Fortress Australia – barriers facing intending migrants.

2nd Global Conference - Migrations and Diasporas

Saturday 1st December 2018 – Sunday 2nd December 2018

Vienna,

Austria

Tony Caravella

Perth, Western Australia

December 2018

Fortress Australia – barriers facing intending migrants.

Key Words Administration of Australia's migration law; Barriers to Australian migration.

Introduction

This paper does not claim to be, and cannot be, an exhaustive statement of every barrier, obstacle, difficulty, or challenge that might confront a person who seeks to enter or remain in Australia. It considers a sample of them.

The sample of barriers discussed is based on the author's experience and observations gathered as a decision maker in migration appeals in Australia for almost 10 years.

Decisions on who may enter and remain in a country have long been, and continue to be, socially and politically volatile. Migration decisions have propensity to engender much heated, as well as much misinformed, debate.

For example, in Australia, in relation to the policies towards asylum seekers, both of the major political parties have enacted laws which might rightly be condemned, or at least criticised. Indeed some have been condemned by various commentators, non-government organisations, and the UNHCR. The offshore processing of asylum seekers in Narau and Manus Islands is such an example. On the other hand, I argue there is also evidence that many of Australia's migration laws are thoughtfully designed, positive, humane, and beneficial to the intending migrants, and to Australia. We do however live in an imperfect world.

The author of this paper is an ordinary person who has been privileged to have worked in a range of Australian government organisations during a public service career which spans almost 40 years. This has included the experience gained in hearing and deciding several thousand migration appeal cases as a Member of the Australian Migration Review Tribunal / Refugee Review Tribunal ("MRT-RRT"). The MRT-RRT was subsequently amalgamated into the Administrative Appeals Tribunal ("AAT"). Through these experiences I have observed the workings of Australian migration law from both sides, that is from the applicant's perspective and from the government's, and have also observed the wide diversity of circumstances in which intending migrants find themselves.

The reader may, as they traverse the following pages, sense a degree of criticism of some of the policies and approaches taken by successive Australian governments in the area of migration policy and law. However, nothing in this paper should be interpreted as a personal criticism or attack on the policy makers, the elected members of parliament, or the people of Australia.

The views I express in what follows are also of course influenced by my life experiences, including being of migrant background myself. My father migrated to Australia from Italy in the early 1950's. Italy at that time was still recovering from the aftermath of World War II.

At the time, my father saw little hope for his, and for his family's, future in Italy. Further, due to the destruction of basic infrastructure in Italy as a result of the war, public health and other services in that country were in a parlous state. My father and mother faced the tragic loss of two infant children when those children were around 8 months old. The infants both succumbed and died due to gastro enteritis. That is now and easily preventable and curable condition, but not then in the circumstances which Italy faced. I was subsequently born in Australia after my mother joined my father there some five years later. My story is therefore not a dissimilar to the story of many migrants who sought and found a better future then. It is also not a lot different from the story to today's migrant who seeks a better future.

My views are also influenced by the fact that I was born, grew up, was educated, and followed a career, in a most fortunate country which is Australia. A country which has been free of war or violent conflict within its borders, and has been free of catastrophic natural disasters. It has also been free of political or religious or ethnic violence or turmoil as sadly experienced in many countries on our planet. Australia has also been characterised during my lifetime as a country with, generally, a very healthy economy where most people could find paid work, or pursue their own business or other interests, if they wanted it. It has also been characterised as a country where its residents have had access to excellent education and health care if they wanted or needed it. It has been a country where most people could generally live a comfortable and secure life. So, I have been indeed privileged in the lottery of life. I have been conscious of these circumstances in my life and in assembling and writing the content in this paper.

In preparing this paper I reflected on my own experience, however, I also listened to the ideas and experiences of people from a range of backgrounds, including work colleagues and former work colleagues, migration agents and lawyers, persons who have sought asylum in Australia, and other persons who kindly shared their views and ideas. I thank them sincerely for their insights.

Ultimately, however, the views I express are my own and not necessarily those of my past or present employers, colleagues, or business partners or associates.

What do I mean by "barrier" to migration?

A "barrier to migration" means different things to different people. To someone who might be reasonably content and safe and financially secure in their home country, more minor barriers might ultimately persuade them to abandon their migration preference. Whereas, to someone at risk of losing their life, or of being tortured due to political opinion, religion, race, or otherwise facing adversity, a barrier might need to be very significant to dissuade their efforts to migrate. Evidence of the latter can be seen daily in the risks taken by asylum seekers and other people who cross countries or oceans to get to where they feel safe and to where they hope they will be permitted to remain. We are at the present time

witnessing a caravan of several thousand Hondurans walk across entire countries in their attempt to migrate to the USA to live a better life. It remains to be seen how this ends and one prays it will end well. People in those circumstances see a barrier differently to others, in fact such people might consider there are no real barriers at all that will prevent their migration. I therefore accept that what I am discussing is necessarily a relative thing.

