REFUGEE JOURNEYS

HISTORIES OF RESETTLEMENT,
REPRESENTATION AND RESISTANCE

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EDITED BY JORDANA SILVERSTEIN AND RACHEL STEVENS

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PRESS

Published by ANU Press
The Australian National University
Acton ACT 2601, Australia
Email: anupress@anu.edu.au

Available to download for free at press.anu.edu.au

ISBN (print): 9781760464189
ISBN (online): 9781760464196

WorldCat (print): 1232438634
WorldCat (online): 1232438632

DOI: 10.22459/RJ.2021

Cover design and layout by ANU Press. Cover artwork: Zohreh Izadikia, *Freedom*, 2018, Melbourne Artists for Asylum Seekers.

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Part III: Understanding refugee histories and futures

ACKNOWLEDGEMENTS

This volume originated in the Global Histories of Refugees conference organised by Professor Joy Damousi in 2016. We are grateful to her, and her leadership in the Kathleen Fitzpatrick Laureate Research Project in which we worked, as well as to our other colleagues on the project, whose intellectual engagement over the five years enabled this work to be produced: Dr Mary Tomsic, Dr Alexandra Dellios, Dr Niro Kandasamy, Dr Sarah Green and Dr Anh Ngyuen.

Additionally, we want to thank ANU Press and Professor Frank Bongiorno and the Social Sciences Editorial Board for their support of the project, as well as our wonderful copyeditor, Beth Battrick.

Finally, we send a big thanks to our dedicated authors for their efforts to bring this volume together.

Funding to support this edited collection was provided by the Australian Research Council, ARC FL140100049, 'Child Refugees and Australian Internationalism from 1920 to the Present'.

This text is taken from *Refugee Journeys: Histories of Resettlement, Representation and Resistance*, edited by Jordana Silverstein and Rachel Stevens, published 2021 by ANU Press, The Australian National University, Canberra, Australia.

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REFUGEE JOURNEYS

Jordana Silverstein and Rachel Stevens[1]

During the Academics for Refugees National Day of Action on 17 October 2018, Behrouz Boochani – 'a Kurdish writer, film maker, scholar and journalist' – issued a statement calling on academics across Australia to act:

> academics have a really important role in researching this policy of exile and exposing it. What I believe from living through this policy and experiencing this prison camp firsthand is that we are only able to understand it in a philosophical and historical way. Definitely Manus and Nauru prison camps are philosophical and political phenomena and we should not view them superficially. The best way to examine them is through deep research into how a human, in this case a refugee, is forced to live between the law and a situation without laws.[2]

In May 2013, Boochani had fled his homeland, Iran, to seek asylum in Australia. As a politically active Kurdish journalist, Boochani faced persecution from the Islamic Revolutionary Guard and likely imprisonment. Once in Indonesia, Boochani embarked on the treacherous sea crossing to northern Australia. His first attempt failed; in his second attempt in July 2013, his boat was intercepted by the Royal Australian Navy and he, along with 60 other asylum seekers, was transported and detained on Christmas Island, a ravaged 135 km^2 Australian territory in the Indian Ocean that is far closer to Indonesia than mainland Australia.

1 This chapter was written with funding provided by the Australian Research Council Laureate Research Fellowship Project FL140100049, 'Child Refugees and Australian Internationalism from 1920 to the Present'.

2 Behrouz Boochani, 'Statement from Behrouz Boochani in Support of the Academics for Refugees National Day of Action, 17 October 2018', NDA Public Read-Ins, Academics for Refugees, available at: academicsforrefugees.wordpress.com/nda-public-read-ins/?fbclid=IwAR2ZGL1CJIvvGtYKo5vyG-rfVpcQ9_SR61orz6t19I3UMnL3eA-BruEide0.

After one month, in August Boochani was relocated to Manus Island, Papua New Guinea. These precise dates are important. By virtue of Boochani's decision (or forced decision) to seek refuge in Australia in mid-2013, he inadvertently became ensnared in the Machiavellian machinations that characterised the Australian domestic political landscape throughout the 2010s and an increasingly punitive government approach to assessing – or refusing to assess – refugee claims.

How did we get here?

The detention of asylum seekers who arrived by boat has been a feature of Australian Government policy for more than 30 years. When 26 Cambodians arrived in Australia in 1989 without prior authorisation, on a boat codenamed the *Pender Bay*, the Hawke Labor Government invoked the discretionary detention provision under the *Migration Act 1958* (Cth). These asylum seekers would spend the next two-and-a-half years incarcerated at former migrant hostels in suburban Melbourne (Maribyrnong) and Sydney (Villawood) before their refugee claims were rejected and they were forcibly repatriated. In 1991 Gerry Hand, the minister for immigration, local government and ethnic affairs, declared that all subsequent asylum seekers who arrived by boat would be detained in an inhospitable former miners' camp at Port Hedland, in the north-west of the country. The following year, the Labor Government passed with bipartisan support a number of legislative changes to the Migration Act that codified retrospectively the detention of asylum seekers and made mandatory the detention of all people who subsequently came by boat, which came into effect in 1994.[3] In the late 1990s and early 2000s, the conservative Howard Government established more immigration detention centres, often in former military sites and typically in extremely hot and isolated locations, far removed from the assistance of their communities, immigration lawyers, human rights activists and journalists. These detention centres, although distant from population hubs, were on the mainland of Australia. This, however, would change in 2001.

As Kathleen Blair explores in Chapter 6 of this volume, the arrival of the MV *Tampa* off the coast of Australia in August 2001 served as a lightning rod for an incumbent government unpopular with voters in an election

3 Rachel Stevens, *Immigration Policy from 1970 to the Present* (New York: Routledge, 2016), 121–22.

year. When a boat carrying 438 asylum seekers began to sink en route to Australia, the nearby Norwegian freighter, the MV *Tampa*, rescued the stranded passengers, and in doing so, prevented a likely catastrophe. The Howard Government threatened the Norwegians with prosecution if they tried to land on Australian territory, specifically the neighbouring Christmas Island, and they were ordered to dock in Indonesia. The mostly Afghan and Hazara asylum seekers resisted the rerouting to Indonesia, which is not a signatory to the *1951 Refugee Convention*, leading to a diplomatic deadlock between the Norwegian, Australian and Indonesian governments. After days drifting at sea, the impasse ended when the New Zealand Government agreed to resettle 150 asylum seekers, while the Micronesian island-state of Nauru detained the remaining 288 individuals at a processing centre in exchange for Australian foreign aid.[4]

The opportunistic Howard Government used the *Tampa* incident to legislate a suite of reforms with the intention of transferring asylum seeker processing to countries outside Australia, which is meticulously documented by Savitri Taylor in Chapter 9 of this volume. In September 2001, the Howard Government introduced the 'Pacific Solution', which excised Christmas Island and Ashmore Reef from the Australian Migration Zone. This migration excision would be extended in 2005 to include all Australian territories except the mainland and Tasmania, while the mainland and Tasmania were excised in 2013.[5] The excision of territories from the migration zone in 2001 marked the beginning of the Australian Government refusing asylum seekers the 'state of having arrived'.[6] This legal exclusion is important as it denied asylum seekers protections under Australian law and, later, access to legal challenges in the courts.

In addition to territory excision, the Australian Government delegated the detention of asylum seekers to two of its client states, both of which are recipients of Australian foreign aid.[7] Immigration detention centres were established on Manus Island, Papua New Guinea and Nauru. Although asylum seekers were physically detained offshore, the management of the

4 Kathleen Blair, Chapter 6, this volume.

5 Karen Barlow and staff, 'Parliament Excises Mainland from Migration Zone', *ABC News*, 17 May 2013, available at: www.abc.net.au/news/2013-05-16/parliament-excises-mainland-from-migration-zone/4693940.

6 Stevens, *Immigration Policy*, 132.

7 In the late 2010s, the Australian Government provided over AU$500 million in ODA (official development assistance) to Papua New Guinea; during the same time period, Nauru received approximately AU$25 million per year. Though this figure may seem small, it is equivalent to 25 per cent of Nauruan GDP. See: www.dfat.gov.au/aid/where-we-give-aid/Pages/where-we-give-aid.

centres and the adjudication of the asylum claims remained under the control of the Australian state. Since 2001, so-called offshore processing and the long-term incarceration of asylum seekers has for the most part been the modus operandi of the Australian Government. There was a brief (in relative terms) respite between early 2008 and mid-2012, which Savitri Taylor dubs 'the false spring'.[8] The incoming Rudd Labor Government swept to power in December 2007 with an 18-seat majority and an election pledge to replace offshore processing with onshore mandatory detention of asylum seekers, albeit on the remote Christmas Island.

Arguably, the suspension of offshore processing was contingent on two transient contextual factors: first, the small number of asylum seekers arriving by boat in 2007–08. According to government sources, only 21 individuals arrived by boat seeking asylum in 2007–08; in 2006–07, there were 23 applicants. These figures were a fraction of the 2,222 asylum seekers who arrived by boat in 2001–02 when the Pacific Solution was introduced. With few boat arrivals and resulting media coverage, the issue of asylum seeker policy faded into the background and lost its political salience.[9] Consequently, the Rudd Government was in a secure political position to reform asylum seeker policy with little practical impact. Second, after nearly 12 years in power, there was discontent with the incumbent government and a general desire for generational change at the top. The Rudd Government came to power with a moderate reform agenda on a range of issues, including industrial relations, climate change, education and internet infrastructure. There was therefore an electoral appetite for change, even if the reforms only moderated the excesses of the Howard years. This public desire for change, once satisfied, proved fickle. Coupled with a marked increase in the number of asylum seeker arrivals – 4,597 individuals arrived in 2009–10 – Rudd felt that his position against offshore processing, as well as his leadership of the Labor Party, became untenable.

8 Savitri Taylor, Chapter 9, this volume.

9 Unfortunately, the Australian Election Study did not include a question on the importance of refugees and asylum seekers as an election issue in 2007, perhaps indicative of a lack of interest in the issue at the time. Furthermore, there was no mention of refugees and only a passing reference to asylum seekers in Paul D Williams's reflective commentary on the 2007 election, see 'The 2007 Australian Federal Election: The Story of Labor's Return from the Electoral Wilderness', *Australian Journal of Politics and History* 54, no. 1 (2008): 104–25. doi.org/10.1111/j.1467-8497.2008.00487.x. John Wanna similarly omitted any reference to asylum seeker policy in his summary of the 2007 election, see 'Political Chronicles. Commonwealth of Australia. July to December 2007', *Australian Journal of Politics and History* 54, no. 2 (2008): 289–341. These collective silences in political commentary and analysis suggest that the issue of asylum seeker policies simply did not register with voters or political scientists.

