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Introduction

> What men, what monsters, what inhuman race,
> What laws, what barb'rous customs of the place,
> Shut up a desert shore to drowning men,
> And drive us to the cruel seas again![1]

1.1 INSTITUTIONAL RESPONSES TO UNSOLICITED MIGRATION

The spectre of vast hordes arriving on Australian shores in little fishing boats has long captured the public imagination. Ever since the exodus from Vietnam that began in 1975, the arrival of so-called 'boat people' has been met with growing hostility and increasingly harsh measures.[2] Since 1992, 'boat people' seeking Australia's protection have been subject to mandatory detention for months and often years without meaningful recourse to the courts. Described at the time as an "interim" measure,[3] the practice of mandatory detention has survived constitutional

[1] Virgil, *Aeneis* in John Dryden, *The Poetical Works of John Dryden, with the Life of Virgil* (Milner and Sowerby, 1864) 104.

[2] While numbers of 'boat people' arriving in Australia since this time have increased significantly, they remain modest in global terms: see United Nations High Commissioner for Refugees (UNHCR), *UNHCR Statistical Yearbook 2014* (UNHCR, 14th ed, 2015); Janet Phillips and Harriet Spinks, 'Boat Arrivals in Australia Since 1976' (Research Paper, Parliamentary Library, Parliament of Australia, first published 25 June 2009, statistical appendix updated 23 July 2013). For an overview of Australia's responses to unauthorised arrivals over the last quarter of the twentieth century, see Andreas Schloenhardt, 'Australia and the Boat People: 25 Years of Unauthorised Arrivals' (2000) 23(3) *University of New South Wales Law Journal* 33.

[3] Commonwealth, *Parliamentary Debates*, House of Representatives, 5 May 1992, 2370 (Gerry Hand, Minister for Immigration) (Commonwealth parliamentary debates are hereinafter referred to as 'CPD').

challenge,[4] been exported,[5] and, more than 25 years later, remains a central platform of contemporary migration law and policy both in Australia[6] and as part of Australia's offshore detention and processing policy.[7]

Between 1997 and 2009, many asylum seekers applying to remain in Australia had a 'no work' condition[8] imposed on their stay while they awaited the outcome of lawful immigration procedures. These procedures could take months and sometimes years to run their course. Although some of the harshest consequences of the no-work policies of this 12-year period[9] were mitigated by policy and regulatory changes from 2009,[10] the way in which they were framed and rationalised is of more than historical interest. This is because, notwithstanding the relaxation of the policy for some, work rights are still regarded as a privilege.[11] The regulatory framework for imposing the no-work condition remains in place,[12] and the risk of detention for breach of the no-work condition remains real.[13] In 2014, at least 19,000 asylum seekers

[4] See especially *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 ('*Lim*'); *Al-Kateb v Godwin* (2004) 219 CLR 562 ('*Al-Kateb*'); *Plaintiff M76-2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 ('*Plaintiff M76*'); *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 ('*Manus Island Case*'); *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 ('*Plaintiff S4*'); *Plaintiff M96A/2016 v Commonwealth of Australia* [2017] HCA 16 (3 May 2017) ('*Plaintiff M96A*'); *Plaintiff S195/2016 v Minister for Immigration and Border Protection and Ors* [2017] HCA 31, 17 August 2017. See also Chapter 5.

[5] Although there have been some recent changes to the offshore detention regime established under memoranda of understanding between Australia and Nauru and Papua New Guinea, 'boat people' transferred from Australia to Nauru and Manus Island, Papua New Guinea, have been mandatorily detained for long periods and the validity of the regional processing scheme upheld: see *Manus Island Case* (2014) 254 CLR 28; *Plaintiff M68-2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 ('*Nauru Detention Case*'). Cf *Namah v Pato* [2016] PGSC 13; SC1497 (26 April 2016); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 ('*Malaysian Declaration Case*'). The relaxation of policy notwithstanding, the confinement of a person on an island may nevertheless constitute a deprivation of liberty: *Case of Guzzardi v Italy* (1980) 3 Eur Court HR (ser A, no 39) 533.

[6] See especially *Migration Act 1958* (Cth) divs 6–7 ('*Migration Act*').

[7] See, eg, *Manus Island Case* (2014) 254 CLR 28; *Nauru Detention Case* (2016) 257 CLR 42; *Namah v Pato* [2016] PGSC 13; SC1497 (26 April 2016).