Based on the foregoing, it should be apparent that I have defined the concept of "barrier" in the migration context widely, and I use the word to mean the physical and non-physical and anything that must be considered, faced, or dealt with, complied with, or satisfied, negotiated or endured, overcome or fought (preferably legally).

What do I mean by "migrant"?

I have similarly defined the word migrant widely in this paper. Essentially, the term "migrant" in this paper is used to describe a person who moves from one place to another. Their purpose in migrating might to find employment or better living conditions, or it might be to avoid mistreatment or death, or for other reasons. It includes persons who migrate temporarily to undertake studies or other activities, and people who might want to join other members of their family. The reasons why a person might want to migrate are wide and varied.

Within this broad meaning of 'migrant', it is sometimes useful to distinguish between those migrants who are asylum seekers or who are otherwise seeking protection, as compared to those who are not forced to flee from their country because they fear serious harm if they remain there. In Australia, as in many other jurisdictions around the world, different legal and other barriers face asylum seekers as compared to the laws and barriers that face people who want to migrate for other reasons. I have therefore sought to discuss the barriers that apply to asylum seekers arriving in Australia separately to those facing other migrants where relevant. There are of course barriers that face both groups.

Why does Australia have barriers to migration?

There are many reasons why a sovereign nation may create barriers to intending migrants. Australia is not vastly different to most other countries in the world that regulates migration. It is not vastly different from many other countries that enact laws and regulations to govern who is allowed to enter its borders, or who is not permitted to enter or to stay within its borders. Nor is it significantly different to other jurisdictions in terms of making laws to govern who it will deport or expel. Every country regulates immigration in its own imperfect way. Immigration continues to be referred to as "social engineering,"[1] as it contributes significantly to building a country's population of the future. Australia is a social engineer, like many other countries. It has designed its current migration program to

[1] Mr. Justin Gest, Professor at George Mason University's Schar School of Policy and Government.

focus on admitting migrants with special skills. There is little doubt also that the relatively high levels of migration experienced by Australia over recent decades since World War II has contributed to building growing markets and consumer demand.

We see different countries on our planet articulating various policy objectives through the way they regulate migration. We also observe many countries benefiting from migration through, for example, benefiting from foreign workers and entrepreneurs admitted into the particular jurisdiction. We also see some countries having populations that are 80 percent foreign-born, but which offer no pathway to permanency.

Australia is no different to many other countries in the benefits it derives from foreign workers, and it also has strict residency requirements and other criteria to be satisfied for the bestowal of citizenship. Many countries erect barriers to citizenship, for example, by restricting it to people whose parents were born there. Therefore, before considering a range of barriers facing the migrant to Australia, it is therefore useful to remind ourselves of the complexity and diversity of issues that arise in considering the policy objectives that a migration law regime seeks to deliver. For example:

- In Canada, as a result of a shortage of skilled labor, that country has adopted one of the most open immigration policies in the world. As at 2010, the foreign-born population makes up 21.3 percent of the country's total population[2]. It has recently announced a Start-up Visa Program[3] in an effort to attract highly skilled foreign entrepreneurs. Immigrants with support for a start-up business may be eligible for immediate permanent residency. If the new business fails, the entrepreneur will not necessarily be subject to deportation.

- In Japan, a country that has historically favored a racially homogenous society, the migrant population accounted for only 1.7 percent of the total population in 2010. Japan's strict immigration policies have drawn heavy criticism. However, Japan is facing a sharply falling population and its low birth rate struggles to match the death rate. Estimates indicate the population of Japan will reduce by one third by 2060. This may well turn out to be the determining force on the country to loosen its comparatively restrictive immigration policies.

- Denmark illustrates another approach taken by a country that has been largely homogenous. Reports indicate it has offered immigrants cash incentives to leave if they cannot assimilate into Danish culture[4]. Driven by the far-right Danish People's Party, states that "*Denmark is not an immigrant-country and never has been. Thus we will not accept transformation to a multiethnic society.*" This is a further example of barriers, in the form of incentives in this case, utilised to control immigration.

[2] https://news.nationalgeographic.com/news/2013/06/130630-immigration-reform-world-refugees-asylum-canada-japan-australia-sweden-denmark-united-kingdom-undocumented-immigrants/

[3] https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/start-visa.html

[4] https://www.dw.com/en/denmark-boosts-cash-incentive-to-immigrants-to-return-home/a-4875040

Denmark is also reported to apply a 24-year rule, which provides that for the foreign spouse of a Danish citizen to qualify for citizenship both the Danish spouse and the foreign spouse must be at least 24 years old. This rule's reported purpose is to limit the number of immigrants, prevent forced marriages, and create a better integration process[5].

- Sweden, which has a long record of positive asylum seeker policies and a reputation of welcoming refugees from war-torn nations, including Iraq, Syria, and Somalia, has recently seen community discontent over these policies. It has seen growing unemployment among foreign residents, and its citizens questioning and challenging its generous immigration policy. While by comparison the opposition to immigration in Sweden appears to reflect a minority view, debate over sustainable immigration policy has arguably contributed to the growth in support for the Sweden Democrats party, a far-right anti-immigration political party.