Since 2008–09, the number of asylum seekers arriving by boat steadily increased, peaking in 2012–13 with 18,365 arrivals. Furthermore, in 2011–12 the number of asylum seekers arriving by boat eclipsed the number of asylum seekers arriving by air for the first time.[10] Although both boat and air arrivals requested onshore asylum (as distinct from applying for refugee status offshore, typically in a third country), air arrivals have never triggered a public frenzy simply by virtue of their successful passage through immigration and customs at their port of entry. Conversely, since the first boats of Vietnamese asylum seekers reached the shores of northern Australia in 1976, these migrants have been the subject of hostility, politicking and incarceration, predicated on racist fears of contagion, imaginary threats to security and alleged criminality.[11]

Compounding matters further, between 2010 and 2013 there were a series of high-profile tragedies in which asylum seekers drowned at sea and many more had to be rescued during their journey to Australia. For example, on 15 December 2010, a boat carrying 90 asylum seekers from Iraq and Iran crashed into rocky cliffs at Christmas Island during a monsoonal storm. Fifty people – 35 adults and 15 children – died, the most significant asylum seeker disaster (in terms of lives lost) to occur on Australian territory at that time. Images of distressed bodies and rickety boats floating in choppy waters blanketed TV and print news coverage. Sensational reporting dominated tabloid newspapers and articles were mostly written from the perspectives of local Christmas Islanders, not the surviving asylum seekers. For instance, *The Daily Telegraph* reported anecdotes from locals: 'We witnessed people actually drowning. To see people die and not to be able to do a darn thing is one of the worst things you can possibly do'.[12] The next day, Melbourne tabloid *The Herald Sun* similarly reported on the experiences of helpless witnesses. One local

10 This data is sourced from the Parliament of Australia research paper, 'Asylum Seekers and Refugees: What are the Facts?', *Research Paper Series 2014–15*, last updated 2 March 2015, available at: www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp1415/asylumfacts#_Toc413067443.

11 For further discussion, see Rachel Stevens, 'Political Debates on Asylum Seekers during the Fraser Government, 1977–1982', *Australian Journal of Politics and History* 58, no. 4 (2012): 526–41. doi.org/10.1111/j.1467-8497.2012.01651.x; Katrina Stats, 'Welcome to Australia? A Reappraisal of the Fraser Government's Approach to Refugees, 1975–1983', *Australian Journal of International Affairs* 69, no. 1 (2015): 68–87. doi.org/10.1080/10357718.2014.952707.

12 Alison Rehn, 'Now 50 Feared Dead After Asylum Boat Crashes off Christmas Island', *Daily Telegraph* (Sydney), 15 December 2010.

woman described the scene of the accident: 'It was horrible. They were screaming and yelling for help and falling into the ocean. We just felt so hopeless, there wasn't anything we could do'.[13]

Within a month, there was another tragedy at sea in which 17 asylum seekers drowned off the coast of Java, Indonesia, en route to Australia. In December 2011, an overcrowded vessel sank, resulting in the deaths of at least 160 mostly Afghan and Iranian asylum seekers. Between June and October 2012, there were five separate incidents in which collectively 287 people perished.[14] The Opposition, then led by conservative hardliner Tony Abbott, seized the opportunity to capitalise politically on the asylum seeker tragedies. The conservatives reframed the debate over onshore versus offshore processing, arguing illogically that interdiction and offshore processing saved the lives of asylum seekers. Thus, the Abbott Opposition cloaked their anti-asylum seeker policies in the language of humanitarianism. The hollowness of the conservatives' rhetoric was plain to see; however, by late 2010, the Labor Government had a new leader, Julia Gillard, and was clinging onto power in a hung parliament. Insecure and reactive in leadership, and long holding less sympathetic views about refugees, Gillard sought to quash debate around asylum seekers by reversing Rudd's reforms and reinstating offshore processing in Nauru and Manus Island in late 2012.

Over the last 20 years, politicians of both major parties have used the arrival of asylum seekers to try to gain a political advantage in some way. As a divisive issue, polling data indicates there are sizeable minorities on both sides who are sufficiently galvanised, making a major policy change unlikely in the present environment. The Australian Election Study (AES) has been measuring political attitudes among a nationally representative sample of voters since 1987. Questions about asylum seekers and refugees began in 2001 and have continued in every election year except 2007. The longitudinal nature of this survey, as well as the use of exact question wording, enable comparisons over time, and the data presents a very muddled picture.

13 Staff writers, 'Christmas Island Tragedy: Screams, Yells and then they Drowned', *Herald Sun* (Melbourne), 16 December 2010.

14 These figures are drawn from *SBS News*, 'Timeline: Asylum Seeker Boat Tragedies', available at: www.sbs.com.au/news/timeline-asylum-seeker-boat-tragedies.

In the AES surveys, there are three questions that address political attitudes towards asylum seekers and refugees. One, what is the most important non-economic election issue for you? Two, which is your preferred political party policy on refugees and asylum seekers? Three, should boats carrying asylum seekers be turned back or not turned back? The results from the survey are compiled in Table 1.

Table 1. Compilation of AES survey questions that relate to asylum seekers (in percentages)

Year of survey	2001	2004	2010	2013	2016	2019
Most important non-economic issue						
Refugees and asylum seekers	13	3	6	10	6	3
Preferred party policy						
Coalition	46	36	38	41	34	35
ALP	15	22	21	19	19	25
No preference	27	22	27	27	34	22
Attitudes towards asylum seekers						
Boats should be turned back	52	54	51	49	48	50
Boats should not be turned back	20	28	29	34	33	28
No response/undecided	28	18	20	17	19	22

Source: Data compiled by authors from data in Sarah Cameron and Ian McAllister, *Trends in Australian political opinion: Results from the Australian Election Study, 1987–2019* (Canberra: Australian National University, 2019). Downloaded from australianelectionstudy.org.

From the data in Table 1, it is evident that public attitudes are divided on the mandatory detention of asylum seekers. Since 2001 there has been a consistent majority or near majority of respondents who support the turning back of boats containing asylum seekers, despite it constituting refoulement and thus being illegal, as well as immoral and deeply violent. But there has also remained a steady group of opponents, ranging from one in five to one in three respondents. Furthermore, when asked whether boats should be turned back, between 17 and 28 per cent of respondents did not provide a response or were undecided. The presence of so many undecideds speaks to the intractability of a pernicious and long-lasting debate within Australian politics, which has left many unwilling to engage or care about refugees. On the question of preferred political party policy, no political party has received a majority, although the policies of the Coalition parties (generally viewed as more restrictive than the Labor Party), have been the most popular among respondents. Importantly,

on average, approximately one-third of respondents had no party preference on asylum seeker policy, which reinforces the argument that a substantial minority of voters are disengaged.

Voter apathy on asylum seeker policy is also evident when respondents were asked to select the most important non-economic issue. In the full AES report, results showed that respondents consistently selected health as the most important non-economic issue, closely followed by environmental/global warming. The data in Table 1 reveals voter volatility on the proportion who nominated asylum seekers/refugees as the most important non-economic issue, with response rates ranging from 3 to 13 per cent. Heightened attention to asylum seekers typically coincided with high-profile events, such as the *Tampa* incident in 2001 and the drownings of asylum seekers from December 2010 through to 2013. As of 2019, asylum seeker policy has once again been relegated to the background, with only 3 per cent declaring the issue as their most important. In conclusion, the data from the AES provides compelling evidence that Australian voters are deeply divided on how to respond to the arrival of asylum seekers by boat, and that this issue will not influence voting behaviour for the vast majority of Australians. These findings have been replicated over the past 12 years in the annual Scanlon Foundation Survey on Mapping Social Cohesion. These reports – which can be viewed online – consistently show that, while a small minority believe asylum seekers are poorly treated under current policies, only 2 per cent of respondents identified asylum seekers as the most important issue facing Australia.[15]

The decision of the Labor Government to reinstall offshore mandatory processing was more than a retreat to the policies of the Howard years; it signalled the beginning of an increasingly aggressive and militarised approach to asylum seekers. When Kevin Rudd seized the leadership of the Labor Party, thus beginning his brief second term as prime minister, his approach to asylum seekers had no resemblance to his 2007 commitment to end offshore processing. In July 2013, Rudd announced that any asylum seeker who arrived without a visa – that is, by boat – would not be eligible for asylum in Australia. Instead, intercepted asylum seekers would be taken to Manus Island and have their refugee claims adjudicated by the Papua New Guinean (PNG) Government. Should they be successful,

15 Andrew Markus, *Mapping Social Cohesion: The Scanlon Foundation Surveys, 2019* (Melbourne: Monash University, 2019), 37, available at: scanloninstitute.org.au/research/surveys.

asylum seekers could resettle in PNG but never make a claim for asylum against the Australian Government. In return for their cooperation, the Australian Government offered the PNG Government financial aid. The blanket refusal of the Rudd Government to consider claims for refugee status among asylum seekers marked yet another turning point in the Australian Government's increasingly hostile approach to asylum seekers: from onshore mandatory detention in cities, then in remote desert towns, to the Pacific Solution and, finally, forced resettlement in a poor neighbouring nation.

It is at this time in July 2013 that Behrouz Boochani arrived in Australia, albeit on Christmas Island. Boochani was one of the first to be subject to the Rudd Government's new policy, and, in August 2013, he was relocated to Manus Island processing centre. In effect, Boochani was imprisoned indefinitely, languishing on an impoverished island with no prospect of resettlement in Australia. During his incarceration, the Coalition (conservative) parties came to power in September 2013. For the most part, the incoming government continued the policies of their predecessor, but also added a mix of hysterical rhetoric under their new strategy, Operation Sovereign Borders, along with tightened media access to government information on this policy. Boochani remained incarcerated at Manus Island processing centre until October 2017, at which point the centre officially closed. He, along with the other male asylum seekers imprisoned there, was forcibly moved to 'another prison camp' on the island, living a precarious existence among violence, hunger and protests.[16] At the time of writing, Boochani is living in New Zealand having been granted refugee status, while hundreds of other refugees and asylum seekers remain living precarious and unsupported lives in Port Moresby (PNG), Nauru, and Australia awaiting medical treatment, unable to either leave or re-establish themselves in the manner that they would choose.