[8] *Migration Regulations 1994* (Cth) reg 2.05(1), sch 8 reg 8101('*Migration Regulations*').

[9] See, eg, Grant Mitchell et al, 'Welfare Issues and Immigration Outcomes: Asylum Seekers Living in Australia on Bridging Visa E' (2003) 25(3) *Migration Action* 20.

[10] *Migration Amendment Regulations 2009 (No 6)* (Cth).

[11] Joint Standing Committee on Migration, Parliament of Australia, *Immigration Detention in Australia: Community-Based Alternatives to Detention – Second Report of the Inquiry into Immigration Detention in Australia* (2009) 139 [5.38].

[12] *Migration Regulations* sch 2.

[13] For example, since 14 December 2013, 'boat people' released into the community pending the determination of their status are also required to sign a code of conduct the breach of

lived in the Australian community without work rights,[14] and although (since that time) many of those asylum seekers have now been given work rights, pursuant to a deal brokered between then Immigration Minister Scott Morrison and minor-party senators,[15] the grant of such rights is still discretionary and subject to withdrawal.[16]

As well as the prospect of a no-work condition, many asylum seekers have also been, and indeed continue to be, denied access to any or adequate welfare support.[17] They have been left to depend on charity and forced into homelessness and begging.[18] As a result, many asylum seekers face

which risks reduction or cessation of welfare support or visa cancellation and return to immigration detention. Furthermore, breach of the code may lead to the refusal of further visa applications and, in certain circumstances, permanent exclusion from Australia. The terms of the code of behaviour include an expectation that asylum seekers will comply with all Australian laws including road laws: *Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013* (Cth); *Instrument IMMI 13/155: Code of Behaviour for Public Interest Criterion 4022* (Cth), signed on 12 December 2013, made under *Migration Regulations* sch 4 pt 4 cl 4.1. However, even without the Code of Behaviour, breach of the no-work condition can lead to visa cancellation and re-detention on the grounds of being an 'unlawful non-citizen': *Migration Act* ss 13, 14, 116(1)(b), 189. Note also that *Migration Amendment (Employer Sanctions) Act 2007* (Cth) amended the *Migration Act* to include both civil and criminal liability on employers for allowing a person to work in breach of the no-work condition: *Migration Act* ss 245AA–245AP.

[14] This was especially the case for a cohort of 'boat people' released from detention pursuant to a ministerial discretion and subject to a 'no advantage' policy recommended by an expert panel on asylum seekers in August 2012: Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Estimates 2013–2014 (Immigration and Border Protection)*, Canberra, 27 May 2014, 81 (Martin Bowles, Secretary, Department of Immigration and Border Protection (DIBP); Chris Bowen, Minister for Immigration and Citizenship, 'No Advantage Onshore for Boat Arrivals' (Media Release, 21 November 2012); *Instrument IMMI 12/114: Classes of Persons* (Cth), signed on 20 November 2012, made under *Migration Regulations* sch 2 regs 050.613A(1)(b), 051.611A(1)(c); Australian Human Rights Commission, Submission No 8 to Joint Committee on Human Rights, Parliament of Australia, *Examination of the Migration (Regional Processing) Package of Legislation*, January 2013, 47–9; Lisa Hartley and Caroline Fleay, 'Policy as Punishment: Asylum Seekers in the Community without the Right to Work' (Centre for Human Rights Education, Curtin University, 2014) 34; Peter Mares, 'Refuge without Work: "This is a Poison, a Poison for the Life of a Person"' (2014) 45 *Griffith Review* 103, 105. On the expert panel report, see below n 38.

[15] Morrison agreed to grant work rights and to exercise his discretion to release children from detention in exchange for the passage of controversial legislation enabling extraterritorial detention on the high seas: Scott Morrison, Minister for Immigration and Border Protection, Press Conference, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Coalition Government, Parliament House, Canberra, 5 December 2014.

[16] See Chapter 6, Section 6.2, 258–72. [17] Hartley and Fleay, above n 14, 34.

