first large-scale experience of unauthorised boat arrivals from outside its region, with the interdiction of 2,882 Chinese nationals. These arrivals stoked fears of a possible future mass influx of irregular migrants from China. Public fears were amplified by the highly publicised arrival in New York on 6 June 1993, of a cargo ship named Golden Venture, carrying 286 undocumented Chinese migrants. The ship ran aground on a sandbar a few hundred metres off Rockaway Beach in Queens and 10 of the passengers drowned while attempting to swim to shore. The whole tragedy was broadcast live on national television. The incident occurred a little more than two weeks before the Supreme Court handed down its decision in Sale. It is possible that this highly publicised incident and resulting fear of unauthorised Chinese immigration, as well as continued concerns about Haitian and Cuban boat arrivals, may have weighed on the minds of the majority in that case.

Two terrorist attacks carried out in the United States in 1993 further heightened national security fears during this period. On 25 January 1993, a lone gunman opened fire outside the Central Intelligence

---


38 The US Coast Guard interdicted 40,627 migrants in 1992. Between 1982 and 1991, the total number of interdicted migrants was 31,470: see Appendix B, Table 6, which sets out by interdictions by the US Coast-Guard per fiscal year from 1982-2014.

39 See Appendix B, Table 6.


41 Appendix B, Table 6.

42 Appendix B, Table 6.

Agency (‘CIA’) compound in Langley, killing two people and seriously injuring three others.\(^{44}\) One month later, terrorists detonated explosives in the World Trade Centre, killing 6 people and injuring thousands. Foreigners living in the United States without legal status were implicated in both attacks. The Federal Bureau of Investigation (‘FBI’) established that the Langley attack was carried out by Mir Aimal Kansi, a native of Pakistan who had entered the United States on a fraudulent business visa and had subsequently applied for asylum.\(^{45}\) His application was still pending at the time of the attack. Ramzi Ahmed Yousef, one of four conspirators convicted for the 1993 World Trade Centre attack, travelled to the United States without a visa and claimed asylum on arrival. He was released into the community as detention centres were full and had failed to turn up to any of his scheduled hearings.\(^{46}\) The involvement of asylum seekers in these attacks linked the issue of irregular migration flows with concerns of national security and terrorism. This sentiment is captured by the following comments made by Susan Schreck in 1993:

> The 1990’s, if the first third of the decade is any reliable forecast of things to come, is likely to be remembered as the period Americans became vulnerable to terrorist attacks on US soil. Why the vulnerability? The answer is simple: America’s borders had become so porous that those who wished to send a message, whether political or religious, could easily gain entry to the United States and make their presence known with an inhumane act certain to generate worldwide media attention.\(^{47}\)

The ‘rights-precluding’ decision in \textit{CABA}, handed down in January 1995, was decided in an even more acute context of mass arrivals and resulting public fear. There were a total of 64,443 persons interdicted at sea en route to the United States in the 1994-1995 fiscal year.\(^{48}\) This remains by far the most number of interdictions carried out in a single year. As discussed in \textit{Chapter Six}, the influx of mostly Cuban asylum seekers was triggered by an announcement by Fidel Castro on 8 August 1994 that he would no longer patrol the coast nor forcibly prevent emigration by boat. Christina Frohock describes the fallout of the new policy:

> Within ten days of Castro’s announcement, approximately 8000 Cubans arrived in South Florida. By contrast, the US Coast Guard had previously rescued and brought to the United States only 1300 Cuban rafters during the first six months of 1993 and 4700 during the first six months of 1994. In little more than a week in August 1994, the number of Cubans entering the United States from across the Florida Straits had nearly doubled from the entire first half of the year.\(^{49}\)

\(^{46}\) Ibid 1030.
\(^{47}\) Schreck, above n 44, 642.
\(^{48}\) See Appendix B, Table 6.
By the end of the year, a total of 38,560 Cuban asylum seekers had been intercepted attempting to reach the United States by boat.50 Some feared the influx would lead to a repeat of the 1980 Mariel Boat lift, which saw the arrival of more than 130,000 Cubans and Haitians.51

The ‘rights-protecting’ decision handed down in Boumediene (2008) was formulated in a very different political environment. It is true that in the immediate aftermath of the September 11 attacks in 2001, the political context in the United States was one of fear and panic.52 However, the impending sense of crisis had abated by 2008 when Boumediene was decided. The United States was still technically at war in Afghanistan and Iraq. However, the immediate threat to national security had receded and for most Americans, the detainees at Guantanamo no longer posed an actual or existential threat. Moreover, the treatment of the enemy combatants had received widespread criticism, both within the United States and abroad. Domestically, the policy was criticised by the likes of former President Jimmy Carter,53 as well as by congressmen54 and academics.55 Internationally, former British Prime Minister Tony Blair, former Secretary-General of the United Nations Kofi Annan, German Chancellor Angela Merkel and a number of other world leaders unequivocally called on the US government to close the Guantanamo facility.56

An important distinction between the asylum seeker and enemy combatant cases was the size of the groups affected by the rulings. By the time Boumediene was heard, there were only about 250 enemy combatants left at Guantanamo,57 and there were no plans to transfer any new detainees to the facility. This meant that the Boumediene decision applied to a clearly defined and numerically limited cohort of persons. Relevantly, the majority went to great lengths to emphasise the limited reach of the holding: ‘[o]ur decision today holds only that petitioners before us are entitled to seek the writ [of Habeas Corpus].’58 The political consideration behind extending rights to this limited cohort was very different to the considerations at play in Baker and CABA. Those cases dealt with the rights of tens of thousands of Haitians and Cubans held at Guantanamo. Moreover, those decisions would have

50 See Appendix B, Table 6.
51 See Chapter Four, nn 65-8 and accompanying text.
52 See below nn 61-3 and accompanying text.
relevance to an almost unlimited class of future asylum seekers that might attempt the journey by sea to the United States. This consideration as to the potential size of the group claiming a particular constitutional right is primarily a political question. The Court’s ‘functional’ approach to determining whether constitutional provisions have legal effect at Guantanamo adopted in Boumediene appears to allow for exactly such considerations. The approach dictates a flexible test to determine which provisions apply at a location under US control, with provisions having legal effect as long as they are not ‘impractical or anomalous’. It could be argued that the greater the number of persons claiming a constitutional right, the more impractical it becomes to extend them protection.

The decision in Zadvydas was handed down in a context of relative peace and security, three months before the 2001 September 11 attacks. Accordingly, the political climate was appropriate for taking an expansive view of the rights of non-citizens. In contrast, the Supreme Court’s decision to adopt a ‘rights-precluding’ approach in relation to a challenge to the mandatory nature of detention in Demore v Kim, was decided in 2003, in the post-September 11 climate of heightened national security concerns. As Donald Kerwin notes, after the September 11 attacks ‘immigration and terrorism became inextricably linked in the US public debate on security’. The possible impact of the September 11 attacks on the divergent approaches taken in Zadvydas and Demore v Kim has been noted by academic commentators. Yoh Nago observes that:

Although never mentioned in the Court’s opinion, one reason for the Court’s shift could be a response to new national security policies instigated by the September 11, 2001 terrorist attacks on the United States. Notably, Zadvydas, which extended due process protections afforded aliens, was decided in June 2001, nearly three months prior to the September 11th attacks. Demore, on the other hand, was decided after September 11th and, unlike Zadvydas, restricted the definition of due process applied to aliens...

Thus, even though the September 11th attacks were not mentioned in Demore, and no one has alleged that Kim has any ties to terrorism, its post-September 11th timing, combined with the realities of the new political climate, suggest that the decision reached by the majority signals judicial mirroring of the post-September 11th political and legislative climate of willingness to sacrifice personal liberties in exchange for a more certain national security.

Similarly, Alexis Hedman comments that

It has been argued that the role of the judiciary has been compromised since the September 11, 2001 attacks due to the assertions of both the President and Congress of their authority to construct

---

59 Ibid 756-66. See Chapter Eight, nn 56-61 and accompanying text. See also, Gerald Neuman, ‘The Extraterritorial Constitution After Boumediene v. Bush’ (2009) 82 Southern California Law Review 259, 261 (arguing that the Boumediene holding rejects ‘formalistic reliance’ on factors such as nationality or location and presents functionalism as the ‘standard methodology’).


extraordinary procedures. Consequently it would be irrational to presuppose that the Court’s opinion in Demore was not affected by the overwhelming pressure to defer to the government’s interest in preventing criminal aliens from fleeing or engaging in more criminal activity, especially against the backdrop of the war on terrorism.63

9.3.2 Public Opinion and the US Cases

In the same vein, correspondences can be observed between shifts in US public opinion around immigration and asylum seekers and the adoption of ‘rights-precluding’ or ‘rights-protecting’ approaches in the US case study cases. The decisions in Sale (1993), Baker (1992), CABA (1995), and Demore v Kim (2003) all occurred at times of relatively high anti-immigration sentiment. In contrast, the decisions in Zadvydas (2001) and Boumediene (2008) were handed down in the context of relatively high support for immigration.

Figure 2 sets out data from polls carried out by Gallup between 1965 and 2014.64 According to this data, the United States experienced its highest level of anti-immigration sentiment between the years 1993 and 1995.65 The large number of irregular arrivals, the poor state of the US economy,66 and the perceived nexus between irregular migration flows and terrorism, combined to create wide-spread anti-immigrant sentiment amongst the US public during this period. In the Gallup polls taken in July 1993 and July 1995, 65 per cent of respondents believed that immigration levels should be decreased. This can be contrasted with the long-term average of 47 per cent between 1965 and 2013.67

---

64 The data relied upon to construct this graph is set out in Appendix B, Table 8.
65 Note that Gallup does not have polling data available for 1992; See Appendix B, Table 8.
66 For an examination of the poor state of the US economy during this period, see Paul Krugman, The Age of Diminished Expectations (MIT Press, 3rd ed, 1997).
67 See Figure 2 and Appendix B, Table 8.
In your view, should immigration be kept at its present level, increased, or decreased?

Source: Gallup, Immigration (6 June 2014) <http://www.gallup.com/poll/1660/Immigration.aspx#1>. The full data set is reproduced in Appendix B, Table 8.
The ‘rights-protecting’ decision by the US Supreme Court in *Boumediene* (2008) was handed down in the context of relatively high support for immigration. In the Gallup poll of June/July 2008, only 39 per cent of respondents indicated that they would like to see immigration decreased. However, it is important to note that *Boumediene* was not an immigration case. The case dealt with a similar substantive legal question to that addressed in *Baker* and *CABA*, relating to the applicability of US Constitutional protections to aliens detained at Guantanamo. However, Mr Boumediene was not a would-be immigrant, but an ‘enemy combatants’ captured abroad during the ‘war on terror’ and transferred to the US detention facility on Guantanamo against his will. My argument relating to the correlation between US public opinion and judicial decision making is better illustrated by more tailored polling measuring the shifts in the attitude of the American public to enemy combatants detained at the Guantanamo facility. In a Gallup poll taken in January 2002, 72 per cent of Americans questioned found the treatment of Taliban soldiers at Guantanamo acceptable. As time passed, public sentiment appears to have shifted. In a 2005 poll, 36 per cent of respondents believed that the prison at Guantanamo should be closed. By January 2009, around six months after the decision was handed down in *Boumediene*, the proportion of Americans who wanted Guantanamo closed had increased to 51 per cent. While the polls are not directly comparable, given the difference in the language of the questions asked, they do indicate that the ‘rights-protecting’ decision in *Boumediene* appears to be in line with a general decline in support for the continuing operation of the enemy combatant detention facilities at Guantanamo.

In relation to US case law on the limits of immigration detention, there again appears to be a clear relationship between public sentiment towards immigration and judicial decision making. In a Gallup poll taken in June 2001, just days before the US Supreme Court handed down its decision in *Zadvydas*, only 41 per cent of respondents wanted immigration levels to be decreased. As demonstrated in Figure 2, the outcome of this poll represented one of the highest levels of pro-immigration sentiment since data began being collected on the issue in 1965. As such, if there ever was a moment in recent US history when the public would have supported a decision affirming the rights of non-citizens, June 2001 was it. In contrast, by the time *Demore v Kim* was decided in April 2003, support for immigration had dropped markedly. In the closest Gallup poll preceding the

---


70 Ibid.

71 The 2002 poll asked ‘[b]ased on what you have heard or read, would you consider the way the U.S. is treating the Taliban soldiers being held at the U.S. base at Guantanamo Bay in Cuba to be acceptable or unacceptable treatment, or don’t you know enough to say?’. The 2005 and 2009 polls asked ‘based on what you have heard or read, do you think the US should continue to operate the prison, or do you think the U.S. should close the prison and transfer the prisoners somewhere else?’. See Figure 2 and Appendix B, Table 8.
decision, taken in September 2002, 54 per cent of respondents wanted immigration levels to be decreased.\footnote{73}

### 9.4 Australian Cases

In Australia, the arrival of boats carrying unauthorised migrants has always caused great public concern, both hardening public opinion towards such migrants and raising national security fears. This public reaction, as well as other factors influencing the national security climate, appear to have influenced judicial responses to policies aimed at stemming the flow of unauthorised boat arrivals. The ‘rights-precluding’ decisions in Lim (1992), Vadarlis (2001), Al-Kateb (2004), Plaintiff S156 (2014) and CPCF (2014) were all handed down at times when Australia was under threat from actual or perceived national security crises. In contrast, the ‘rights-protecting’ approaches adopted in the Offshore Processing (2010) and Malaysian Solution (2011) cases were handed down at times of relative amity. There does not appear to be as clear a relationship between judicial decision making and public sentiment towards immigration, as is evident in the United States. However, we see a clearer correlation when the judicial outcomes are compared to more tailored opinion polls measuring public sentiment towards asylum seekers who arrive in Australia by boat.

#### 9.4.1 National Security and the Australian Cases

The High Court upheld the legality of mandatory administrative detention of unauthorised arrivals in Lim in 1992. This decision was handed down in the context of acute public concern about national security and a loss of control over Australia’s borders. While there were no direct links drawn between irregular arrivals and terrorism, such as seen in the United States, the arrival of the relatively modest number of sea-borne asylum seekers in this period triggered public paranoia about a possible flood of asylum seekers descending on Australia’s shores. A total of just over 600 asylum seekers reached Australia by boat between 1990 and 1992.\footnote{74} However, a number of factors combined to fuel fears that these arrivals were just the tip of the iceberg and that Australia was on the verge of a mass-influx type situation. First, these arrivals represented the first sizeable cohort to have travelled to Australia with the aid of people smugglers motivated by profit. In this regard, Australia was in unchartered territory and there was no way of ascertaining how many more asylum seekers would seek to do the same. Although most of the arrivals between 1990 and 1992 were from Cambodia, there were fears that asylum seekers from other Asian nations would follow. For example, in an interview in 1993, Gerry Hand, who had recently retired as Minister for Immigration, flagged a possible impending arrival in Australia of ‘large mass movements’ of asylum seekers from Hong Kong as a result of the soon scheduled handover of that territory back to China.\footnote{75}

The decision of the Full Federal Court in Vadarlis was handed down in the immediate aftermath of the September 11 attacks. Justice North handed down the primary judgement at around 2.15pm

\footnote{73}{See Figure 2 and Appendix B, Table 8.}\footnote{74}{See Appendix B, Table 7.}\footnote{75}{‘An interview with Mr Gerry Hand, Former Minister for Immigration, Local Government and Ethnic Affairs’ (1993) 1(4) People and Place 1, 7-8.}
Australian Eastern Standard Time on 11 September 2001, just a few hours before terrorists carried out the attack on the World Trade Centre in New York. The appeal was heard on 13 September 2001 and the Full Federal Court handed down its decision on 18 September 2001. None of the judges in the appeal court mentioned the September 11 attacks. However, the impact of this event is evident in the tone of the majority judgements. Beaumont J’s judgement is particularly noteworthy in this regard.

As Mary Crock has noted, his Honour’s judgement is replete with a sense of urgency, if not moral panic. The judge underscores passages and words. His conclusion—that an alien has no right to enter Australia—is placed quite literally in bold print. The effect is to emphasise and re-emphasise the outside status of the rescues. The word ‘alien’ appears no less than 27 times in the 30 paragraphs of his judgement.

In the aftermath of the September 11 attacks, the issue of ‘boat people’ and terrorism became inextricably linked in Australia. Peter Mares observes that ‘[a]s soon as the finger of blame for September 11 was pointed in the direction of the Middle East and Afghanistan, shrill voices echoed down the talkback lines to warn of Australia’s vulnerability to terrorists posing as “boat people”’. This view was perpetuated by the government of the time. Within 48 hours of the attacks in the United States, Defence Minister Peter Reith warned that the unauthorised arrival of boats on Australian territory ‘can be a pipeline for terrorists to come in and use your country as a staging post for terrorist activities’. It is impossible to determine whether the outcome of the case would have been different if the September 11 attacks had not been carried out. It would, however, be naïve to think that such a monumental game-changing event would have no impact on the decision making of the judges.