Amidst government secrecy on the execution of a brutal government policy, incarcerated asylum seekers filled the vacuum, providing firsthand accounts of life on Manus Island and Nauru. Boochani is perhaps the most well-known asylum seeker-cum-activist in Australia, and has published

16 'A Message from Behrouz Boochani – Kurdish Refugee and Independent Journalist', Asylum Seeker Resource Centre, 28 November 2017, available at: web.archive.org/web/20190203095505/www.asrc.org.au/2017/11/28/message-behrouz-boochani-kurdish-refugee-independent-journalist/.

widely in a variety of media, including his award-winning memoir, *No Friend but the Mountains*.[17] During the October 2018 Academics for Refugees National Day of Action, Boochani urged academics:

> to do research that unpacks where these [asylum seeker] policies stem from, why they are maintained and how they can be undone. It's the duty of academics to understand and challenge this dark historical period, and teach the new generations to prevent this kind of policy in future.[18]

This book in part is a response to Boochani's call. Academics, activists and refugees have a duty to dissect the history and current state of affairs on refugees and asylum seekers. In the context of tight government control of information and, at present, minimal media coverage, the edited collection makes an intervention into academic and public discourses, opening a new space to think about the histories, presents and possible futures for refugees and asylum seekers. These are important public and political discussions to have and will have relevance well beyond Australia's borders, as Western countries around the world continue to tighten their borders and institute ever more violent controls over people seeking asylum.

Aims

At its heart, *Refugee Journeys: Histories of Resettlement, Representation and Resistance* understands refugee policy and asylum-seeking movements as a process: refugees undertake physical journeys between countries, and then face the journey of settling and integrating – whether permanently or temporarily, with full or partial social support – in a new place. Those journeys are shaped by a multitude of personal, governmental, social and political forces. What then are those forces? This book provides an exploration of some of them. It presents stories of how governments, the public and the media have responded to the arrival of people seeking asylum, and how these responses have impacted refugees and their lives. The chapters within mostly cover the period from 1970 to the present, providing readers with an understanding of the political, social

17 Behrouz Boochani, *No Friend but the Mountains: Writing from Manus Prison*, trans. Omid Tofighian (Sydney: Picador, 2018).

18 Boochani, 'Statement', available at: academicsforrefugees.wordpress.com/nda-public-read-ins/?fbclid=IwAR2ZGL1CJIvvGtYKo5vyG-rfVpcQ9_SR61orz6t19I3UMnL3eA-BruEide0.

and historical contexts that have brought us to the current day. *Refugee Journeys* also considers possible ways to break existing policy deadlocks, encouraging readers to imagine a future where we carry vastly different ideas about refugees, government policies and national identities.

With contributions from academics and activists from a diverse range of backgrounds, *Refugee Journeys* is unique as it provides space for multiple perspectives. Where public discourse often prioritises flattened and simplistic stories and solutions – such as the idea that all boats must be stopped, or that there is a queue that some jump, or that newly resettled refugees do not deserve financial and material support – this book encourages readers to think outside the box. By offering an edited collection, rather than a single-authored monograph – many of which exist and make important contributions to public discussion – we hope to present readers with a much-needed cacophony of different approaches, with multiple speakers and writers jutting up against each other, creating the space for new ideas to thrive. Against singular narratives, there is an urgent need in the Australian landscape for diverse interpretations. Other recent texts have focused on particular questions, such as detention systems, or temporariness, or refugee testimonies. *Refugee Journeys* is able to span a broader range, thereby offering readers the opportunity to understand the fuller social, political, cultural and historical contexts in which refugees and asylum seekers navigate their journeys and the repressive governments with which they interact.

Themes of the book

One of the central methods, or approaches, of this book involves the exploration of some of the different ways that histories and stories are, and have been, used by refugees and asylum seekers, researchers, writers, social workers, community workers and policymakers. Some chapters explore personal histories, whether narrated by refugees and asylum seekers themselves, or refracted through the words of social workers, anthropologists, community workers or historians. Other chapters explore national or community histories, thinking about how they have been understood by newspapers, politicians and historians. Many chapters demonstrate the interplay between individual and communal, private and public, stories. This volume thus responds to anthropologist Miriam Ticktin's recent call for scholars, and the public, to pay attention

to the histories that people carry, and to do so in a way that evades the stereotypical discourses of vulnerability and loss that are often understood to be carried by refugees and asylum seekers. Rather than producing a reductive humanitarianism that sees rich nation-states in the role of 'saviour' to vulnerable and crisis-laden refugees and asylum seekers, the histories and stories that people write need to contain greater subtlety and complexity. As she writes:

> humanitarianism provides little room to feel and recognize the value of particular lives (versus life in general), or to mourn particular deaths (versus suffering in general); and little impetus to animate political change.[19]

Instead, this humanitarianism buttresses a binary of racialised rescuer and rescued, of asylum seekers as incapable of determining their own futures, and of the white nation-state as the subject who must always be in control. As Melanie Baak highlights in her chapter in this book, it is necessary to write histories, and create understandings, that avoid the 'deficit model', representing the place of refugees and asylum seekers in the world not as loss or crisis or impossibility.

Similarly, anthropologist Liisa Malkki writes of the ways in which refugees have been too often understood by Western authorities and actors as 'speechless emissaries', incapable of speaking for themselves, or determining their own futures. 'Such forms of representation', she argues, 'deny the very particulars that make of people something other than anonymous bodies, merely human beings'.[20] In this book, successive chapters write against such forms of representation, presenting explorations of, and critical engagements with, the histories that refugees carry in all their multiplicity, individuality and communality. This collection of essays is concerned with thinking about how people label and understand themselves, how they are understood by others and the impacts these labels have.

This deliberately interdisciplinary book seeks to write new histories of Australia and the world's relationships with refugees and asylum seekers, and of refugees and asylum seekers' relationships with Australia and the world. We seek to write new histories of ideas and practices of generosity

19 Miriam Ticktin, 'Thinking Beyond Humanitarian Borders', *Social Research: An International Quarterly* 83, no. 2 (2016): 256.

20 Liisa H Malkki, 'Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization', *Cultural Anthropology* 11, no. 3 (1996): 388. doi.org/10.1525/can.1996.11.3.02a00050.

and humanitarianism, interrogating the often-triumphalist popular histories of Australia's past that currently exist.[21] There is not one past but many being narrated in this book: these are temporally and spatially different pasts, but they also differ depending on who is the author and their positionality and relationality to the pasts that are being described, analysed and critiqued. This volume, then, seeks to make accessible and approachable the complexity of what is at stake in the possibilities of researching, writing and narrating these histories.

State of current research

As Klaus Neumann, Sandra M. Gifford, Annika Lems and Stefanie Scherr made clear in a 2014 article that explored trends and approaches in research on refugees in Australia from 1952 to 2013, there has been an 'exponential' increase in the publication of research on this topic since the end of the 1970s.[22] This trend has continued, as demonstrated in Ruth Balint and Zora Simic's 2018 State of the Field review essay. Their review explores the large body of literature on histories of migrants and refugees in Australia and notes that, 'for those of us who work in the field, there has always been enough scholarship to sustain and inspire us', with many 'exciting' publications coming from researchers at all levels of academia and from across the country.[23] As Neumann et al. note, the sheer number of research institutes, grants, and workshops and conferences around the country in the 2010s further testifies to this large and growing body of research and writing.

There are, however, numerous gaps in the scholarship, which they identify: intersections between histories of the border and settlement processes, and between categories of refugee, asylum seeker and permanent resident, as well as histories of humanitarianism.[24] They conclude their survey by noting:

21 Klaus Neumann, Chapter 10, this volume.

22 Klaus Neumann et al. 'Refugee Settlement in Australia: Policy, Scholarship and the Production of Knowledge, 1952–2013', *Journal of Intercultural Studies* 35, no. 1 (2014): 2. doi.org/10.1080/07256868.2013.864629.

23 Ruth Balint and Zora Simic, 'Histories of Migrants and Refugees in Australia', *Australian Historical Studies* 49, no. 3 (2018): 378. doi.org/10.1080/1031461X.2018.1479438.

24 Neumann, Gifford, Lems and Scherr, 'Refugee Settlement in Australia', 12–13.

> Australian scholarship on refugee settlement needs to reinvent itself by taking stock of its past, and firmly situating new inquiry within the broader contexts of migration, humanitarianism and globalisation, to ensure that it does not uncritically endorse current thinking and practice but contributes to charting new approaches to responding to and understanding refugees in Australia and elsewhere.[25]

The large increase in scholarship examining refugees and asylum seekers in and around Australia and the world makes a full exploration of this literature impossible. However, there are four key areas of recent scholarship with which we are engaging here. Firstly, we are engaging with texts that think about the broad historical contexts in which current refugees and asylum seekers today live. Following on from the path set by texts such as Klaus Neumann's *Across the Seas: Australia's Response to Refugees: A History*, Madeleine Gleeson's *Offshore: Behind the Wire on Manus and Nauru*, Claire Higgins's *Asylum by Boat*, William Maley's *What is a Refugee?* and Jane McAdam and Fiona Chong's *Refugee Rights and Policy Wrongs*, various chapters in this volume explore the policy settings, influence of politicians and roles of officials in controlling refugee and asylum seeker journeys to Australia and through the labyrinthine processes that determine how they will live.[26] In both their individual work and their collective work with others on the Deathscapes project, Suvendrini Perera and Joseph Pugliese outline the racial and colonial histories and presents in which refugee and asylum seeker controls are instituted.[27] As these books and projects collectively make clear, there are a wide variety of bureaucratic, social, cultural and political histories that combine to determine how

25 Ibid., 13.

26 Klaus Neumann, *Across the Seas: Australia's Response to Refugees: A History* (Melbourne: Black Inc., 2015); Madeleine Gleeson, *Offshore: Behind the Wire on Manus and Nauru* (Sydney: NewSouth Publishing, 2016); Claire Higgins, *Asylum by Boat: Origins of Australia's Refugee Policy* (Sydney: NewSouth Publishing, 2017); William Maley, *What is a Refugee?* (Brunswick: Scribe Publications, 2016); Jane McAdam and Fiona Chong, *Refugee Rights and Policy Wrongs* (Sydney: NewSouth Publishing, 2019).

