

CRITIQUE AND COMMENT

DEFINING STRANGERS: HUMAN RIGHTS, IMMIGRANTS AND THE FOUNDATIONS FOR A JUST SOCIETY

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[This article explores the extent to which the law's treatment of immigrants has shaped notions of human rights in Australia. It examines the ramifications of the choice made at Federation not to include Australian citizenship in the Australian Constitution, but rather to confer power on the Parliament to legislate such status. It is argued that the constitutional silence resulted in fragilities in both concepts of membership and in the regime for the protection of human rights in Australia. As well as creating profound ambiguities as to who was and was not a constituent part of the Australian polity, vesting the power to determine membership in Parliament has made the protection of human rights highly politicised. The discomfiting results of judicial deference in such a climate are seen in cases like Al Kateb v Godwin. It is dangerous to align notions of human rights with citizenship because of the ease with which people can be deliberately or mistakenly characterised as societal 'outsiders'.]

CONTENTS

I	Immigrants and Human Rights	1053
II	Human Rights and Belonging: The Fragility of Citizenship in Australia.....	1056
III	Immigration and the Rule of Law	1061
IV	Human Rights as Privilege: Immigration and the Dangers of Exceptionalism	1067
V	An Immigrant Country or a (Model) Globalised Society	1069

I IMMIGRANTS AND HUMAN RIGHTS

The decade of conservative rule in Australia that was marked in 2006 has been characterised by economic prosperity and apparent stability in governance at both state and federal levels. From the perspective of human rights advocates and lawyers, however, the successes of these years have masked a deeper revolution, the effects of which have not been so positive for the country. At no other time in Australia's history have such profound divisions opened up between the citizen and the non-citizen on the one hand, and between the economically powerful and Australia's battlers on the other.

In this article various aspects of Australia's immigration laws are studied to explore the role that they have played in creating partitions between what might be termed societal insiders and outsiders. While the primary impact of the

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immigration control measures taken by the government before and after the watershed election of 2001 has been on the human rights of immigrants themselves, the effects of the laws have been felt also in the legal domain occupied by Australian citizens. The central argument is that to have real meaning, 'human rights' must be read as an indivisible phrase — not as two words that can be separated according to putative membership of a society. The treatment of the alien *outsider* inevitably impacts on the citizen *insider*.

The starting points for this reflective article are two projects that have been a focus for the author in recent years. The first was conducted with Jacqueline Bhabha of Harvard University's John F Kennedy School of Government¹ and involved a three-year comparative study of unaccompanied and separated children and the protections afforded by refugee law.² The second is work undertaken with Associate Professor Helen Irving examining the impact that migrants have had on the development of public law in Australia.³

Bhabha has written recently on how immigration has changed the face of human rights law in Western states through a tripartite process of internationalisation, globalisation and universalism. She argues that the phenomenon of inter-country migration has led to 'rights spillovers', such that the discourse on human rights has been irrevocably enriched.⁴ She points out that migrants compel *internationalisation* in the way a society thinks by literally bringing home events that are occurring in different parts of the globe.⁵ They encourage *globalisation* in the law in that events in distant lands must be taken into account when making domestic decisions to deport or remove.⁶ Finally, indeterminacy of membership within communities of mixed cultural heritage leads to re-evaluation of notions of belonging and increases pressure for the *universalisation* of rights and entitlements.⁷ One example of this in the Australian context is the unease generated by policies that deny social security and other benefits to temporary protection visa holders and other non-citizens whose presence is barely tolerated by the federal government.⁸

The transformative effect of immigration is at the heart of the research with Associate Professor Irving.⁹ We are finding that immigration cases have had and are having extraordinary influences on both the law and on societal attitudes to

¹ Jacqueline Bhabha is the Executive Director of Harvard University's Human Rights Committee, situated within the John F Kennedy School of Government.

² See Jacqueline Bhabha and Mary Crock, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in Australia, the UK and the US: A Comparative Study* (2007) 9 ('*Seeking Asylum Alone*').

³ Mary Crock and Helen Irving, 'The Impact of Migrants on Public Law in Australia: An Historical and Cultural Study' (Australian Research Council Discovery Project, The University of Sydney, 2004–2007).

⁴ See Jacqueline Bhabha, 'Rights Spillovers: The Impact of Migration on the Legal System of Western States' in Elspeth Guild and Joanne van Selm (eds), *International Migration and Security: Opportunities and Challenges* (2005) 28, 28.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.* 28–9.

⁸ See Mary Crock, Ben Saul and Azadeh Dastyari, *Future Seekers II: Refugees and Irregular Migration in Australia* (2006) 137–43.

⁹ See Crock and Irving, above n 3.

key human rights principles. Whether the intersections have *enriched* the discourse on human rights in Australia is highly debatable. As explored in this article, it may be more accurate to say that political and legal responses to immigration have distorted and continue to distort notions of human rights in this country.

In *Seeking Asylum Alone*, Australia emerged as the worst of the three states studied in terms of its human rights record in dealing with the phenomenon of children travelling without the assistance of a responsible adult.¹⁰ At the time the research was undertaken, Australia was the only country that mandated the detention of children arriving without a visa. Its practices were in breach of most of the key precepts of the United Nations' supreme human rights convention for children: the *Convention on the Rights of the Child* ('CRC').¹¹ It mirrored and continues to mirror the United States in the adoption of programmes to interdict and deflect asylum seekers arriving by boat — with no exceptions made for unaccompanied children. These are programmes that have led directly or indirectly to horrendous loss of life at sea. Australia continues to resist calls to appoint an *effective* guardian to assist all children arriving without the protection of a responsible adult in their initial dealings with the migration bureaucracy.¹² Even where such children have gained recognition as refugees, we continue to condemn them to the debilitating uncertainty of three or five-year temporary protection visas which preclude the reunification of the children with their families.¹³

Although Australia is party to all of the key international human rights instruments — from the *Convention on the Prevention and Punishment of the Crime of Genocide* ('Genocide Convention')¹⁴ through to the *CRC* — its human rights record in immigration is patchy, to say the least. This article examines how this might have come about — and why it is something that should be of concern to all Australians.

The article is in three main Parts. It begins with some reflections on why Australia is the only Western democracy without a bill of rights. The omission is no accident: it has much to do with historical and contemporary attitudes to who is and is not a member of the Australian community. The end result is fragilities in both concepts of citizenship in Australia and in the regime for the protection of human rights.

There follows in Part III an exploration of the consequences of the choices made by the drafters of the *Australian Constitution*. I will argue that the *constitutional* decision to assign to the federal Parliament the power to make laws about alienage and citizenship in both form and content has made the protection of human rights in this country a highly politicised affair. The politicians have

¹⁰ Bhabha and Crock, above n 2, 70–1.

¹¹ Opened for signature 20 November 1989, 1577 UNTS 44 (entered into force 2 September 1990).

¹² Bhabha and Crock, above n 2, 67–8, 89.

¹³ See *ibid* 182–3; Mary Crock, *Seeking Asylum Alone: A Study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children: Australia* (2006) 96, 205. See also Mary Crock, 'Lonely Refuge: Judicial Responses to Separated Children Seeking Refugee Protection in Australia' (2005) 22(2) *Law in Context* 120, 123.