- The United Kingdom, regarded historically as the "Motherland" of Australia and a country with which Australia continues to have strong and links, has experienced a significant increase in immigrants in the last decade. The UK Census reports the increase has been from 4.6 million in 2001 to nearly 7.5 million in 2011. Immigration has become the country's most significant issue. The UK Border Agency has also acknowledged that hundreds of thousands of migrants with expired visas continue to reside in the country. There are calls to introduce immigration more reforms aimed at those who breach visa conditions, including the imposition of a significant fee or security bond on migrants entering the U.K. to work or study.

The foregoing is but a very small example of the different circumstances and policy objectives which are pursued through different nations.

In Australia, as discussed in further detail in this paper, the country has a complex migration regime which also aims to achieve a wide and varied range of domestic policy objectives. Its migration regime also aims to meet, or at least advance, the country's obligations under a range of international conventions to which Australia is a signatory. Australia's permanent migrant intake currently emphasises the admission of persons with specialised skills to fill employment vacancies in industry sectors, and in rural and remote geographic locations, which currently experience shortages of skilled workers. While that might sound fairly straightforward, it is not, since as a result of a constantly changing labour market, the intending migrant who might have skills that are in demand today, might no longer be a person who holds skills that are in demand in the next year, or at some later point in time generally.

[5] www.humanityinaction.org.

Judging the past with the benefit of hindsight – The *Immigration Restriction Act 1901* and "the Dictation Test"

Hindsight is a blessing that enables us to find fault, error, prejudice, unfairness, or vested interests in past actions in a range of human endeavours. This applies equally in considering migration law and practice. Hindsight makes it relatively easy now to find policies and laws of past governments that are objectionable, or indeed abhorrent, when looked through the eyes of the 21st century observer.

For example in my own home state of Western Australia, by the time it obtained responsible government in 1890, a number of laws restricting Chinese immigration and employment were in place. These came about as a response to the widespread anti-Asian sentiment that swept through the Australian colonies in the 1880's.[6]

One of the first laws passed by the Australian federal parliament after Australia federated from a group of colonies governed by Great Britain into the Commonwealth of Australia on 1 January 1901, was the *Immigration Restriction Act 1901*. This law put in place what became known as the *White Australian Policy*. One of the provisions of the *Immigration Restriction Act 1901* was a mechanism to prevent persons of non-European background migrating to Australia. It did this by permitting Australian government officials to impose a Dictation Test to anyone who applied to migrate to Australia. The test required a person seeking entry to Australia to write out a passage in English of fifty words dictated to them in any European language, at the discretion of an immigration officer. The test was not designed to allow immigration officers to evaluate applicants on the basis of language skills, rather the language chosen was always one known beforehand that the person would fail.

An example of a passage used in the dictation test in 1932 is as follows:

> "The tiger is sleeker, and so lithe and graceful that he does not show to the same appalling advantage as his cousin, the lion, with the roar that shakes the earth. Both are cats, cousins of our amiable purring friend of the hearthrug, but the tiger is king of the family."[7]

The instructions given to migration officials administering this test included:

---

[6] See Pioneering the Dictation Test ? The creation and administration of Western Australia's Immigration Restriction Act, 1897-1901 , Jeremy C Martens http://www.academia.edu/6363279/Pioneering_the_Dictation_Test_The_creation_and_administration_of_Western_Australia_s_Immigration_Restriction_Act_1897-1901

[7] https://www.google.de/search?q=sample+dictation+tests+from+Immigration+Restriction+Act+1901&sa=N&rlz=1C1CHBF_en-GBAU758AU760&biw=1366&bih=657&tbm=isch&source=iu&ictx=1&fir=czzAkPJypLLkbM%253A%252Ctsl40J2H_guslM%252C_&usg=AI4_-kSGRWt2G0tfiPQB2elQeRKnKyI85Q&ved=2ahUKEwjkhtfbrfzeAhWMblAKHTERAHs4ChD1ATAFegQIBhAE#imgrc=uZtxweI8VbR-0M:

> "If the Officer has good reason to believe that the person to be tested could write in English, a passage of not less than fifty words in some other European language may be selected. If an officer is not available to read the passage correctly in the language chosen, a person acquainted with the language may be authorised to dictate the passage."

For over 50 years the dictation test could be given to people on arrival in Australia, or indeed after they had entered Australia. The test would be given in a range of languages, including Estonian or Scottish Gaelic or another European language. In other words, this was a test you could not pass if the Immigration officers didn't want you to. Very few people passed the test. The historical records of Australia make it clear that the test was used for political, moral and racial purposes.

It will be interesting to see how history in the future will view the laws and regulations Australia has in place today, in particular its refugee laws. Will they be viewed in the same light as we view the Dictation Test today? Despite some Australians arguing our laws to be non-discriminatory and fair today, will they be viewed as such in 20, 50, or 100 years' time?