27 Suvendrini Perera, *Australia and the Insular Imagination: Beaches, Borders, Boats, and Bodies* (New York: Palgrave Macmillan, 2009), doi.org/10.1057/9780230103122; Suvendrini Perera, 'White Shores of Longing: "Impossible Subjects" and the Frontiers of Citizenship', *Continuum* 23, no. 5 (2009): 647–62. doi.org/10.1080/10304310903154693; Suvendrini Perera and Joseph Pugliese, 'White Law of the Biopolitical', *Journal of the European Association of Studies on Australia* 3, no. 1 (2012): 87–100; Joseph Pugliese, 'Migrant Heritage in an Indigenous Context: For a Decolonising Migrant Historiography', *Journal of Intercultural Studies* 23, no. 1 (April 1, 2002): 5–18. doi.org/10.1080/07256860220122368; Joseph Pugliese, 'The Incommensurability of Law to Justice: Refugees and Australia's Temporary Protection Visa', *Law and Literature* 16, no. 3 (Fall 2004): 285–311. doi.org/10.1525/lal.2004.16.3.285; Suvendrini Perera and Joseph Pugliese, 'Deathscapes: Mapping Race and Violence in Settler States', 2016–2020, available at: www.deathscapes.org/.

refugees will be thought of, and affected by, national and international systems of regulation. They also make clear that the refugees themselves play an important role in determining their own histories, pushing back and resisting the controls placed on them where necessary, narrating and enforcing their own self-determination where desired.

Secondly, there is a growing and important body of research that addresses Australia's broader refugee and migrant community histories. We have recently seen the production of Jayne Persian's *Beautiful Balts: From Displaced Persons to New Australians*, Albrecht Dümling and Diana K. Weekes's *The Vanished Musicians: Jewish Refugees in Australia*, Alexandra Dellios's *Histories of Controversy: The Bonegilla Migrant Centre*, and Joy Damousi's *Memory and Migration in the Shadow of War: Australia's Greek Immigrants after World War II and the Greek Civil War*.[28] These accounts, like many of the chapters in the current volume, explore smaller communities, examining their experiences of migration and settlement, the histories that brought them to Australia and the larger Australian histories into which they were thrust. This literature points us to the importance of thinking beyond the level of the nation-state, reminding us of the everyday ways in which lives are lived and journeys are negotiated. Individual people and their histories – as Miriam Ticktin and Liisa Malkki argue – need to be narrated in order for their full humanity to be recognised.

As such, biographical accounts and memoirs of refugee journeys and resettlement in Australia are a third area of scholarship with which this volume engages. Partly as a result of the Australian practice of mandatorily detaining asylum seekers who either attempted to, or successfully came to, Australia, from the late 1980s – a practice that, coupled with other punitive regimes, continues to exist – as well as the practice of autobiographical and memoir writing in Australia and internationally, among other factors, there has been a growth in publications written by people who identify as being, or having been, refugees. These publications tell individual stories, but they also tell broader, larger stories of refugee journeys. Books such as a Teresa Ke's *Cries of Hunger*, Carina Hoang's *Boat People: Personal*

28 Jayne Persian, *Beautiful Balts: From Displaced Persons to New Australians* (Sydney: NewSouth Publishing, 2017); Albrecht Dümling, *The Vanished Musicians: Jewish Refugees in Australia*, trans. by Diana K. Weekes (Bern: Peter Lang AG, 2016); Alexandra Dellios, *Histories of Controversy: The Bonegilla Migrant Centre* (Melbourne: Melbourne University Press, 2017); Joy Damousi, *Memory and Migration in the Shadow of War: Australia's Greek Immigrants after World War II and the Greek Civil War* (Cambridge: Cambridge University Press, 2015), doi.org/10.1017/cbo9781316336847.

Stories from the Vietnamese Exodus, 1975–1996 and the reissue of Colin McPhedran's *White Butterflies*, among others, have opened these stories and these modes of narration up to new audiences.[29]

Additionally, and perhaps most importantly, there is an increasing emphasis in the Australian scholarly and public sphere on highlighting refugees writing and speaking in new formations. There are a range of projects, often co-produced by refugees and asylum seekers and Australian citizens, that have influenced this volume. Indeed, as the chapter here by André Dao and Jamila Jafari explores, projects like Behind the Wire – through which people who have been imprisoned by Australia as part of its mandatory detention regime share their experiences – provide an important new method of narrating histories and exploring refugee journeys. Similarly, Behrouz Boochani's *No Friend but the Mountains*, the Facebook page Free the Children NAURU and *The Messenger*, a podcast by Abdul Aziz Muhamat and Michael Green, provide spaces for speaking out in the midst of these journeys through Australian carceral and bureaucratic regimes.[30] All of these books and projects provide important background to the present volume, and we seek to build on the ideas and knowledge that these others have produced.

Outline of the book

This collection is divided into three sections, with each section containing a series of chapters that provide snapshot explorations of the histories of different aspects of the journeys that refugees take, and the settlement processes and modes of control – juridical, narratorial, cultural and political – that governments, states, bureaucracies and others have exerted over refugee and asylum seeker peoples' journeys. From 'Labelling refugees' to 'Flashpoints in Australian refugee history' to 'Understanding refugee histories and futures', each section of this book contributes to exploring the argument that 'refugees' are made in part through strict controls on the movement of populations and the delineation of borders and construction of identities, but also through self-description and

29 Teresa Ke, *Cries of Hunger* (Fremantle: Vivid Publishing, 2017); Carina Hoang, *Boat People: Personal Stories from the Vietnamese Exodus, 1975–1996* (Fremantle: Beaufort Books, 2013); Colin McPhedran, *White Butterflies*, updated edition (Sydney: NewSouth Books, 2017).

30 Boochani, *No Friend but the Mountains*; Free the Children NAURU available at: www.facebook.com/childrennauru/; Behind the Wire and the Wheeler Centre, *The Messenger*, available at: www.wheelercentre.com/broadcasts/podcasts/the-messenger?show_all=true.

self-determination. This book offers reflections on the very nature of this storytelling, arguing that the histories that are told, and those that are forgotten, fundamentally shape how people and journeys will be understood and made known by those witnessing them.

Beginning with the notion of 'labelling', this volume will introduce readers to histories of the ways that governments, settlement procedures and bureaucracies have worked to name, control and, at times, demonise displaced people. In the first chapter, an overview of the state of Australian and international legal and governmental approaches from World War II to the present is provided by legal scholar Eve Lester. Lester demonstrates that there have been various shifts and turns in how the national and international community labels and understands refugees and asylum seekers. In the next chapter, Melanie Baak, a refugee education researcher, comments: 'the question becomes, when, if ever do people who have been refugees, stop being refugees (with all of the frames of recognition this entails)?' That is, what is the temporal, emotive and descriptive quality of these labels? Baak explores how Dinka women from South Sudan, among others, narrate themselves and their histories in the face of such labelling. In the following chapter, historian Jordana Silverstein offers an exploration of labelling from another side, exploring the ways that those social workers and government employees who controlled the lives of refugee children in the late 1970s and early 1980s labelled, described and thus imagined unaccompanied Vietnamese and Timorese refugee children. While Baak and Silverstein explore the international coming to the national – refugees coming to Australia – historian Ann-Kathrin Bartels examines the resonances in Germany of the Australian context, providing further evidence of the idea that what happens in Australia is not merely contained within our national borders. Bartels explores newspaper instantiations of public discourses of asylum seekers as 'bogus' or 'economic refugees' that denigrate them for being criminals and focus on their 'cultural differences'. These histories from outside Australia thus shed light on the ways that similar projects of the construction of national identity, and the labelling of refugees as Other, are promulgated within Australia.

In the second section of this volume – 'Flashpoints in Australian refugee history' – three snapshot histories are provided that offer readers an excursion through the different ways that refugees and asylum seekers have been understood within Australian history, thus providing a greater sense of the national context. In her chapter, historian Rachel Stevens

shows the ways in which Australians responded to the 10 million refugees who emerged from the Bangladesh Liberation War against West Pakistan in 1971. This chapter thus provides an opportunity to reflect on the gap between government refugee policy and community attitudes in 1971, with many in the community supporting refugees in ways that the government did not. This issue of public and governmental approaches is further developed by social scientist Kathleen Blair in her exploration of the media messaging around the 2013 federal election campaign in Australia. Blair's chapter responds to Bartels', providing the Australian experience of such narratives of demonisation. Finally, in writers André Dao and Jamila Jafari's chapter, Dao interviews Jafari as they work together to understand what it was like for her to share her story through the Behind the Wire project. Through this interview we are able to get a more complex understanding of the ways that stories can be told and people can make a claim to narrating their own pasts. This chapter speaks to many of the other chapters in the book, pointing out the necessity of people controlling their own stories and modes of narration, determining how they themselves will be represented.

The third and final section of this volume is called 'Understanding refugee histories and futures', and it moves readers towards grasping the ways that histories of this past can be, and are being, written, prompting a consideration of how refugee pasts shape future possibilities from the perspective of both refugees and policymakers. What are the stories being told? What narratives do they put forward? It is these questions that animate this section. Sociologist Laurel Mackenzie's chapter opens the section, as she documents the various impacts – both practical and emotional – of Australian Government policy at the grassroots level, focusing on the transition experiences of a group of Afghan Hazaras in Australia. Through her fieldwork, Mackenzie works to understand how these Hazara refugees understand themselves and their journeys. With this new understanding of the ways that individuals narrate their lives and histories, this section then turns to a chapter by legal scholar Savitri Taylor, who examines the 'incremental steps' taken on the journey to Australia's current asylum seeker policy settings and considers the implications of that history for the next 25 years. Taylor argues for the central role that the White Australia policy has played in shaping all future immigration policies, and explores this through a focus on two key features of contemporary asylum seeker policy – mandatory detention, introduced in 1992, and offshore processing, initially introduced in 2001.