The ‘rights-precluding’ decision in Al-Kateb was also made in a context defined by heightened national security concerns. The judgement was handed down on 6 April 2004. Although two and half years had passed since September 11, several terrorist acts in the intervening period meant fears of an attack by Islamic militants on Australia remained high. In October 2002, Australians were targeted in an explosion at a nightclub in Bali, Indonesia, which killed 202 people. The attack was allegedly carried out by the al-Qaeda affiliated Islamic militant group, Jamaah Islamiyah. The Madrid train bombings, carried out by al-Qaeda inspired extremists in March 2004, occurred less than a month before the Al-Kateb decision. These incidents were a reminder that terrorism continued to

79 Quoted in Mares, ibid 23.
80 88 of these were Australian citizens: ‘Bali Death Toll Set at 202’, BBC News (online), 19 February 2003 <http://news.bbc.co.uk/2/hi/asia-pacific/2778923.stm>.
81 The attack killed at least 192 people and injured more than 1400 and was the deadliest terrorist attack in Europe since World War II: Elaine Sciolino, ‘Spain Struggles to Absorb Worst Terrorist Attack in its History’, New York Times, (online), 11 March 2004 <http://www.nytimes.com/2004/03/11/international/europe/11CND-TRA1.html>.
pose a real threat to western nations. These national security concerns may have been further exacerbated by the fact that Mr Al-Kateb was a Palestinian Muslim.

By contrast, the decisions of the High Court of Australia in the Offshore Processing Case (2010) and Malaysian Solution Case (2011) were handed down in a more tranquil national security climate. As such the time was ripe for taking an expansive view on the rights which should be afforded to asylum seekers subject to extraterritorial processing measures. The threat of an imminent terrorist attack on Australian soil had abated and Australia had significantly scaled down its involvement in the wars in Afghanistan and Iraq. Although the number of boats significantly increased in 2010, they decreased again in 2011. The scale of arrivals during this period was roughly on par with the wave of arrivals which occurred between 1999 and 2001. As such, Australia was not in uncharted territory, having experienced and dealt with similar sized flow in the past.

In contrast, by the time the High Court handed down its ‘rights-precluding’ decisions in Plaintiff S156 (2014) and CPCF (2015), the geopolitical climate had shifted back to one of heightened concerns with terrorism and national security. The decision in Plaintiff S156 coincided with the rise of the Islamic State in Iraq and Syria (‘ISIS’). The Court handed down its judgement on 18 June 2014. This was a little more than one week after ISIS gained international prominence by taking control of Mosul, Iraq’s second largest city. On 13 June 2014, Australia’s Prime Minister Tony Abbot had flagged the possibility of redeploying Australian troops to Iraq to counter the threat of ISIS. The rise of ISIS and reports that Australians were travelling to fight with the group, led to renewed fears of a terrorist attack on Australian soil. On 19 June 2014, the day after the decision in Plaintiff S156 was handed down, Sydney’s Daily Telegraph newspaper ran the headline ‘Aussies are waging jihad in Iraq: Fears terrorists will bring their twisted belief system home’. The following day, the same paper ran the headline: ‘Australia goes into terror lockdown: Spy agencies and customs will lock down borders to potential jihadists’. 


84 Tony Abbot, Prime Minister of Australia, Interview with James Glenday, ABC AM (13 June 2014); transcript available at <https://www.pm.gov.au/media/2014-06-13/interview-james-glenday-abc-am>.


By 28 January 2015, when the High Court handed down its decision in CPCF, a number of violent incidents on Australian soil had sent the nation into a national security panic. As a result of intelligence indicating that Australians were working with terrorist groups such as ISIS, the Australian government raised the National Terrorism Public Alert level from medium to high on 12 September 2014. Less than two weeks later, 18 year old Abdul Numan Haider attacked two police officers with a knife outside a Melbourne police station. Haider had migrated to Australia from Afghanistan 10 years earlier, and had purported links with an Australian-based radical Islamic group. This was followed by what became known as the Martin Place siege, which occurred on 15-16 December 2014. Man Haron Monis, a refugee from Iran and a self-proclaimed ‘sheik’, took a number of customers and staff hostage in a café in the heart of Sydney’s commercial district. The siege lasted for more than 17 hours and was televised live both domestically and internationally. It ended with the death of Monis and two hostages. Despite having no official links with any terrorist organisation, Prime Minister Tony Abbott was quick to label Monis a terrorist whose actions were ‘inspired by that death cult, now rampant in much of Syria and Iraq, which is a travesty of religion and governance and which should never be dignified with the term Islamic State.’

The implication of asylum seekers and migrants as the perpetrators of these attacks resulted in national security and asylum seeker issues becoming inextricably linked in the Australian psyche.

9.4.2 Public Opinion and the Australia Cases

Figure 3 below demonstrates that there is no clear relationship between judicial decision making in the Australian case study cases and shifts in general public sentiment towards immigration. For example, the ‘rights-precluding’ decisions in Vadarlis (2001), Al-Kateb (2004), Plaintiff S156 (2014) and CPCF (2015) were all handed down in the context of relatively high public support for immigration. The Australian public has traditionally drawn a sharp distinction between general migration and so-called ‘boat people’ who arrive in Australia without authorisation. Given that the cases studied all dealt with issues concerning the scope of rights afforded to maritime asylum seekers, public opinion towards this specific cohort may be more relevant. Unfortunately, there is no consistent comparable polling data measuring public attitudes towards maritime asylum seekers across the relevant period. Rather, the analysis in this section utilises a number of polls based on
different questions across time. This data is useful for demonstrating shifts in sentiment within the periods covered by each poll series.

**Figure 3: Australian Public Opinion on Immigration**

‘What do you think of the number of immigrants accepted into Australia?’

Source: Varied Opinion Polls taken from 1990 to 2014\(^\text{92}\)\(^\text{3}\)

The High Court’s decision in *Lim* (1992), upholding the legality of mandatory detention, was handed down at a time of near record anti-immigration sentiment. Data on Australian public opinion from 1954

---

to 2014, reveals that anti-immigration sentiment was at its peak during 1991 and 1992. The closest poll measuring attitudes towards maritime asylum seekers was taken in September 1993, less than a year after the decision in *Lim* was handed down. This poll illustrates significant anti-asylum seeker sentiment, with 44 per cent of respondents expressing the view that maritime asylum seekers should be sent back; while 46 per cent were of the view that they should be allowed to stay, but detained while their claims were being processed.

In *Vadarlis*, the Australian Full Federal Court adopted a ‘rights-precluding’ approach to determining the rights of asylum seekers subject to maritime interdiction. As already discussed, the decision was handed down shortly after the September 11 terrorist attack in New York. This was a time of relatively high negative sentiment towards asylum seekers arriving by boat. The polling data in Table 2 demonstrates, that there was a modest hardening of public opinion towards maritime asylum seekers after the attack. Before September 11, 50 per cent of respondents believed all boats should be turned back. When asked the same question after September 11, 56 per cent wanted all boats turned back.

### Table 2: Whether Australia Should Turn Back All, Some or None of the Asylum Seekers, 2001-2004 (percentages)

<table>
<thead>
<tr>
<th>Date</th>
<th>Allow all</th>
<th>Allow some</th>
<th>Allow none</th>
<th>Neither</th>
</tr>
</thead>
<tbody>
<tr>
<td>August 2004</td>
<td>14</td>
<td>47</td>
<td>35</td>
<td>4</td>
</tr>
<tr>
<td>August–September 2002</td>
<td>10</td>
<td>38</td>
<td>48</td>
<td>4</td>
</tr>
<tr>
<td>October 2001</td>
<td>8</td>
<td>33</td>
<td>56</td>
<td>3</td>
</tr>
<tr>
<td>August–September 2001</td>
<td>9</td>
<td>38</td>
<td>50</td>
<td>3</td>
</tr>
</tbody>
</table>


Table 3 sets out the data from another series of polls carried out in Australia after the September 11 attacks. The results demonstrate an even higher degree of public animosity towards asylum seekers arriving by boat during this period. These polls carried out between 2001 and 2014 all asked respondents whether they agree or disagree with the policy of turning back boats carrying asylum seekers. The three polls taken in the immediate aftermath of the September 11 attacks all report relatively high levels of negative sentiment towards asylum seekers who arrive by boat. Between 68 and 77 per cent of respondents agreed with the statement that boats carrying asylum seekers should be turned around.

### Table 3: Whether to Turn Back the Boats Carrying Asylum Seekers, 2001-2014 (percentages)

93 See Figure 3 for a visualisation of data from 1990-2014. The data for the period 1954-2014 is set out in Appendix B, Table 9.
<table>
<thead>
<tr>
<th>Date</th>
<th>Agree</th>
<th>Disagree</th>
<th>Neither</th>
</tr>
</thead>
<tbody>
<tr>
<td>February 2014</td>
<td>71</td>
<td>28</td>
<td>1</td>
</tr>
<tr>
<td>August–October 2010</td>
<td>55</td>
<td>26</td>
<td>10</td>
</tr>
<tr>
<td>July 2010</td>
<td>64</td>
<td>26</td>
<td>10</td>
</tr>
<tr>
<td>March 2010</td>
<td>64</td>
<td>26</td>
<td>10</td>
</tr>
<tr>
<td>October–November 2009</td>
<td>66</td>
<td>14</td>
<td>20</td>
</tr>
<tr>
<td>November 2001–April 2002</td>
<td>61</td>
<td>20</td>
<td>20</td>
</tr>
<tr>
<td>October 2001a</td>
<td>73</td>
<td>22</td>
<td>5</td>
</tr>
<tr>
<td>October 2001b</td>
<td>77</td>
<td>18</td>
<td>4</td>
</tr>
<tr>
<td>September 2001</td>
<td>68</td>
<td>20</td>
<td>12</td>
</tr>
</tbody>
</table>


The decision of the Full Bench of the Federal Court in Vadaris was also in line with polling of public sentiment towards the particular cohort of asylum seekers who were the subject of the litigation (see Table 4). The Full Bench of the Federal Court handed down its decision on 18 September 2001. Polling carried out between 12 and 16 September 2001, after Justice North’s first instance decision, but before the Full Federal Court decision was handed down, reported that 76 per cent of respondents did not want the asylum seekers aboard the Tampa transferred to the Australian mainland. This was despite the fact the question expressly stated that the Federal Court had determined that continued detention was unlawful.95

### Table 4: Support for Complying with the Initial Federal Court Ruling on the Tampa, 12-15 September 2001

<table>
<thead>
<tr>
<th>‘In your opinion, should the Tampa boat people be returned to the Australian mainland now, or not?’96</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes, should be returned to mainland</td>
</tr>
<tr>
<td>No</td>
</tr>
<tr>
<td>Undecided</td>
</tr>
</tbody>
</table>


---

95 See below n 96.

96 The full question was as follows ‘As you probably know, boat people picked up by the Norwegian vessel, the Tampa, are now being sent by the Australian Government to Nauru and New Zealand for processing. The Federal Court of Australia has ruled that the Government acted unlawfully in detaining the refugees on the Tampa, and has ordered the boat people on the Tampa be returned to the Australian mainland. In your opinion, should the Tampa boat people be returned to the Australian mainland now, or not?’
The ‘rights-precluding’ decision of the High Court of Australia in *Al-Kateb* was handed down in April 2004. Unfortunately there is little data on public sentiment towards maritime asylum seekers at that time. The only relevant polling data taken around this time demonstrates that public support for maritime asylum seekers was at a relative high point. In a poll carried out in August 2004, around six months after the decision in *Al-Kateb* was handed down, only 35 per cent respondents wanted all asylum seeker boats turned back (see Table 2). This was down from 56 per cent in October 2001 and 48 per cent in August/September 2002. As such, it appears the *Al-Kateb* decision does not fit neatly into my hypothesis that we should expect ‘rights-protecting’ decisions at times of relative public support for maritime asylum seekers. However, it is important to caution against putting too much weight on the findings of a single poll taken six months after the decision was handed down. It is also important to note the limitations of relying on relative polling data that only covers such a short period of time (2001-2004).

There is comparably more reliable polling data on public sentiment towards maritime asylum seekers from the time of the High Court’s decisions in the *Offshore Processing Case* (2010), *Malaysian Solution Case* (2011) and *Plaintiff S156* (2014). The polling data in Table 3 indicates that the ‘rights-protecting’ decision in the *Offshore Processing Case* came at a time when positive public sentiment towards maritime asylum seekers was at its highest during the period of the data-set (2001-2014). The decision was handed down in November 2010. In a poll taken in August/September 2010, only 55 per cent of respondents agreed with the statement that all asylum seekers should be sent back. In contrast, the ‘rights-precluding’ decision in *Plaintiff S156* handed down in May 2014, came a time at when public support for maritime asylum seekers was at its lowest during the period. The poll taken in February 2014 reported that 77 per cent of respondents believed that asylum seekers should be sent back. At the time of writing, there was no data on public opinion on this issue for 2015 when the ‘rights-precluding’ decision in *CPCF* was decided. The data outlined in Table 3 also lacks a polling point for 2011, the year in which the *Malaysian Solution Case* was decided. However, an *Age/Nielson* poll administered after the hearing of the *Malaysian Solution Case* (but before the court handed down its decision), indicates that the High Court’s ‘right-protecting’ approach in that case was in line with public opinion. Only 28 per cent of poll respondents said people arriving by boat should be sent to another country for processing, 15 per cent believed they should be sent back to sea, while 53 per cent favoured assessing them in Australia.97

With the possible exception of *Al-Kateb*, the decision by judges in each of the Australian cases to adopt either a ‘rights-protecting’ or a ‘rights-precluding’ approach correlates closely with relevant public opinion. The ‘rights-protecting’ decisions in the *Offshore Processing Case* (2010) and the *Malaysian Solution Case* (2011) both appear to reflect a climate in which support for maritime asylum seekers was relatively high. At the same time, the ‘rights-precluding’ decisions in *Lim* (1992), *Vadarlis*...
(2001), Plaintiff S156 (2014) and CPCF (2015) were all handed down at times of relatively low public support for maritime asylum seekers.

9.5 Conclusion: Implications for Predicting Success of Legal Transfers

In Chapter Six, Seven and Eight, I argued that the leading cases challenging the policies of long-term mandatory detention, interdiction and extraterritorial processing in the United States and Australia could have been decided differently. In almost all the cases examined, I argued that there were reasonable interpretations open to the judges that could have led them down either a ‘rights-protecting’ or ‘rights-precluding’ path. The decision to adopt one approach over another was influenced by judges’ understanding of the legal position of non-citizens and the degree to which such persons are entitled to domestic constitutional and statutory protections. The data presented in this chapter suggests that the view of judges on this point may be influenced by national security concerns and public opinion.

My findings hold substantial ramifications for the study of legal transfers, and in particular, the factors which contribute to their legal success or failure. The implication of the contingency of the decisions examined is that differences in legal structures between the United States and Australia were not determinative on the legal success or failure of the transferred policies. Rather, it appears that extra-legal factors played a significant role in determining whether courts adopted an interventionist ‘rights-protecting’ approach (frustrating the intention of the law makers who initiated the transfers and resulting in a legal failure), or a deferential ‘rights-precluding’ approach (implementing the will of law makers to restrict the rights of particular cohorts of asylum seekers or non-citizens). The lesson for law makers considering engaging in the transfer of immigration restriction measures is that compatible legal structures are not enough to ensure legal success. Rather, law makers must undertake a more holistic approach and look at the broader political context in the receiving state.
Now the Australian government is prepared to turn boats around, we’ve been able to do it safely and effectively and I am not surprised that other countries are now doing likewise.

—Prime Minister Tony Abbott

Immigration control is an area that naturally lends itself to inter-jurisdictional policy and legal transfers. The global nature of population movements means that immigration policies are inherently interconnected. Governments are aware that changes in the immigration settings of one jurisdiction can directly affect migratory flows in other places. As Lavenex and Uçarer note, the adoption of a more permissive policy in one state can lead to a reduction of immigration in neighbouring states, while a more restrictive policy can increase the number of migrants seeking entry to other countries. This interconnectivity has fueled somewhat contradictory motivations for transfers in the immigration policy sphere. On the one hand, states are engaging in cooperative behaviour whereby policies are harmonised across countries in a bid to secure common goals. At the same time, states are increasingly in contest with each other in efforts to achieve desired immigration outcomes. They are competing to attract particular international cohorts of highly skilled workers and wealthy investors. I argue that states also compete to deter ‘undesirable’ irregular migration. In both their quest to attract and deter, policy makers keep a close eye on policies introduced in competitor jurisdictions, and adapt and import policies viewed as effective.

Governments are most likely to engage in transfers when they share common policy goals and face similar constraints limiting their possible policy responses. Innovations that meet a policy goal while circumventing the common constraints spread quickly to other jurisdictions operating within the same paradigm. The governments of Australia and the United States share the common objective of maximising control over who can enter and remain in their territory. They also face similar impediments to achieving this goal. First are the non-refoulement obligations created by the Convention relating to the Status of Refugees (‘Refugee Convention’) and human rights


4 Convention relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) (‘Refugee Convention’) art 33(1); Protocol relating to the Status of
instruments. Second, each country’s judiciary has operated to frustrate government measures. At times, judges have been viewed by politicians in both countries as being overly sympathetic to asylum seekers and irregular migrants. The policies of mandatory detention, interdiction and extraterritorial processing spread between the United States and Australia because they were seen as well suited to addressing these constraints. The United States and Australia are not the only governments operating within this environment. Many nations strive to maximise control over their borders. Their policy options are limited by domestic and international legal constraints similar to those facing governments in the United States and Australia. It is unsurprising that the case study policies have been considered and/or adopted in other jurisdictions. I begin my analysis in this chapter with an examination of a number of examples of such transfers.

Given the prevalence of inter-jurisdictional transfers of restrictive immigration control measures, it is important to identify, rationalise and critique the processes underlying the phenomenon. Philosopher George Santayana warned that ‘those who cannot remember the past are condemned to repeat it.’ Selective memory can be even more dangerous than no memory. In the context of policy and legal transfers, a robust understanding of the history and consequences of policies being considered for emulation is essential to avoid repeating mistakes made in other jurisdictions. I conclude with an analysis of the implications of my findings for policy makers considering engaging in the transfer of restrictive immigration control measures. While my analysis in this study focused primarily on the legal dimension of success, I also make some brief observations in relation to the process, programmatic and political dimensions of success. At a deeper level, I argue that a nuanced understanding of how states borrow from each other is critical to understanding how international protection norms are developed and enforced—herein lies the deepest need to persuade states to think carefully about the potential ramifications of their actions.