The Dictation Test was clearly effective as a barrier preventing non-Europeans, and in particular Asians, who failed the test from entering Australia. That is until a certain person by the name of Egon Erwin Kisch, who was an Austrian and Czechoslovak writer and journalist, tried to get into Australia. Given where this conference is being held, that is Austria, I thought it might be apt to briefly talk about this case. It illustrates, amongst other things, how even effective barriers, such as the Dictation Test, can be overcome.

In brief, Egon Erwin Kisch, had been assessed by the British Special Branch as a militant communist. He had been invited to Australia to speak at the Centenary celebration in Melbourne in 1934. The Victorian Police Commissioner Major-General Sir Thomas Blamey informed the Government that Kisch should be excluded from entering Australia. The then Minister sought to exclude Kisch under the *Immigration Restriction Act 1901* by applying the dictation test which required "any person who (...) when an officer dictates to him not less than fifty words in any prescribed language, fails to write them out in that language in the presence of the officer" would not be admitted. Although this was primarily intended, and used, as a means to exclude non-whites from entering Australia under the White Australia Policy, it could be used to exclude other undesirables. Kisch demonstrated his fluency in a number of European languages, and he was then asked to write the Lord's Prayer in Scottish Gaelic. He refused to participate and was deemed to have failed the test. He was then taken into custody but released him on AU£200 bail.

The Victorian government did not anticipate that Kisch's case would be challenged and that the matter would eventually be heard by the highest court in Australia, the High Court of Australia (HCA). On 19 December 1934, the HCA ruled that Kisch be free to visit Australia. Kisch's lawyers argued and won, that the person who administered the dictation test to Kisch, a Constable Mackay, although born in Scotland, was not actually able to understand the Lord's Prayer in Scottish Gaelic himself. Perhaps more significantly, the HCA ruled that the dictation test had been invalid in any case, in that Scottish Gaelic was not "a European

language" within the meaning of the *Immigration Restriction Act 1901*. Kisch was subsequently charged under a further provision but then ultimately was released.

Despite the restrictive legislation, many non-European immigrants, including people from Asia, did enter or continue to reside in Australia during the period of the White Australia Policy. Records in the Australian National Archives' collection show how these people negotiated the restrictions imposed by the Act, the impact it had on their lives, changing community attitudes to the Act, and the negative impact this legislation had on Australia's relations with Asian neighbours[8].

The *Immigration Restriction Act 1901*, and the Dictation Test, was in place in Australia until 1958 and demonstrates a very effective barrier to migration, and illustrates the ingenuity of law makers in this area. One can only imagine how creative they could get if unconstrained!

Fortunately the Dictation Test as provided by the *Immigration Restriction Act 1901* no longer applies. However, there are a range of current visa classes that have English language requirements as one of their eligibility criteria. This applies, for example, in the area of skilled employment visas, and with student visas. The English language test which applies now in various classes of visas in Australia is arguably a not insurmountable barrier.

The Kisch case also beautifully illustrates the interrelationship between policy, politics, law, and the legal system. It is a useful reminder of the checks and balances that operate in Australian migration law, and the importance of the right of administrative or judicial review in cases where barriers might be unfair, or wrong, or wrongly applied.

Barriers arising from a fear of "The Other" coming to Australia from across the seas

In Australia, commentators have discussed the notion that we have a fear of "the other". During our colonial era, that is pre-1900, the Australian landmass comprised a series of separate colonies ultimately under the rule and control of the government of Great Britain. There were territorial fears then of persons, mainly non-European, coming into the colonies and indeed invading the land. This fear flowed into the federation process and into the federated Australian nation that was born in 1900.

In relation to Australia, a particular feature which forms part of the migration recipe is its relative isolation, distance, and separation from the rest of the migrating world. This was undoubtedly a significant barrier in the past when we relied on sea travel. However in the age of air travel, and in the age of willing people smugglers lured by the prospect of enormous profits, the vast oceans that surround Australia are a less significant barrier to migration than are many other barriers.

Another factor that has eroded the effectiveness of the great oceanic barrier which surrounds Australia, is the age of the internet. Through this technological miracle, more people know about the conditions in the rest of the world. It is not unreasonable in these

[8] http://www.naa.gov.au/collection/a-z/immigration-restriction-act.aspx

circumstances to expect that there is likely to be more demand for movement to the more attractive places that one might migrate to on this planet. Put another way, and hopefully without any suggestion of xenophobia, persons living in some parts of the world today, such as in third-world or developing countries, who now have the opportunity to access information about Australia (and many other first world / advanced countries) might decide they want some of what we who reside in these countries already enjoy. For example, such things as access to first world health and education, access to a comparatively uncorrupted government and law enforcement regimes with independent appeal rights, respect (generally) for different religions, political opinions, and nationalities, and relatively high wages, and comparatively low levels of unemployment, are a few of the "migration pull" factors we observe today.

