

## Migration and Refugee Law

### Principles and Practice in Australia

Third Edition

*Migration and Refugee Law: Principles and Practice in Australia* is a comprehensive overview of the legal principles governing the entry of people into Australia. This fully revised third edition provides an accessible analysis of the theory and practice of this complex and controversial area of the law. It considers the social and political context of migration and refugee law in devising innovative policies aimed at creating an equitable and rational immigration system.

*Migration and Refugee Law: Principles and Practice in Australia* combines an astute consideration of theory with the creation of practical policy solutions, and is therefore an essential resource for migration lawyers and agents, government employees, students, judicial officers and policymakers.

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## Abbreviations

MIEA	Minister for Immigration and Ethnic Affairs
MILGEA	Minister for Immigration, Local Government and Ethnic Affairs
MIMA	Minister for Immigration and Multicultural Affairs
MIMIA	Minister for Immigration and Multicultural and Indigenous Affairs

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## Preface to the third edition

A defining aspect of national sovereignty is that nation states have the right to determine which people are permitted to come within their geographical borders. Individuals, like nations, appear to be inherently territorial. In addition to this, a defining aspect of many people's personhood (their core identity) is the place where they were born or live.

Despite the disparate range of interests and projects that individuals have and pursue, there are basic goals that communities invariably share. Thus, in Australia, the current generation (building on the work of earlier generations) has committed enormous resources to building state institutions (such as our political and legal system), hospitals, schools, roads and recreational and sporting amenities and facilities.

These common projects serve to entrench our feeling of community. We also come to share some fundamental values and beliefs.

Immigration policy and law is concerned with setting the parameters within which 'foreigners' (or 'aliens' as they are called in the Commonwealth Constitution) come to share our community, enjoy our resources and become exposed to our culture and values, whether permanently or for a shorter period. It is, thus, inherently controversial. Limits seemingly need to be placed on the numbers and types of people who can come to Australia.

This book examines the way in which Australia currently responds to this challenge. It is divided into two main sections. The first 11 chapters examine migration law. The next seven chapters look at refugee law. The dichotomy between migration and refugee law is nonexistent at a formal level. Refugee law and policy is in fact one branch of migration law. It involves three among over 150 available visas. Chapter 19 outlines the scope for 'merits review' and judicial review of decisions made in relation to migration or refugee visas.

However, substantively, there is a fundamental distinction between migration and refugee law. Migration law and policy is in essence concerned with what migrants can do for Australia. The principal objective in framing migration law is to let in people who will contribute something tangible to Australia. Australia seeks to attract people who will make the community richer or smarter.

Refugee law is the main exception to this principle. It focuses on what we as a community can do for a person fleeing serious harm, rather than what he or she has to offer us as a nation. Refugees make a significant contribution to the country, but this is an incidental outcome of refugee policy.

## xxiv PREFACE

The differences between migration and refugee law are also to some extent reflected in the development and state of the law. Migration legislation is regulation-driven, and is highly fluid and constantly changing. Refugee law, though far less voluminous in terms of legislation, is imbued with many conflicting principles and interests.

The authors have incorporated into this third edition the numerous and significant changes to migration legislation and policy, as well as important developments in migration and refugee case law, that have occurred since the publication of the second edition in 2007.

The chapters dealing with migration law provide a detailed analysis of the major legislative provisions relating to the most widely utilised visa categories. The structure of these chapters reflects the fact that migration law is predominantly contained in Regulations. Each visa category has numerous legal criteria, but invariably has a ‘signature’ criterion (such as having a spouse for a spouse visa). This book does not look at all visa categories or at all criteria for the visa classes it does consider. While it focuses on the signature criteria, it does so with the caveat that the failure to meet any of the other criteria can prove fatal to a visa application.

Refugee law is derived from the Convention relating to the Status of Refugees which was completed at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 (the Refugees Convention). Article 1A(2) of the Refugees Convention defines a refugee as a person who:

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

At the heart of this definition are the concepts of fear and persecution. Despite the apparent simplicity of these concepts, the interpretation of Article 1A(2) has proven to be fertile ground for legal and judicial analysis. Refugee law is littered with controversy regarding the meaning and scope of key terms in the definition, due in no small part to the history of the drafting of the Refugees Convention, and to the absence of a coherent doctrinal rationale underpinning it.

The chapters on refugee law provide an overview of existing legal principles in relation to the more unsettled areas of law (such as how persecution is defined) and suggest a way in which the law can be made more coherent and workable.

Chapter 18 analyses the fundamental failings of the Convention and suggests a more appropriate definition of a refugee.

This book is essentially concerned with the principles governing the manner in which non-citizens come to gain lawful access to Australia. The focus is not on

how people come to lose this status or the legal process through which migration and refugee status is determined. This last area involves the entire ambit of administrative law and is another fertile source of jurisprudence. A treatment of this is beyond the scope of this book. However, for the sake of completeness, we provide an overview of these areas in Chapters 11 and 19 respectively.



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Readers will note that the case citations in the book do not accord with those found in the various hard copy law reports. For reasons of expense and accessibility to readers, references to all cases which can be accessed on a free database are as per the citation in the electronic database. In relation to these cases, readers are referred to the Australasian Legal Information Institute database (a joint facility of UTS and UNSW Faculties of Law) at [www.austlii.edu.au](http://www.austlii.edu.au).