10.1 The Adoption of the Case Study Policies in Other Jurisdictions

The transfer of migration control policies between the United States and Australia examined in this thesis are not isolated incidents. Policies of mandatory detention, interdiction and extraterritorial processing have been considered and or implemented in a number of other jurisdictions. The policies

---

5 See, for example, Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 3 (express prohibition against the expulsion, return or extradition of a person to a place where he or she would be in danger of being subjected to torture); International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 6 and 7 (implied prohibition against the expulsion or return of a person to a territory where they face a real risk of irreparable harm, such as a threat to the right to life or torture or other cruel, inhuman or degrading treatment or punishment); Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 6 and 37 (implied prohibition against the expulsion or return of a child where there are substantial grounds for believing that there is a real risk of irreparable harm).

6 George Santayana, The Life of Reason: Reason in Common Sense (Charles Scribner’s Sons, 1905) vol 1, 284.
have been identified (and justified) as measures used by the US and Australian governments. Copycat law making in this field is very much a live issue. In May 2015, it was reported that European leaders were considering implementing aspects of Australia’s border control measures in response to an increase in sea-borne asylum seekers crossing the Mediterranean. May 2015 also saw the use of maritime interdiction and push-back operations by Thai, Indonesian and Malaysian authorities. These actions left thousands of Rohingya and Bangladeshi asylum seekers adrift in the Andaman Sea, with no countries in the region willing to grant them access to their territory. In this section, I briefly examine these and other recent examples of the adoption or consideration of interdiction, extraterritorial processing and mandatory detention policies.

10.1.1 The ‘Australian Solution’ as a Model for Europe?

Australia’s use of interdiction, boat turn-backs and extraterritorial processing has been touted as a possible answer to contemporary irregular migration crises in Europe. Almost 220,000 migrants travelled by boat across the Mediterranean from North Africa in 2014. A further 40,000 had made the journey by May 2015. This large number of arrivals was accompanied by an unprecedented number of deaths at sea. In one weekend alone in April 2015, more than 1,000 migrants perished in separate incidents across the Mediterranean. These deaths were the immediate trigger for calls for Europe to adopt the ‘Australian Solution’. Prime Minister Tony Abbott urged European countries to use his government’s tough asylum seeker policies to stop people smuggling. This view was echoed by the architect of Australia’s border protection policy. Retired Major General Jim Molan called on European nations to adopt interdiction, push-back and extraterritorial processing measures to stop migrants drowning at sea. Across Europe, and particularly in Germany, Austria and the UK, newspapers carried stories asking whether Australia’s tough border protection regime could serve as a model for Europe. The deputy leader of the UK Independence Party, Paul Nuttall, backed the use of gunboats to turn back asylum seekers in the Mediterranean. He said, ‘Australia has got this right. 18 months ago they created a ring of steel around the country. Since then there have been no boats, no drownings and no deaths.’ Prime Minister Abbott, as well as The Australian newspaper, reported that European immigration officials requested a briefing on the workings of Australia’s push-back and

---

8. Ibid.
10. Tan, above n 7.
extraterritorial processing policies.\textsuperscript{15} It appears Australian officials provided such a briefing to senior immigration officials from Europe, North America and New Zealand in the context of the Intergovernmental Consultations on Migration, Asylum and Refugees (‘IGC’) meeting, which took place in Sydney in May 2015.\textsuperscript{16} The irony of all this, as I discussed at length in \textit{Chapter Five}, is that Australia’s offshore processing and interdiction policies are modelled on US practice. The suite of policies labelled the ‘Australian Solution’ could just as accurately be called the ‘American Solution’.

For now, Europe has made it clear that it will not be implementing the Australian approach in its entirety. Natasha Bertaud, a spokesperson for the European Commission, stated ‘the Australian model can never be a model for us’.\textsuperscript{17} However, her comments appear to specifically relate to pushback operations and the fact that they may contravene \textit{non-refoulement} obligations under international law.\textsuperscript{18} On the other hand, the option of implementing a European Union (‘EU’) extraterritorial processing regime appears to be still on the table. Reports indicate the EU is in negotiations with Tunisia and other African countries to host asylum processing centres to which asylum seekers interdicted in the Mediterranean could be returned.\textsuperscript{19} It is important to note that these proposals for interdiction and extraterritorial processing in the EU are not completely novel.

\textit{(a) European Maritime Interdiction Activities}

Maritime interdiction operations to combat irregular migration have been carried out in recent years by individual European nations, as well as by the EU. The programs were motivated, at least in part, by a desire to avoid responsibility for asylum claims that would have been made if the migrants reached the territory of the interdicting state. Italy implemented a scheme in 1991 to block boats from Albania attempting to cross the Adriatic following the fall of Albania’s communist regime.\textsuperscript{20} From 1997 onwards, interdicted migrants were returned to Albania pursuant to a bilateral agreement between Albanian and Italian authorities.\textsuperscript{21} Italian legal scholar Tullio Scovazzi justified the legality of these measures with reference to US interdiction practices.\textsuperscript{22} Italy began interdicting boats coming from

\begin{itemize}
\item Ibid. For analysis of the IGC and the role it plays in facilitating transfers, see \textit{Chapter Four}, nn 169-72 and accompanying text.
\item Ibid.
\item Ibid 71.
\end{itemize}
Libya and other North African states in 2006. Initially, these were not push-back operations, with most of the intercepted migrants taken to Italy. However, from 2009, intercepted migrants were returned to Libya pursuant to a bilateral agreement with the Libyan government. Spain has also carried out maritime interdictions, targeting migrants attempting to reach the Canary Islands from North Africa. Like the Italian operations, Spain’s program was carried out pursuant to bilateral arrangements with countries of departure. Spain concluded agreements allowing for joint interdiction operations and repatriation of interdics with Mauritania and Senegal in 2006; Cape Verde in 2007; and Gambia, Guinea and Guinea Bissau in 2008.

At times, Italian and Spanish interdiction activities have been carried out with the support of Frontex, the EU’s border security agency. Frontex began operations in 2005 with the mission of improving ‘the integrated management’ of the EU’s external borders. The aim was to ensure ‘a uniform and high level of control and surveillance’. Spain’s interdiction activities were supported through operations Hera I, Hera II and Hera III which took place in 2006 and 2007. These involved joint patrols by up to seven member states targeting migration flows from the West African coast to the Canary Islands. Frontex has coordinated similar operations to assist Spain’s interdiction activities in subsequent years. Italy’s interdiction program was supported by operations codenamed Nautilus carried out between 2006 and 2008. Under these arrangements, France, Germany, and Greece provided maritime and aerial assistance to the Italian and Maltese interdiction efforts in the Mediterranean. Other operations in which Frontex coordinated assistance for Italy’s interdiction activities in the Mediterranean include the initiatives codenamed Hermes, carried out between 2007 and 2013. Push-back operations carried out under the auspices of Frontex are accompanied by asylum screening procedures. However, commentators have raised concerns, claiming that the screenings ‘are far from ideal and in many cases are probably of little practical effectiveness in ensuring

23 For a detailed overview of Italy’s maritime interdiction program see Alessia di Pascale, ‘Migrant Control at Sea: The Italian Case’ in Bernard Ryan and Valsamis Mitsilegas (eds), Extraterritorial Immigration Control: Legal Challenges (Martinus Nijhoff, 2010) 281.
24 Ibid 297-8.
26 For a detailed examination of Frontex’s role in maritime interdiction activities, see Violeta Moreno-Lax, ‘Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea’ (2011) 23 International Journal of Refugee Law 174.
28 For an overview of these operations, see Frontex, Archive of Operations <http://frontex.europa.eu/operations/archive-of-operations/>.
29 See, for example, operation Minerva, targeting irregular maritime flows from Africa to the southern seaports of Spain, in 2009 and subsequent years until 2012: Frontex, above n 28.
30 Pascale, above n 23, 292; Frontex, above n 28.
31 Frontex, above n 28.
The push-back activities carried out by Spain and Italy outside the Frontex framework have generally included no procedures at all to screen for asylum claims.

(b) Plans for EU Extraterritorial Processing

Plans for the extraterritorial processing of asylum claims have been proposed by European nations since the late 1980s. In 1986, Denmark proposed a draft resolution in the UN General Assembly, which called for the establishment of regional asylum processing centres run by the UN. The proposal sought to end the in-country processing of asylum claims altogether. It was said that ‘asylum seekers who arrive irregularly in third countries outside their region should in principle be returned to the UN processing centre of their home region to have their case examined.’ The draft failed to garner the necessary support and was abandoned.

The establishment of extraterritorial processing centres was picked up by the Dutch government in 1993. Then Dutch State Secretary for Justice, Aad Kosto, proposed a system where ‘all asylum seekers would be sent back to reception centres in their own region of origin’ for the processing of their claims. The proposal was discussed, but ultimately dismissed, in the Intergovernmental Consultation on Asylum, Refugees and Migration (‘IGC’) in 1993.

The most comprehensive proposal to introduce extraterritorial processing of asylum claims in the European context was set out in a 2003 UK Cabinet Office and Home Office policy paper entitled ‘A New Vision for Refugees.’ The document outlined plans to create ‘transit processing camps’ on the non-EU side of Europe’s borders. Under the proposal, no asylum claims would be processed within EU territory. Any asylum seekers who managed to enter the EU would be transferred to the extraterritorial camp for assessment of their protection claims. The camps were to be run by the International Organization for Migration and screening procedures were to be approved by the UNHCR. Countries such as Albania and Croatia were suggested as possible locations for the camps. While the proposal was backed strongly by the Danish and Dutch governments, it was

35 Ibid.
37 Noll, above n 36, 312.
38 UK Home Office, ‘New Vision for Refugees’ (7 March 2003). This document was originally intended to be confidential, but was leaked to The Guardian newspaper and thereafter circulated informally in the NGO sector. The document formed the basis of discussions pursued in the Intergovernmental Consultation on Asylum, Refugees and Migration; European Council; and EU Committee on Immigration and Asylum. Noll, above n 36, 305, 319.
39 UK Home Office, above n 38.
abandoned after it met strong resistance from a number of European governments, including Germany, which referred to the proposed centres as ‘concentration camps’. However, by 2004, Germany had changed tack and with the support of Italy, revived the proposal for extraterritorial processing. The Baltic States, Slovakia and Ukraine were suggested as possible locations for the camps. Again, however, the proposal failed to gain the required level of support.

These EU proposals for extraterritorial processing clearly drew inspiration from the US and Australian precedents. This is borne out in IGC policy documents. Gregor Noll explains:

The Spring 2003 debate reveals that the “Pacific Solution” constituted a source of inspiration for the British and Danish governments. On the 23 April meeting of the mini-IGC… the Australian model as well as the Haiti and Cuban interdiction programs implemented by the US were discussed.

On the role of Australia’s policies, Liza Shuster observes that ‘developments in Australia were watched very closely… The Pacific Solution was referred to approvingly by both [Prime Minister] Tony Blair and [Home Secretary] David Blunkett when they first mooted the idea of external camps. In fact, Australia was actively promoting its extraterritorial processing as a best practice model during this period. Graham Thom of Amnesty International notes that

[t]he Australian government appears to have spent a great deal of money from 2000 to 2004, sending officials and consultants to international forums, extolling the virtues of their system and defending their system against criticisms from organisations like Amnesty International... [T]he UK has quite clearly picked up on the Australian initiatives, as seen in some of the options that the UK has flagged.

While the EU wide proposal did not go ahead, individual European nations have established ad hoc extraterritorial immigration detention camps in transit countries in Africa. One of the most notorious examples is the Nouadhibou Detention Centre in Mauritania. Sometimes referred to as ‘El Guantanamito’ or ‘little Guantanamo’, the camp was built in 2006 by the Spanish army and funded by the Spanish Agency for International Development Cooperation. Until its closure in 2012, the camp was used to confine third country nationals interdicted on the high seas en route to the Canary

41 Noll, above n 36, 304, 309.
43 Levy, above n 40, 111.
45 Quoted in Madeleine Byrne, ‘Exporting the “Pacific solution”, New Matilda (online), 22 December 2004 <https://newmatilda.com/2004/12/22/exporting-pacific-solution>.
47 Global Detention Project, ‘21st Session of the Committee on Migrant Workers: Issues regarding Immigration Detention in Mauritania and Belize’ (August 2014).
Islands. Migrants were interdicted by joint patrols carried out by Spanish Guardia Civil and Mauritanian authorities.\(^{50}\) Once taken into custody, the migrants were returned pursuant to an agreement between Spain and Mauritania concluded in 2003 (and updated in 2006). Mauritania accepted the return of not only its own citizens, but also nationals from third countries who attempted to travel to Spain from the Mauritanian coast.\(^{51}\) Unlike the extraterritorial processing facilities used by the United States in Guantanamo Bay, and by Australia in the Pacific, no processes were instituted for the screening of asylum claims. Rather, the centre was used as a temporary holding site while preparations were made to return the interdicted migrants to their home countries. Similar camps were set up by Italy in Libya. Reports indicate that at least three such camps were in operation from 2003-2010.\(^{52}\)

10.1.2 Interdiction and Push-Back Operations in Thailand, Malaysia and Indonesia

In May 2015, the Thai, Malaysian and Indonesian governments carried out maritime interdiction and push-back operations in the Andaman Sea. These activities resulted in a temporary humanitarian disaster, with approximately 8,000 Rohingya and Bangladeshi asylum seekers stranded at sea on decrepit vessels.\(^{53}\) The purported justification for the interdiction activities echoed that used by Australian authorities in regard to their push-back operations. The operations were promoted as necessary to save lives at sea, working to deter prospective asylum seekers from making the dangerous journey. Australia’s Prime Minister, Tony Abbott, publicly supported the actions of Thailand, Malaysia and Indonesia on these grounds.\(^{54}\) After a two week stand-off, Indonesian and Malaysian authorities reached an agreement to allow the asylum seekers to temporarily land on their territories.\(^ {55}\) The agreement came too late for some—with dozens of deaths reported as a consequence of the push-back operations.\(^{56}\)

10.1.3 Mandatory Detention in Canada and New Zealand

In the last few years, both Canada and New Zealand have introduced mandatory detention laws targeting specific cohorts of asylum seekers arriving without authorisation. The Canadian policy appears to be modelled on the US and Australian mandatory detention measures. In turn, the Canadian policy appears to have been influential in shaping New Zealand’s mandatory detention regime.


\(^ {51}\) Ibid.

\(^ {52}\) Levy, above n 40, 113.


\(^ {54}\) Maher and Alford, above n 1.


Canada appears to have drawn heavily on the experience of the United States and Australia when devising its new immigration detention framework. As in those countries, the trigger for legislative change in Canada was a particular cohort of sea-borne asylum seekers. The *Ocean Lady* arrived on Canada’s shores in October 2009 carrying 76 Tamil passengers. This was followed by the *Sun Sea*, which was intercepted off the west coast of Canada on 13 August 2010 with 490 Tamil passengers on board. Plans for a mandatory detention regime were announced shortly after the *Sun Sea*’s arrival. The Bill setting out the new measures was introduced to the Canadian Parliament immediately after a visit to Australia by Jason Kenny MP, the then Canadian Minister for Citizenship, Immigration and Multiculturalism. Reports indicate the trip was, at least in part, a border control fact-finding mission, with the Minister meeting with his Australian counterpart at the time, Chris Bowen, and other senior immigration officials.

After a two year legislative process, the *Protecting Canada’s Immigration Act* (or Bill C-31) was enacted in June 2012. This Act amended the *Immigration and Refugee Protection Act* to give the Canadian Minister of Citizenship, Immigration and Multiculturalism authority to label groups of non-citizens ‘designated foreign nationals’. The designation process is triggered when non-citizens enter Canada in violation of immigration law, with the assistance of a smuggler motivated by profit, or when the Minister believes the non-citizens as a group cannot be examined and dealt with ‘in a timely manner’. While the provisions are drafted in general terms to apply to groups of smuggled persons, it is clear that they target irregular maritime arrivals.

One ramification of being a ‘designated foreign national’ is detention for a period of up to one year for the purpose of determining identity, inadmissibility and illegal activity. The original legislative proposal provided that detainees would not have their detention reviewed for a minimum of 12 months and thereafter every six months. In a concession to refugee advocates and opposition parties, an amendment was introduced that provides for the review of mandatory detention within 14 days and thereafter every six months. Even with this concession, the changes represent a major departure from the earlier detention provisions (which continue to apply to persons not designated by the Minister). Non-designated asylum seekers can only be detained in clearly defined, exceptional circumstances. These include where there are reasonable grounds to believe that the person in

---

59 *Protecting Canada’s Immigration Act*, SC 2012, c 12.
60 *Immigration and Refugee Protection Act*, SC 2001, c 27, s 20.1(1).
61 Ibid s 20.1(1).
62 Ibid s 55(3.1). The second major ramification is disqualification from eligibility for permanent visa if found to be a genuine refugee: see s 24(5). This measure is itself modelled on the Australian Temporary Protection visa regime which operated from 1999-2007.
63 Ibid s 57.1(1).
question is unlikely to appear at their next hearing or interview; is considered a danger to public safety; is inadmissible on security grounds or for violating human or international rights; or cannot provide adequate identification to satisfy the officer of their identity. In contrast to the detention of a ‘designated foreign national’ which is not reviewed for six months, a decision to detain non-designated persons must be reviewed within 48 hours, again after seven days and then every 30 days after that.