This racial history is, indeed, a thread that runs throughout the chapters in this volume. Finally, this section concludes with an exploration of the histories that have been told by Klaus Neumann, a historian. Neumann argues against certain orthodoxies in Australian refugee and asylum seeker historiography, suggesting that, by examining little-known stories and bringing them into prominence, and by considering new 'genealogies of current policies and practices', we can imagine new ways of understanding the past and present, as well as conceptualising viable possible futures.

Together, this book highlights the role of individual, communal and governmental stories. Woven throughout the volume is a series of new explorations of the different aspects of the journey across land or water or by air, through bureaucracy and imprisonment and settlement processes, and into representation in government, public and media discourse, that refugees and asylum seekers have taken and continue to take. Through these chapters, we gain a sense of the vital role that history-writing, and thinking historically, can play in discussions about the place of refugees and asylum seekers in Australia and internationally. At this moment, when Australia's borders are hardened and support services are being retracted – as in many other places around the world – it becomes ever more crucial to understand these histories anew and reconceptualise how new thinking, storytelling and activism could happen from here.

This text is taken from *Refugee Journeys: Histories of Resettlement, Representation and Resistance*, edited by Jordana Silverstein and Rachel Stevens, published 2021 by ANU Press, The Australian National University, Canberra, Australia.

9

STEP BY STEP

The insidious evolution of Australia's asylum seeker regime since 1992

Savitri Taylor[1]

I have been thinking and writing about Australia's asylum seeker policies for over 25 years. When I started back in 1991, the asylum seeker policies now espoused by the major parties would have been inconceivable to most politicians on all sides – but here we are. Explaining how we got here requires me to start further back in time than 1991. It requires me to start, in fact, with the drafting of the founding document of the Australian political and legal system – the Constitution. From there, I consider two key features of contemporary asylum seeker policy – mandatory detention, which was introduced in 1992, and offshore processing, which was initially introduced in 2001. I end the chapter by reflecting on the lessons of our past for our future.

1 Associate Professor, Law School, La Trobe University. Part of this chapter is based on Savitri Taylor, 'How Did We Get Here? A Reflection on 25 Years of Australian Asylum Seeker Policy', *Law and Justice: La Trobe Law School Blog*, 25 February 2016, available at: law.blogs.latrobe.edu.au/2016/02/25/how-did-we-get-here-a-reflection-on-25-years-of-australian-asylum-seeker-policy/. Other parts of the chapter are based on earlier articles of mine as cited.

The original sin

The Australian obsession with immigration and border control pre-dates Federation, with a major motivator for Federation being the desire to achieve uniformity in such control across the Australian continent.[2] Constitutional enshrinement of parliament's unqualified power to legislate with respect to 'naturalization and aliens'[3] and 'immigration and emigration'[4] was taken as a matter of course through all the constitutional conventions from 1891.[5] By contrast, proposals made at those conventions to include due process and equal protection clauses in the Constitution were fervently and successfully opposed.[6] As Eve Lester explains in her excellent book, *Making Migration Law*, rejection of such clauses was:

> intended to ensure that the Commonwealth could discriminate on account of race and colour. This purpose is articulated by a number of delegates during the constitutional conventions, including Sir John Forrest and (most doggedly) Isaac Isaacs. Other delegates made clear their concerns that above all the provision should not prevent discrimination against non-Europeans.[7]

This was the original sin.

Mandatory detention

Julie Macken identifies the introduction of mandatory detention by the Labor Government as 'the stone that began the avalanche'.[8] Looking back over 25 plus years, I agree. What particularly struck me as I was reading Macken's piece was a quote from Neal Blewett's memoir, *A Cabinet Diary*. Neal Blewett, who was then minister for social security, had a meeting on

2 Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (Sydney: Federation Press, 2011), 24–26.
3 *Australian Constitution*, s 51(xix).
4 Ibid., s 51(xxvii).
5 Eve Lester, *Making Migration Law: The Foreigner, Sovereignty, and the Case of Australia* (Cambridge: Cambridge University Press, 2018), 115.
6 Ibid., 116.
7 Ibid.
8 Julie Macken, 'The Long Journey to Nauru', *New Matilda*, 12 January 2016, available at: newmatilda.com/2016/01/12/the-long-journey-to-nauru/.

30 March 1992 with Peter Staples, then the minister for aged, family and health services, and Gerry Hand, then the minister for immigration. In his diary entry about the meeting, Blewett said:

> A 9 pm meeting with Hand and Staples on the asylum-seekers' benefit. Hand wanted nothing to do with any ameliorative stance. He was for interning all who sought refugee status in camps, mostly at Port Hedland, where they would be fed and looked after. This is a nonsensical proposal – politically unsellable to the liberal constituency, impossible in practice (if any significant number of refugees took up the option his department would collapse) and financially irresponsible – if it worked it would cost more than the other options. It was obviously [Hand's] intention that if Staples provided an asylum-seekers' benefit, or I the charity option or a modified asylum-seekers' benefit, we would have to take responsibility for the measure. His left-wing mate Staples accused Hand of 'abdicating responsibility for his own shit'. So Staples and I decided to call his bluff and accept his lead as Immigration Minister. It will be interesting to see the cabinet response to his proposals.[9]

What Macken does not mention in her piece is that mandatory detention as we know it today was not introduced all at once; it was introduced bit by bit. In late 1989, Australia started experiencing its second wave of people arriving by boat (mostly Cambodian nationals). There were changes made to the *Migration Act 1958* (Cth) in 1989 that allowed immigration officials to detain 'illegal entrants' (as they were called at the time) until their immigration status was resolved and, as a matter of administrative policy, that is what happened. The next step was the one foreshadowed by Gerry Hand in his meeting with Blewett and Staples. In May 1992, the Labor Government, with the support of the Coalition, procured the passage of the *Migration Amendment Act 1992* (Cth). This legislation labelled the unauthorised boat arrivals as 'designated persons' and provided for their mandatory detention. In his second reading speech, Gerry Hand said that the legislation was 'only intended to be an interim measure' and was designed 'to address only the pressing requirements of the current situation'.[10] That original legislation also imposed a 273-day limit on the duration of detention, though there were circumstances in which the clock would stop ticking.

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9 Neal Blewett, *A Cabinet Diary: A Personal Record of the First Keating Government* (Adelaide: Wakefield Press, 1999), 83.

10 Commonwealth, *Parliamentary Debates*, House of Representatives, 5 May 1992, 2370.

The most fateful step came with the passage of the *Migration Reform Act 1992* (Cth) in late 1992. The Act was passed with Coalition support and came into effect on 1 September 1994. It divided non-citizens into two categories: those with a visa (who were called 'lawful') and those without a visa (who were called 'unlawful'). It then provided that 'unlawful non-citizens' had to be detained until granted a visa or removed from the country. The 273-day time limit that applied to the previous version of mandatory detention was dropped. The legislation also introduced the bridging visa regime. Unlawful non-citizens who met certain criteria could be granted a bridging visa pending the granting of a substantive visa or departure from the country. The grant of a bridging visa made them lawful non-citizens and enabled their release from detention. The bridging visa criteria were such that if a person had become unlawful by overstaying they could get one with ease but if they had entered the country without a visa it was almost impossible to get one.

In 2004, the question of whether a person could be held in immigration detention indefinitely ended up before the High Court of Australia.[11] Mr Al-Kateb was a stateless Palestinian who was born and spent most of his life in Kuwait. He arrived in Australia without authorisation and thereby became an unlawful non-citizen subject to detention. After failing in his application for a protection visa, Mr Al-Kateb made a written request to be removed from Australia. However, the Department of Immigration[12] was unable to find any country prepared to allow him entry. The High Court majority (Justices Callinan, Hayne, Heydon and McHugh) held that the relevant provisions of the *Migration Act*, by providing that detention of an unlawful non-citizen must continue 'until' the occurrence of one of, at that time, three specified events (that is, grant of a visa, removal or deportation),[13] had the effect of unambiguously authorising the indefinite detention of unlawful non-citizens in the unfortunate position of neither qualifying for the grant of a visa nor, in practice, being removable/deportable from Australia in the foreseeable future. Having decided the question of statutory interpretation, the majority judges had to consider whether the statutory provisions were, as argued by the appellant, constitutionally invalid. All four majority judges held that the provisions

11 *Al-Kateb v Godwin* [2004] HCA 37.

12 The Department of Immigration ceased to exist on 20 December 2017, with its functions being merged into the new Department of Home Affairs. The correct name at the time is used throughout this chapter.

13 A fourth specified event was added when the regional processing arrangements were introduced.

were constitutionally valid, being an exercise of the power conferred on the Australian Parliament by section 51(xix) of the Constitution to legislate with respect to aliens, which did not infringe the separation of powers between the parliament, the executive and the courts provided for by Chapter III of the Constitution.

Given that the minority judges (Chief Justice Gleeson and Justices Gummow and Kirby) were able to interpret the *Migration Act* provisions in favour of liberty for Mr Al-Kateb, the majority judges were, in fact, making an interpretive choice that hinged on their internalisation of the (white) nationalist ideology written into the Constitution itself. As Greta Bird points out, the language they used was telling.[14] For example, Justice Callinan (para. 301) referred to the undesirability of giving Mr Al-Kateb 'special advantages because he has managed illegally to penetrate the borders of this country over those who have sought to, but have been stopped before they could do so'. The majority judges were perfectly aware that the conclusion at which they had arrived was incompatible with human rights principles, but they insisted that any remedy lay elsewhere.

The mandatory detention regime was vigorously opposed from the outset by many civil society organisations. Increasing media scrutiny from 2000 also had an effect on public opinion.[15] In 2005, the then Coalition government introduced residence determinations (colloquially known as 'community detention') to appease members of its own backbench who had started rebelling against the harshness of mandatory detention.[16] The relevant *Migration Act* provisions – which are still in effect – give the minister for immigration a personal and non-compellable power exercisable 'in the public interest' to make a determination that a specified person is to reside in a specified place and comply with certain conditions instead of being detained in the manner usually required by the *Migration Act*.[17] The purpose of the power is to enable the de facto release[18] into

14 Greta Bird, 'An Unlawful Non-Citizen Is Being Detained or (White) Citizens Are Saving the Nation from (Non White) Non-Citizens', *University of Western Sydney Law Review* 9 (2005): 87–110.