[18] Nadine Liddy, Sarah Sanders, and Caz Coleman, 'Australia's Hidden Homeless: Community-Based Options for Asylum Homelessness' (Hotham Mission Asylum Seeker Project, 2010).

destitution[19] or, for those denied work rights, risk detention for trying to mitigate their hardship – an effect that, as we saw in the prologue, has been described by a senior member of the judiciary as Kafkaesque.[20] The relaxation of the work rights policy notwithstanding, for many, the denial or piecemeal grant of work rights[21] and the denial of access to adequate welfare has fostered social and economic exclusion, with far-reaching and damaging effects.[22] This exclusion, coupled with the uncertainty of a precarious legal status that conditions access to protection procedures by 'boat people'[23] on a non-compellable 'public interest' discretion[24] and the imposition of arbitrary and unrealistic 'lodge or leave' deadlines,[25] has put asylum seekers under

[19] See, eg, Hartley and Fleay, above n 14, 34; Asylum Seekers Resource Centre (ASRC), 'Destitute and Uncertain: The Reality of Seeking Asylum in Australia' (October 2010).

[20] *De Silva v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 350, 351 (Merkel J).

[21] A practice has emerged of granting bridging visas with work rights for three-month periods. This creates an almost insurmountable practical barrier to securing work: Refugee Council of Australia (RCOA), 'State of the Nation: Refugees and People Seeking Asylum in Australia' (RCOA Report No 1/17, February 2017) 10 http://www.refugeecouncil.org.au/publications/reports/state-nation-2017/.

[22] See, eg, Jesuit Social Services, 'The Living Conditions of People Seeking Asylum in Australia' (Jesuit Social Services, 2015); see also Carolyn Webb and Cameron Houston, 'Springvale Bank Fire: Asylum Seekers' Lives Precarious, Say Advocates', *The Age* (online), 20 November 2016, www.theage.com.au/victoria/springvale-bank-fire-asylum-seekers-lives-precarious-say-advocates-20161120-gstexl.html.

[23] The cohort affected by these measures comprises some 30,923 'boat people' currently in Australia who are part of what has become known as the 'legacy caseload' – that is, 'boat people' who either arrived before 13 August 2012 and had not had their protection visa application finalised by 18 September 2013, or who arrived on or after 13 August 2012 and who are subject to a fast-track assessment process. The date 13 August 2012 signifies the date on which an expert panel on asylum seekers published a report recommending reinstatement of extraterritorial processing of asylum seekers: see below n 38. 18 September 2013 signifies the commencement date of the military-led campaign to 'Stop the Boats', codenamed Operation Sovereign Borders: Thea Cowie, 'Coalition Launches Operation Sovereign Borders' *SBS Radio* (online), 18 September 2013 www.sbs.com.au/news/article/2013/09/18/coalition-launches-operation-sovereign-borders. For a departmental description of the 'legacy caseload' and statistical data see DIBP, 'IMA Legacy Caseload: Report on Status and Processing Outcomes' (February 2017) <www.border.gov.au/ReportsandPublications/Documents/statistics/ima-legacy-caseload-feb-17.pdf>.

[24] *Migration Act* ss 46A(1), (2), and (7). Members of the 'legacy caseload' are prohibited from applying for permanent protection. They can only apply for a temporary protection visa if the Minister decides that it is in the 'public interest' to exercise his discretion to lift a legislative bar on making such an application. Even then, they are subject to a fast-track assessment process that makes access to merits review a matter of departmental discretion.

[25] A ministerial announcement in May 2017, setting a lodgment deadline of 1 October 2017, led to an explosion in demand for legal advice and assistance: RCOA, 'Recent Changes in Australian Refugee Policy' (RCOA Media Release, 8 June 2017) <www.refugeecouncil.org.au/publications/recent-changes-australian-refugee-policy/>; see also Amnesty International,

immense strain. Indeed, the administration of policy has heightened rather than diminished vulnerability to destitution, detention and ultimately the risk of *refoulement*. These conditions have been described by UNHCR's most senior protection official, Volker Türk, as a "social time bomb".[26]

Mandatory detention and planned destitution[27] can, as we can see, operate with dehumanising effects, separately or in combination. They are two of the most significant developments in Australian migration policy since the 1990s. Even today, as they seem to be overshadowed by increasingly strident responses to unsolicited migration – in particular the controversial policies of interception, boat turnbacks,[28] and extraterritorial detention and processing of asylum seekers[29] – mandatory detention and planned destitution remain central planks of current policy and continue to be viewed as both lawful and legitimate.