¹⁴ Opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

become increasingly resistant and/or hostile to the notion of judicial oversight of their laws and actions. Hence, we have seen the courts and the executive engage in a titanic struggle over who should control immigration to Australia. This has indeed spilled over so as to affect relations more generally between these two arms of government. The conflict has not been good for human rights protection. The Parliament has taken successive measures to try to minimise, and even eliminate, the supervisory role of the courts in reviewing government action. Sadly, the courts (or at least some judges) have responded to the tremendous political pressures being exerted on them by becoming increasingly literal, formalist and introspective in their approach to the curial review function. Nowhere is this more apparent than in the series of cases heard by the High Court in 2004 in which the lawfulness of mandatory immigration detention was considered.¹⁵ The experiences of Vivian Alvarez Solon and Cornelia Rau illustrate that it is not just non-citizens who have been hurt in the fallout.¹⁶

Part IV of this article extends this discussion with a study of attempts that have been made to create literal and figurative law-free zones which are justified as exceptional measures for exceptional times. I conclude with the assertion that there has been no political will to create a system of enforceable human rights protection because the politicians have seen electoral advantage in enacting increasingly punitive laws in respect of immigrants who do not possess certain attributes or conform to certain norms of behaviour. This is a particularly dangerous endgame to play in a multiracial society like Australia.

II HUMAN RIGHTS AND BELONGING: THE FRAGILITY OF CITIZENSHIP IN AUSTRALIA¹⁷

In her 2006 book *The Citizen and the Alien*, US academic Linda Bosniak provides a critique of the popular discourse that has developed over the multiple meanings of citizenship and membership in society.¹⁸ She points to the proliferation of writings on citizenship where that word is used as an aspirational status denoting equality, acceptance and respect for a variety of human rights. Consider in this context the justice claims made for women, African Americans, homosexuals and the disabled: claims that are framed as rights to equal *citizenship*.¹⁹

¹⁵ See *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365; *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 ('Behrooz'); *Al-Kateb v Godwin* (2004) 219 CLR 562 ('Al-Kateb'); *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664 ('Al Khafaji'); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 ('Woolley').

¹⁶ See, eg, Commonwealth Ombudsman, *Inquiry into the Circumstances of the Vivian Alvarez Matter*, Report No 3 (2005); Mick Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau: Report* (2005); Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *The Removal, Search for and Discovery of Ms Vivian Solon: Interim Report* (2005); Peter Prince, 'The Detention of Cornelia Rau: Legal Issues' (Research Brief No 14, Parliamentary Library, Parliament of Australia, 2005); Ian Freckelton, 'Madness, Migration and Misfortune: The Challenge of the Bleak Tale of Cornelia Rau' (2005) 12 *Psychiatry, Psychology and Law* 1.

¹⁷ The issues discussed in the following Part draw on parts of the chapter on citizenship in Mary Crook, *Immigration and Refugee Law in Australia* (2nd ed, 2008, forthcoming).

¹⁸ Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (2006).

¹⁹ *Ibid* 12–13, ch 2.

Bosniak describes this as ‘soft’ citizenship, which she argues often stands in contrast to either express or implicit assertions that equality of rights should only operate within the confines of a defined community.²⁰ In other words, the soft universalist aspirations are bounded by a ‘hard’ external boundary that separates ‘us’ from ‘them’. In a culturally mixed society like the US, Bosniak demonstrates that these characterisations of citizenship are not only easy to demolish at a logical level, they are also positively dangerous.²¹ This is because it is often difficult to characterise people within a society as obvious insiders or outsiders.²² In the streets, citizens mingle freely with non-citizen visitors, permanent residents, temporary workers, illegal migrants and refugees.

How can we determine who counts as ‘us’? If easy characterisations are impossible, there is also the bigger question of whether we should make harsh distinctions between ‘them’ and ‘us’. If we treat the outsiders with harshness, do we inevitably contaminate the basic principles of equal citizenship: inclusion and equality? I would answer this question in the affirmative.

In the Australian context, there are particular reasons why the concept of citizenship — both in the formal sense of membership of the community and in terms of substantive entitlement — is a fragile one. When the Australian colonies came together as a federation in 1901, the decision was made not to include the concept of Australian citizenship in the *Australian Constitution*.²³ Instead, the new federal Parliament was given the power to legislate for the peace, order and good government of Australia with respect to immigration and emigration on the one hand, and naturalisation and aliens on the other.²⁴ As John Quick complained, citizenship in the *Australian Constitution* was created as ‘a mere legal inference’.²⁵ The actual power to make (and unmake) citizens was vested in the new Australian Parliament.²⁶

Interestingly, although legislation was passed soon after Federation that dealt with the *naturalisation* of new arrivals in the country, no attempt was made to enact proper citizenship laws until 1948 — after Australia had fought in two World Wars.²⁷ Instead, membership of the new Australian polity was defined in

²⁰ Ibid 31.

²¹ Ibid 15, ch 5.

²² Ibid 16, ch 6.

²³ *Official Report of the National Australasian Convention Debates*, Melbourne, 2 March 1898, 1750–68 (John Quick).

²⁴ See *Australian Constitution* s 51(xxvii), (xix) respectively. See also *Australian Constitution* s 51(xxix) which confers power to legislate with respect to ‘external affairs’. The sole reference to the term ‘citizen’ in the *Australian Constitution* is in s 44 which makes citizens or subjects of a foreign power ineligible for election to the Commonwealth Parliament.

²⁵ ‘Again, I ask are we to have a Commonwealth citizenship? If we are, why is it not to be implanted in the *Constitution*? Why is it to be merely a legal inference?’: *Official Report of the National Australasian Convention Debates*, Melbourne, 2 March 1898, 1767 (John Quick). John Quick was a Convention delegate from Victoria and later one of the authors of the authoritative annotation of the *Australian Constitution*: see John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (first published 1901, 1976 ed); Kim Rubenstein, *Australian Citizenship Law in Context* (2002) 8, 27.

²⁶ *Australian Constitution* s 51(xix). See also *Official Report of the National Australasian Convention Debates*, Melbourne, 2 March 1898, 1750–68 (John Quick).

²⁷ *Nationality and Citizenship Act 1948* (Cth).

terms of double negatives by specific reference to who was not an ‘immigrant’.²⁸ Put another way, the first Australian citizens were like the hole in the doughnut: they were the residue when all of the excluded or excludable people were defined. Australian citizenship as a legal term of art only emerged with the passage of the *Nationality and Citizenship Act 1948* (Cth) which commenced operation on Australia Day 1949.²⁹

The Convention Debates that preceded Federation reveal that the decision not to include Australian citizenship in the *Australian Constitution* was based on a variety of quite complex factors.³⁰ At Federation, Australia did not acquire the status of an independent nation and a subject of the Queen born or resident in Australia was legally indistinguishable from a British subject.³¹ Interestingly, some thought that the superimposition of an Australian citizenship over and above the colonial status of British subject would be degrading to that most prized of statuses.³² The early Australians saw themselves first and foremost as subjects of the British Queen.³³ Just as importantly, however, there were others who saw no need to define the term ‘citizenship’, using the logic of ‘we know who we are’.³⁴ There were problems in finding agreement between those who saw citizenship as a way of recognising rights and entitlements and those who saw the status as a way of conferring rights on people.³⁵ The pervading difficulty facing the framers of the *Australian Constitution* was the presence in Australia of a range of individuals who were literally and figuratively outsiders to the youthful Anglo-Saxon communities of settlers. These were Australia’s indigenous inhabitants, the Asians and other people of colour who had made their way into the various colonies since the arrival of the First Fleet from England. Kim Rubenstein argues that the desire to carve out an Australian polity with certain

²⁸ See *Naturalisation Act 1903* (Cth); *Nationality Act 1920* (Cth).