15 Savitri Taylor, 'Achieving Reform of Australian Asylum Seeker Law and Policy', *Just Policy* 24 (2001): 41–54.

16 Savitri Taylor, 'Immigration Detention Reforms: A Small Gain in Human Rights', *Agenda: A Journal of Policy Analysis and Reform* 13 (2006): 49–62, doi.org/10.22459/AG.13.01.2006.04.

17 *Migration Act 1958* (Cth) pt 2 div 7 subdiv B ss 197AA–197AG.

18 As a matter of legal technicality, individuals subject to a residence determination are regarded as being nevertheless in 'immigration detention'.

the community of unaccompanied minors, families with children and particularly vulnerable adults. As at 26 April 2018, there were 457 people (including 180 children) in community detention in Australia.[19]

Another reform introduced in 2005 was the conferral on the minister for immigration of a personal and non-compellable power exercisable 'in the public interest' to grant any kind of visa the minister thinks appropriate to a person in immigration detention, even if the person does not fulfil the criteria for grant of a visa of that kind.[20] In November 2011, in the face of large numbers of so-called unauthorised maritime arrivals, the Labor Government started using this power to grant Bridging Visa Es to most of them[21] in order to relieve pressure on detention facilities. The Coalition Government continued the practice when it took office in September 2013. As at 26 April 2018, there were 18,027 unauthorised maritime arrivals (including 3,038 children) living in the Australian community on Bridging Visa Es.[22]

Despite the positive reforms made over time to law and policy, as at 26 April 2018, according to the Department of Home Affairs' statistics, there were 1,369 people (including seven children) in Australia's immigration detention facilities. They had been detained an average of 434 days with 264 people having been in detention for over 730 days.[23] As at 26 April 2018, the longest serving detainee had endured 3,970 days (i.e. over 10 years) in detention.[24] The fundamental problem remains the continued existence of the legal machinery of mandatory detention, with the non-compellable exercise of ministerial discretion being the only road out for many. Politicians, and the courts, have made it clear that this is a problem and a solution that remain within the purview of Australia's elected representatives.

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19 Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (Canberra: Australian Government Department of Home Affairs, 26 April 2018), available at: www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-26-april-2018.pdf.

20 *Migration Act 1958* (Cth) s 195A.

21 Chris Bowen, 'Bridging Visas to be Issued for Boat Arrivals', media release, 25 November 2011, available at: pandora.nla.gov.au/pan/67564/20120320-0000/www.minister.immi.gov.au/media/cb/2011/cb180599.htm.

22 Department of Home Affairs, *Immigration Detention and Community Statistics Summary.*

23 Ibid.

24 Evidence to Senate Legal and Constitutional Affairs Legislation Committee (SLCALC), *Committee Hansard*, 21 May 2018 (evidence of Mr Outram, Australian Border Force Commissioner).

Offshore processing

From the legal device of 'excised offshore places' to the establishment of detention centres in other countries with which Australia has had colonial relationships, the history of offshore processing is vital to understand if we are to comprehend the fullness of successive Australian governments' approaches to managing the arrival of refugees.

Excision

In September 2001, in the wake of the *Tampa* incident[25] and in the shadow of the terrorist attacks in the United States, the Coalition Government with the support of Labor procured amendments to the *Migration Act* that defined Christmas Island, Ashmore and Cartier Islands and Cocos (Keeling) Islands to be 'excised offshore places' and allowed for the making of regulations designating other parts of Australia to be 'excised offshore places'. The 2001 amendments also specified that an unauthorised arrival who became an unlawful non-citizen by entering Australia at an 'excised offshore place' was an 'offshore entry person'. The amendments then went on to provide for two things. First, a purported visa application made by an offshore entry person who was an unlawful non-citizen in Australia was invalid unless the minister for immigration exercised a personal and non-compellable power to allow such an application to be made.[26] Second, an offshore entry person could be kept at an excised offshore place or taken to any 'place outside Australia', including a 'declared country'.[27]

In July 2005, regulations were adopted that effectively designated all parts of Australian territory with the exception of the mainland and Tasmania to be 'excised offshore places'.[28] In 2006, the Coalition Government tried to go a step further by extending the statutory bar on protection visa applications to all unauthorised maritime arrivals regardless of where they

25 In late August 2001, 433 asylum seekers were rescued from a sinking boat by the Norwegian freighter MV *Tampa*. The *Tampa* headed for Christmas Island, but was informed by Australian authorities that the rescued people would not be allowed to disembark there. The Pacific Solution was an outcome of the government's desperate attempts to resolve the ensuing standoff.

26 *Migration Act 1958* (Cth) s 46A.

27 These amendments were made by the *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth) and the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth).

28 *Migration Regulations 1994* (Cth) reg 5.15C inserted by *Migration Amendment Regulations 2005 (No. 6)* (Cth).

first entered Australia. However, Australian civil society organisations mobilised successfully against the Bill intended to accomplish this purpose.[29] The Senate Legal and Constitutional Affairs Legislation Committee (SLCALC) inquiry into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 received 137 submissions but only the Department of Immigration's submission supported the Bill.[30] The committee's majority report, written by government parliamentarians, recommended that the Bill should not proceed, or in the event that it did proceed, should be very significantly amended to respond to concerns raised during the inquiry and should include an 18-month sunset clause.[31] The minority and dissenting reports written by the non-government parliamentarians on the committee differed only in their refusal to contemplate an alternative to a complete abandonment of the Bill. The Bill passed the House of Representatives on 10 August 2006, but three government MPs crossed the floor and two abstained from voting.[32] Although the Coalition had a one-seat majority in the Senate, the prime minister was forced to withdraw the Bill when it became clear that at least one Liberal senator was willing to cross the floor to defeat it.[33]

The 'Pacific Solution'

By authorising the taking of 'offshore entry persons' to 'declared countries', the 2001 amendments to the *Migration Act* enabled the lawful implementation of the Pacific Strategy (colloquially known as the 'Pacific Solution') – or so it was thought at the time.[34] In the same year, Nauru and Papua New Guinea (PNG) were designated as declared countries after their governments had been persuaded to enter into Memoranda of Understanding (MoUs) allowing offshore entry persons to be taken to Australian-controlled facilities in their territory to have any protection

29 Savitri Taylor, 'Australia's Pacific Solution Mark II: The Lessons to be Learned', *UTS Law Review* 9 (2007): 106–24.

30 The Bill was introduced into the House of Representatives on 11 May 2006. On the same day, the Senate referred the Bill to the SLCALC for inquiry and report by 13 June 2006. The deadline for submissions was 22 May 2006. The submissions received by the inquiry are available at: www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2004-07/migration_unauthorised_arrivals/submissions/sublist.

31 SLCALC, *Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* (report, 2006), paras 3.208–3.217.

32 Ross Peake, 'Asylum Bill in Trouble as Senators Waver', *Canberra Times*, 12 August 2006, 3.

33 Ibid.

34 As explained in the next section, the lawfulness of the first iteration of the Pacific Solution was later cast into doubt by the High Court's decision in *Plaintiff M70/2011 v Minister for Immigration and Citizenship*.

claims considered by Australian Department of Immigration officers. It was Coalition Government policy that those found to be refugees would only be resettled in Australia as a last resort if no other country was willing to take them.[35]

The first iteration of the Pacific Solution remained in place from 2001 to 2008. During this period, 1,637 people were taken to Nauru or PNG.[36] One of them died and another 483 returned voluntarily to their country of origin.[37] The remaining 1,153 people were resettled in Australia (705), New Zealand (401), Sweden (21), Canada (16), Denmark (6) and Norway (4).[38]

The false spring

In February 2008 the newly elected Labor Government closed down the processing facilities in Nauru and PNG. In retrospect it seems to have done so only because the number of unauthorised boat arrivals had dwindled substantially since 2001,[39] leading Labor to believe that they were no longer a political problem. In 2009, unauthorised boat arrivals increased dramatically.[40] Most of those arriving on the boats fell into the definition of 'offshore entry persons' and therefore needed ministerial permission to make a visa application. The government took the boat arrivals to Christmas Island to have their protection claims determined there by the so-called Refugee Status Assessment/Independent Merits Review (RSA/IMR) process, which was a separate and inferior process to the protection visa application process. Only those found to be refugees were given ministerial permission to apply for a protection visa. In *Plaintiff M61/2010E & Others v the Commonwealth of Australia and Others*,[41] however, the High Court held that the RSA/IMR process was not lawful.

35 Savitri Taylor, 'The Pacific Solution or a Pacific Nightmare: The Difference between Burden Shifting and Responsibility Sharing', *Asian-Pacific Law and Policy Journal* 6 (2005): 1–43.

36 Janet Phillips, 'The "Pacific Solution" Revisited: A Statistical Guide to the Asylum Seeker Caseloads on Nauru and Manus Island' (Background Note, Parliamentary Library, Parliament of Australia, 4 September 2012), available at: www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/PacificSolution.

37 Ibid.

38 Ibid.

39 Janet Phillips, 'Boat Arrivals and Boat "Turnbacks" in Australia since 1976: A Quick Guide to the Statistics' (Research Papers 2016–17, Parliamentary Library, Parliament of Australia, updated 17 January 2017), available at: www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/BoatTurnbacks.

40 Ibid.

41 [2010] HCA 41.

On 25 July 2011, Australia and Malaysia entered into a legally non-binding Arrangement on Transfer and Resettlement. The arrangement provided for the transfer to Malaysia of up to 800 persons arriving irregularly in Australia by boat after the date of signing. It also stated that, in exchange for Malaysia's assistance, Australia would resettle, over a period of four years, 4,000 UNHCR recognised refugees living in Malaysia at the time of signing. Minister for Immigration Chris Bowen then purported to make Malaysia a 'declared country' using the legal machinery created to implement the Pacific Solution.