While Australia has vast oceans that surround it and which might have provided an effective barrier in the past, in more recent times, and with the growth of very lucrative people smuggler operations, that ocean barrier was largely overcome. While access to Australia from across the oceans might still be dangerous and difficult, it is certainly not impossible or out of the reach of many, as we have seen tens of thousands of asylum seekers set off in small often unseaworthy boats to reach Australia in search of refuge. Even today, and in other parts of the world, desperate people such as those leaving Syria by boat knowing that many have already drowned making their attempt for a safer and better life.

By international standards and comparison, the numbers coming to Australia are small. However, some Australians thought we were being invaded, and some continue to articulate a fear of invasion. Fuelled on by the narrower-minded sectors of Australian society, and fuelled on by some politicians and a populist media which often appeared to demonise the asylum seeker, successive federal governments, irrespective of general ideology, legislated to impose more and more barriers to prevent those who chose to arrive on Australian territory by sea.

The Migration Debate in Australia

Although Australia is a country with a significant proportion of its population being born overseas[9], it is also a country that has had a long, and at times bitter, angry, and polarising debate about immigration. In recent times that debate has focussed on people arriving on Australian shores by sea. The debate has all too commonly been lacking in reason, logic, or compassion.

We have had government's demonise asylum seekers who arrive by boat. One of our prime ministers proudly beat his chest saying, "We decide who will enter Australia", fuelling the

[9] At 30 June 2015, 28.2% of the estimated resident population (ERP) was born overseas (6.7 million persons). This was an increase from 30 June 2014, when 28.0% of the population was born overseas (6.6 million persons). In 2005, ten years earlier, 24.2% of the population was born overseas (4.9 million persons). Source: http://www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/3412.0Main%20Features32014-15?opendocument&tabname=Summary&prodno=3412.0&issue=2014-15&num=&view

fear of the threat or actual attack or invasion. We had another politician, who was also Prime Minister for a while, run an election on the mantra and promise that his government would "Stop the Boats". We Australians sure have a fixation with boat arrivals. Upon election, true to his word, the particular boat stopping Prime Minister proceeded to pursue the enactment of measures and complexities to further distinguish between the treatment and rights enjoyed by asylum seekers who arrive on Australian territory by boat as compared to the treatment and rights of someone who arrives by aircraft and seeks asylum. The reasoning Australians were given for this distinction is that this is the most humane thing we could do to prevent people smugglers exploiting people who might be tempted to make the dangerous journey by unseaworthy boat to Australia. However, others argue that this misses the point altogether, and there were other less generous motives underlying the policy. Suffice it to say, and without devoting pages to a detailed explanation of the technicalities and differences in law applicable to asylum seekers who arrive by boat in Australia, as compared to those who arrive by other means (aircraft usually), there are rather greater barriers facing those who arrive, or who attempt to arrive, by boat onto Australian territory.

A range of barriers to migration – in summary

Physical barriers, such as oceans, are not the only sorts of barriers in place in the Australian context to screen out persons from migrating into its territory. There are many others. In relation to Australia, these include:

- **Legislative barriers** - Migration into Australia is governed under the Australian Constitution by the federal or national government.

    - The main piece of legislation is the *Migration Act 1958*. That is its short tile. The long title is: *An Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons* [my emphasis].

    - The *Migration Act 1958* is a large and complex piece of law comprising 507 sections, and many, many, many subsections. However the Act is dwarfed by the *Migration Regulations* which weigh in with around 265 regulations and an enormous number of sub-regulations, sub-sub regulations, and sub-sub-sub regulations. Then there are also currently thirteen Schedules attached to the Regulations and some of these have hundreds of clauses and subclauses. Then there are a range of Legislative Instruments (more rules) and Ministerial Directions (more rules). Then there is the Department of Home Affairs policy manual (referred to as "PAM") which guides the migration decision makers in how to interpret and how to apply the migration laws and regulations to particular circumstances. The PAM is not binding on a decision-maker deciding an appeal; however its contents must

be considered by the appeal decision-maker, even if not followed, and is to be followed by the Departmental decision-makers.

- If a person is contemplating migrating to Australia, they must therefore satisfy the laws, regulations, instruments, directions, and policies. Given their magnitude and the complex ways some are written, these are not easy things to understand. In fact the *Migration Act* 1958 itself recognises it is not an easy thing to understand as it also regulates who is permitted to give migration advice or assistance.[10] More about that later.

- The following provides some basic law on how Australia regulates migration. Put another way, the following are some basic "must know" elements of Australia's migration law:

    - All non-citizens entering Australia require a visa (s.29 Migration Act 1958);

    - All non-citizens in the migration zone (a term that is defined in the law) without a visa are unlawful non-citizens or "UNCs". They used to be referred to as aliens. (s.13, s14 of the Act). An UNC must be detained (s.189). Immigration detention is therefore enshrined in our current law. Intending migrants must therefore be aware that they will be confronted with a very major barrier indeed, in the form of a walled or fenced compound, not too dissimilar to a prison facility, if they do not hold a visa, or if their visa expires and they do not depart Australia beforehand, or unless they acquire what is referred to as a "bridging visa". Mandatory immigration detention could be changed by a simple amendment by the Australian Parliament, but there appears to be little appetite for that amongst most of the Australian population in the foreseeable future.