²⁹ *Nationality and Citizenship Act 1948* (Cth) ss 10–11, 13, 16. The Act came into operation on 26 January 1949.

³⁰ See Rubenstein, above n 25, 30–3.

³¹ *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 183 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ).

³² In *The Annotated Constitution of the Australian Commonwealth*, Quick and Garran lament that despite the ‘apparently logical’ contentions in the 1898 Convention that there should be a national citizenship ‘above and beyond and immeasurably superior to State citizenship’, these contentions were not accepted, and consequently legal membership of the Commonwealth must be deduced from the *Australian Constitution* rather than flowing from explicit provision: see Quick and Garran, above n 25, 955. Nonetheless they acknowledge ‘that there might have been an impropriety’ in preferring citizen over subject: at 957. The nearest concept in the *Australian Constitution* equivalent to citizenship of the Commonwealth is ‘people of the Commonwealth’ but that is a subsidiary status to subjects of the Queen common to the individual units of the British Empire. Quick and Garran regarded the new status as at least an embryonic Australian nationality. They suggest that people of the Commonwealth who ‘territorially’ may be termed Australians, although ‘constitutionally’ remaining British subjects or subjects of the Queen, nonetheless acquired the ‘character’ of a member of the people of the Commonwealth. This, they state, is a national character not lost either when travelling between the states of the federation, between parts of the Empire or outside it: at 957–8.

³³ This is a fact that has interesting resonances in the contemporary republican debates in Australia.

³⁴ See *Official Report of the National Australasian Convention Debates*, Melbourne, 3 March 1898, 1782 (Josiah Symon).

³⁵ Rubenstein, above n 25, 30.

racial characteristics is probably the chief reason why the *Australian Constitution* did finally go to the vote without a clause creating Australian citizenship.³⁶

The decisions made at Federation are significant today for two reasons. First, the silences in the *Australian Constitution* have created ongoing uncertainties about who Australians think they are and, indeed, what citizenship should mean in substantive terms. Bosniak's observations about the indeterminacy of membership are particularly apposite in Australia. Secondly, the decision to vest power in the Parliament to make (and to unmake) citizenship has made this status susceptible to the vagaries of politics.

The central problem in my view is that while we may *think* we know who we are, in reality we have always been somewhat confused about our identity. If no agreement could be reached on how membership of the community should be defined, it is not surprising that attempts to articulate the benefits or entitlements flowing from such membership should also fail.

In the early days after Federation, the sense of common purpose between the framers of the *Australian Constitution* and the first justices of the High Court³⁷ was such that the government relied on the courts to determine membership of the new Australian community.³⁸ The exclusionary device devised by the federal legislature (and used until 1958) was a dictation test whereby a person was required to write out without errors of any kind 50 words in a European language.³⁹ The test could only be administered to 'immigrants'.⁴⁰ There being no constitutional power to exclude non-immigrants (and the status of 'alien' being as constitutionally uncertain as that of 'citizen'), it fell to the courts to determine who was and who was not an immigrant.

The dictation test cases reveal that the law operated in fact on a variety of un-articulated understandings and suppositions about who was and who was not a constituent member of the Australian community. The early cases studied in our history project suggest that much turned on a person's physical appearance, with Anglo-Saxon features taken as the norm.⁴¹ The dictation test was a device

³⁶ Ibid 38–9. In their study of how Australia's early laws impacted on the citizenship of the country's indigenous inhabitants, John Chesterman and Brian Galligan point out that the absence of citizenship provisions in the *Australian Constitution* cannot be 'blamed' for all the discriminatory practices that became entrenched after Federation. The real disenfranchisement of the 'unwanted' inhabitants of Australia occurred through a web of state and federal enactments: John Chesterman and Brian Galligan, *Citizens without Rights: Aborigines and Australian Citizenship* (1997) ch 3. What these authors might have noted, however, is that these enactments were facilitated by the silences in the *Australian Constitution* in both the legal form and practical meaning of the concept of citizenship. The most striking irony for the immigration scholar is the correlation between the measures taken by the newly federated colonialists — nearly all 'migrants' themselves — to exclude from the 'Australian' polity, indigenous people and non-white migrants.

³⁷ This is not surprising as the first justices of the High Court were former politicians who had assisted in drafting the *Australian Constitution*.

³⁸ See Mary Crock, *Immigration and Refugee Law in Australia* (1998) 15–19.

³⁹ *Immigration Restriction Act 1901* (Cth) s 3(a), repealed by *Migration Act 1958* (Cth) sch.

⁴⁰ *Immigration Restriction Act 1901* (Cth) s 3, repealed by *Migration Act 1958* (Cth) sch.

⁴¹ See, eg, *Potter v Minahan* (1908) 7 CLR 277; *Ah Yin v Christie* (1907) 4 CLR 1428. James Minahan had been born in Australia (albeit before Federation) but raised in China: *Potter v Minahan* (1908) 7 CLR 277, 286–7 (Griffith CJ). He was of mixed parentage in the sense that his (deceased) mother was English by birth: at 286 (Griffith CJ). On the other hand, both parents of Ah Yin were ethnic Chinese: *Ah Yin v Christie* (1907) 4 CLR 1428, 1430 (Grif-

aimed to exclude — immigrants could be (and were) asked to submit to multiple tests in a variety of languages, the failure of any one of which became the basis for prosecution and deportation.⁴²

The regime for controlling immigration to Australia is now dramatically different. The concept of citizenship is anchored firmly in statute law and the old discretionary system has been replaced by complex immigration laws that govern rights to enter and remain in Australia.⁴³ The old cases are relevant nonetheless because they highlight structural fragilities in Australian citizenship that are still there today.