Under *Migration Act* section 198A, 'offshore entry persons' could be taken to any country that the minister for immigration had declared, in writing, to meet three criteria: that it provided asylum seekers with access 'to effective procedures for assessing their need for protection' and protected them pending determination of their refugee status, that it provided protection to refugees pending their voluntary repatriation or resettlement, and that it met 'relevant human rights standards in providing that protection'. The orthodox interpretation of the provision at the time was that the minister's declaration did not have to be true as long as the minister believed it to be true. However, acting on behalf of a man who was to be transferred to Malaysia pursuant to the arrangement with that country, a team of pro bono lawyers coordinated by the Refugee and Immigration Legal Centre swung into action. The team, which had also been responsible for the successful *M61* litigation, challenged the orthodox interpretation of section 198A in the High Court and won.[42]

In *Plaintiff M70/2011 v Minister for Immigration and Citizenship*,[43] a High Court majority (Justice Heydon dissenting) held that section 198A required that a declared country, at a minimum, be bound under international law or their own national laws to provide the protections it specified to asylum seekers and refugees. Since Malaysia did not meet the minimum requirements of section 198A, the High Court's decision invalidated the declaration that the minister had purported to make in respect of it. The reasoning of the majority in *M70* cast retrospective doubt on the lawfulness of the Pacific Solution and prospective doubt on the government's ability to take asylum seekers to any country in which they would receive less protection than they would in Australia.

42 Caroline Counsel, 'M70 – The End of Offshore Processing?', *LIV President's Blog*, 2 September 2011, available at: www.liv.asn.au/LIVPresBlog/September-2011/M70-the-end-of-off-shore-processing.
43 [2011] HCA 32.

The decisions in *M61* and *M70* were read by some as a shift by a now differently composed High Court bench away from *Al-Kateb* and towards a more rights-oriented jurisprudence. And to some extent they were correct. However, because the shift was accomplished through the vehicle of statutory interpretation (i.e. purporting to give effect to the presumed intention of parliament), parliament was handed a trump card. Parliament could now continue to do the work of shaping legislation to circumvent the courts.

Back to the future

In March 2012, in the wake of its High Court losses in *M61* and *M70*, the Labor Government announced that it would no longer have a parallel processing system for unauthorised boat arrivals. Instead, it would lift the statutory bar on visa applications as a matter of course, enabling such individuals to apply for a protection visa from the outset.[44] However, Labor was not happy with the situation in which it found itself and, in June 2012, Prime Minister Gillard sought advice on how to 'stop the boats' from an Expert Panel.[45]

In its report released on 13 August 2012, the Expert Panel made 22 recommendations. One of its recommendations was that all unauthorised maritime arrivals, regardless of where they first entered Australia, should be prevented from applying for a protection visa. This was what the Coalition Government had unsuccessfully attempted to do in 2006. In response to the Expert Panel report, the Labor Government made the same attempt and succeeded. The *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth) entered into force on 1 June 2013.

The Expert Panel also recommended that the government should procure the passage of legislation overturning the High Court decision in *M70*. It promptly did so. The amendments made to the *Migration Act* by *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) give the minister for immigration the power to designate

44 Chris Bowen, 'New Single Protection Visa Process Set to Commence', media release, 19 March 2012, available at: web.archive.org/web/20120321130512/www.minister.immi.gov.au/media/cb/2012/cb184344.htm.

45 The panel consisted of a former chief of the Defence Forces, Angus Houston, a former secretary of the Department of Foreign Affairs and Trade, Michael L'Estrange, and an asylum seeker advocate, Paris Aristotle.

a country as a 'regional processing country'. *Migration Act* section 198AD provides that an unauthorised maritime arrival detained in the migration zone must be taken to a regional processing country unless the minister for immigration exercises a personal non-compellable power under section 198AE to exempt the person from being transferred.

Another two recommendations of the Expert Panel were to enter into new asylum seeker processing arrangements with Nauru and PNG.[46] The panel described the establishment of such arrangements as a 'necessary circuit breaker to the current surge in irregular migration to Australia'.[47] Again, the government implemented the recommendations with expedition and immediately thereafter the minister for immigration, acting under new *Migration Act* section 198AB, designated Nauru and PNG as regional processing countries in September and October 2012, respectively.

In the case of *Plaintiff S156/2013 v Minister for Immigration and Border Protection,*[48] the plaintiff tried to argue that *Migration Act* sections 198AB and 198AD were not supported by any constitutional head of power and were therefore invalid or, in the alternative, that the minister's designation of PNG as a regional processing country was not valid. The High Court held that sections 198AB and 198AD were supported by the 'aliens' head of power in section 51(xix) of the Constitution. It also held that the designation of PNG as a regional processing country was perfectly valid. This was just as well for the government, because it was clear that the standards of treatment received by the people transferred to Nauru and PNG had fallen egregiously short of human rights standards from the outset.[49] The decision in *S156* was an acknowledgement by the High Court that parliament had played the trump card handed to it in *M70*. It also underscored that, as intended by the drafters, the Constitution enabled parliament to deal with aliens exactly as it pleased.

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46 The Expert Panel also recommended that the transfer provisions of the Malaysian Arrangement should be implemented, after the government had negotiated better human rights safeguards and accountability provisions with Malaysia. Theoretically, the minister for immigration could have done so after designating Malaysia as a regional processing country. However, any such designation would have been disallowed by the Senate because the Coalition opposed implementation of the arrangement for reasons that had more to do with political obstructionism than principle. By contrast, the Coalition had consistently advocated for a return to the Pacific Solution.

47 Expert Panel on Asylum Seekers, *Report of the Expert Panel on Asylum Seekers* (Canberra: Department of the Prime Minister and Cabinet, August 2012), para. 3.45.

48 [2014] HCA 22.

49 See Ken McPhail, Robert Nyamori and Savitri Taylor, 'Escaping Accountability: A Case of Australia's Asylum Seeker Policy,' *Accounting, Auditing & Accountability Journal* 29 (2016): 947–84, doi.org/10.1108/AAAJ-03-2014-1639 and sources cited therein.

On 19 July 2013, not long after replacing Julia Gillard as prime minister following an internal challenge, Kevin Rudd held a joint press conference with Peter O'Neill, the prime minister of PNG. At the press conference, it was announced that asylum seekers arriving in Australia by boat after that date would have 'have no chance of being settled in Australia as refugees'.[50] The MoUs with Nauru and PNG were subsequently updated to facilitate the implementation of what Rudd admitted was 'a very hard-line decision' intended to deter people smuggling.[51] I will return to this history of 'processing' in PNG and in Nauru below.

Operation Relex and Operation Sovereign Borders

In the aftermath of the *Tampa* incident, the Howard Coalition Government instituted Operation Relex to prevent unauthorised arrivals from entering Australian waters. Between October and December 2001, four vessels were intercepted at sea by the Australian navy and escorted back towards Indonesia.[52] The navy also attempted to turn back three other vessels in 2001. All sank at some point during the course of interception and were towed back towards Indonesia, though mercifully all but two of the passengers were successfully rescued. The fifth and final tow back of the Howard Government period took place in November 2003.[53]

The Abbott Coalition Government came into power in September 2013 on a platform that included a pledge to put an end to the resurgence of boat arrivals. Immediately upon taking office, the Coalition Government implemented the military-led Operation Sovereign Borders, which involved, among other things, the turn-back of unauthorised maritime arrivals to their most recent country of departure (usually Indonesia) or, in the case of those arriving directly from their country of origin, handing back to country of origin authorities. In theory, an exception is made for those found in a screening interview to have prima facie protection claims. Unauthorised maritime arrivals screened-in pursuant to this process are supposed to be taken to a regional processing country instead

50 Kevin Rudd, 'Transcript of Joint Press Conference', Press Office, Prime Minister of Australia, 19 July 2013, available at: webarchive.nla.gov.au/awa/20130730234007/pandora.nla.gov.au/pan/79983/20130731-0937/www.pm.gov.au/press-office/transcript-joint-press-conference-2.html.
51 Ibid.
52 Senate Select Committee on a Certain Maritime Incident, *Report of the Senate Select Committee on a Certain Maritime Incident* (Canberra: Parliament of Australia, 2002), para 2.74.
53 Savitri Taylor, 'Towing Back the Boats: Bad Policy Whatever Way You Look at It', *The Conversation*, 12 June 2013, available at: theconversation.com/towing-back-the-boats-bad-policy-whatever-way-you-look-at-it-15082.

of being turned back or handed back. Between the commencement of Operation Sovereign Borders and 21 May 2018, 800 people on 32 boats had been intercepted at sea.[54] Of those only two people had been screened-in – both in 2014.[55] In addition, 157 Sri Lankan passengers on a vessel departing from India, which was intercepted in late June 2014,[56] were transferred to Nauru on 2 August 2014 after a brief sojourn on the Australian mainland.[57] These individuals had not actually been screened-in; rather, Australia had tried but failed to convince Indian or Sri Lankan authorities to take them. In any event, the screen-in figures give rise to the strong inference that the screening process is, at best, unreliable or, at worst, cynical window-dressing.

The Nauru arrangement

As of August 2018, the arrangement with Nauru[58] means that 'unauthorised maritime arrivals' can be transferred to Nauru for processing of asylum claims by the Nauruan Government. As mentioned above, the most recent transfer took place in 2014. In theory, the processing centre in Nauru in which those transferred were detained until October 2015[59] and in which some still reside,[60] is run by the Nauruan Government. However,

54 Evidence to SLCALC, *Committee Hansard*, 21 May 2018 (evidence of Air Vice Marshal Osborne).

55 One passenger out of 41 arriving on a boat from Sri Lanka in late June 2014 was screened-in but elected to be repatriated with the others: Scott Morrison, 'Australian Government Returns Sri Lankan People Smuggling Venture', media release, 7 July 2014, available at: webarchive.nla.gov.au/gov/20140801014043/www.minister.immi.gov.au/media/sm/2014/sm216152.htm. Another passenger out of 38 arriving by boat from Sri Lanka in mid-November 2014 was also screened-in: Scott Morrison, 'People Smuggling Venture Returned to Sri Lanka', media release, 29 November 2014, available at: webarchive.nla.gov.au/gov/20141215053228/www.minister.immi.gov.au/media/sm/2014/sm219651.htm. Interestingly, Air Vice Marshal Osborne's evidence to the SLCALC on 21 May 2018 was that only one person had been screened-in during the period.

56 Department of Immigration, *Annual Report 2014–2015* (Australian Commonwealth Department of Immigration, 2015), 209.

57 Scott Morrison, 'Transfer of 157 IMAs from Curtin to Nauru for Offshore Processing', media release, 2 August 2014, available at: webarchive.nla.gov.au/gov/20141215053416/www.minister.immi.gov.au/media/sm/2014/sm216855.htm.