(b) New Zealand

New Zealand adopted mandatory detention laws targeting certain unauthorised arrivals in 2013. The Immigration Amendment Act 2013 (NZ) introduced provisions for the detention of irregular migrants who reach New Zealand as part of a ‘mass arrival group’. This is defined as 30 people or more. Such arrivals can be subject to detention for an initial period of up to six months. The New Zealand proposal has drawn heavily from the Australian, and in particular Canadian, systems. However, it does contain an important additional safeguard. Most notably, the group warrant for detention can only be issued by a District Court judge, who must be satisfied that detention is necessary based on certain stipulated grounds. This judicial oversight is absent in Australia, the United States and Canada. In Australia and the United States detention is automatic for all unauthorised arrivals. In Canada the decision to designate a group as subject to mandatory detention is made by the Minister for Citizenship, Immigration and Multiculturalism.

While detention laws in the United States, Australia and Canada were all introduced in response to specific boat arrivals, New Zealand has never actually had an asylum seeker vessel reach its shores. The need for the proposed measures is based on a claim of an ‘ongoing threat’ of mass arrivals. In justifying this statement, New Zealand Prime Minister John Key pointed to the arrival of Tamil asylum seekers in Canada, stating ‘if they can get to Canada they can get to New Zealand’. He also cited a number of cases in which asylum seekers arriving in Australia had declared that their intended destination was New Zealand as it did not have mandatory detention laws.

In this regard, the introduction of New Zealand’s mandatory detention regime is a clear example of a transfer motivated by a competition to deter. However, the fact that no asylum seeker boats have ever reached New Zealand indicates that this ‘competition’ can be just as much about reassuring a domestic audience, as about sending a signal to potential irregular entrants. The logic behind this

64 Ibid s 55.
65 Ibid s 57.
66 Immigration Amendment Act 2013 (NZ).
67 Immigration Act 2009 (NZ), s 317A.
68 The judge must determine that the warrant is necessary to effectively manage the mass arrival group; or to manage any threat or risk to security or to the public arising from, one or more members of the mass arrival group; or to uphold the integrity or efficiency of the immigration system; or to avoid disrupting the efficient functioning of the District Court: ibid, ss 317A(1)(a), 317B.
69 See Chapter Four, nn 91-9, 131-3 and accompanying text.
move is that some New Zealanders may fear that their nation’s relaxed detention policy (particularly when compared to Australia or Canada) will make them a target for future boat arrivals. The proposal is aimed, at least in part, at addressing this fear so as to gain political mileage for the Conservative government. Both the unnecessary nature of the proposed changes and their resemblance to the Australian and Canadian precedents have not gone unnoticed by New Zealand’s Labour opposition. In 2012, Darien Fenton, then the party’s Spokesperson for Immigration Issues, quipped that ‘the Minister of Immigration has been carried away by spending too much time with the big boys in Australia and Canada instead of focusing on the real issues in New Zealand.’

In addition to these detention laws, New Zealand has also made arrangements for the extraterritorial processing of asylum seekers who arrive in New Zealand as part of a ‘mass arrival group’. In February 2013, New Zealand negotiated an agreement with Australia pursuant to which New Zealand would resettle 150 refugees from Australia’s extraterritorial processing facilities in Nauru and Papua New Guinea (‘PNG’). In return, New Zealand was given the option of transferring future mass arrivals arriving on its shores to those facilities.

10.2 Implications for Policy Makers Considering Engaging in Transfers of Restrictive Immigration Measures

It has been seen that the transfers of restrictive immigration measures between the United States and Australia are not isolated incidents. Rather, they represent examples of a phenomenon that is taking place across many nations. Future transfers of this nature are inevitable. In this concluding section, I examine the lessons that can be gleaned from my analysis of the US and Australian case study transfers for policy makers considering engaging in the transfer of restrictive immigration control measures. I begin with an examination of the factors which contribute to the legal dimension of success which was the focus of my analysis in Chapter Six to Nine. I then make some observations about the three additional dimensions of success: process, programmatic and political.

10.2.1 Legal Success

Restrictive immigration control measures such as mandatory long-term detention, interdiction and extraterritorial processing push the boundaries of what is acceptable under both international and domestic law. As a consequence, such transfers may result in a legal failure, where the imported law or policy is rejected by the legal system of the receiving state. This may take the form of an adverse judicial decision determining that the measures are unlawful. Alternatively, it may be judicial interpretation of the provisions that frustrates the policy’s underlying purpose of maximising government control over asylum seekers and irregular migrants. So what factors do law makers need to take into account to avoid such a failure?

---


My comparative analysis of the case law challenging mandatory and long-term immigration detention, interdiction, and extra-territorial processing in the United States and Australia, suggests that differences in the legal structures in these jurisdictions were not as determinative to legal success or failure as one might think. The case law on immigration detention turned on two key issues. The first was whether legislative provisions in each country allow for indefinite detention. The second related to the legality of mandatory detention provisions. In relation to interdiction and extraterritorial processing, the litigation has focused on both the legality of the practice and the procedural and substantive rights that are to be afforded to persons subject to the policies. I argued that in each of the leading US and Australian cases, the courts were faced with a choice between a ‘rights-protecting’ or a ‘rights-precluding’ approach. A ‘rights-protecting’ approach is one where the court upholds the rights of the immigrant involved in the litigation, frustrating the purpose of the restrictive immigration control measure. In the context of a challenge to a policy imported through a process of legal or policy transfer, such an outcome could be viewed as a legal failure. A ‘rights-precluding’ approach is one where the court shows deference to the political branches of government by interpreting the relevant legal provisions in a way that minimises the scope of rights afforded to the immigrant litigant. In the context of a challenge to a policy implemented as the result of a process of policy or legal transfer, such an outcome could be categorised as a legal success.

My analysis revealed that in most instances, the relevant legal rules in the United States and Australia were ambiguous enough to justify either a ‘rights-protecting’ or a ‘rights-precluding’ approach. From this, we can conclude that at least in the case study transfers examined, the different legal structures were not determinative to legal success or legal failure. Rather, my analysis in Chapter Nine suggests that extra-legal factors such as the national security climate and relevant public opinion may be more important factors in determining legal success or failure. There, I argued that we can expect ‘rights-precluding’ decisions at times of relatively high anti-immigration sentiment and heightened national security concerns. At the same time, we can expect judges to take a more expansive view as to the rights of non-citizens at times of high public support for immigration and relative peace and security.

These findings have significant ramifications for law makers who are considering engaging in legal or policy transfer of restrictive immigration measures. Compatibility of legal structures and domestic legal protections in the sending and receiving jurisdictions may not be enough to ensure legal success. Further, incompatibility of legal structures and domestic legal protections will not necessarily lead to legal failure. As was demonstrated in my case law analysis, the existence of a constitutional bill of rights in the United States and the absence of any such protections in Australia was not determinative in explaining the similarities and differences in the way the courts in each jurisdiction addressed the legality of the case study policies. My findings suggest that law makers ought to adopt a more holistic approach to comparing the compatibility of the exporting and importing jurisdiction by taking into account wider political and social forces.

My analysis is based on a comparison of cases from only two jurisdictions: the United States and Australia. As such, my findings downplaying the importance of different legal structures in determining legal success or failure cannot be generalised to apply to transfers occurring in other jurisdictions.
Further comparative research is needed. A cursory look at the European jurisprudence challenging interdiction practices reveals that it may not conform neatly to my hypothesis. In the 2012 case of *Hirsi Jamaa v Italy*, the Grand Chamber of the European Court of Human Rights confirmed that the European Convention on Human Rights ('ECHR') applies extraterritorially and provides extensive protections for asylum seekers interdicted on the high seas by member nations. The Court grounded its jurisdiction to review the action on the fact that the Italian authorities exercised continuous and exclusive *de jure* and *de facto* control over the applicants. The findings of the Court in relation to the rights of interdicted asylum seekers are summarised by Violeta Moreno-Lax:

> extraterritoriality does not preclude the application of the ECHR in the context of border surveillance and migration control operations. The interdiction of migrants on the high seas without consideration of the particular case of each individual concerned is prohibited by the Convention. Information on the procedure to be followed to oppose removal to a third country as well as access to legal assistance and linguistic interpretation must be guaranteed. There must also be an opportunity to suspend the removal before it is implemented. In addition, the safety of the receiving State cannot be presumed in absolute terms. Public information on the prevailing situation must be taken into account. These conditions must be respected regardless of whether asylum has been explicitly requested.

This 'rights-protecting' approach is a far cry from the approach taken by Australian and US courts in cases challenging interdiction practices in those jurisdictions. At face value, the difference seems to be a direct result of the different legal structures which operate in Europe—namely the binding supra-national human rights protection instrument in the form of the ECHR. Importantly, this regime was held to apply extraterritorially and to non-citizens regardless of their immigration status. This can be contrasted to the territorial limitations of statutory and constitutional protections and the broader 'exceptional' treatment of non-citizens in Australia and the United States.

One final note on legal success is that transfers initially rejected by the Courts can be modified to survive subsequent judicial challenges. In this regard, what starts out as a legal failure can turn into a legal success with a little tweaking. Itamar Mann notes that '[w]hen courts review policy and enforcement directed towards unauthorised migrants, they provide guidelines to policymaking and enforcement networks on how to push policies beyond the courts' jurisdiction.' The Australian government's reaction to *Plaintiff M70/2011 v MIAC* ('Malaysian Solution Case') is an example of such responsive law making. The High Court's decision that Malaysia did not meet the statutory safeguards for third country transfers provided the blueprint for the amendments creating the current

---

74 *Hirsi Jamaa v Italy* [2012] II Eur Court HR 1.
76 *Hirsi Jamaa v Italy* [2012] II Eur Court HR 1, 133 [81].
77 Moreno-Lax, ‘*Hirsi Jamaa*’, above n 33, 595.
78 See Chapter Seven.
79 Mann, above n 22, 369.
80 (2011) 244 CLR 144.
offshore processing regime. These new provisions survived judicial challenge in *Plaintiff S156/2013 v MIBP*.

However, protection instruments may not always be so easily modified. For example, a decision grounded in the US Constitution, or in the ECHR cannot be circumvented via a simple process of legislative amendment. States may still be able to get around such decisions by amending the operation of the policy itself. We may see this course of action emerge in Europe in response to *Hirsi*. By saying that states cannot turn back asylum seekers with boats under their *de jure or de facto* control, the ECtHR left the door open for interdiction policies conducted with no such control. As such, it may be possible to ensure the legal success of interdiction policies within the context of the ECHR if European nations outsource these activities to foreign flagged boats.

**10.2.2 Process Success**

The *process* dimension of success relates to the legitimacy of the process underlying the policy or legal transfer. In relation to the case study transfers between the United States and Australia, my research raised concerns about the *quality* of the information relied upon when deciding to emulate a foreign practice and the *transparency* of the process generally. Policy and legal transfer can only be an effective policy making tool when it is informed by reliable and independent information about the operation and effect of the policy in the source country. The policy measures examined in this study all share the underlying goal of maximising the power of the political branches to deal with irregular migrants and reducing the number of irregular migrant flows. In relation to the second objective, it is unclear what evidence policy makers are relying on when evaluating the effectiveness of foreign models. There exists a relative dearth of hard research on the real effects and effectiveness of migration control measures in influencing irregular migrant flows.

The discourse on immigration and border control in many countries seems to be characterised by assertion and assumption rather than by reasoned and evidence-based exposition. The unreliability of the information relied upon is compounded by the closed and exclusionary nature of the forums in which governments share information about migration control policies. As discussed in *Chapter Four* and *Five*, the main forums for the sharing of policy ideas between Australia and the United States were various regional consultative processes (‘RCPs’) (in particular the Five Country Conferences) and informal bilateral discussions. These forums all took place behind closed doors and the information shared at such meetings was generally not open to public scrutiny.

I make two suggestions for improving the quality of the transfer process. First, there needs to be more robust research examining the effects of restrictive immigration measures on irregular migration flows. Such evidence would provide a stronger basis of empirical evidence for law makers considering

---

81 See *Chapter Eight*, Part 8.2.2(b)-(c).
83 Mann, above n 22, 367.
84 For a notable exception in the European context, see Eiko Thielemann, ‘How Effective are National and EU Policies in the Area of Forced Migration’ (2012) 31 *Refugee Survey Quarterly* 21.
85 See *Chapter Three*, Part 3.2.4; *Chapter Four*, nn 164-172 and accompanying text.
engaging in transfers. Compiling such evidence is no easy task given the multitude of factors, other than changes in policy, which can influence migratory flows. The study would need to isolate the influence of policy changes from push factors, such as changing conditions in the migrant source countries, as well as pull factors such as community ties and the availability of people smuggling services. Isolating these factors is very difficult when dealing with a small sample group of jurisdictions. However, a large-n study comparing changes in immigration policies and changes in flow data could control for and isolate the effect of these various factors.

One of the primary impediments to such a study to date has been the absence of comprehensive, cross-national comparable data on immigration policies; and a lack of a systemic method for classifying, measuring and comparing migration policies across countries and over time. Researchers are currently compiling a data-set with the express aim of filling this gap as part of the International Migration Policy and Law Analysis ('IMPALA') Database Project.86 Once complete, the database will contain a compilation of comparable data on immigration law and policy across 29 countries and over 50 years. This data-set will facilitate research into the effects of various immigration control measures along the lines outlined above. For example, it will be possible to identify all jurisdictions which have introduced detention measures targeting irregular arrivals, and to correlate the introduction of the measure in each jurisdiction with changes in irregular migratory flows.

Second, there needs to be more transparency in the transfer process and a greater degree of public scrutiny of the policy choices being considered. In particular, academics, immigration practitioners and civil society actors should be afforded an opportunity to scrutinise and comment on the evidence being relied upon to justify a transfer. The first step to achieving this would be for policy makers to be more open about the fact that they are engaging in transfers in the first place. As borne out in my interviews examined in Chapter Four and Five, policy makers involved in importing policies are generally very reluctant to admit that they have done so.87 Without disclosing that such transfers are occurring, independent scrutiny of the process underlying the transfers becomes very difficult. Further, the evidence relied upon for transfers should be made public, either by the inclusion of a wider range of participants, such as academics and NGO representatives in RCP and bilateral discussions, or through the release of policy documents which explicitly set out the evidence relied upon to justify the transfer.

In the absence of such measures, academics, the migration profession and civil society must work hard to recognise potential transfers and influence the policy debate. This can only be achieved by these parties taking an active role in sharing and discussing policy developments in their respective countries. These non-government actors need to share their experience about the practical implications and impacts of policy developments with their overseas counterparts. By engaging with developments abroad, these actors will not only be in a position to react appropriately to poor transfer

---


87 The reasons for this reluctance are explored in Chapter Five, Part 5.4.
proposals, but they can also play an active role in lobbying for and facilitating sound transfers based on substantiated evidence.

10.2.3 Programmatic Success

Programmatic success has two distinct dimensions. The first is whether a policy has achieved its intended outcomes. The second is whether the benefit of these outcomes outweighs any intended and unintended negative consequences. Here, I make some brief observations about each of these dimensions of programmatic success in the context of the transfer of restrictive immigration measures. The question of measuring whether the case study transfers achieved their intended outcomes was beyond the scope of this study. Any future studies examining this point would have to confront the issues relating to the highly subjective nature of success.\(^{88}\) The typology of motivations driving transfers set out in Chapter Three may assist in addressing these concerns.\(^{89}\) Different stakeholders are always going to have different views as to what constitutes success or failure, and success is always going to be contested to some degree. A useful starting point for a benchmark to measure success is whether it met the goals of the actors involved in the transfer process. By identifying the motivation of the actors involved in a given transfer, we can then assess whether the transfer met its intended goals. Using my typology we can ask, did the efficiency-driven transfer lead to an efficient policy outcome? Did the transfer driven by considerations of prestige result in authority and legitimacy for the imported law or policy? Did the cooperative transfer succeed in its aim of mutually beneficial harmonisation for the state parties involved? Did the competitive transfer lead to an advantage for the importing jurisdiction vis-à-vis competitor jurisdictions? Even where it is possible to get around the subjectivity issues, there will be significant methodological difficulties in isolating the causal effect of a policy, compared to other independent variables. These are the same issues discussed above in relation to the process dimension of success. As discussed, these concerns may be addressed by a well-designed large-n comparative study.

Any analysis of programmatic success must also take into account the negative consequences of transfers of restrictive immigration measures. In this regard, I am concerned that there has been insufficient attention paid to the damage caused by such policies. Australia provides an instructive example of the harm that can be caused by so-called ‘deterrent’ measures like mandatory detention, interdiction and extraterritorial processing.\(^{90}\) These policies have had a devastating impact on the welfare of the vulnerable asylum seekers they target. Numerous studies have demonstrated the adverse impact of mandatory detention on physical and mental health.\(^{91}\) These problems are only

---

compounded when detention occurs in remote extraterritorial processing facilities. On top of these mental health issues, asylum seekers held in offshore processing facilities in Nauru and PNG have to contend with a range of tropical diseases and substandard medical assistance, as well as hostile local populations. In February 2014, tensions between asylum seekers detained on Manus Island and locals led to an all-out confrontation in which one Iranian asylum seeker was killed and another 62 detainees were seriously injured. In October 2014, four unaccompanied minors released from detention centres in Nauru to live in the community were hospitalised after being physically assaulted by two local men. Australia’s maritime interdiction activities have put both asylum seekers and Navy personnel at serious risk. Vice Admiral Ray Griggs provided the following warning in regard to his experience with interdiction activities to Senate Estimates Hearing in 2011:

There are risks involved in this whole endeavor. As I said, there were incidents during these activities [in 2001], as there have been incidents subsequently, which have been risky. There have been fires lit... attempts to storm the engine compartment... people jumping in the water and that sort of thing.