    - Criteria for the grant of a visa are prescribed in the Migration Regulations and in the Act. If a person meets the criteria for the grant of a visa then then Minister must grant the visa, if not then the application for the visa must be refused (s65). This particular feature of Australian migration law reduces the discretion and options open to the migration decision maker. However, it is important to note that it was not always like this. Successive governments in Australia have enacted laws which have progressively removed discretions from administrators making migration decisions. Not only this, but successive governments

[10] Section 280 of the Act refers to *Restrictions on giving of immigration assistance*

have sought to remove the power of courts to review decisions made by migration officials.

- All onshore visa refusals and cancellations, or where the person has been sponsored by an Australian resident, are subject to merits review by the Migration Review Division of the Australian Administrative Appeals Tribunal (AAT).

- The scope of judicial review of migration decisions is limited (or intended to be limited) by the privative clause in s.474 of the Act;

- In terms of protection visas, these can be divided into 2 broad groups:
    - Refugee protection – which implements Australia's legal obligations under the 1951 UN Convention on the Status of Refugees (and the 1967 Protocol);

    - Complementary protection - which implements Australia's non-refoulement obligations under
        - the International Covenant on Civil and Political Rights (ICCPR),
        - Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty ('Second Optional Protocol'),
        - Convention on the Rights of the Child ('CROC') and
        - Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT').

- **Economic barriers** – Where there are high costs associated with migrating, this can create a barrier to the intending migrant. Aside from the costs associated with travelling to Australia, finding accommodation and meeting the high cost of living expenses etc, an intending migrant will face such costs as:

    - Visa application fees - these vary depending on the type of visa. For example the cost of a protection visa application is quite modest at AUD $45. Whereas, for example, a partner / spouse visa comes with an AUD$ 7,000 visa application fee, and a student visa will cost you $575 as a minimum, and with additional fees payable for the student's spouse and children if they have any. These fees are not refundable if the application is assessed and refused by the Department. If one is wanting to sponsor one's parents to come to Australia this might cost you around AUD $4,000. On the other hand, if you're applying for a business talent visa it will costs you around $7,000.

- In addition there are fees associated with such things as providing evidence of English language ability, medical examinations, police clearances, etc;

- There are also often fees associated with getting advice and assistance to navigate one's way through the maze of laws, regulations, instruments and policies that I referred to earlier. These fees vary depending on the complexity of the work or visa sought, and depending on the skills and experience of those providing the service. An internet search of the websites of some migration agents and migration lawyers provides an indication of the range of fees charged for these services.

- **Social or community attitude barriers** - The prevailing community attitudes, and the perceived attitudes, of Australia's population towards migrants can operate as a barrier, or as an incentive, to migration. Many intending migrants will, at some point, turn their mind to thinking about how they might be received, accepted, or treated if they uproot and move to a new country. A detailed discussion of this would take many pages and is likely to conclude that Australian community attitudes will vary across different locations, different socio-economic groupings, and across different periods of time. It can however be said that while many individuals and groups within the Australian population wholeheartedly and generously welcome new migrants irrespective from what country they originate, that might not always be the case.

- **Serendipity - the barrier of chance**. The course of human history tells us that human activity is far from precisely planned or even predictable. One of the many things that we learn as we grow older is that despite the best planning, things do not always proceed in accordance with our plans or forecasts. Despite what we might be taught in our undergraduate studies that we can plan and design our lives to achieve our particular desired outcomes, we are not always in control and serendipity or chance often plays a significant role. We commonly hear stories of serendipity. For example, the story of the man who decided to migrate to Australia during a time of mass migration and turned up at the place where there were officials from different countries taking applications from intending migrants. The particular person had previously chosen another country to migrate to. On seeing a long queue of people waiting to make an application to migrate to that country, he looked at the other queues and chose the country that had the shortest queue of applicants. There are many decisions like this which I term "serendipitous" and which present a further barrier to migration. From the perspective of policy makers who seek to design migration programs to attract the best or the worthiest migrants, such serendipitous factors seem to be beyond policy control. Maybe that is a good thing which builds in a richness and diversity in a world that is otherwise becoming more and more dominated by global corporations, uniform designs, and international standardisation.

- **Internal barriers** - These are the barriers that intending migrants face, or might face, if they decide to leave their country to start a new life in Australia, or any other country for that matter. For example, we know from reliable country information that certain countries take a negative view of some who decide to leave their country to seek asylum in other countries, including Australia. The extent to which this forms a barrier to migration to Australia varies depending on the particular individual and depending on the particular country from which they come. It is simply a further factor, or a further piece in the mind bogglingly complex picture of migration. In Australia, in particular, during my years of deciding appeals in refugee status determination cases, it was often argued that the mere act of applying for refugee status in Australia exposed an asylum seeker to harm if he/she returned to their country because the government of their country did not like the negative connotation or criticism that would be imputed to it by the mere act of one of its nationals making an asylum claim in another country. The challenge of course for the decision maker is in deciding whether this in fact give rise to a real chance or real risk of serious harm if they were returned to their country. Nonetheless, the treatment of returnees may present a further barrier to the intending migrant.