The notion of Australian citizenship as indicative of a certain racial stereotype should have been killed off with the demise of the White Australia policy. Australia is in many respects a country of immigrants. With the current percentage of Australian citizens who were either born overseas or who had an overseas-born parent almost equal to the percentage of foreign-born who were present in the country at Federation in 1901,⁴⁴ Australia can claim truly to be one of the more multicultural nations on Earth. The experiences of two women — both affected by mental illness or disability — suggest, however, that racial stereotyping continues to play a role in public understandings of citizenship in Australia. In the case of Vivian Alvarez Solon, the assumption was that the long-term citizen and mother to Australian children was an illegal migrant who had probably been brought into Australia from the Philippines as a sex slave.⁴⁵ Such was the resolve of the immigration authorities to preserve the purity of immigration control that she was removed from Australia in the face of obvious and extreme physical and mental frailty.⁴⁶ The long-term permanent resident Cornelia Rau suffered from similar institutional blindness, her case complicated by the complexities of her mental disorder.⁴⁷ She was arrested as a supposed illegal migrant and detained in Baxter Detention Centre in increasingly punitive conditions until her fellow non-citizen detainees raised the alarm about the impropriety of her situation.⁴⁸ There seems to be little doubt that Vivian Alvarez

fith CJ). Minahan was found ultimately not to be an immigrant — rather he was an individual who was ‘coming home’ to Australia: *Potter v Minahan* (1908) 7 CLR 277, 290 (Griffith CJ), 291 (Barton J), 307 (O’Connor J). Ah Yin, however, was excluded on the basis that he was an immigrant who was unable to pass the dictation test: *Ah Yin v Christie* (1907) 4 CLR 1428, 1432–3 (Griffith CJ), 1434 (Barton J), 1435–6 (Isaacs J), 1437 (Higgins J). These cases were discussed further in Helen Irving, ‘A Nation Built on Words: The Constitution and Cultural Identity in the United States and Australia’ (Speech delivered as the inaugural Returning Harvard Chair of Australian Studies Lecture, The University of Sydney, 8 March 2007).

⁴² See, eg, *R v Wilson; Ex parte Kisch* (1934) 52 CLR 234; *R v Davey; Ex parte Freer* (1936) 56 CLR 381; *Chia Gee v Martin* (1905) 3 CLR 649.

⁴³ See *Australian Citizenship Act 2007* (Cth); *Migration Act 1958* (Cth).

⁴⁴ In 2005, 24 per cent of Australians met this description: see Australian Bureau of Statistics, *Year Book Australia, 2007: Country of Birth* (2007) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/1301.02007?OpenDocument>>.

⁴⁵ Commonwealth Ombudsman, above n 16, x, 13, 15, 47.

⁴⁶ *Ibid* xi. See also David Marr, ‘Guilty Secrets: The Lies That Kept Vivian Alvarez Hidden for Years’, *The Sydney Morning Herald* (Sydney), 20 August 2005, 27; Joseph Kerr, ‘For Two Years, They Kept Mum’, *The Sydney Morning Herald* (Sydney), 20 August 2005, 1; David Marr, ‘The Cover-Up Comes Unstuck’, *The Sydney Morning Herald* (Sydney), 22 August 2005, 9.

⁴⁷ See Palmer, above n 16.

⁴⁸ See *ibid*. See also Crock, Saul and Dastyari, above n 8, 156–8.

Solon was arrested, detained and removed because of her Philippine ethnicity. Some have argued that it is the fact that Cornelia Rau fitted the norm of white Australia — that she ‘looked like us’ — that her case finally moved the country to take note of the atrocities occurring within the immigration detention centres.⁴⁹

Whether this is so or not, these two cases demonstrate that institutional understandings of citizenship in Australia still rely to a certain extent on assumptions and shared understandings about the physical characteristics of the archetypal Australian. The catastrophic consequences of the errors made in those cases underscore why it is important that Australia adopt laws that are respectful of basic human rights and the dignity of persons irrespective of actual or imputed citizenship.

The fact remains, however, that citizenship in Australia is a construct of the federal legislature — the power to include and exclude people as Australians in this context is largely unfettered. The federal Parliament can and has made quite dramatic changes to the law over the years. For example, although the *Australian Citizenship Act 1948* (Cth) originally included a concept of *jus soli* (or citizenship by birthright to persons born on Australian soil), this right lasted less than 40 years.⁵⁰ The invocation of rights by two children of illegal migrants induced such alarm that the law was changed in 1986 to provide that children born in Australia will automatically acquire citizenship only if one parent is a citizen or permanent resident.⁵¹

More recent reminders of Parliament’s power in this area have been moves to extend the waiting period for persons wishing to be naturalised as citizens and to introduce a language and culture test for such new citizens. It is apparent also in calls to strip the outspoken mufti, Sheikh Al Hilaly, of his Australian citizenship because of his controversial preachings.⁵² Such calls underscore the weakness of any human right to free speech that might be recognised in this country.

III IMMIGRATION AND THE RULE OF LAW

The argument thus far is that concepts of citizenship in Australia are fragile on two counts. First, they are fragile because the drafters of the *Australian Constitution* declined to articulate Australian citizenship in either form or substance. The absence of a constitutionally entrenched bill of rights is a by-product of this omission. Secondly, Australian citizenship is fragile because the power to construct the basis for membership of the community was vested in the federal Parliament. In this Part, I will explore the implications of this distribution of powers within the *Australian Constitution* for human rights and the operation of the rule of law in this country.

⁴⁹ See David Marr, ‘Purgatory in Baxter’, *The Sydney Morning Herald* (Sydney), 19 July 2005, 12.

⁵⁰ *Australian Citizenship Amendment Act 1986* (Cth) s 4, amending *Australian Citizenship Act 1948* (Cth) s 10.

⁵¹ *Australian Citizenship Amendment Act 1986* (Cth) s 4(a), amending *Australian Citizenship Act 1948* (Cth) s 10(2). The case was that of *Kioa v West* (1985) 159 CLR 550. On the current law: see Rubenstein, above n 25, 90–3; *Australian Citizenship Act 2007* (Cth) s 12.

⁵² See Gerard McManus, ‘Moderate Stance for Sheik’, *Herald Sun* (Melbourne), 10 April 2007, 11. See also Editorial, ‘Enough Is Enough’, *Herald Sun* (Melbourne), 10 April 2007, 18.

In a 2007 lecture,⁵³ Helen Irving commented on one remarkable difference between the *Australian Constitution* and its US counterpart. While the *United States Constitution* bears witness to the triumph of a revolution by '[w]e the People of the United States',⁵⁴ the Australian document records a compromise between the Queen's subjects resident in the various Australian colonies. In the *United States Constitution*, the People are sovereign. In the *Australian Constitution*, it is the federal Parliament that is sovereign — most particularly, as we have seen, in the powers given to it to determine membership of the Australian polity. The closest thing in the *Australian Constitution* to a bill of rights — absent a few specific rights-bearing clauses — are the guarantees that actions taken by officers of the Commonwealth will be subject to judicial review.⁵⁵ The fragility of these guarantees has been all too clear in recent times when dissonances have developed between the courts and the government over basic issues of human rights.

In the early days after Federation, the synergies between the framers of the *Australian Constitution* and the first justices of the High Court were such that the government relied on the courts to determine membership of the new Australian community.⁵⁶ This sense of common purpose did not survive. Rather, a battle royal has raged between the courts and the government over who should have the final say in immigration decision-making.⁵⁷ The constitutional powers given to the federal Parliament to make laws in this area has both created a sense of entitlement in the politicians and placed pressure on the courts to be deferential and noninterventionist in their review of government action.