A number of asylum seeker deaths can be directly linked to Australia’s push-back operations. An asylum seeker vessel returned to Indonesia by the Australian Navy in 2001 ran aground a few hundred metres from the Indonesian shore and three passengers reportedly drowned while trying to reach the shore. A further five asylum seekers died in 2009 as a result of an explosion on an asylum seeker vessel under the control of the Australian Navy. The fire was reportedly lit deliberately by some of the asylum seekers in an apparent bid to prevent their return to Indonesia.

These policies have come at a massive financial cost. The detention and processing of irregular maritime arrivals cost the Australian government more than AUD$3.1 billion in 2013-14. AUD$2.7 billion has been allocated for the task in the 2014-15 budget. To this we must add the extra AUD$420 million in foreign aid promised to PNG in return for hosting the extraterritorial processing
facility at Manus Island. This expenditure comes at a time when Australia is purportedly experiencing a budgetary crisis. Any evaluation of programmatic success must take into account these hefty outlays and consider whether these funds would be better spent on other government programs.

By pushing the boundaries of what is acceptable under international human rights law and the Refugee Convention, Australia’s policies have undermined its international reputation and its moral authority to call out human rights abuses carried out by other nations. This was demonstrated recently when China deflected Australian criticism relating to crackdowns on dissidents and academics by expressing concerns about Australia’s treatment of asylum seekers.

Finally, by demonising so-called ‘boat people’, the policies of mandatory detention, interdiction and extraterritorial processing have damaged the general health of Australia’s multicultural society. This demonisation has created and exacerbated divisions within emergent ethnic communities and between migrant and traditional Anglo-Saxon communities. Writing in 2010, when the Australian government was considering the reintroduction of interdiction and offshore processing, Mary Crock and I cautioned:

> It is more than a passing coincidence that the years of extraordinarily harsh border control policies under the Howard government culminated in, first, an unprecedented number of wrongful arrests, detention and removals of citizens and lawful permanent residents and, second, in inter-racial rioting that made headlines all over the world.

Itamar Mann describes the fundamental political challenge facing states in this context:

> either treat people as humans and risk changing who you are (in terms of the composition of your population), or give up human rights and risk changing who you are (in terms of your constitutive commitments).

The damage caused in Australia by the decision to adopt the latter option should be taken as a warning for other nations considering going down this path.

### 10.2.4 Political Dimension

It is also important to note that the transfer of restrictive immigration control measures may at times be driven by political, rather than programmatic considerations. This is based on a belief that fear mongering, particularly on the issue of race, can be a vote winner. Tad Tietze describes the perceived causation as follows: ‘[p]oliticians respond to the dark passions of the voters and the electoral

---


102 Crock and Ghezelbash, ‘Do Loose Lips Bring Ships?’, above n 90, 276.

103 Mann, above n 22, 321.
calculus makes resisting these difficult if not impossible’. While there is little in the way of direct evidence for this underlying assumption, it appears to be taken as a foregone conclusion by most commentators. John Pilger has observed that the barbarity of Australia’s border control policies are ‘considered a vote-winner’ by both of Australia’s major parties. He argues that ‘a crude, often unconscious racism remains an extraordinary current in Australian society and is exploited by [the] political elite.’ The introduction of mandatory detention by Prime Minister Paul Keating has been explained by Ben Eltham as a ‘knee-jerk policy prescription designed to appease xenophobic Labor voters in marginal seats, dressed up in the language of deterring people smugglers.’ In a similar vein, Prime Minister John Howard’s decision to interdict and deflect the asylum seekers aboard the MV Tampa has often been recognised as a decisive factor in his come-from-behind victory in the 2001 federal election. This is not an issue that is unique to Australia. In 2001, the United Nations High Commissioner for Refugees warned that

> [a]sylum seekers have become a campaign issue in various recent and upcoming election battles, with governments and opposition parties vy ing to appear toughest on the ‘bogus’ asylum seekers ‘flooding’ into their countries. In some nations—Australia, Austria, Denmark, Italy and Britain, for example, individual politicians and media appear at times to be deliberately inflating the issue. Statistics are frequently manipulated, facts are taken out of context, and the character of the asylum seekers as a group is often distorted in order to present them as a terrible threat—a threat their detractors can then pledge to crush. Politicians taking this line used to belong to small extremist parties. But nowadays the issue is able to steer the agenda of bigger parties … Genuine refugees should not become victims yet again. Surely, there are other ways to win elections.

Regardless of whether the underlying assumption that harsh deterrent measures win votes holds true, transfers in the immigration control policy sphere should never be driven by such considerations. Given the substantial social damage caused by these policies, their use as tools for scoring cheap political points is beyond reckless.

### 10.2.5 Ramifications for the International Refugee Protection Regime

Finally, the way in which the transfer of restrictive immigration measures has been carried out has the potential to undermine the international refugee protection regime. As states compete to deter irregular migrants, the result is the dissemination of progressively harsher and more punitive

---

105 Ibid.
measures. In Chapter Three, I explained this behaviour by drawing an analogy with regulatory theory. I argued that the interdependence of governments’ migration policy decisions and the resulting transfers resemble the ‘cooperative interdependence’ observed by diffusion scholars in the context of economic regulation. In the same way that the decision of one government to reduce corporate taxes to attract investment may place pressure on other governments to do the same, the introduction of certain immigration policies by one government can create externalities for other governments.

In this policy paradigm, the adoption of harsh deterrent measures targeting asylum seeker flows, places pressure on comparator jurisdictions to follow suit or face a possible increase in the number of asylum seekers attempting to enter their territory. The assumption is that asylum seekers choose countries in which to seek refuge according to ease of access and what might loosely be termed immigration and settlement outcomes. This competitive approach creates a vicious cycle which leads to a race to the bottom in which governments seek to outdo each other by implementing progressively more restrictive policies. In this context, the policy imperative becomes deflecting irregular arrivals to alternate destinations and reassuring the public that the government is in control of the nation’s borders. States are essentially being called upon to weigh up their competitiveness in deterring unwanted immigration against the value of abiding by their obligations under the Refugee Convention. As more states opt for deterrence over protection, this places pressure on other states to follow suit. This scenario has, and will continue to have, a devastating impact on the institution of asylum and international human rights more generally.

The legality of the case study policies under international law was beyond the scope of this study. This question has been explored at length by other scholars who have raised serious concerns about the compatibility of aspects of mandatory detention, interdiction and extraterritorial processing with the Refugee Convention and international human rights instruments. Repeated non-compliance with the Refugee Convention or international human rights norms, has the potential to completely unravel the international protection regime. Recent years have seen the proliferation of theories which seek to

---

110 See Chapter Three, Part 3.1.2.

explain why nations conform to international human rights norms.\textsuperscript{112} Goodman and Jinks aggregate these theories into three broad categories: coercion, persuasion and acculturation. Compliance through coercion occurs where states and institutions influence the behaviour of other states by creating benefits for conformity and/or imposing costs on non-conformity.\textsuperscript{113} Persuasion theory explains the influence of international law on state behaviour as resulting from ‘processes of social “learning” and other forms of information conveyance’.\textsuperscript{114} According to this approach, actors need to be consciously convinced of the appropriateness of a norm. Acculturation explains conformance with international norms through a ‘general process by which actors adopt the beliefs and behaviour patterns of the surrounding culture.’\textsuperscript{115} This is the result of pressures to assimilate, both self-imposed and emanating from external actors. It is unnecessary for our current purposes to engage in the debate about which of these models best reflects the empirical reality. Under all three models, derogations from the \textit{Refugee Convention} or international human rights norms, particularly by liberal democracies, have the potential to seriously undermine the international protection regime. States that violate international refugee or human rights laws would leave themselves open to charges of hypocrisy if they attempted to coerce other states to conform to those very same principles. Moreover, such hypocrisy would completely undermine their moral authority to persuade other states to conform to such norms. On the acculturation model, non-compliance may itself spread through a process of acculturation as states adopt the beliefs and behaviour of the surrounding culture.

We see a number of these issues playing out in the response to Rohingya asylum seekers attempting to travel to Thailand, Malaysia and Indonesia by sea. The decision of each of these jurisdictions to undertake push-back operations was fuelled at least in part by competitive interdependence. This was based on a view that if one jurisdiction was to grant entry to the asylum seekers, while the others continued to deny such access, then this would act as a pull factor for future arrivals. The resulting stalemate saw thousands of asylum seekers adrift at sea with nowhere to go. The fact that a liberal democracy like Australia has engaged in push-backs provides legitimacy to operations which in reality raise serious concerns under international law. As Human Rights Watch Deputy Director in Asia, Phil Robertson has noted:

\begin{quote}
Australia’s shameful actions on boat people seeking asylum in Australia has given the green light to other countries in the region to believe that they can get away with pushing boats back. It's undermined humanitarian protection and refugee protection throughout the region. The Abbott Government should
\end{quote}


\textsuperscript{113} Goodman and Jinks, above n 112, 633.

\textsuperscript{114} Ibid 635.

\textsuperscript{115} Ibid 626.
be ashamed of themselves and their example is part of the reason that these governments are going ahead with this kind of policy.¹¹⁶

There is nothing inherently wrong with drawing on the practice of other jurisdictions when developing domestic policy responses. On the contrary, it makes sense for policy and law makers to look abroad for inspiration when grappling with domestic policy challenges. Why reinvent the wheel when there are tried and tested models in existence abroad? For transfers to be successful, however, policy and law makers need to do more than simply copy and paste foreign legislation. Rather, they need to undertake a holistic examination of the legal, political and social context in the sending and receiving state. They must consider the potential harms that may result from the imported policy, and weigh these up against the perceived benefits.

It is not only law and policy makers that should be looking abroad. Writing in 360 BC, Plato called upon all citizens to learn from foreign laws, stating that:

> It is always right for one who dwells in a well-ordered state to go forth on a voyage of enquiry by land and sea so as to confirm thereby such of his native laws as are rightly enacted and to amend any that are deficient.¹¹⁷

I echo Plato’s call in encouraging all engaged citizens to look abroad for best practice policies in dealing with asylum seekers and irregular migration, and to advocate for their implementation in their home jurisdictions. In this way, it is hoped that we will see a shift towards transfers of measures that seek to provide durable solutions for the international refugee crisis, rather than cruel and harmful measures aimed at deterrence.


BIBLIOGRAPHY

1 Articles/Books/Reports


Amann, Diane Marie, 'Guantanamo' (2004) 42 Columbia Journal of Transnational Law 263


‘An interview with Mr Gerry Hand, Former Minister for Immigration, Local Government and Ethnic Affairs’ (1993) 1(4) People and Place 1

Andrade, Paula Garcia, 'Spanish Perspective on Irregular Immigration by Sea' in Bernard Ryan and Valsamis Mitsilegas (eds), Extraterritorial Immigration Control: Legal Challenges (Martinus Nijhoff, 2010) 311


Benson, David and Andrew Jordan, ‘What Have We Learned from Policy Transfer Research? Dolowitz and Marsh Revisited’ (2011) 9 *Political Studies Review* 366


Betts, Alexander, Global Migration Governance (Oxford University Press, 2011)

Betts, Katherine, The Great Divide: Immigration Politics in Australia (Duffy and Snellgrove, 1999)

Betts, Katherine, 'Boat People and Public Opinion in Australia' (2001) 9 People and Place 34

Bhagwati, Jagdish, 'Borders Beyond Control' (2003) 82 Foreign Affairs 98


Bovens, Mark, Paul ‘t Hart and B Guy Peters, 'Analysing Governance Success and Failure in Six European States' in Mark Bovens, Paul ‘t Hart and B Guy Peters (eds), Success and Failure in Public Governance: A Comparative Analysis (Edward Elgar, 2001) 12


Briggs, Vernon, 'US Asylum Policy and the New World Order' (1993) 1 People and Place 1

Brubaker, Rogers, Citizenship and Nationhood in France and Germany (Harvard University Press, 1992) 26

Buchanan, Patrick J, A Republic, Not an Empire: Reclaiming America’s Destiny (Regnery Publishing, 1999)

Bulmer, Simon, et al, Policy Transfer in European Union Governance: Regulating the Utilities (Routledge, 2007)
Cardoza, Benjamin, *The Nature of the Judicial Process* (Yale University Press, 1921)


Clawson, Victoria, Elizabeth Detweiler and Laura Ho, ‘Litigating as Law Students: An Inside Look at Haitian Centers Council’ (1994) 103 Yale Law Journal 2337


Collier, David, ‘Prerequisites Versus Diffusion: Testing Alternative Explanations of Social Security Adoption’ (1975) 69 American Political Science Review 1299


Cotterrell, Roger, ‘Is there a Logic of Legal Transplants’ in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart, 2001) 71


Crock, Mary, ‘A Legal Perspective on the Evolution of Mandatory Detention’ in Mary Crock (ed), *Protection or Punishment: The Detention of Asylum Seekers in Australia* (Federation Press, 1993) 25


Crock, Mary, 'Durable Solutions or Politics of Misery: Refugee Protection in Australia after Tampa’ in Natalie Bolzan, Michael Darcey and Jan Mason (eds), Fenced Out, Fenced In: Border Protection, Asylum and Detention in Australia (Common Ground Publishing, 2006) 23


Crock, Mary and Laurie Berg, Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia (Federation Press, 2012)

Crock, Mary and Mary Anne Kenny, ‘Rethinking the Guardianship of Refugee Children after the Malaysian Solution’ (2012) 34 Sydney Law Review 437


Daniels, Roger, Guarding the Golden Door: American Immigration Policy since 1882 (Hill and Wang, 2004)

Davies, Phillip, 'Spies as Informants: Triangulation and the Interpretation of Elite Interview Data in the Study of Intelligence and Security Services' (2001) 21 Politics 73


Dastyari, Azadeh, 'Refugees on Guantanamo Bay: A Blue Print for Australia's 'Pacific Solution'?' (2007) 79 Australia Quarterly 4


Dastyari, Azadeh, Out of Sight, Out of Right?: The United States’ Migrant Interdiction Program in International Waters and in Guantánamo Bay (PhD Thesis, Monash University, 2013)

Detention Watch Network, ‘Community-Based Alternatives to Immigration Detention’ (Policy Brief, August 2010)


Donahue, Charles, ‘Comparative Law before the Code Napoléon’, Mathias Reimann and Reinhard Zimmermann (eds), The Oxford Handbook of Comparative Law (Oxford University Press, 2006) 4


Duncan, Natasha, Immigration Policy Making in the Global Era (Palgrave Macmillan, 2014)


Evans, Mark and Jonathan Davies, ‘Understanding Policy Transfer: A Multi-Level, Multi-Disciplinary Perspective’ (1999) 77 Public administration 361


Every, Danielle and Martha Augoustinos, ‘Constructions of Racism in the Australian Parliamentary Debates on Asylum Seekers’ (2007) 18 Discourse and Society 411


Foster, Nicholas, 'Transmigration and Transferability of Commercial Law in a Globalised World' in Andrew Harding and Esin Örücü (eds), Comparative Law in the 21st Century (Kluwer Academic, 2002) 55


Freeman, Gary, ‘Modes of Immigration Politics in Liberal Democratic States’ (1995) 19 International Migration Review 881

Freeman, Gary and James Jupp, ‘Comparing Immigration Policy in Australia and the United States’, in Gary Freeman and James Jupp (eds), Nations of Immigrants: Australia, the United States and International Migration (Oxford University Press, 1992) 1


Fullerton, Maryellen, ‘Stealth Emulation: The United States and European Protection Norms’ in Hélène Lambert, Jane McAdam and Maryellen Fullerton (eds), The Global Reach of European Refugee Law (Cambridge University Press, 2013) 201


George, Alexander and Andrew Bennett, Case Studies and Theory Development in the Social Sciences (MIT Press, 2005)


Goldstein, Brandt, *Storming the Court: How a Band of Yale Law Students Sued the President – and Won* (Simon & Schuster, 2005)


Goot, Murray and Ian Watson, 'Population, Immigration and Asylum Seekers: Patterns in Australian Public Opinion' (Parliamentary Library Pre-Election Policy Unit Report, Parliamentary Library, May 2011)


Graziadei, Michele, 'Comparative Law as the Study of Transplants and Receptions' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 441


Greenberg, Karen and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005)

Grewcock, Mike, ‘Slipping Through the Net? Some thoughts on the Cornelia Rau and Vivian Alvarez Inquiry’ (2005) 17 *Current Issues in Criminal Justice* 284


Gryll, Sarah, 'Immigration Detention Reform: No Band-Aid Desired' (2011) 60 *Emory Law Journal* 1211


Hansen, Randall, ‘Interstate Cooperation: Europe and Central Asia’ in Gervais Appave and Frank Laczko (eds), Interstate Cooperation and Migration (International Organization for Migration, 2005) 17


Harns, Charles, ‘Regional Inter-State Consultation Mechanisms on Migration: Approaches, Recent Activities and Implications for Global Governance of Migration’ (IOM Migration Research Series Report No 45, 2013)

Hathaway, James, The Rights of Refugees under International Law (Cambridge University Press, 2005)


Hawkins, Freda, Critical Years in Immigration: Canada and Australia Compared (McGill-Queen's University Press, 1989)