58 *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues*, signed 3 August 2013, available at: dfat.gov.au/geo/nauru/pages/memorandum-of-understanding-between-the-republic-of-nauru-and-the-commonwealth-of-australia-relating-to-the-transfer-to-and.aspx.

59 The processing centre in Nauru was made an open centre in October 2015: Joyce Chia and Asher Hirsch, 'Did "Ending" Detention on Nauru Also End the Constitutional Challenge to Offshore Processing?', *The Conversation*, 9 October2015, available at: theconversation.com/did-ending-detention-on-nauru-also-end-the-constitutional-challenge-to-offshore-processing-48667.

60 As at 21 May 2018, 253 people resided in the processing centre: evidence to SLCALC, *Committee Hansard*, 21 May 2018 (evidence of Ms Newton, Department of Home Affairs).

all the work is done by organisations contracted, instructed and paid by the Australian Government. These arrangements have been challenged by successive court cases. All, however, have failed, with the government changing the relevant legislation to deal with any breaches, or potential breaches, identified by the High Court.[61]

The PNG arrangement

Similarly, the current MoU with PNG[62] provides for the transfer of 'unauthorised maritime arrivals' to PNG for processing of asylum claims by the PNG Government. The most recent transfer to PNG took place in 2014.[63] As in the case of the processing centre in Nauru, the processing centre on Manus Island in PNG, which until recently was used to house those transferred, was run, in theory, by the PNG Government. However, as in the case of Nauru, all the work was done by organisations contracted, instructed and paid by the Australian Government.

On 26 April 2016, the PNG Supreme Court ruled that amendments to the PNG Constitution intended to enable the detention of those transferred at the processing centre were invalid and that such detention was therefore unconstitutional and illegal.[64] Following this, the PNG Government made the decision that the Manus Island processing centre would be closed. In April 2017, the two governments agreed to work towards a closing date of 31 October 2017. When this date came around, despite resistance by centre residents,[65] the foreshadowed closure of the Manus Island centre took place as planned.

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61 See, for example, Nicole Hasham, 'High Court Finds Offshore Detention Lawful', *Sydney Morning Herald*, 3 February 2016, available at: www.smh.com.au/politics/federal/high-court-finds-offshore-detention-lawful-20160203-gmk5q6.html.

62 *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to, and Assessment and Settlement in, Papua New Guinea of Certain Persons, and Related Issues*, signed 6 August 2013, available at: dfat.gov.au/geo/papua-new-guinea/pages/memorandum-of-understanding-between-the-government-of-the-independent-state-of-papua-new-guinea-and-the-government-of-austr.aspx.

63 Evidence to SLCALC, *Committee Hansard*, 21 May 2018 (evidence of Air Vice Marshal Osborne).

64 *Namah v Pato* [2016] PGSC 13.

65 This resistance is described and its rationale explained in Behrouz Boochani, 'A Letter from Manus Island', *Saturday Paper*, 9 December 2017, available at: www.thesaturdaypaper.com.au/news/politics/2017/12/09/letter-manus-island/15127380005617.

Durable solutions?

The MoU with PNG provides that 'Transferees' recognised by it as refugees will be settled in PNG or elsewhere but not in Australia. As at 22 May 2017, only 38 recognised refugees had chosen to settle in PNG.[66] The MoU with Nauru also provides for the possibility that 'Transferees' recognised by it as refugees will be settled in that country, subject to the case-by-case agreement of the Nauruan Government. Thus far, however, the most that Nauru has been prepared to grant to those whom it has recognised as refugees is permission to remain in Nauru for 20 years.[67]

According to *The Guardian*:

> Over the past five years, Australia has approached dozens of countries – including Kyrgyzstan – offering millions of dollars and other inducements in exchange for resettling some refugees from Australia's camps.[68]

Thus far it has only had two successes.

On 26 September 2014, the Australian Government signed a four-year MoU with the Cambodian Government providing for the voluntary resettlement in Cambodia of people recognised as refugees by Nauru.[69] As at the time of writing, seven refugees had resettled in Cambodia[70] but four of them had subsequently returned to their countries of origin.[71]

On 13 November 2016, the Australian Government announced that unauthorised maritime arrivals, who had already been transferred to Nauru or PNG, would be considered for refugee resettlement in the

66 Evidence to SLCALC, *Committee Hansard*, 22 May 2017 (evidence of Ms Newton, Department of Immigration).

67 Department of Immigration, Answer to Question Taken on Notice AE17/213, Additional Estimates Hearing: 27 February 2017, available at: www.aph.gov.au/~/media/Committees/legcon_ctte/estimates/add_1617/DIBP/QoNs/AE17-213.pdf.

68 Ben Doherty, 'Australia's Refugee Deal "a Farce" after US Rejects All Iranian and Somali Asylum Seekers', *Guardian*, 8 May 2018, available at: www.theguardian.com/australia-news/2018/may/08/australias-refugee-deal-a-farce-after-us-rejects-all-iranian-and-somali-asylum-seekers.

69 *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, available at: www.refworld.org/docid/5436588e4.html.

70 Evidence to SLCALC, *Committee Hansard*, 21 May 2018 (evidence of Ms Geddes, Department of Home Affairs).

71 Erin Handley, 'Nauru Refugee Quietly Arrives', *Phnom Penh Post*, 25 May 2017, available at: www.phnompenhpost.com/national/nauru-refugee-quietly-arrives.

United States by officials of that country upon referral by UNHCR.[72] As at 21 May 2018, the United States had accepted 372 refugees for resettlement and actually resettled 249 of them (165 from Nauru and 84 from PNG).[73] However, it had also vetted and refused resettlement to a further 121 recognised refugees, including 70 Iranians.[74]

Since the recommencement of offshore processing, three refugees have managed to arrange resettlement for themselves in Canada.[75] Australia has so far resisted taking up a longstanding offer from New Zealand to resettle 150 refugees in case those resettled in New Zealand take advantage of the Trans-Tasman Travel Arrangement to relocate to Australia at a later date.[76] However, it has not entirely closed the door on the offer.[77]

As at 21 May 2018, 939 of the people, including women and children, transferred by Australia to Nauru were still in Nauru.[78] As at the same date, 716 of the people transferred by Australia to PNG were still in PNG.[79] A further 460 people, who had previously been transferred to Nauru or PNG, were in Australia after being brought there for the purpose of medical treatment.[80] Individuals in this last group are expected to return to Nauru or PNG as the case may be upon completion of treatment, though they often refuse to do so.

It is not clear exactly how many of the 2,115 people still subject to the offshore processing arrangements as at 21 May 2018 were recognised refugees. However, given the recognition rates of 87 per cent in Nauru

72 Peter Dutton, 'Joint Press Conference with the Prime Minister, Maritime Border Command, Canberra' [transcript], The Hon Peter Dutton MP Minister for Immigration and Border Protection, 13 November 2016, available at: web.archive.org/web/20170307202401/www.minister.border.gov.au/peterdutton/Pages/press-conference-with-the-minister-for-immigration-and-border-protection-maritime-border-command.aspx.

73 Evidence to SLCALC, *Committee Hansard*, 21 May 2018 (evidence of Ms Geddes, Department of Home Affairs).

74 Ibid.

75 Ibid. (evidence of Mr Pezzullo, Secretary, Department of Home Affairs).

76 Ibid.

77 Peter Dutton, 'Doorstop Interview, Parliament House' [transcript], The Hon Peter Dutton MP Minister for Home Affairs\Minister for Immigration and Border Protection, 24 May 2018, available at: web.archive.org/web/20180821025013/minister.homeaffairs.gov.au/peterdutton/Pages/Interview-Parliament-House.aspx.

78 Evidence to SLCALC, *Committee Hansard*, 21 May 2018 (evidence of Ms Newton, Department of Home Affairs).

79 Ibid. (evidence of Ms Geddes, Department of Home Affairs).

80 Ibid. (evidence of Ms Dunn, Department of Home Affairs).

and 74 per cent in PNG,[81] the majority would be. Even if the United States allocates the remainder of the 1,250 resettlement places it has put on the table, a large number of refugees will be left without the prospect of a durable solution in the foreseeable future.

A reflection

Australia did not get to where it currently is all at once but step by incremental step. Some of those steps were taken by Labor governments, others were taken by Coalition governments, but except for a period from 2004 to 2007 when the Coalition controlled both houses of parliament, the legislative steps at least could not have been taken without the support of non-government politicians. The most insidious thing about every step taken was that it became the new normal and brought the next step into the realm of conceivable. The upshot was that most politicians in the two major parties were able, at every crucial point along the 25-plus-year journey, to rationalise taking just that one step more for the sake of winning or at least not losing the ongoing struggle for political power.

It is possible through litigation to get Australian courts to adjudicate on the lawfulness of executive action and to award enforceable remedies for breaches of the law. As illustrated above, however, in the migration jurisdiction the usual reaction when the government of the day does not agree with a judicial decision is to seek passage of legislation overturning the decision as a precedent for the future. Usually, too, the government is able to muster the parliamentary numbers necessary to succeed in such attempts. The only scenario in which the courts have the upper hand is in the interpretation of the Australian Constitution. However, as interpreted by the courts, the Constitution does not place many limits on the executive government or the parliament. So far, just about everything that the government and parliament have done in relation to asylum seekers and refugees has passed the constitutionality test. My depressing conclusion is that the stain of Australia's original sin remains, tainting the present and future. Because of Australia's constitutional beginnings, Australians cannot rely on their existing legal and political structures to deliver them from evil.

81 Australian Border Force, 'Operation Sovereign Borders Monthly Update: October 2017', Australian Border Force Newsroom, 14 November 2017, available at: newsroom.abf.gov.au/channels/Operation-Sovereign-Borders/releases/a4e1949e-3a4b-4750-bc65-cda9b3a668d1. These percentages are from 31 October 2017, on which date the Australian Government stopped updating the statistics.

This text is taken from *Refugee Journeys: Histories of Resettlement, Representation and Resistance*, edited by Jordana Silverstein and Rachel Stevens, published 2021 by ANU Press, The Australian National University, Canberra, Australia.

doi.org/10.22459/RJ.2021.09