It is with this context in mind that this book aims to explain how policies such as the mandatory detention and planned destitution of certain foreigners[30] have come to be characterised as both lawful and legitimate institutional responses to unsolicited migration – policies that are central to, indeed underpin, Australia's contemporary responses to unsolicited migration. To do this, I unearth the juridical tradition in which migration law-making in Australia is embedded in order to show how certain kinds of

'Government Sets Impossible Deadlines for Asylum Applications', 13 March 2017 <www.amnesty.org.au/unrealistic-deadlines-imposed-on-people-seeking-asylum/>.

[26] Michael Gordon, '"Social Time Bomb": UNHCR's Warning on the Plight of 30,000 Asylum Seekers Already Living in Australia', *The Age* (online), 23 November 2016, quoting Volker Türk, UNHCR's Assistant High Commissioner for Refugees (Protection), <www.smh.com.au/federal-politics/political-news/social-time-bomb-unhcrs-warning-on-the-plight-of-30000-asylum-seekers-already-living-in-australia-20161122-gsuyk5.html>.

[27] In March 2008, then Minister for Immigration and Citizenship, Senator Chris Evans, characterised the policy of denying work rights and restricting access to welfare as planning for people to be destitute: CPD, Senate, 18 March 2008, 1090 (Chris Evans). Cholewinski describes similar practices in the United Kingdom as 'enforced destitution': Ryszard Cholewinski, 'Enforced Destitution of Asylum Seekers in the United Kingdom: The Denial of Fundamental Human Rights' (1998) 10(3) *International Journal of Refugee Law* 462.

[28] There have even been suggestions that effecting turnbacks may entail making government-sanctioned payments to people smugglers to do so: Jared Owens, 'Were Asylum Seeker Boats Paid to Turn Back?' *The Australian* (online), 14 June 2015 www.theaustralian.com.au/national-affairs/immigration/were-asylum-seeker-boats-paid-to-turn-back/news-story/f19bd5b8e14e590b31e0579a80b4c535 .

[29] See Section 1.2.2.1, 'Selection of the Case Studies', in this chapter. See also the epilogue, 'A Campaign to "Stop the Boats"', 292.

[30] In this book, I use the terms 'foreigner' and 'alien' more or less interchangeably, according to their usage in the particular texts with which I am working. However, as will become clear, my genealogical analysis of the figure of the foreigner in international law suggests the foreigner to be a figure with a more complex juridical history.

political-economic interests have shaped the relationship between the foreigner and the sovereign ('the foreigner-sovereign relation'). I argue that a discourse of 'absolute sovereignty'[31] emerged in the nineteenth century as the conceptual frame of that relation and continues to inform migration law-making today. It is this discourse that has helped make current institutional responses to unsolicited migration thinkable and, for some, seemingly inevitable. Yet, as I argue, it is a discourse whose past and present are contingent, undermining the sense that such responses are inevitable and raising the possibility of a different future.

1.1.1 *Common Humanity: A Backdrop*

In this book, I take the notion of our 'common humanity' as a backdrop.[32] As a notion, it impels us to think from – and to treat as axiomatic – the idea that all people are connected to one another through a common bond of human aspiration, frailty, and experience. It is a notion to which the Australian state gestures through its embrace of immigration and humanitarian obligation,[33]

[31] Throughout this book, 'absolute sovereignty' is a term I use in inverted commas as shorthand for the claim that there is an absolute sovereign right to exclude and condition the entry and stay of (even friendly) aliens. In addition, the convention is adopted of using inverted commas to mark the terms the book problematises as social constructs or embodied in discursive techniques. At least in their first use, I wrap such terms in inverted commas. I depart from this style when I see a particular value in doing so. For example, in the case of 'absolute sovereignty', inverted commas provide a way of reminding the reader that it has a particular meaning in this book and that it holds in relation a number of different political and juridical modes and registers. In relation to 'boat people', inverted commas provide a way of reminding my reader (and myself) that the term's ambiguity is part of the work it is doing. In addition, while using quotation marks in the usual way, inverted commas are used where text is quoted from legislation or where previously quoted text is requoted or paraphrased for analytical purposes. See Piet Strydom, *Discourse and Knowledge: The Making of Enlightenment Sociology* (Liverpool University Press, 2000) 10; Jothie Rajah, *Authoritarian Rule of Law: Legislation, Discourse and Legitimacy in Singapore* (Cambridge University Press, 2012) 4. See also Chapter 5, Section 5.1.1.3, 175–6.