The management of an immigration programme is never an easy thing for a government to achieve. Few societies accept the intrusion of outsiders without demur — even those in countries that have largely been created through immigration. It is perhaps for this reason that there has been a longstanding convention in Australia that political parties should strive for a bipartisan approach to immigration that enables the continuation of a programme that everyone knows is electorally popular. If the 'me too' politics has lingered, what is remarkable about recent Australian history is the extent to which governments have decided to play the 'good immigrant, bad immigrant' game. Increasingly harsh and punitive laws have been passed to restrict all forms of irregular migration to Australia. In most cases the changes have been made quite plainly with the voting electorate in mind. At the same time there has also been a sense in which successive governments have been playing with the courts to see just how far they can go with their punitive measures. It is almost as if they have been throwing down the gauntlet to the judges in a context where courts, as defenders

⁵³ Irving, above n 41.

⁵⁴ *United States Constitution* preamble.

⁵⁵ *Australian Constitution* s 75(v).

⁵⁶ See Crock, *Immigration and Refugee Law*, above n 38, 15–19.

⁵⁷ See Mary Crock, 'Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law' (2004) 26 *Sydney Law Review* 51, 58–61, 72; Mary Crock, 'A Legal Perspective on the Evolution of Mandatory Detention' in Mary Crock (ed), *Protection or Punishment: The Detention of Asylum Seekers in Australia* (1993) 25, 30–4; Mary E Crock, 'Climbing Jacob's Ladder: The High Court and the Administrative Detention of Asylum Seekers in Australia' (1993) 15 *Sydney Law Review* 338, 352–3.

of basic human rights, are seen as threats to the strength of the government (and/or their electoral potency).

The concept that Parliament is sovereign is summed up neatly in then Prime Minister John Howard's impassioned election speech around the time of the *MV Tampa* affair: 'we [the politicians] will decide who comes to this country and the circumstances in which they come.'⁵⁸ The unspoken echo rings out: 'and not the courts'. On an earlier occasion at Sydney Law School, the then Immigration Minister railed against decisions made by the courts which dissented from his interpretation of the law as examples of the courts going against the will of the people.⁵⁹

Such attitudes and public statements have generated enormous pressures on the Australian courts to adopt a narrow, Diceyan view of the judicial review function.⁶⁰ Such a view posits that the courts are there to enforce the intentions of Parliament: no more and no less. Judicial review conceived in these terms is introspective and necessarily domestic in its orientation. It allows little scope for the intrusion of norms of international law — unless the Australian Parliament has taken the step of translating those norms into domestic law through legislation. This is so whether the international law in question concerns treaties entered into by the Australian executive or the less choate principles of customary international law or *leges erga omnes*.⁶¹

The contrasting view is that the rule of law in Australia is more than the edicts of Parliament. It comprises not only statute law made by Parliament but also common law made by judges over time.⁶² According to this approach, Australian law is a living entity that grows with each judicial ruling.⁶³ It is also influenced by developments abroad in courts of similar heritage and by international law itself.⁶⁴ 'Living law' theorists recognise the indeterminacy of language and the scope that will always exist for two or more interpretations of the same piece of text.⁶⁵

⁵⁸ John Howard, Prime Minister of Australia, 'Address' (Speech delivered at the Federal Liberal Party Campaign Launch, Sydney, 28 October 2001) <<http://pandora.nla.gov.au/pan/10052/20020221-0000/www.pm.gov.au/news/speeches/2001/speech1311.htm>> (emphasis added).

⁵⁹ See also Philip Ruddock, Minister for Immigration and Multicultural Affairs, 'Address' (Speech delivered at the National Press Club, Canberra, 28 March 1998) (emphasis added):

Only two weeks ago a decision to deport a man was overturned by the Federal Court although he had been convicted and served a gaol sentence for possessing heroin with an estimated street value of \$3 million. Again, *the courts have reinterpreted and re-written Australian law — ignoring the sovereignty of Parliament and the will of the Australian people. Again, this is simply not on.*

⁶⁰ See A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1965) 40, 131.

⁶¹ See Crock, 'Judging Refugees', above n 57, 53; Peter Gerangelos, 'The Separation of Powers and Legislative Interference with Judicial Functions in Pending Cases' (2002) 30 *Federal Law Review* 1; Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretative Disagreement' (2005) 27 *Sydney Law Review* 29.

⁶² See, eg, Justice Michael Kirby, 'Beyond the Judicial Fairy Tales' (2004) 48(1) *Quadrant* 26, 32.

⁶³ *Ibid* 33.

⁶⁴ See Justice Michael Kirby, 'International Law — The Impact on National Constitutions' (Speech delivered at the Seventh Annual Grotius Lecture, Annual Meeting of the American Society of International Law, Washington DC, 30 March 2005).

⁶⁵ See, eg, *ibid*; Kirby, 'Beyond the Judicial Fairy Tales', above n 62, 29, 33.

From my perspective as a migration practitioner, the battle was joined first after the arrival of boat people from Cambodia in 1989. The decision by the then Labor government to detain the arrivals — all of whom sought protection as refugees — led eventually to legislation that laid the foundation for the present regime which mandates the detention of all non-citizens in Australia without the authority of a visa.⁶⁶ The enactment provided for the detention of ‘designated’ boat arrivals and stated that ‘a court is not to order the release’ of such persons.⁶⁷

The discomfort of the courts when presented with these politically charged cases has been apparent from the outset. In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (‘*Chu Kheng Lim*’)⁶⁸ the High Court focused on Parliament’s power to legislate and showed an almost complete disregard for principles of international human rights law. In that case, the High Court struck down as unconstitutional the provision purporting to exclude judicial review.⁶⁹ However, it upheld the validity of the detention regime on the basis that the power to legislate with respect to aliens provided virtually unfettered power to make laws with respect to non-citizens in Australia.⁷⁰ No mention was made of the prohibition on arbitrary detention contained in art 14 of the *International Covenant on Civil and Political Rights*⁷¹ to which Australia is a party.⁷²

This decision set the benchmark for a much more troubling set of rulings in 2004 when challenges were made to laws that had the potential to mandate the incarceration of non-citizens for the term of their natural life — and in the most inhumane of conditions.⁷³ As amended, the *Migration Act 1958* (Cth) provides that non-citizens who are in Australia without the authority of a visa must be detained until they are either granted a visa to enable their release or until they are removed from the country.⁷⁴

The most important of the cases involved a stateless Palestinian who came to Australia without a visa and was refused protection as a refugee.⁷⁵ Although Ahmed Ali Al-Kateb made a request in writing to be removed from Australia, the Australian authorities were unable to secure his admission into another country.⁷⁶ By the time his case came to be heard in the High Court the man had languished in immigration detention — sometimes in the most appalling of conditions — for

⁶⁶ See Mary Crock, ‘You Have to Be Stronger than Razor Wire: Legal Issues Relating to the Detention of Refugees and Asylum Seekers’ (2002) 10 *Australian Journal of Administrative Law* 33.

⁶⁷ See *Migration Act 1958* (Cth) ss 54L, 54N, 54P, 54R. See also Crock, ‘Climbing Jacob’s Ladder’, above n 57.

⁶⁸ (1992) 176 CLR 1, discussed in Crock, ‘Climbing Jacob’s Ladder’, above n 57.

⁶⁹ *Chu Kheng Lim* (1992) 176 CLR 1, 35–7 (Brennan, Deane and Dawson JJ), 53 (Gaudron J). Mason CJ, Toohey and McHugh JJ dissented: at 14 (Mason CJ), 50–1 (Toohey J), 75 (McHugh J).

