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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.
3 Commonwealth, Parliamentary Debates, House of Representatives, 5 May 1992, 2570 (Gerry Hand, Minister for Immigration) (Commonwealth parliamentary debates are hereinafter referred to as ‘CPD’).
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challenge,4 been exported,5 and, more than 25 years later, remains a central platform of contemporary migration law and policy both in Australia6 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’ condition8 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 period9 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 14,000 asylum seekers

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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; SC4497 (26 April 2016); Plaintiff M76/2011 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 Guezzardi v Italy (1980) 3 Eur Court HR (ser A, no 39) 533.

6 See especially Migration Act 1958 (Cth) divs 6–7 (‘Migration Act’).


8 Migration Regulations 1994 (Cth) reg 2.05(1), sch S reg 8101 (‘Migration Regulations’).


10 Migration Amendment Regulations 2009 (No 6) (Cth).


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 record 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 cl 130 050.613A(i) (b), 051.613A(i)(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.


\(^{16}\) See Chapter 6, Section 6.2, 258–72.\(^{17}\) Hartley and Fleay, above n 14, 34.

\(^{18}\) Nadine Lidily, Sarah Sanders, and Caz Coleman, ‘Australia’s Hidden Homeless: Community-Based Options for Asylum Homelessness’ (Hotham Mission Asylum Seeker Project, 2010).
destitution 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. The relaxation of the work rights policy notwithstanding, for many, the denial or piecemeal grant of work rights and the denial of access to adequate welfare has fostered social and economic exclusion, with far-reaching and damaging effects. This exclusion, coupled with the uncertainty of a precarious legal status that conditions access to protection procedures by ‘boat people’ on a non-compellable ‘public interest’ discretion and the imposition of arbitrary and unrealistic ‘lodge or leave’ deadlines, 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).
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-launched-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.”

Mandatory detention and planned destitution 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, and extraterritorial detention and processing of asylum seekers – 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 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/realistic-deadlines-imposed-on-people-seeking-asylum/>.


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/f39bd58c14e590b30e579a8804e5335.

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.

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’ emerged in the nineteenth century as the conceptual frame of that relation and continues to inform migration lawmaking 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. 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.

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.


33 As Dauvergne has noted, although humanitarian admissions “[d]o 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 and refugee law instruments. Yet the policies that I introduced through the prologue have effects on asylum seekers that deny or disremember the bond of a common humanity that we share with those who seek Australia’s protection. 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 –


56 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://newroom.border.gov.au/channels/Operation-Sovereign-Borders/photos/a-storyboard-on-people-smuggling>.
policies as those I problematise here. 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

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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?aid=39123#.WW8hitLdTI>. On the axiom of a ‘common humanity’, see also CPD, House of Representatives, 14 February 2008, 350 (Scott Morrison, Maiden Speech).
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 with⁴² – 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

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⁴² See, eg, CPD, House of Representatives, 5 May 1992, 2370–90; CPD, Senate, 5 May 1992, 2234–62. See also Chapter 5.  
to exclude and condition the entry and stay of aliens holds an authority in migration law that is seldom questioned by the judiciary or the academy, much less the legislature. 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, which was the provenance of ‘absolute sovereignty’ as a constitutional claim. Proponents of these policies also assume that the foreigner is an outsider and thus, a priori, she has lesser rights than the ‘citizen’. 


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