[32] Emmerich de Vattel, *The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and of Sovereigns* (Joseph Chitty ed and trans, Lawbook Exchange, first published 1854, 2005 ed) bk I ch XIX §229 [trans of: *Le Droit des gens; ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains* (first published 1758)]; see Chapter 2, Section 2.4.2, 74–5.

[33] As Dauvergne has noted, although humanitarian admissions "[do] not fit in with an ideological vision of community or family – admitting people because they are 'us'" – such admissions are "vital" because they "mark the nation as good, prosperous, and generous." Yet, as she saliently observes, "[h]umanitarianism is an impoverished stand-in for justice": Catherine Dauvergne, *Humanitarianism, Identity and Nation: Migration Laws of Australia and Canada* (University of British Columbia Press, 2005) 7.

not least through its accession to international human rights[34] and refugee law instruments.[35] Yet the policies that I introduced through the prologue have effects on asylum seekers that deny or disremember[36] the bond of a common humanity that we share with those who seek Australia's protection.[37] And, discordantly, a common humanity is at the same time a notion the Australian state claims (unabashedly) to uphold in the execution of the same – or similar –

[34] Australia is a party to: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force, 3 May 2008). There are only two core international human rights instruments to which Australia is not a party: *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003); *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 6 February 2007, UN Doc A/61/488 (entered into force 23 December 2010).

[35] Australia is a party to: *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('*Refugee Convention*'); *Convention relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960); *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975); *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967). Australia reaffirmed its commitment to the *Refugee Convention* in UNHCR, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/MMSP/2001/09 (16 January 2002); see also UNHCR, *Ministerial Communiqué*, UN Doc HCR/MINCOMMS/2011/6 (8 December 2011), marking the 60th anniversary of the *Refugee Convention* and the 50th anniversary of the *Convention on the Reduction of Statelessness*.

[36] On disremembering as a form of social or institutional forgetting in the context of indigenous Australians, see W E H Stanner, 'The Boyer Lectures: After the Dreaming (1968)' in W E H Stanner, *The Dreaming and Other Essays* (Black Inc, first published 2009, 2010 ed) 172, 189.

[37] See also a storyboard on people smuggling depicting Afghan asylum seekers engaging people smugglers in an attempt to seek protection and instead having their hopes dashed and finding themselves detained in communal tents on remote islands, covered in malarial mosquito bites and suffering the effects of isolation, dislocation, boredom, anxiety, and uncertainty: Australian Customs and Border Protection Service, *Operation Sovereign Borders: A Storyboard on People Smuggling* (1 November 2013) <http://newsroom.border.gov.au/channels/Operation-Sovereign-Borders/photos/a-storyboard-on-people-smuggling>.

policies as those I problematise here.[38] This discordance gives rise to ethical questions about motivation and the ways in which we acknowledge the humanity of unsolicited migrants. However, for the purposes of this book, our common humanity provides a setting for my inquiry into how the policies I have identified can be considered thinkable, even appropriate, and furthermore in Australia's 'national interest'.

With this in mind, the book is motivated by the following questions: How could legislation providing for mandatory detention without meaningful recourse to the courts pass so effortlessly onto the statute books? How could the High Court of Australia ('the High Court') uphold the constitutional validity of such legislation when it is manifestly oppressive? What makes mandatory detention conceivable within Australian migration law? How is it possible to deny people the right to work and/or access to any or adequate welfare for months and years while they pursue lawful immigration procedures? How is it possible that indefinite detention could be the result of working to try and provide for one's family in such circumstances? What is it about migration lawmaking that leads to work and welfare policies that produce the destitution of unsolicited migrants, including children?