Hirst, John, ‘Girt by Sea: Correspondence’ (2002) 6 Quarterly Essay 89

Holmes, Oliver Wendell, Jr, The Common Law (American Bar Association, 1881)


Hunt, Erling, American Precedents in Australian Federation (Columbia University Press, 1930)

Ingram, Helen and Dean Mann (eds), Why Policies Succeed or Fail (Sage, 1980)

Inkeles, Alex, One World Emerging? Convergence and Divergence in Industrial Societies (Westview Press, 1998)

International Detention Coalition, ‘Case Management as an Alternative to Detention: The Australian Experience’ (Report, June 2009)

International Organization for Migration, Global Meeting of Chairs and Secretariats of Regional Consultative Processes on Migration (RCPs) - Bangkok, 4-5 June 2009: Summary Report (International Organization for Migration, 2009)


Jastram, Kate, 'The Kids before Khadr: Haitian Refugee Children on Guantanamo' (2012) 11 Santa Clara Journal of International Law 81

Johns, Fleur, 'Guantanamo Bay and the Annihilation of the Exception' (2005) 16 European Journal of International Law 613


Kahn-Freund, Otto, 'Comparative Law as an Academic Subject' (1966) 82 Law Quarterly Review 40


Kaplan, Amy, 'Where is Guantanamo?' (2005) 57 American Quarterly 831

Kerr, Clark, The Future of Industrial Societies: Convergence or Continuing Diversity? (Harvard University Press, 1983)


Koehler, Jobst, 'What Government Networks do in the Field of Migration: An Analysis of Selected Regional Consultative Processes’ in Randall Hansen, Jobst Koehler and Jeannette Money (eds), Migration, Nation States, and International Cooperation (Routledge, 2011) 101


Koser, Khalid, 'International Migration and Global Governance' (2010) 16 Global Governance 301

Kramer, Mark et al, ‘Remembering the Cuban Missile Crisis: Should We Swallow Oral History?’ (1990) 15 International Security 212


Lambert, Hélène, Jane McAdam and Maryellen Fullerton (eds), The Global Reach of European Refugee Law (Cambridge University Press, 2013)


Law, Anna On Ya, Who’s Minding the Gates? The Effects of Institutional Norms on Judicial Behavior in Immigration (Doctoral Dissertation, Graduate School of the University of Texas, 2003)


Liebreich, Fritz, Britain’s Naval and Political Reaction to the Illegal Immigration of Jews to Palestine, 1945-1948 (Routledge, 2005)


Lin, Li-Wen, ‘Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example’ (2009) 57 American Journal of Comparative Law 711


Llewellyn, Karl, ‘Some Realism about Realism: Responding to Dean Pound’ (1931) 44 Harvard Law Review 1222


Marshall, Thomas, Public Opinion and the Supreme Court (Unwin Hyman, 1989)


Martin, David, 'Effects of International Law on Migration Policy and Practice: The Uses of Hypocrisy' (1989) 23 International Migration Review 547


McAdam, Jane, Climate Change, Forced Migration, and International Law (Oxford University Press, 2012)

McAdam, Jane, 'Migrating Laws? The "Plagiaristic Dialogue" between Europe and Australia’ in Hélène Lambert, Jane McAdam and Maryellen Fullerton (eds), The Global Reach of European Refugee Law (Cambridge University Press, 2013) 25

McConnell, Allan, Understanding Policy Success: Rethinking Public Policy (Palgrave MacMillan, 2010)


McVoy, Edgar, 'Patterns of Diffusion in the United States' (1940) 5 American Sociological Review 219


Michaels, Ralf, ‘Make or Buy – A Public Market for Legal Transplants?’ in Horst Eidenmüller (ed), Regulatory Competition in Contract Law and Dispute Resolution (Beck, 2013) 27


Ministry of Business, Innovation and Employment, New Faces, New Future: New Zealand (Department of Labour, 2009)

Mishler, William and Reginald Sheehan, 'The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions' (1993) 87 American Political Science Review 87


Moreno-Lax, Violeta, ‘Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?’ (2012) 12 Human Rights Law Review 574


Nelken, David, ‘Towards a Sociology of Legal Adaptation’ in David Nelken and Johannes Feest (eds), Adapting Legal Cultures (Hart, 2001)


Neuman, Gerald, ‘Closing the Guantánamo Loophole’ (2004) 50 Loyola Law Review 1


Nicholls, Glenn, Deported: A History of Forced Departures from Australia (UNSW Press, 2007)

Nielsen, Anne-Grethe, 'Cooperation Mechanisms' in Ryszard Cholewinski, Richard Perruchoud and Euan MacDonald (eds), International Migration Law: Developing Paradigms and Key Challenges (TMC Asser Press, 2007) 405


Oakes, Laurie, Labor’s 1979 Conference Adelaide (Objective Publications, 1979)


Örücü, Esin, 'Law as Transposition' (2000) 51 International and Comparative Law Quarterly 205


Pascale, Alessia di, 'Migrant Control at Sea: The Italian Case' in Bernard Ryan and Valsamis Mitsilegas (eds), Extraterritorial Immigration Control: Legal Challenges (Martinus Nijhoff, 2010) 281


Ramji-Nogales, Jaya, Andrew Schoenholtz and Philip Schrag, Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform (NYU Press, 2009)

Rehnquist, William, All the Laws But One: Civil Liberties in War Time (Alfred A Knopf Inc, 1998)
Rintoul, Stuart, ‘Emerging from the Shadows to Face New “Crisis of Whiteness”’, The Australian, 6 May 2002, 8

Robertson, Geoffrey, The Tyrannicide Brief (Vintage, 2006)

Rogers, Everett M, Diffusion of Innovations (Free Press, 5th ed, 2003)

Rogers, Everett M and F Floyd Shoemaker, Communications of Innovations: A Cross-Cultural Approach (Free Press, 1971)

Rolls, Alice, ‘Avoiding Tragedy: Would the decision of the High Court in Al-Kateb have been any different if Australia had a Bill of Rights like Victoria?’ (2007) 18 Public Law Review 119


Rose, Richard, Learning from Comparative Public Policy: A Practical Guide (Routledge, 2005)


Ryan, Bernard, ‘Extraterritorial Immigration Control: What Role for Legal Guarantees?’ in Bernard Ryan and Valsamis Mitsilegas (eds), Extraterritorial Immigration Control: Legal Challenges 3


Santayana, George, The Life of Reason: Reason in Common Sense (Charles Scribner’s Sons, 1905)


Schaffer, RP, ‘South-East Asian Refugees –The Australian Experience’ (1977) 7 Australian Year Book of International Law 200


Schriro, Dora, Immigration Detention Overview and Recommendations (2009)


Schuck, Peter, Citizens, Strangers and In-Betweens (Westview Press, 1998)


Seldon, Anthony and Joanna Papworth, By Word of Mouth: 'Elite’ Oral History (Methuen, 1983)


Siems, Mathias, Comparative Law (Cambridge University Press, 2014)


Spamann, Holger, ‘Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law’ (2009) 6 *Brigham Young University Law Review* 1813

Spigelman, James, Hon, *Statutory Interpretation and Human Rights* (University of QLD Press, 2008)


Stone, Diane, ‘Learning Lessons and Transferring Policy across Time, Space and Disciplines’ (1999) 19 *Politics* 51


Tauman, Jessica, ‘Rescued at Sea, but Nowhere to Go: The Cloudy Legal Waters of the Tampa Crisis’ (2002) 11 *Pacific Rim Law & Policy Journal* 461


Thielemann, Eiko, ‘How Effective are National and EU Policies in the Area of Forced Migration’ (2012) 31 *Refugee Survey Quarterly* 21

Thouez, Colleen and Frédérique Channac, ‘Convergence and Divergence in Migration Policy: The Role of Regional Consultative Processes’ (Global Migration Perspectives No 20, Global Commission on International Migration, January 2005)


Twining, William, Globalisation and Legal Scholarship (Wolf Legal Publishers, 2011)


UN Ad Hoc Committee on Refugees and Stateless Persons, A Study of Statelessness, UN Doc E/1112; E/1112/Add.1 (August 1949)


US Immigration and Customs Enforcement, Detention Reform Accomplishments <http://www.ice.gov/detention-reform>


Wagner, Steven, ‘British Intelligence and the “Fifth” Occupying Power: The Secret Struggle to Prevent Jewish Illegal Immigration to Palestine’ (2014) 29 Intelligence and National Security 698


Watson, Alan, Legal Transplants: An Approach to Comparative Law (Scottish Academic Press, 1974)


Watson, Alan, Legal Transplants: An Approach to Comparative Law (University of Georgia Press, 1993, 2nd ed)


Wise, Edward, 'The Transplant of Legal Patterns' (1990) 38 American Journal of Comparative Law 1


2 Cases

Australia

Al-Kateb v Godwin (2004) 219 CLR 562

Australian Communist Party v The Commonwealth (1951) 83 CLR 1

Azemoudeh v MIEA (1985) 8 ALD 281

Chu Kheng Lim v MILGEA (1992) 176 CLR 1

CPCF v MIBP [2015] HCA 1 (28 January 2015)

Daniels Corporation International Pty Ltd v Australian Competition & Consumer Commission (2002) 213 CLR 543

Dietrich v The Queen (1992) 177 CLR 292

Jerger v Pearce (1920) 28 CLR 588

Koon Wing Lau v Calwell (1949) 80 CLR 533

Lloyd v Wallach (1915) 20 CLR 299

MIEA v Teoh (1995) 183 CLR 273

MIMA v Haji Ibrahim (2000) 204 CLR 1

MIMIA v Al Masri (2003) 126 FCR 54

MIMIA v Khawar (2002) 210 CLR 1

MIMIA v QAAH (2006) 231 CLR 1

P1/2003 v MIMIA [2003] FCA 1029

P1/2003 v MIMIA [2003] FCA 1370

Plaintiff M47/2012 v Director-General Security (2012) 251 CLR 1


Plaintiff M70/2011 v MIAC (2011) 244 CLR 144

Plaintiff M76/2013 v MIMAC (2013) 251 CLR 322


Plaintiff S156/2013 v MIBP (2014) 309 ALR 29
Plaintiff S4/2014 v MIBP (2014) 312 ALR 537

Polites v The Commonwealth (1945) 70 CLR 60

Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority (1997) 190 CLR 410

Re Woolley; Ex parte M276/2003 (2004) 225 CLR 1

Robtelmes v Brenan (1906) 4 CLR 395

Ruddock v Vadarlis (2001) 110 FCR 491

Sadiqi v Commonwealth [2008] FCA 1262

Sadiqi v Commonwealth (No 2) (2009) 181 FCR 1

Sadiqi v Commonwealth (No 3) [2010] FCA 596

SHDB v Goodwin [2003] FCA 300

Victorian Council for Civil Liberties v MIMA (2001) 110 FCR 452

WAJC v MIMA [2002] FCA 1631

USA

Barrera-Echavarria v Rison, 44 F3d 1441 (9th Cir, 1995)

Benitez v Wallis, 337 F3d 1289 (11th Cir, 2003)

Borrero v Aljets, 325 F3d 1003 (8th Cir, 2003)


Carlson v Landon, 342 US 524 (1952)

Chae Chan Ping v United States, 130 US 581 (1889)

Clark v Martinez, 543 US 371 (2005)

Cuban American Bar Association v Christopher, No 94-2183 (SD Fla, 24 October 1994)

Cuban American Bar Association v Christopher, 43 F3d 1412 (11th Cir, 1995)


Fiallo v Bell, 430 US 787 (1977)

Foucha v Louisiana, 504 US 71 (1992)
Fong Yue Ting v United States, 149 US 698 (1893)


Haitian Centers Council v McNary, 969 F2d 1326 (2nd Cir, 1992)

Haitian Centers Council v McNary, 969 F2d 1350 (2nd Cir, 1992)

Haitian Centers Council v Meissner, No 92-1258 (SJ) (ED NY, 22 February 1994)

Haitian Centers Council v Sale, 823 F Supp 1028 (ED NY, 1993)

Haitian Refugee Center v Baker, 789 F Supp 1552 (SD Fla, 1991)

Haitian Refugee Center v Baker, 949 F2d 1109 (11th Cir, 1991)

Haitian Refugee Center v Baker, 953 F2d 1498 (11th Cir, 1992)

Haitian Refugee Center v Baker, 502 US 1122 (1992)

Haitian Refugee Center v Gracey, 809 F2d 794 (DC Cir, 1987)

Hamdan v Rumsfeld, 548 US 557 (2006)

Hoang v Comfort, 282 F3d 1247 (10th Cir, 2002)

Hoyle-Mesa v Ashcroft, 272 F3d 989 (7th Cir, 2001)

In re D-J-, 23 I & N Dec 572 (Att’y Gen 2003)

Jackson v Indiana, 406 US 715 (1972)

Jean v Nelson, 711 F2d 1455 (SD Fla, 1983)

Johnson v Eisentrager, 339 US 763 (1950)

Kansas v Hendricks, 521 US 346 (1997)

Kim v Ziglar, 276 F3d 523 (9th Cir, 2002)

Kleindienst v Mandel, 408 US 753 (1972)


Leng May Ma v Barber, 357 US 185 (1958)

Louis v Nelson, 544 F Supp 973 (SD Fla, 1982)

Ma v Reno, 208 F3d 815 (9th Cir, 2000)

Marbury v Madison, 5 US 137 (1803)
Mathews v Diaz, 426 US 67 (1976)
Mathews v Eldridge, 424 US 319 (1976)
McCulloch v Maryland, 17 US 316 (1819)
Monongahela Navigation Co v United States, 148 US 312 (1893)
Nishimura Ekiu v United States, 142 US 651 (1892)
Northern Securities Co v United States, 193 US 197 (1904)
Parra v Perryman, 172 F3d 954 (7th Cir, 1999)
Patel v Zemski, 275 F3d 299 (3rd Cir, 2001)
RIL-R v Jeh Charles Johnson (DC, Civ No 15-11-JEB, 20 February 2015)
Rios v INS, 324 F3d 296 (5th Cir, 2003)
Rosales-Garcia v Holland, 322 F3d 386 (6th Cir, 2003)
Sierra v Romaine, 347 F3d 559 (3rd Cir, 2003)
Shaughnessy v United States ex rel Mezei, 345 US 206 (1953)
United States v Salerno, 481 US 739 (1987)
Xi v INS, 298 F3d 832 (9th Cir, 2002)
Welch v Ashcroft, 293 F3d 213 (4th Cir, 2002)
Wong Wing v United States, 163 US 228 (1896)
Yamataya v Fisher, 189 US 86 (1903)
Zadvydas v Davis, 533 US 678 (2001)
Zadvydas v Underdown, 185 F3d 279 (5th Cir, 1999)

European Court of Human Rights

Amuur v France [1996] III Eur Court HR 826
Hirsi Jamaa v Italy [2012] II Eur Court HR 1
Inter-American Commission on Human Rights

Haitian Center for Human Rights v United States, Inter-American Commission on Human Rights, Case 10.675 (13 March 1997)

UN Human Rights Committee

A v Australia, Communication No 560/1993: Australia, CCPR/C/59/D/560/1993 (30 April 1997)

United Kingdom

Musgrove v Chun Teeong Toy [1891] AC 272

R (European Roma Rights Centre) v Immigration Officer at Prague Airport [2005] 2 AC 1
3 Bills and Legislation

Australia

Administrative Decision (Judicial Review) Act 1977 (Cth)

Border Protection Legislation Amendment Act 1999 (Cth)

Border Protection (Validation and Enforcement Powers) Act 2001 (Cth)

Federal Court of Australia Act 1976 (Cth)

Immigration Act 1925 (Cth)

Immigration Restriction Act 1901 (Cth)

Judiciary Act 1903 (Cth)

Maritime Powers Act 2013 (Cth)

Migration Act 1958 (Cth)

Migration Amendment Act 1992 (Cth)

Migration Amendment Act 1994 (Cth)

Migration Amendment (Detention Arrangements) Act 2005 (Cth)

Migration Amendment (Excision from Migration Zone) Act 2001 (Cth)

Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth)

Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2012 (Cth)

Migration Legislation Amendment Act 1989 (Cth)

Migration Legislation Amendment Act 1994 (Cth)

Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 (Cth)

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth)

Migration Reform Act 1992 (Cth)

Pacific Island Labourers Act 1901 (Cth)

War-time Refugees Removal Act 1949 (Cth)
United States

Administrative Procedure Act of 1946, Pub L No 79-404, 60 Stat 237

Anti-Drug Abuse Act of 1988, Pub L No 100-690, 102 Stat 4181


Chinese Exclusion Act of 1882, ch 126, 22 Stat 58


Cuban Adjustment Act of 1966, Pub L No 89-732, 80 Stat 1161


Immigration Act of 1891, ch 551, 26 Stat 1084

Immigration Act of 1893, ch 206, 27 Stat 569

Immigration Act of 1990, Pub L No 101-649, 104 Stat 4978

Immigration and Nationality Act of 1952, Pub L 82-414, 66 Stat 163


Joint Resolution to Authorise the use of United States Armed Forces Against those Responsible for the Recent Attacks Launched Against the United States, Pub L No 107-40, 115 Stat 224 (2001)


Passport Act of 1918, ch 81, 40 Stat 559

Refugee Act of 1980, Pub L No 96-212, 94 Stat 102

Scott Act of 1888, ch 1015, 25 Stat 476

Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub L No 107-56, 115 Stat 272

Canada

Protecting Canada’s Immigration Act, SC 2012
Immigration and Refugee Protection Act, SC 2001

Germany

Act to Control and Restrict Immigration and to Regulate the Residence and Integration of EU Citizens and Foreigners (Immigration Act) (Germany) 20 June 2002

New Zealand

Immigration Amendment Act 2013 (NZ)

Immigration Act 2009 (NZ)
4 Regulations, Policies and Other Government Documents

Australia


Andrews, Kevin, Minister for Immigration, ‘War Crimes MOU and Asylum Agreement Signed’ (Media Release, 17 April 2007)

Australian Cabinet Paper, Submission No 2906: Review of the Indo-Chinese Refugee Situation–Decision No 7501, 23 January 1979, available through the National Archives of Australia (Series: A12909) (Control: 2906)

Australian Greens, ‘Bill of Rights: One Way to Defeat Indefinite Detention’ (Media Release, 6 August 2004)

Bowen, Chris, Minister for Immigration, ‘Joint Statements by the Prime Ministers of Australia and Malaysia on a Regional Cooperation Framework’ (Media Release, 7 May 2011)

Bowen, Chris, Minister for Immigration, ‘Bridging Visas to be Issued for Boat Arrivals’ (Media Release, 25 November 2011) <http://www.chrisbowen.net/media-centre/media-releases.do?newsId=5240>

Bowen, Chris, Minister for Immigration and Citizenship, Instrument of Declaration of Malaysia as a Declared Country under Subsection 198A(3) of the Migration Act 1958, F2011L01685, 25 July 2011


DIBP, Australia’s Migration Trends 2012-13 (2014)


DIMIA, ‘Australia Not Alone in Detention Stance’ (UNHCR Discussion Paper No 2, 2002)
Evans, Chris, Minister for Immigration and Citizenship, ‘Last Refugees Leave Nauru’ (Media Release, 8 February 2008).