⁷⁰ *Ibid* 10 (Mason CJ), 25–6 (Brennan, Deane and Dawson JJ), 45 (Toohey J), 64 (McHugh J).

⁷¹ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁷² See *Chu Kheng Lim* (1992) 176 CLR 1, 55 (Gaudron J).

⁷³ See *Al-Kateb* (2004) 219 CLR 562; *Al Khafaji* (2004) 219 CLR 664; *Woolley* (2004) 225 CLR 1; *Behrooz* (2004) 219 CLR 486. See also Crock, Saul and Dastyari, above n 8, 178–81, ch 11.

⁷⁴ See *Migration Act 1958* (Cth) ss 189, 198; Crock, Saul and Dastyari, above n 8, ch 9.

⁷⁵ *Al-Kateb* (2004) 219 CLR 562.

⁷⁶ *Ibid* 572 (Gleeson CJ).

almost five years.⁷⁷ By a narrow majority, the High Court ruled that the silences in the *Australian Constitution* and the vesting of legislative power in Parliament meant that the provisions in question were valid, obligations assumed by Australia under international human rights law notwithstanding.⁷⁸ The majority agreed that the words used in the migration legislation had to be given their natural meaning: the Act cannot be read ‘subject to a purposive limitation or an intention not to affect fundamental rights’.⁷⁹

McHugh J described the majority ruling as ‘tragic’ and asserted that the case demonstrated conclusively the need for a statutory bill of rights in Australia.⁸⁰ However, his Honour agreed with the majority that as long as a detainee can be characterised as an ‘alien’ for the purposes of the *Australian Constitution*, Parliament’s power to detain is virtually unlimited.⁸¹ While McHugh J acknowledged that Australia’s detention laws were in breach of obligations assumed as a party to the major international human rights conventions, his Honour ruled that international law was irrelevant unless incorporated into Australian law through an Act of Parliament.⁸²

The minority justices, on the other hand, showed that a variety of judicial techniques were available to place constraints on Parliament’s ability to make laws that contravene basic principles of human rights. Gleeson CJ and Gummow J focused on basic rules of statutory interpretation and the traditions of the English common law,⁸³ while Kirby J extended his discussion to stress the significance of principles of human rights law assumed by Australia under international law.⁸⁴ All three ruled that where it was practically impossible to remove a non-citizen from Australia, the *purpose* of the detention provisions in the Act could no longer be fulfilled.⁸⁵ This meant that the authority to detain a person disappeared as soon as removal became impossible. On this point, Hayne J observed for the majority that it was not for the courts to assume that the executive would *never* be able to remove Al-Kateb.⁸⁶ The minority’s approach allowed for the validity of mandatory detention — including the detention of innocents such as children — in a way that need not offend the prohibition under international law against *arbitrary* detention.⁸⁷ The dissentients also found that the power to legislate with respect to ‘aliens’ was limited by the constitutional injunction that the ‘judicial’ power could only be exercised by a court of law.⁸⁸

⁷⁷ Ibid 596, 614 (Gummow J), 652 (Callinan J).

⁷⁸ Ibid 591, 595 (McHugh J), 645, 651–2 (Hayne J), 662 (Callinan J), 662–3 (Heydon J).

⁷⁹ Ibid 581 (McHugh J).

⁸⁰ Ibid 581, 594–5.

⁸¹ Ibid 595.

⁸² Ibid 594–5.

⁸³ Ibid 578–80 (Gleeson CJ), 595, 598, 609–14 (Gummow J).

⁸⁴ Ibid 617–26.

⁸⁵ Ibid 578 (Gleeson CJ), 608–9 (Gummow J). Kirby J agreed with Gummow J: at 614.

⁸⁶ Ibid 639–40.

⁸⁷ See, eg, *ibid* 575, 577–8 (Gleeson CJ), 607–8, 612–13 (Gummow J), 615–16, 619–20 (Kirby J).

⁸⁸ Ibid 612–13 (Gummow J), 615–17 (Kirby J).

They found that detention without administrative purpose becomes punitive, and so performs a function that is open only to courts of law.⁸⁹

By 2004, the politics surrounding mandatory detention in Australia were intense. Popular opinion continued to support the government's hard line even though there were (and in fact still are) aspects of the prevailing policies that were patently at odds with many of the basic obligations assumed by Australia as signatory to various international human rights instruments. What is interesting about even the minority rulings is that — just as in *Chu Kheng Lim*⁹⁰ in 1992 — most of the justices felt compelled to keep their critique *domestic*. Kirby J is the only justice who quite fearlessly used norms of international human rights law as beacons to guide his judgment. As the highly defensive judgment of McHugh J demonstrates, it is not that the rest of the Court was unaware of these principles and the extent to which they are at odds with the laws and practices in Australia.

The ruling in *Al-Kateb* was a narrow one, but it is devastating nonetheless. In a series of cases, the High Court went on to confirm the validity of legislation mandating the detention of immigrant children and ruled that the basic lawfulness of immigration detention was unaffected by even the most appalling conditions in the detention centres.⁹¹ While these findings are particularly harsh from the perspective of the non-citizen or constitutional alien in Australia, they bode ill equally for other (unpopular) minorities in the community. The central point is that the *Australian Constitution* contains no safeguards against the abuse of fundamental human rights in instances where the legislature is vested with power to deal with the subject matter in question. The government's victories in the immigration detention cases have contributed to the repression of other societal outsiders, through laws such as the anti-terrorism legislation, which apply equally to citizens and non-citizens. As McHugh J states in *Woolley*, the fact that the *Australian Constitution* confers 'subject' powers on Parliament to legislate with respect to a range of matters that 'intrinsically refer to human beings' means that the power may be there to legislate for the administrative detention of citizens in a range of circumstances.⁹² His Honour offers as examples detention laws made with respect to marriage, divorce, bankruptcy and the influx of criminals.⁹³

⁸⁹ Ibid 617 (Kirby J). See also ibid 611–13 (Gummow J); Matthew Zagor, 'Uncertainty and Exclusion: Detention of Aliens and the High Court' (2006) 34 *Federal Law Review* 127; Juliette Curtin, "'Never Say Never': *Al Kateb v Godwin*' (2005) 27 *Sydney Law Review* 355.

⁹⁰ (1992) 176 CLR 1.

⁹¹ See *Al Khafaji* (2004) 219 CLR 664; *Woolley* (2004) 225 CLR 1; *Behrooz* (2004) 219 CLR 486. A huge number of parliamentary and other reports have been written about conditions in Australia's immigration detention centres. The most potent criticisms are those made in Human Rights and Equal Opportunity Commission, *A Last Resort? Report of the National Inquiry into Children in Immigration Detention* (2004).

⁹² (2004) 225 CLR 1, 27.

⁹³ Ibid. See also Peter Prince, 'The High Court and Indefinite Detention: Towards a National Bill of Rights?' (Research Brief No 1, Parliamentary Library, Parliament of Australia, 2004).