The answer to each of these questions, offered from within the politico-legal frame of reference from which those questions emanate, is that there is an absolute sovereign right to exclude and condition the entry and stay of

[38] "I want to stop the boats for Australia's sake and for the sake of common humanity": Leigh Sales, Interview with Tony Abbott, Prime Minister (ABC, 7:30 *Report*, 13 November 2013) 00:12:18 (Tony Abbott), <www.abc.net.au/7.30/content/2013/s3890402.htm>. The context of this claim is the argument that the 'stop the boats' policy and detention and processing of asylum seekers offshore are necessary to save lives at sea. The directive to save lives at sea was central to the terms of reference of an expert panel on asylum seekers established in mid-2012 following a spike in unauthorised boat arrivals. The panel recommended, inter alia, reopening offshore processing facilities in 2012: Angus Houston, Paris Aristotle, and Michael L'Estrange, 'Report of the Expert Panel on Asylum Seekers' (Australian Government, August 2012) 9. David Manne responds to the policy of consciously-harming-people-to-save-lives-at-sea justification from the ethical dimension of law's purpose – of striving to be a just and good society. He frames what he describes as the "ethics of protection", where human dignity is promoted and protected, not abused; where "the ethical rock . . . is the conviction that cruelty is an unjustifiable abuse of the human dignity of people we are obliged to protect": David Manne, Address to UNHCR Annual Consultations (Speech delivered at UNHCR Annual Consultations, Canberra, 15 October 2013); see also Andrew Hamilton, 'Asylum Seeker Ethics Is Simple' (2014) 24(5) *Eureka Street* (2014), <https://www.eurekastreet.com.au/article.aspx?aeid=39123#.WW_8hitLdTI>. On the axiom of a 'common humanity', see also CPD, House of Representatives, 14 February 2008, 350 (Scott Morrison, Maiden Speech).

aliens[39] – an answer popularly encapsulated in the Australian public conversation in the statement "*we will decide who comes here and the circumstances in which they come*"[40] and for which I use the shorthand 'absolute sovereignty' throughout this book.[41] However, behind this answer lies a multifaceted story of considerable complexity.

1.1.2 *'Absolute Sovereignty': A Backstory*

The claim of 'absolute sovereignty', as I use the term, relies on a particular idea and practice of sovereignty cast in terms which ostensibly embody an unfettered right of the state to exclude and condition the entry and stay of aliens. As the argument goes, the performance of this sovereign right is consistent with[42] – or at least not "significantly shaken by"[43] – international human rights or refugee law; so it retains its validity. In Australia, the doctrinal claim that there is an absolute sovereign right

[39] *Constitution* ss 51(xix), 51(xxvii); *Migration Act* s 4. For recent expressions of sovereignty in connection with offshore detention and processing and the related policies of interdiction and boat tow-backs, see Leigh Sales, Interview with Tony Abbott, Prime Minister (ABC, *7:30 Report*, 13 November 2013) 00:08:42, 00:09:46, 00:14:04, <www.abc.net.au/7.30/content/2013/s3890402.htm> : "This is a humanitarian disaster as well as an affront to our Australian sovereignty", "this is a sovereignty issue", "a very serious affront to our national sovereignty and is into the bargain a humanitarian disaster" (Tony Abbott); Stephanie Anderson, 'Refugee, asylum seeker ban won't break international obligations, Peter Dutton says', *ABC News* (online), 31 October 2016, <www.abc.net.au/news/2016-10-31/dutton-says-refugee-ban-won't-break-international-obligations/7979242>: "[W]e decide who is coming here. We don't outsource that to the people smugglers" (Malcolm Turnbull, Prime Minister).

[40] See, eg, ABC, 'Liberals Accused of Trying to Rewrite History', *Lateline*, 21 November 2001 (John Howard, former Prime Minister). Recent restatements of the claim have been made by Minister for Immigration and Border Protection, Peter Dutton, and former Prime Minister, Tony Abbott: Peter Dutton, *Address to the Australian Strategic Policy Institute*, 20 September 2016 <www.minister.border.gov.au/peterdutton/2016/Pages/address-australian-strategic-policy-institute-15092016.aspx>; Tony Abbott, *Address to the Alliance of European Conservatives and Reformists*, Lobkowicz Palace, Prague, Czech Republic, 18 September 2016 <http://tonyabbott.com.au/2016/09/address-alliance-european-conservatives-reformists-lobkowicz-palace-prague-czech-republic/>.

[41] See also Martijn C Stronks, 'The Question of Salah Sheekh: Derrida's Hospitality and Migration Law' (2012) 8(1) *International Journal of Law in Context* 73, 75; on the oppositional relation between hospitality and hostility, see Giannacopoulos's engagement with Derrida's notion of 'hostipitality': Maria Giannacopoulos, 'Offshore Hospitality: Law, Asylum and Colonisation' (2013) 17 *Law, Texture, Culture* 163.