- **Australian values statement – a barrier based on Australian values** If you apply for a visa to enter or reside in Australia, and if you're over 18 years of age, you will be required to sign an Australian values statement. In it, you declare that you understand such things as that the Australian society values respect for the freedom and dignity of the individual, freedom of religion, commitment to the rule of law, Parliamentary democracy, equality of men and women and a spirit of egalitarianism that embraces mutual respect, tolerance, fair play and compassion for those in need and pursuit of the public good. It also states that Australian society values equality of opportunity for individuals, regardless of their race, religion or ethnic background. The statement provides that the English language, as the national language, is an important unifying element of Australian society. Importantly, by signing the statement one undertakes to respect these values of Australian society during one's stay in Australia and to obey the laws of Australia. There are other undertakings made if one proceeds to seek to become an Australian citizen. The Australian Values Statement is linked to a *Life in Australia* booklet[11] which sets out a range of principles and values to which visitors and permanent migrants to Australia must undertake to comply with it covers such things as:

    - Fundamental freedoms;
    - Respect for the equal worth, dignity and freedom of the individual
    - Freedom of speech
    - Freedom of religion and secular government

[11] https://www.homeaffairs.gov.au/LifeinAustralia/Documents/lia_english_full.pdf

- Freedom of association
- Support for parliamentary democracy and the rule of law
- Equality under the law
- Equality of men and women
- Equality of opportunity and a spirit of egalitarianism
- Peacefulness
- Shared values
- Character requirements
- Australian workplace rights

Many intending migrants may not regard this values statement as controversial or objectionable. Indeed, many intending migrants might find it a statement of values which reflect their own values and aspirations, and the very reasons why they want to migrate to Australia. However, that might not always be the case and to some this may present as a further barrier in the migration process.

The entity administering the migration laws of Australia

The Australian Department of Home Affairs ("DHA") is the Department that administers Australia's migration laws. Previously, this department's name included the word "Immigration" in its title, however, those who gave birth to the DHA decided, for some reason, to omit the word in its present name.

The Home Affairs Portfolio brings together the Department of Home Affairs, the Australian Border Force (ABF), the Australian Federal Police (AFP), the Australian Criminal Intelligence Commission (ACIC (including the Australian Institute of Criminology)), the Australian Security Intelligence Organisation (ASIO), and the Australian Transaction Reports and Analysis Centre (AUSTRAC). Reading the latest annual report, one gets an impression that the primary focus is security and protection, rather than migration.

There are some who have expressed concern over the formation of DHA and who argue that bringing together the Australian Security Intelligence Organisation and the Australian Federal Police under the one minister is a dangerous move in terms of accountability[12].

The entity and the individuals that administer Australia's migration laws have a very real and direct capacity to create barriers to migration, and they have a very real and direct capacity to reduce or eliminate them. The DHA's Vision Statement is: "*A secure Australia that is prosperous, open and united.*" Its Mission Statement is: *Work together with the trust of our partners and community to keep Australia safe and secure, and support a cohesive and united Australia open for global engagement*."

According to its latest annual report, DHA has 14,416 staff. In the last financial year it processed and granted 16,250 humanitarian visa places, conferred Australian citizenship on

[12] See https://theconversation.com/the-new-department-of-home-affairs-is-unnecessary-and-seems-to-be-more-about-politics-than-reform-81161

80,562 people, and granted 8.7 million temporary visas. Amongst the many other things it does, it processed 46 million travellers crossing into Australian territory.

Last financial year DHA granted 162,417 permanent visas under the migration and child programs. The majority of which are in the skilled visa (111,099), family (47,732), child (3,350). In terms of the temporary visas granted, in 2017-18, DHA granted:

- 8,694,048 temporary visas;
- 351,516 maritime crew and transit visas;
- 1,856,614 New Zealand visas;
- 13,074 other temporary visas;
- 378,292 student visas;
- 180,459 temporary resident (other);
- 64,470 temporary resident (skilled);
- 5,639,167 visitor;
- 210,456 working holiday maker.

The DHA's annual report also claims that zero people smuggling ventures reached Australia in the reporting period. Further, it also proudly reports that 14,750 unlawful non-citizens, that is persons without a current or valid visa, were located in the year, and DHA also located 2,389 illegal workers.

The Department's annual report also reports that during 2017–18, Australia's immigration and citizenship programmes continued to have beneficial impacts on the economy and Australian society. It reports on the economic and fiscal benefits that migrants have brought to Australia have undoubtedly played a part in Australia's 26 years of uninterrupted economic growth.

Looking to the future, the DHA annual report estimates that the volume of visa applications is forecast to continue to increase from approximately 9 million to 13 million per annum by 2026–27.