IV HUMAN RIGHTS AS PRIVILEGE: IMMIGRATION AND THE
DANGERS OF EXCEPTIONALISM

Concomitant with Parliament's assertion of its supremacy in the immigration cases has been the view that access to the courts and to judicial review is a privilege that should not necessarily be extended to all non-citizens (or to those otherwise excluded from the Australian polity). A centrepiece of the litigation in *Chu Kheng Lim* was a statutory provision stating that no court could order the release of the detainees in question.⁹⁴ As noted earlier, the High Court resisted this and later, more blatant attempts to exclude judicial review of migration decisions. The *Migration Act 1958* (Cth) to this day contains provisions that appear to deny judicial oversight of such decisions altogether.⁹⁵ Partly in response to these rebuffs from the High Court, successive governments have tried other mechanisms to create spaces — both literally and in a figurative sense — where political rule can be supreme and untroubled by judicial oversight.

From the time the first immigration detention centres were constructed in the early 1990s, attempts were made to place physical distance between the detainees and their lawyers. These distances have grown incrementally over the years, culminating most recently in the construction of a \$400 million holding centre on Christmas Island which lies south of Indonesia off the West Australian coast.⁹⁶ In 2004, a visit to that island cost almost as much as a return airfare to London.

Leaving to one side initiatives to make it more difficult for lawyers to physically meet with immigration detainees, a more worrying development in the context of human rights protection has been the creation of legal black zones for unwanted would-be migrants. The tactic was adopted in 2001 at the height of the so-called *MV Tampa* affair, when legislation was passed to 'excise' offshore territories like Christmas Island, Ashmore Reef and the Cocos (Keeling) Islands from Australia's 'migration zone'.⁹⁷ These territories have not ceased to be part of Australia. Rather, the excision legislation operates to prevent non-citizens in the specified zones from lodging any form of visa application.⁹⁸ The migration legislation is said not to apply, leaving open the possibility that a different

⁹⁴ *Chu Kheng Lim* (1992) 176 CLR 1; *Migration Act 1958* (Cth) s 54R.

⁹⁵ See, eg, *Migration Act 1958* (Cth) s 183.

⁹⁶ Submission to Parliamentary Standing Committee on Public Works, Parliament of Australia, *Construction of a Respecified Immigration Reception and Processing Centre on Christmas Island*, September 2003, Submission No 1, 19 (Department of Finance and Administration); Parliamentary Standing Committee on Public Works, Parliament of Australia, *Proposed Respecified Christmas Island Immigration Reception and Processing Centre* (2003) 7; Evidence to Joint Committee on Public Works, Parliament of Australia, Canberra, 31 October 2003, 8 (Timothy Wise).

⁹⁷ See *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth). The legislation is discussed in Mary Crock, 'In the Wake of the *Tampa*: Conflicting Visions of International Refugee Law in the Management of Refugee Flows' (2003) 12 *Pacific Rim Law and Policy Journal* 49. See also Crock, Saul and Dastyari, above n 8, ch 7.

⁹⁸ See *Migration Act 1958* (Cth) s 5 for the definition of 'excised offshore place', which is accompanied by the following note: 'The effect of this definition is to excise the listed places and installations from the migration zone for the purposes of limiting the ability of offshore entry persons to make valid visa applications.'

assessment regime (or no regime at all) might apply to asylum seekers collected at these locations.⁹⁹

In practice, the status of non-citizens within an excised zone such as Christmas Island remains uncertain. This is because the excision laws were only one part of the Howard Coalition government's Pacific Strategy. Persons apprehended at or before landing on 'excised' Australian territories have been sent for processing in the foreign countries of Nauru and Papua New Guinea.¹⁰⁰ This initiative was taken for the express purpose of ensuring that the interdicted asylum seekers would not receive the procedural benefits that are usually afforded by Australian law.¹⁰¹

The idea was not original. When Charles II and the monarchy were restored to power in the 1660s, republican prisoners were incarcerated on Jersey and the Isle of Man where it was decreed that the royal writ of habeas corpus did not run.¹⁰² The purpose then as now was to circumvent judicial interference in a measure of national security at a time of emergency.¹⁰³

The immediate precedent for Australia's Pacific Strategy, however, was the construction by the US of an offshore detention and processing centre for asylum seekers from Haiti and Cuba in the US protectorate of Guantánamo Bay. These arrangements were made originally so as to deny these people access to both US territory¹⁰⁴ and, more importantly, to the protections of international law as far as these might have been enforceable through US law.¹⁰⁵

⁹⁹ *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth) s 4; *Migration Act 1958* (Cth) ss 46A, 494AA.

¹⁰⁰ See Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, *A Certain Maritime Incident* (2002); Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* (2006).

¹⁰¹ Crock, Saul and Dastyari, above n 8, 118.

¹⁰² See Geoffrey Robertson, *The Tyrannicide Brief* (2005) 349. The British Parliament eventually outlawed the practice. See the subtitle to the *Habeas Corpus Act 1679*, 31 Car 2, c 2: 'An Act for the better securing the Liberty of the Subject, and for Prevention of Imprisonment beyond the Seas.'

¹⁰³ See Fleur Johns, 'Guantánamo Bay and the Annihilation of the Exception' (2005) 16 *European Journal of International Law* 613, 621.

¹⁰⁴ See Gerald L Neuman, 'Anomalous Zones' (1996) 48 *Stanford Law Review* 1197, 1228–33. The following is a selection of the many articles written on the interdiction programme that has been run in the US since the early 1980s: Margaret A Coon, 'The Law of Interdiction: Time for Change' (1980) 27 *Louisiana Bar Journal* 223; Stanley Mailman, 'Reagan's Policy on Haitian Refugees', *New York Law Journal* (New York), 7 October 1981, 1; Louis B Sohn, 'Interdiction of Vessels on the High Seas' (1984) 18 *International Lawyer* 411; Bill Frelick, 'Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection' (1993) 26 *Cornell International Law Journal* 675.

¹⁰⁵ In the US, various challenges were made to the Haitian interdiction programme by the Haitian Centers Council, culminating in the US Supreme Court case of *Sale v Haitian Centers Council Inc*, 509 US 155 (1993). See James R Zink, 'Race and Foreign Policy in Refugee Law: A Historical Perspective of the Haitian Refugee Crises' (1998) 48 *DePaul Law Review* 559; Frelick, 'Haitian Boat Interdiction and Return', above n 104; Bill Frelick, 'US Refugee Policy in the Caribbean: No Bridge over Troubled Waters' (1996) 20(2) *Fletcher Forum of World Affairs* 67; Hiroshi Motomura, 'Haitian Asylum Seekers: Interdiction and Immigrants' Rights' (1993) 26 *Cornell International Law Journal* 695; Thomas David Jones, 'A Human Rights Tragedy: The Cuban and Haitian Refugee Crises Revisited' (1995) 9 *Georgetown Immigration Law Journal* 479. See also Thomas David Jones, 'International Decisions' (1996) 90 *American Journal of International Law* 456, 477; Stephen H Legomsky, 'The USA and the Caribbean Interdiction

The extent of Australia's reliance on the US for the legitimacy of its actions is apparent in the government's announcement in late April 2007 that it would engage in 'refugee swapsies' with the US government.¹⁰⁶ Informal agreements were apparently reached to exchange up to 200 refugees, with refugees processed by the US government at Guantánamo Bay to be resettled in Australia while the same number of refugees processed by Australia on Nauru would be resettled in the US.¹⁰⁷ The response by then Opposition Leader Kevin Rudd to the announcement in April 2007 suggests that the plan will not go ahead under the new Labor government.¹⁰⁸

It should be well-understood that no government attempts to exclude the rule of law for benign reasons. Consider Guantánamo Bay. It began as an immigration detention facility but has been transformed since 11 September 2001 into a holding camp for 'enemy combatants' that has become infamous for the most egregious abuses of human rights.¹⁰⁹ The practice of rendition — or the delivery of persons into the hands of foreign governments for interrogation and torture — is another example in point.