Evans, Chris, Minister for Immigration, ‘New Directions in Detention: Restoring Integrity to Australia’s Immigration System’ (Speech delivered at Parliament House, 29 July 2008)

Explanatory Memorandum, Maritime Powers Bill 2012 (Cth)

Gillard, Julia, Prime Minister of Australia and Chris Bowen, Minister for Immigration, ‘Australia and Malaysia Sign Transfer Deal’ (Media Release, 25 July 2011)

Gillard, Julia, Prime Minister of Australia and Chris Bowen, Minister for Immigration, ‘Australia Signs Memorandum of Understanding with Nauru’ (Media Release, 29 August 2012)

Gillard, Julia, Prime Minister of Australia and Chris Bowen, Minister for Immigration, ‘Australia and Papua New Guinea Sign Updated Memorandum of Understanding’ (Media Release, 8 September 2012)

Hancock, Nathan, ‘Border Protection (Validation and Enforcement Powers) Bill 2001’ (Bills Digest No 62 2001-02, Department of the Parliamentary Library - Information and Research Services, 2001)

Howard, John, Prime Minister of Australia, ‘Arrangement with Papua New Guinea to Process Unauthorised Arrivals’ (Media Release, 10 October 2001)

Howard, John, Prime Minister of Australia, speech delivered at the Federal Liberal Party Campaign Launch, Sydney (28 October 2001)

Migration Regulations 1994 (Cth)

Ruddock, Phillip, Minister for Immigration, Address to the National Press Club, Canberra, 18 March 1998

Select Committee for an Inquiry into a Certain Maritime Incident, ‘A Certain Maritime Incident’ (Commonwealth of Australia, 23 October 2002)

United States

Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed Reg 57833 (16 November 2001)


Executive Order No 12,324 (29 September 1981), 46 Fed Reg 48,109 (1 October 1981)

Executive Order No 12,807 (24 May 1992), 57 Fed Reg 23,133 (1 June 1992)

Executive Order No 13,276 (15 November 2002), 67 Fed Reg 69,985 (19 November 2002)

Executive Order No 13,286 (28 February 2003), 68 Fed Reg 10,619 (5 March 2003)


Memorandum from INS Commissioner, ‘Parole Project for Asylum Seekers at Ports of Entry and in INS Detention’ (20 April 1992)

Memorandum from INS Deputy Commissioner, ‘Implementation of Expedited Removal’ (31 March 1997)

Memorandum from INS Executive Associate Commissioner for Field Operations, ‘Expedited Removal: Additional Policy Guidance’ (30 December 1997)

Memorandum from INS Executive Associate Commissioner for Field Operations, ‘Detention Guidelines’ (9 October 1998)

Memorandum from INS Offices of General Counsel, Programs and International Affairs, to Commissioner, ‘Asylum Pre-screening Evaluation’ (13 June 1996)

Memorandum from the Deputy Secretary of Defense to the Secretary of the Navy, ‘Order Establishing Combatant Status Review Tribunal’ (7 July 2004)

Philbin, Patrick and John Yoo, Deputy Assistant Attorney Generals, ‘Memo 3 - Memorandum for William J. Haynes II, General Counsel, Department of Defense: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba’ (28 December 2001)


Subcommittee on Immigration of the Committee on the Judiciary, ‘The Detention and Treatment of Haitian Asylum Seekers’ (United States Senate, 107th Congress, 2002)


US Immigration and Customs Enforcement, ‘Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture’ (Directive No 11002.1, 8 December 2009)

**Canada**


Citizenship and Immigration Canada, ‘Meeting with Senior Officials from Australia at Parliament House to Discuss Effective Solutions to Combat the Global Problems of Migrant Smuggling and Human Trafficking’ (News Release, 20 September 2010)

**European Union**


**New Zealand**


**United Nations and UNHCR**

UN, *Constitution of the International Refugee Organization*, 15 December 1946, 18 UNTS 3


5  Treaties

Multilateral Treaties

Additional Protocol to the Provisional Arrangement and to the Convention signed at Geneva on July 4th, and February 10th, 1938, respectively, concerning the Status of Refugees coming from Germany, 198 UNTS 141 (signed and entered into force 14 September 1939)

Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees, signed 12 May 1926, 89 LTNS 47 (entered into force 5 February 1929)

Arrangement relating to the Legal Status of Russian and Armenian Refugees, signed 30 June 1928, 89 LNTS 53 (entered into force 2 May 1929)

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, signed 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987)

Convention on the Protection of Rights of All Migrant Workers and Members of their Families, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 Juley 2003)


Convention relating to the International Status of Refugees, signed 28 October 1933, 159 LNTS 199 (entered into force 13 June 1935)

Convention relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954)

International Covenant on Civil and Political Rights, signed 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)


Bilateral Agreements and Arrangements

Agreement between the United States of America and the Republic of Cuba for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, TS No 418 (signed and entered into force 23 February 1903)

Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement, signed 25 July 2011
Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia, Relating to the Settlement of Refugees in Cambodia, signed 26 September 2014

Memorandum of Understanding between the Government of the United States and the Government of Jamaica for the Establishment within the Jamaican Territorial Sea and Internal Waters of a Facility to Process Nationals of Haiti seeking Refuge within or Entry to the United States of America, entered into force 2 June 1994, KAV 3901, Temp State Dept No 94-153

Memorandum of Understanding between the Government of the United Kingdom, the Government of the Turks and Caicos Islands, and the Government of the United States to Establish in the Turks and Caicos Islands a Processing Facility to Determine the Refugee Status of Boat People from Haiti, entered into force 18 June 1994, KAV 3906, Temp State Dept No 94-158

Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia for Cooperation in the Administration of Asylum Seekers and Related Issues (Answers to Questions on Notice, Department of Foreign Affairs and Trade, 19 June 2002)


Treaty between the United States of America and Cuba Defining their Relations, signed 29 May 1934, TS No 866 (entered into force 9 June 1934)
6  Other


ABC TV, ‘Saving People “Key Right Now” as Migrants Adrift and in Limbo on Boats off Thailand’, 7:30 Report, 15 May 2015 <http://www.abc.net.au/7.30/content/2015/s4236809.htm>


Abbot, Tony, Prime Minister of Australia, Interview with James Glenday, ABC AM (13 June 2014); transcript available at <https://www.pm.gov.au/media/2014-06-13/interview-james-glenday-abc-am>


Andrew and Renata Kaldor Centre for International Refugee Law, ‘Offshore Processing: Conditions’ (Fact Sheet, 7 April 2015) <http://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-conditions>


Byrne, Madeleine, ‘Exporting the “Pacific solution”’, *New Matilda* (online), 22 December 2004 <https://newmatilda.com/2004/12/22/exporting-pacific-solution>


Davies, Sara and Alex Reilly, ‘FactCheck: Were 70% of People sent to Nauru under the Pacific Solution Resettled in Australia?’, *The Conversation*, 13 August 2013 <http://theconversation.com/factcheck-were-70-of-people-sent-to-nauru-under-the-pacific-solution-resettled-in-australia-16947>


Gallup, *Immigration* (8 June 2014) <http://www.gallup.com/poll/1660/Immigration.aspx#1>

Global Detention Project, ‘21st Session of the Committee on Migrant Workers: Issues regarding Immigration Detention in Mauritania and Belize’ (August 2014)


Scott, Steven, ‘Follow My Lead on Boats: Abbott Tells Europe Turn-Back Model Stops Deaths’, *Courier-Mail* (Brisbane), 22 April 2015, 1, 8

Shaw, Meaghan, ‘Ban Indefinite Detention: Lawrence’, *The Age*, 12 August 2004, 4


Vance, Andrea, ‘Key Says No to Refugee Detention Centre’, *stuff.co.nz* (online), 29 October 2010 <http://www.stuff.co.nz/national/politics/4287400/Key-says-no-to-refugee-detention-centre>


APPENDIX A:
INTERVIEW METHODOLOGY

A.1 Sample Selection

The interview sample consists of key policy makers (including politicians, bureaucrats and non-government actors) involved in developing and implementing interdiction and extraterritorial processing policies in Australia and the United States. Interview subjects were selected using a reputational snowballing approach. This sampling method is well suited for obtaining information about well-defined and specific events and processes involving elite actors, such as politicians and senior policy makers.\(^1\) The method draws a purposive sample that includes the most important players who have participated in the event being studied.\(^2\)

The first stage of sample selection involved identifying a subset of relevant respondents through an examination of evidence on the public record relating to the policy process in question. Relevant sources examined include government press releases, media reports, conference proceedings, parliamentary speeches, explanatory memoranda and other parliamentary and departmental reports.\(^3\) This initial sample was used to initiate a snowballing/chain-referral process whereby each interview respondent was asked to provide a list of people they felt were influential in the suspected transfer under study. This procedure was repeated with each round of new nominees, until respondents began repeating names. This method has the additional advantage of assessing the level of influence of each interview subject, as the number of nominations each person receives provides an indication of their stature within the law and policy making process.\(^4\)

A.2 Sample Size

Using the sampling method outlined above, 35 Australian and 25 US policy makers were identified as being potentially involved in the case study transfers. Of these, a total of 16 Australian, and nine US policy makers agreed to be interviewed. The break down between politicians, bureaucrats, and others is set out in Table 5 below. Confidentiality for interview subjects was guaranteed so as to maximise participation and encourage full and frank disclosure. Each interview respondent is referred to in the study with reference to a codename. The first two letters of the code indicate which country the policy maker is from: AU (Australia) or US (United States). The third letter indicates if the policy maker is a politician (P), bureaucrat (B) or other (O). This latter category consists mainly of academics and NGO

---

3. These are what I identify as sources of ‘physical evidence’ in my framework for identifying transplants set out in Chapter Two, Part 2.2.
actors. The last two digits are randomised numbers from 01-99 which are used to provide a unique identifier for each respondent.

Table 5: List of Interview Subjects

<table>
<thead>
<tr>
<th>Code</th>
<th>Country</th>
<th>Type</th>
</tr>
</thead>
<tbody>
<tr>
<td>AUB41</td>
<td>Australia</td>
<td>B</td>
</tr>
<tr>
<td>AUO40</td>
<td>Australia</td>
<td>O</td>
</tr>
<tr>
<td>AUP11</td>
<td>Australia</td>
<td>P</td>
</tr>
<tr>
<td>AUB01</td>
<td>Australia</td>
<td>B</td>
</tr>
<tr>
<td>AUB15</td>
<td>Australia</td>
<td>B</td>
</tr>
<tr>
<td>AUB77</td>
<td>Australia</td>
<td>B</td>
</tr>
<tr>
<td>AUP35</td>
<td>Australia</td>
<td>P</td>
</tr>
<tr>
<td>AUB19</td>
<td>Australia</td>
<td>B</td>
</tr>
<tr>
<td>AUP50</td>
<td>Australia</td>
<td>P</td>
</tr>
<tr>
<td>AUP49</td>
<td>Australia</td>
<td>P</td>
</tr>
<tr>
<td>AUB67</td>
<td>Australia</td>
<td>B</td>
</tr>
<tr>
<td>AUB30</td>
<td>Australia</td>
<td>B</td>
</tr>
<tr>
<td>AUB80</td>
<td>Australia</td>
<td>B</td>
</tr>
<tr>
<td>AUB27</td>
<td>Australia</td>
<td>B</td>
</tr>
<tr>
<td>AUB96</td>
<td>Australia</td>
<td>B</td>
</tr>
<tr>
<td>AUO12</td>
<td>Australia</td>
<td>O</td>
</tr>
<tr>
<td>USO62</td>
<td>USA</td>
<td>O</td>
</tr>
<tr>
<td>USB19</td>
<td>USA</td>
<td>B</td>
</tr>
<tr>
<td>USB21</td>
<td>USA</td>
<td>B</td>
</tr>
<tr>
<td>USB79</td>
<td>USA</td>
<td>B</td>
</tr>
<tr>
<td>USB06</td>
<td>USA</td>
<td>B</td>
</tr>
<tr>
<td>USB98</td>
<td>USA</td>
<td>B</td>
</tr>
<tr>
<td>USB33</td>
<td>USA</td>
<td>B</td>
</tr>
<tr>
<td>USO11</td>
<td>USA</td>
<td>O</td>
</tr>
<tr>
<td>USO82</td>
<td>USA</td>
<td>O</td>
</tr>
</tbody>
</table>

Politician (P), Bureaucrat (B), Other (O)

A.3 Issues with Reliability

Data collected in elite interviews can provide a valuable insight into the processes behind policy decision making. However, there are a variety of factors which could lead to such data being misleading or inaccurate. Interviewees may misrepresent their own positions in ways that raise questions over the reliability of their statements. Mark Kramer observes that politicians may attempt to slant their accounts and inflate or minimise their own role in an event or process depending on whether there is political capital to be gained or lost. Others have noted that civil servants in some

5 Mark Kramer et al, ‘Remembering the Cuban Missile Crisis: Should We Swallow Oral History?’ (1990) 15 International Security 212, 213; Tansey, above n 1, 767
countries are prone to under-representing their role in political decision making. George and Bennett observe that policy makers may slant their accounts in order to portray a 'careful, multi-dimensioned process of policy-making' to the public. Inadvertent memory lapses can also affect the reliability of data collected from interview subjects, with this problem being more acute in circumstances where the events of interest have taken place sometime before the interview.

In order to address these issues of reliability, I triangulate the data collected in my interviews wherever possible. This involves cross-referencing with data from other primary and secondary sources. As Webb et al argue, 'the most fertile search for validity comes from a combined series of measures, each with its own idiosyncratic weaknesses, each pointed to a single hypothesis.' The primary sources used to triangulate data collected in the interviews include parliamentary speeches, media releases, explanatory memorandum, parliamentary reports and other policy documents. Secondary sources used to triangulate include press reports, published interviews with policy makers carried out by other authors, and academic books and articles. In situations where interviews alone are the available source for a particular item, a minimum of two independent interview sources were required before the item was relied on as fact. When interviews conflicted with each other or documentary sources, the uncertainty was reported in the footnotes.