[42] See, eg, CPD, House of Representatives, 5 May 1992, 2370–90; CPD, Senate, 5 May 1992, 2234–62. See also Chapter 5.

[43] Brian Opeskin, 'Managing International Migration in Australia: Human Rights and the "Last Major Redoubt of Unfettered National Sovereignty"' (2012) 46(3) *International Migration Review* 551, 579.

to exclude and condition the entry and stay of aliens holds an authority in migration law that is seldom questioned by the judiciary[44] or the academy,[45] much less the legislature.[46] Indeed, it is on the strength of 'absolute sovereignty' that laws, policies, and practices such as mandatory detention and planned destitution, and more recently offshore detention and processing, have been positioned and validated as thinkable responses to unsolicited migration. And in Australia the claim of 'absolute sovereignty' endures notwithstanding the end of the White Australia policy,[47] which was the provenance of 'absolute sovereignty' as a constitutional claim.[48] Proponents of these policies also assume that the foreigner is an outsider and thus, *a priori*, she[49] has lesser rights than the 'citizen'.

[44] In Australia, see, eg, *Musgrove v Chun Teeong Toy* [1891] AC 272 ('*Musgrove*'); *Robtelmes v Brenan* (1906) 4 CLR 395; *Lim* (1992) 176 CLR 1; *Ruddock v Vadarlis* (2001) 110 FCR 491 ('*Vadarlis*'); *Al-Kateb* (2004) 219 CLR 562; *Ruhani v Director of Police (No 2)* (2005) 222 CLR 580; *Plaintiff M47-2012 v Director General of Security* (2012) 251 CLR 1 ('*Plaintiff M47*'); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 ('*Detention on the High Seas Case*'); *Nauru Detention Case* (2016) 257 CLR 42.

[45] See, eg, Mirko Bagaric and John R Morss, 'State Sovereignty and Migration Control: The Ultimate Act of Discrimination?' (2005) 1(1) *Journal of Migration and Refugee Issues* 25; Jacqueline Bailey, 'Australia and Asylum Seekers: Is a Policy of Protection in the "National Interest"?' (2002) 8(1) *Australian Journal of Human Rights* 57; Simon Evans, 'The Rule of Law, Constitutionalism and the MV Tampa' (2002) 13(2) *Public Law Review* 94. Cf Catherine Dauvergne, 'Illegal Migration and Sovereignty' in Catherine Dauvergne (ed), *Jurisprudence for an International Globe* (Ashgate, 2003) 187; Catherine Dauvergne, 'Challenges to Sovereignty: Migration Laws for the 21st Century' (New Issues in Refugee Research Working Paper No 92, UNHCR, July 2003); Catherine Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) 67(4) *Modern Law Review* 588.

[46] See, eg, parliamentary debates on mandatory detention legislation, in which no questions were raised about the scope of Australia's sovereignty: CPD, House of Representatives, 5 May 1992, 2370–89; CPD, Senate, 5 May 1992, 2234–62. See further Chapter 5, Section 5.1, 167–86. While there is increasing recognition among some commentators that there may be some limits on the sovereign right of states to do so, this analysis tends to relate to ceding a measure of sovereignty in the context of international agreements rather than a rethinking of sovereignty itself: T Alexander Aleinikoff, 'International Legal Norms and Migration: A Report' in T Alexander Aleinikoff and Vincent Chetail (eds), *Migration and International Legal Norms* (TMC Asser Press, 2003) 1; Stephen Legomsky, 'The Last Bastions of State Sovereignty: Immigration and Nationality Go Global' in Andrew C Sobel (ed), *Challenges of Globalization: Immigration, Social Welfare, Global Governance* (Routledge, 2009) 43, 44. For a more far-reaching challenge to the foundations of 'absolute sovereignty' in the context of the United States, see Matthew J Lindsay, 'Immigration, Sovereignty, and the Constitution of Foreignness' (2013) 45(3) *Connecticut Law Review* 743.

[47] On the end of the White Australia policy, see generally Gwenda Tavan, *The Long Slow Death of White Australia* (Scribe, 2005).

[48] See Chapter 4.

[49] Although from time to time I use the male pronoun intentionally, I use the female pronoun generically throughout this book. In making this choice, I am persuaded by Haddad's thinking, which goes beyond the more usual justification that the majority of the world's