Abuses of human rights have occurred also in the execution of Australia's Pacific Strategy.¹¹⁰ In this instance, it should not be difficult to see how the precedents set in the context of immigration control should be of immediate concern to ordinary Australians. In the absence of a bill of rights, the question for Australians is this: if Christmas Island's new detention facility is to be used for purposes similar to those of Guantánamo Bay, what protections will the *Australian Constitution* afford?

V AN IMMIGRANT COUNTRY OR A (MODEL) GLOBALISED SOCIETY

There are particular problems associated with leaving the protection of human rights predominantly in the hands of Parliament and politicians. As the immigration cases demonstrate, the pull of the electorate is strong. Votes lie with parties that are seen to be tough on crime, tough on security and tough on border control. A platform built on protecting the human rights of deeply unpopular people would be viewed by many strategists as electoral suicide. See in this context the continued jibes by the then Coalition government that the Labor opposition was showing weakness by withdrawing support for the Pacific Strategy of processing asylum seekers offshore on Nauru.

Program' (2006) 18 *International Journal of Refugee Law* 677; 'Symposium: The Haitian Refugee Crisis: A Closer Look' (1993) 7 *Georgetown Immigration Law Journal* 1.

¹⁰⁶ ABC Television, 'Opposition, Minor Parties Slam Govt over Refugee Swap Plan', *Lateline*, 18 April 2007 <<http://www.abc.net.au/lateline/content/2007/s1900881.htm>>.

¹⁰⁷ Gerard McManus, 'Taking over Asylum: PM Defends US Refugee Swap', *Herald Sun* (Melbourne), 19 April 2007, 11; Mark Metherell, 'Costs Cited to Justify Refugee Swap with US', *The Sydney Morning Herald* (Sydney), 19 April 2007, 4; Jewel Topsfield, 'Refugees: Now for the US Solution', *The Age* (Melbourne), 18 April 2007, 4.

¹⁰⁸ Mark Metherell, above n 107, 4.

¹⁰⁹ See Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005).

¹¹⁰ See Crock, *Seeking Asylum Alone*, above n 13, 185–99; Crock, Saul and Dastyari, above n 8, ch 7; Michael Gordon, *Freeing Ali: The Human Face of the Pacific Solution* (2005).

In this article, the argument has been made that the allocation of powers within the *Australian Constitution* has encouraged both politicians and some judges to accept that matters pertaining to human rights protection do indeed lie within the province of the Australian Parliament. Although the courts have resisted attempts to oust their jurisdiction in Australia, the present government has largely succeeded in its attempt to assert its primacy — at least where it is acting through the authority of validly enacted legislation. It has also managed to create a juridical space where the rule of law has either no operation or the issue is uncertain. Dissents by Gleeson CJ, Gummow and Kirby JJ in *Al-Kateb* show us that the courts could be more vigorous in their defence of human rights in spite of the shortcomings of the *Australian Constitution*.

The central problem is that if we use notions of alienage as an excuse for the establishment or maintenance of a regime that involves abuse of human rights, it will only be a matter of time before the infection spreads and the rights of constitutional ‘insiders’ are affected. The experiences of Cornelia Rau and Vivian Alvarez Solon show us that Bosniak is right. In modern day Australia it is inherently difficult to characterise people within a society as obvious insiders or outsiders. Not only is it impossible to describe a typical modern Australian through racial stereotyping, the statuses that are conferred by our migration laws are complex. Determination of an immigrant’s immediate entitlements to work or even to remain in the country is not always possible.

It is my personal view that we have been accepting of arguments about emergency and the need for exceptional measures for so long that we have become blind to what I call continental drift. The first decisions to lock up asylum seekers were made in the heat of a complex international political situation in Cambodia.¹¹¹ When the boats carrying asylum seekers kept coming, and coming from different countries, the popularity of the government’s initial stance encouraged more and more draconian responses. Each decision to tighten the law was made on the logic of earlier initiatives; each measure defensive. The inherently self-referential nature of the discourse placed both subtle and not so subtle pressures on the courts to see the judicial review process as one that excluded international human rights norms as decisional referents. Similar pressures are being felt by those who now advocate for change.

Amongst those who are calling for an end to the Pacific Strategy, some are arguing that it is enough that Australia refrain from sending asylum seekers to Nauru. A friend (who I do not wish to name) wrote to me in 2007:

I accept that Christmas Island will be a physical hell hole. But given that it presently enjoys the support of all major political parties, it is essential that we first knock off the Pacific solution and then look further down the track at redirecting the Christmas Island caseload.

¹¹¹ See Andrew Hamilton, ‘Three Years Hard’ (1993) 3(1) *Eureka Street* 24; Andrew Hamilton, ‘Three Years Hard’ (1993) 3(2) *Eureka Street* 22; Andrew Hamilton, ‘The Fourth Year Hard’ (1994) 4(3) *Eureka Street* 26; Mary Crock (ed), *Protection or Punishment: The Detention of Asylum Seekers in Australia* (1993); Gareth Evans and Bruce Grant, *Australia’s Foreign Relations: In the World of the 1990s* (2nd ed, 1995).

It is not appropriate to engage here with all the legal arguments pertaining to offshore decision-making. What is concerning in this analysis is the cool acceptance that the maintenance of Christmas Island as an 'excised' offshore space will continue to involve quite serious breaches of human rights. My friend seems to be trying to find a middle ground using the status quo of the Pacific Strategy as a guide, arguing that improvements have to be made slowly if political stability is to be maintained.

If we take this approach, Australia will begin to look a bit like the doomed polar bears on the dwindling ice floes of the Arctic. Not only have we drifted far from any notion of decency, we are at risk of losing our footing altogether as a nation that prides itself as a defender of human rights.

Australia may have no bill of rights. Some will argue that the experience in the immigration field shows us that Australia needs either a bill of rights or a charter of rights and obligations.¹¹² Leaving these debates aside, however, Australia is party to all of the major international human rights instruments. It is not that we are ignorant of the principles that should be the guide to a healthy and humane society. The experiences of countries like Canada, New Zealand and even England demonstrate that with a little political leadership, the electorate can be persuaded to support measures to protect human rights.¹¹³ What we need to do is to go back to the basics and to reassert the primacy of the rule of law and of respect for basic human rights irrespective of colour, creed or nationality. Recent years have seen this country playing an extremely dangerous endgame with immigration and human rights. It is a game that ultimately puts us all at risk.

¹¹² See, eg, Philip Alston (ed), *Towards an Australian Bill of Rights* (1994).

¹¹³ Reference is made here to the decisions made in those countries to introduce either legislative or statutory regimes for the protection of human rights.