6 Anthony Seldon and Joanna Papworth, *By Word of Mouth: ‘Elite’ Oral History* (Methuen, 1983); Tansey, above n 1, 767.
8 Kramer et al, above n 5, 213.
9 Phillip Davies, ‘Spies as Informants: Triangulation and the Interpretation of Elite Interview Data in the Study of Intelligence and Security Services’ (2001) 21 Politics 73, 76.
## APPENDIX B:
### SUPPLEMENTARY DATA

Table 6: US Coast Guard Migrant Interdiction, 1982-2014

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Haitian</th>
<th>Dominican</th>
<th>Chinese</th>
<th>Cuban</th>
<th>Mexican</th>
<th>Ecuadorian</th>
<th>Other</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>949</td>
<td>293</td>
<td>0</td>
<td>2,059</td>
<td>48</td>
<td>0</td>
<td>29</td>
<td>3,378</td>
</tr>
<tr>
<td>2013</td>
<td>508</td>
<td>110</td>
<td>5</td>
<td>1,357</td>
<td>31</td>
<td>1</td>
<td>82</td>
<td>2,094</td>
</tr>
<tr>
<td>2012</td>
<td>977</td>
<td>456</td>
<td>23</td>
<td>1,275</td>
<td>79</td>
<td>7</td>
<td>138</td>
<td>2,955</td>
</tr>
<tr>
<td>2011</td>
<td>1,137</td>
<td>222</td>
<td>11</td>
<td>985</td>
<td>68</td>
<td>1</td>
<td>50</td>
<td>2,474</td>
</tr>
<tr>
<td>2010</td>
<td>1,377</td>
<td>140</td>
<td>0</td>
<td>422</td>
<td>61</td>
<td>0</td>
<td>88</td>
<td>2,088</td>
</tr>
<tr>
<td>2009</td>
<td>1,782</td>
<td>727</td>
<td>35</td>
<td>799</td>
<td>77</td>
<td>6</td>
<td>41</td>
<td>3,467</td>
</tr>
<tr>
<td>2008</td>
<td>1,583</td>
<td>688</td>
<td>1</td>
<td>2,216</td>
<td>47</td>
<td>220</td>
<td>70</td>
<td>4,825</td>
</tr>
<tr>
<td>2007</td>
<td>1,610</td>
<td>1,469</td>
<td>73</td>
<td>2,868</td>
<td>26</td>
<td>125</td>
<td>167</td>
<td>6,338</td>
</tr>
<tr>
<td>2006</td>
<td>1,198</td>
<td>3,011</td>
<td>31</td>
<td>2,810</td>
<td>52</td>
<td>693</td>
<td>91</td>
<td>7,886</td>
</tr>
<tr>
<td>2005</td>
<td>1,850</td>
<td>3,612</td>
<td>32</td>
<td>2,712</td>
<td>55</td>
<td>1,149</td>
<td>45</td>
<td>9,455</td>
</tr>
<tr>
<td>2004</td>
<td>3,229</td>
<td>5,014</td>
<td>68</td>
<td>1,225</td>
<td>86</td>
<td>1,189</td>
<td>88</td>
<td>10,899</td>
</tr>
<tr>
<td>2003</td>
<td>2,013</td>
<td>1,748</td>
<td>15</td>
<td>1,555</td>
<td>0</td>
<td>703</td>
<td>34</td>
<td>6,068</td>
</tr>
<tr>
<td>2002</td>
<td>1,486</td>
<td>177</td>
<td>80</td>
<td>666</td>
<td>32</td>
<td>1,608</td>
<td>55</td>
<td>4,104</td>
</tr>
<tr>
<td>2001</td>
<td>1,391</td>
<td>659</td>
<td>53</td>
<td>777</td>
<td>17</td>
<td>1,020</td>
<td>31</td>
<td>3,948</td>
</tr>
<tr>
<td>2000</td>
<td>1,113</td>
<td>499</td>
<td>261</td>
<td>1,000</td>
<td>49</td>
<td>1,244</td>
<td>44</td>
<td>4,210</td>
</tr>
<tr>
<td>1999</td>
<td>1,039</td>
<td>583</td>
<td>1,092</td>
<td>1,619</td>
<td>171</td>
<td>298</td>
<td>24</td>
<td>4,826</td>
</tr>
<tr>
<td>1998</td>
<td>1,369</td>
<td>1,097</td>
<td>212</td>
<td>903</td>
<td>30</td>
<td>0</td>
<td>37</td>
<td>3,648</td>
</tr>
<tr>
<td>1997</td>
<td>288</td>
<td>1,200</td>
<td>240</td>
<td>421</td>
<td>0</td>
<td>0</td>
<td>45</td>
<td>2,194</td>
</tr>
<tr>
<td>1996</td>
<td>2,295</td>
<td>6,273</td>
<td>61</td>
<td>411</td>
<td>0</td>
<td>2</td>
<td>38</td>
<td>9,080</td>
</tr>
<tr>
<td>1995</td>
<td>909</td>
<td>3,388</td>
<td>509</td>
<td>525</td>
<td>0</td>
<td>0</td>
<td>36</td>
<td>5,367</td>
</tr>
<tr>
<td>1994</td>
<td>25,302</td>
<td>232</td>
<td>291</td>
<td>38,560</td>
<td>0</td>
<td>0</td>
<td>58</td>
<td>64,443</td>
</tr>
<tr>
<td>1993</td>
<td>4,270</td>
<td>873</td>
<td>2,511</td>
<td>2,882</td>
<td>0</td>
<td>0</td>
<td>48</td>
<td>10,584</td>
</tr>
<tr>
<td>1992</td>
<td>37,618</td>
<td>588</td>
<td>181</td>
<td>2,066</td>
<td>0</td>
<td>0</td>
<td>174</td>
<td>40,627</td>
</tr>
<tr>
<td>1991</td>
<td>2,065</td>
<td>1,007</td>
<td>138</td>
<td>1,722</td>
<td>0</td>
<td>0</td>
<td>58</td>
<td>4,990</td>
</tr>
<tr>
<td>1990</td>
<td>871</td>
<td>1,426</td>
<td>0</td>
<td>443</td>
<td>1</td>
<td>0</td>
<td>95</td>
<td>2,836</td>
</tr>
<tr>
<td>1989</td>
<td>4,902</td>
<td>664</td>
<td>5</td>
<td>257</td>
<td>30</td>
<td>0</td>
<td>5</td>
<td>5,863</td>
</tr>
<tr>
<td>1988</td>
<td>4,262</td>
<td>254</td>
<td>0</td>
<td>60</td>
<td>11</td>
<td>0</td>
<td>13</td>
<td>4,600</td>
</tr>
<tr>
<td>1987</td>
<td>2,866</td>
<td>40</td>
<td>0</td>
<td>46</td>
<td>1</td>
<td>0</td>
<td>38</td>
<td>2,991</td>
</tr>
<tr>
<td>1986</td>
<td>3,422</td>
<td>189</td>
<td>11</td>
<td>28</td>
<td>1</td>
<td>0</td>
<td>74</td>
<td>3,725</td>
</tr>
<tr>
<td>1985</td>
<td>3,721</td>
<td>113</td>
<td>12</td>
<td>51</td>
<td>0</td>
<td>0</td>
<td>177</td>
<td>4,074</td>
</tr>
<tr>
<td>1984</td>
<td>1,581</td>
<td>181</td>
<td>0</td>
<td>7</td>
<td>2</td>
<td>0</td>
<td>37</td>
<td>1,808</td>
</tr>
<tr>
<td>1983</td>
<td>511</td>
<td>6</td>
<td>0</td>
<td>44</td>
<td>0</td>
<td>0</td>
<td>5</td>
<td>566</td>
</tr>
<tr>
<td>1982</td>
<td>171</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>17</td>
</tr>
<tr>
<td>Calendar Year</td>
<td>Number of arrivals</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---------------</td>
<td>-------------------</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2014</td>
<td>157</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2013</td>
<td>20,587</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2012</td>
<td>17,202</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2011</td>
<td>4,565</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2010</td>
<td>6,555</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2009</td>
<td>2,726</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2008</td>
<td>161</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2007</td>
<td>148</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2006</td>
<td>60</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2005</td>
<td>11</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2004</td>
<td>15</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2003</td>
<td>53</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2002</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2001</td>
<td>5,516</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2000</td>
<td>2,939</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1999</td>
<td>3,721</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1998</td>
<td>200</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1997</td>
<td>339</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1996</td>
<td>660</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1995</td>
<td>237</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1994</td>
<td>953</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1993</td>
<td>81</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1992</td>
<td>216</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1991</td>
<td>214</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 8: US Public Opinion on Immigration – Gallup Polling Data (percentages)

*In your view, should immigration be kept at its present level, increased or decreased?*

<table>
<thead>
<tr>
<th>Date of Poll</th>
<th>Present Level</th>
<th>Increased</th>
<th>Decreased</th>
<th>No opinion</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014 Jun 5-8</td>
<td>33</td>
<td>22</td>
<td>41</td>
<td>4</td>
</tr>
<tr>
<td>2014 Feb 6-9</td>
<td>35</td>
<td>27</td>
<td>36</td>
<td>2</td>
</tr>
<tr>
<td>2013 Jun 13-Jul 5</td>
<td>40</td>
<td>23</td>
<td>35</td>
<td>2</td>
</tr>
<tr>
<td>2012 Jun 7-10</td>
<td>42</td>
<td>21</td>
<td>35</td>
<td>3</td>
</tr>
<tr>
<td>2011 Jun 9-12</td>
<td>35</td>
<td>18</td>
<td>43</td>
<td>4</td>
</tr>
<tr>
<td>2010 Jul 8-11</td>
<td>34</td>
<td>17</td>
<td>45</td>
<td>4</td>
</tr>
<tr>
<td>2009 Jul 10-12</td>
<td>32</td>
<td>14</td>
<td>50</td>
<td>5</td>
</tr>
<tr>
<td>2008 Jun 5-Jul 6</td>
<td>39</td>
<td>18</td>
<td>39</td>
<td>3</td>
</tr>
<tr>
<td>2007 Jun 4-24</td>
<td>35</td>
<td>16</td>
<td>45</td>
<td>4</td>
</tr>
<tr>
<td>2006 Jun 8-25</td>
<td>42</td>
<td>17</td>
<td>39</td>
<td>2</td>
</tr>
<tr>
<td>2006 Apr 7-9</td>
<td>35</td>
<td>15</td>
<td>47</td>
<td>4</td>
</tr>
<tr>
<td>2005 Dec 9-11 ^</td>
<td>31</td>
<td>15</td>
<td>51</td>
<td>3</td>
</tr>
<tr>
<td>2005 Jun 6-25</td>
<td>34</td>
<td>16</td>
<td>46</td>
<td>4</td>
</tr>
<tr>
<td>2004 Jun 9-30</td>
<td>33</td>
<td>14</td>
<td>49</td>
<td>4</td>
</tr>
<tr>
<td>2003 Jun 12-18</td>
<td>37</td>
<td>13</td>
<td>47</td>
<td>3</td>
</tr>
<tr>
<td>2002 Sep 2-4</td>
<td>26</td>
<td>17</td>
<td>54</td>
<td>3</td>
</tr>
<tr>
<td>2002 Jun 3-9</td>
<td>36</td>
<td>12</td>
<td>49</td>
<td>3</td>
</tr>
<tr>
<td>2001 Oct 19-21</td>
<td>30</td>
<td>8</td>
<td>58</td>
<td>4</td>
</tr>
<tr>
<td>2001 Jun 11-17</td>
<td>42</td>
<td>14</td>
<td>41</td>
<td>3</td>
</tr>
<tr>
<td>2001 Mar 26-28</td>
<td>41</td>
<td>10</td>
<td>43</td>
<td>6</td>
</tr>
<tr>
<td>2000 Sep 11-13</td>
<td>41</td>
<td>13</td>
<td>38</td>
<td>8</td>
</tr>
<tr>
<td>1999 Feb 26-28 ^</td>
<td>41</td>
<td>10</td>
<td>44</td>
<td>5</td>
</tr>
<tr>
<td>1995 Jul 7-9</td>
<td>27</td>
<td>7</td>
<td>62</td>
<td>4</td>
</tr>
<tr>
<td>1995 Jun 5-6</td>
<td>24</td>
<td>7</td>
<td>65</td>
<td>4</td>
</tr>
<tr>
<td>1993 Jul 9-11</td>
<td>27</td>
<td>6</td>
<td>65</td>
<td>2</td>
</tr>
<tr>
<td>1986 Jun 19-23 †</td>
<td>35</td>
<td>7</td>
<td>49</td>
<td>9</td>
</tr>
<tr>
<td>1977 Mar 25-28</td>
<td>37</td>
<td>7</td>
<td>42</td>
<td>14</td>
</tr>
<tr>
<td>1965 Jun 24-29</td>
<td>39</td>
<td>7</td>
<td>33</td>
<td>20</td>
</tr>
</tbody>
</table>

^ Asked of a half sample
† CBS/New York Times Poll

Source: Gallup, *Immigration* (8 June 2014) <http://www.gallup.com/poll/1660/Immigration.aspx#1>
Table 9: Australian Public Opinion on Immigration – Comparable Polling Data, 1954-2014 (percentages)

<table>
<thead>
<tr>
<th>Poll</th>
<th>Date</th>
<th>Increase/Maintain*</th>
<th>Reduce#</th>
<th>DK</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lowy</td>
<td>2014</td>
<td>(14/47) 61</td>
<td>37</td>
<td>3</td>
</tr>
<tr>
<td>Scanlon</td>
<td>2014</td>
<td>(17/42) 59</td>
<td>35</td>
<td>8</td>
</tr>
<tr>
<td>Scanlon</td>
<td>2013</td>
<td>(13/38) 51</td>
<td>42</td>
<td>7</td>
</tr>
<tr>
<td>Scanlon</td>
<td>2012</td>
<td>(14/42) 56</td>
<td>38</td>
<td>7</td>
</tr>
<tr>
<td>Scanlon</td>
<td>2011</td>
<td>(14/40) 54</td>
<td>39</td>
<td>7</td>
</tr>
<tr>
<td>AES</td>
<td>Aug–Oct 2010a</td>
<td>(9/34) 43</td>
<td>53</td>
<td>3</td>
</tr>
<tr>
<td>AES</td>
<td>Aug–Oct 2010b</td>
<td>(12/32) 46</td>
<td>53</td>
<td>2</td>
</tr>
<tr>
<td>Essential</td>
<td>July–Aug 2010</td>
<td>22</td>
<td>(22/42) 64</td>
<td>14</td>
</tr>
<tr>
<td>Morgan</td>
<td>July 2010</td>
<td>(11/47) 58</td>
<td>40</td>
<td>2</td>
</tr>
<tr>
<td>Nielsen</td>
<td>July 2010</td>
<td>(5/45) 50</td>
<td>47</td>
<td>4</td>
</tr>
<tr>
<td>USSC</td>
<td>July 2010</td>
<td>25</td>
<td>(33/36) 69</td>
<td>6</td>
</tr>
<tr>
<td>Scanlon</td>
<td>June 2010</td>
<td>(10/36) 46</td>
<td>47</td>
<td>7</td>
</tr>
<tr>
<td>Nielsen</td>
<td>April 2010</td>
<td>(6/38) 44</td>
<td>54</td>
<td>2</td>
</tr>
<tr>
<td>Morgan</td>
<td>March 2010</td>
<td>(9/45) 54</td>
<td>41</td>
<td>5</td>
</tr>
<tr>
<td>Nielsen</td>
<td>November 2009</td>
<td>(9/43) 52</td>
<td>43</td>
<td>4</td>
</tr>
<tr>
<td>Scanlon</td>
<td>July 2009</td>
<td>(10/46) 55</td>
<td>37</td>
<td>7</td>
</tr>
<tr>
<td>AES</td>
<td>Dec–Jan 2008a</td>
<td>(15/38) 53</td>
<td>46</td>
<td>2</td>
</tr>
<tr>
<td>AES</td>
<td>Dec–Jan 2008b</td>
<td>(13/45) 58</td>
<td>39</td>
<td>3</td>
</tr>
<tr>
<td>Scanlon</td>
<td>June–July 2007</td>
<td>(12/41) 53</td>
<td>36</td>
<td>11</td>
</tr>
<tr>
<td>Newspoll</td>
<td>Jan–Feb 2007</td>
<td>(23/43) 66</td>
<td>29</td>
<td>5</td>
</tr>
<tr>
<td>AES</td>
<td>Feb–Oct 2006a</td>
<td>(19/47) 66</td>
<td>30</td>
<td>4</td>
</tr>
<tr>
<td>AES</td>
<td>Feb–Oct 2006b</td>
<td>(23/40) 63</td>
<td>34</td>
<td>2</td>
</tr>
<tr>
<td>AuSSA</td>
<td>Aug–Dec 2005</td>
<td>(23/33) 56</td>
<td>39</td>
<td>6</td>
</tr>
<tr>
<td>AuSSA</td>
<td>Aug–Dec 2003</td>
<td>(26/31) 57</td>
<td>38</td>
<td>5</td>
</tr>
<tr>
<td>Saulwick</td>
<td>September 2002</td>
<td>(19/35) 54</td>
<td>42</td>
<td>4</td>
</tr>
<tr>
<td>AES</td>
<td>Nov–Apr 2002a</td>
<td>(18/45) 63</td>
<td>34</td>
<td>4</td>
</tr>
<tr>
<td>AES</td>
<td>Nov–Apr 2002b</td>
<td>(25/37) 62</td>
<td>36</td>
<td>2</td>
</tr>
<tr>
<td>ACNielsen</td>
<td>Aug–Sept 2001</td>
<td>(10/44) 54</td>
<td>41</td>
<td>6</td>
</tr>
<tr>
<td>AES</td>
<td>Oct–Jan 1999a</td>
<td>(10/44) 54</td>
<td>41</td>
<td>5</td>
</tr>
<tr>
<td>AES</td>
<td>Oct–Jan 1999b</td>
<td>(13/38) 51</td>
<td>47</td>
<td>2</td>
</tr>
<tr>
<td>Newspoll</td>
<td>April 1997</td>
<td>(2/26) 28</td>
<td>64</td>
<td>6</td>
</tr>
<tr>
<td>AGB:McNair</td>
<td>November 1996</td>
<td>32</td>
<td>62</td>
<td>6</td>
</tr>
<tr>
<td>Morgan</td>
<td>October 1996</td>
<td>≤30</td>
<td>≥66</td>
<td>4</td>
</tr>
<tr>
<td>Newspoll</td>
<td>September 1996</td>
<td>(2/20) 22</td>
<td>71</td>
<td>7</td>
</tr>
<tr>
<td>AGB:McNair</td>
<td>June 1996</td>
<td>(3/30) 33</td>
<td>65</td>
<td>2</td>
</tr>
<tr>
<td>AES</td>
<td>Mar–June 1996a</td>
<td>(6/30) 36</td>
<td>62</td>
<td>2</td>
</tr>
<tr>
<td>AES</td>
<td>Mar–June 1996b</td>
<td>(8/28) 36</td>
<td>63</td>
<td>1</td>
</tr>
<tr>
<td>Saulwick</td>
<td>November 1991</td>
<td>(9/16) 25</td>
<td>73</td>
<td>2</td>
</tr>
<tr>
<td>Saulwick</td>
<td>May 1990</td>
<td>(8/24) 32</td>
<td>65</td>
<td>4</td>
</tr>
<tr>
<td>Saulwick</td>
<td>February 1988</td>
<td>(8/22) 30</td>
<td>68</td>
<td>2</td>
</tr>
</tbody>
</table>