So although I argue a range of barriers face someone who wants to enter or reside in Australia, we see from these figures that significant numbers of people still successfully overcome the barriers and migrate permanently, or temporarily visit Australia.

In my experience of some 40 years in a range of federal and state government organisations and departments in Australia, I have observed certain laws and policies that work effectively in government, and others that do not. I have found in my experience that even complex laws can be administered effectively and can be well received by community if the law is seen to be fair and accessible and presented in a helpful way. Insofar as Australia's immigration laws are concerned, I'm not sure that we're quite at that point based on my observations of the operations of the DHA. My own experience with DHA has been mixed. I have found some very helpful individuals, but have also experienced others who could not be accurately described as such. More significantly, the means of delivery of immigration services by DHA often creates unnecessary and almost insurmountable barriers. For example, DHA's primary means of delivering its immigration or visa services is via an online application process. The DHA has created a formidable database and visa application

system and directs intending migrants, and others, to it for information and advice. If one does not find what one is looking for, and given the technicalities and complexities of the laws this seems to occur rather frequently, then one might try to communicate by telephone with an official at the Department. That is not necessarily an easy thing to do either. At times it is just as difficult to find a telephone number of a section or for a person that one might speak with in the Department. If one finds the phone number, and makes a call, then one might face a wait of an hour or more on the telephone. One then hopes that the person one eventually speaks to can assist and can give the correct advice and does not have to pass you on to someone else.

It is my view that the Department which administers the migration law of a country, and the people who work in it, play the foremost role in making the migration laws accessible and understandable and assisting intending migrants with navigating or negotiating the barriers. That does not mean assistance from officials should extend to ensuring an applicant overcomes every barrier. That cannot be the objective, because some of the barriers have a legitimate role in preventing an applicant from successfully migrating. However, when the laws are accessible and understandable there is less likelihood of mistakes, delays and injustice, and a better prospect of a better service all round. However, where the systems and the culture of a bureaucratic entity administering the migration law distances itself from its clients, as I believe the DHA has done to a significant extent through the creation of an almost impenetrable barrier to personal contact with clients, then there is far greater scope for error, delay, misunderstandings, and generally a higher level of dissatisfaction for those who use the service. It is my proposition that although there are a number of other significant barriers facing the intending migrant to Australia, one of the most significant can commonly be the Department, and the culture and mindset of those within it and who administer the migration laws of Australia.

In relation to Asylum Seekers or applicants for protection

In the following part, I summarise some of the particular barriers which in my opinion confront asylum seekers in Australia.

- Australia is signatory to the UN Convention on the Status of Refugees and to the Optional Protocol to the Convention. However, my personal observation is that Australia does not necessarily unconditionally embrace the obligations imposed by that Convention. Further, it is my observation that over the past 20 years Australia has taken action to retreat from its obligations, or weaved and ducked some of them, even if we have not withdrawn from the Convention. This has created significant barriers to the asylum seeker.

- In the post-9/11/2001 era after the attacks on the World Trade Centre and other targets in the USA, like in many other countries, Australia erected many legislative and other barriers to migration. The justification has often been security and protection of Australian citizens. This mindset continues today. It appears that

some of the political debate which the main political parties find might win them votes is to take a hard line on migration. On 22 November 2018, for example, the Prime Minister is reported to have unveiled a plan to strip convicted terrorists of their citizenship even if they are native-born Australians. The PM is reported to have said that "*People who commit acts of terrorism have rejected absolutely everything that this country stands for*"[13]. The PM is reported to want the laws broadened so that anyone convicted of a terrorist offence, even native-born Australians, could be expelled if they could reasonably be expected to gain citizenship in another country through parents or grandparents. It remains to be seen if this comes to pass, however, it is not difficult to find holes in the policy behind such a proposal. For example, how will the receiving country react to such a forced deportation of a convicted terrorist, and could the country simply reject the person, as Australia would, and leave them stateless? Will such a deportation serve any meaningful end in the international fight against terrorism? If this position implies the individual is still a risk to the Australian or international community, then should they not continue to remain in prison rather than to reward them by releasing and unleashing them onto a community/country with which they have no or little connection?

- Evidence of the erection of further barriers to prevent intending migrants entering Australia as a result of the fear of terrorist entry can be seen in such things as the mandatory detention of asylum seekers in remote locations within Australia. And, Australia does have a lot of remote locations! If we compare how the wave of Vietnamese asylum seekers in the mid 1970's, and the wave of Cambodian asylum seekers in the late 1980's, were treated in contrast with the waves of asylum seekers in the 2000's and in the 2010's we see an enormous difference. Back in the late 1980's, for example, Cambodian asylum seekers were housed in open hostels in places like Sydney. They were free to come and go and would generally always return to their hostel. Now we have detention in high security installations in remote places like Curtin air force base[14], Christmas Island, and other places like Nauru and Manus Island. It suggests that the Australian government, or perhaps the Australian people, do not want asylum seekers living in their midst? We have also had the Australian Parliament excise parts of Australia from the migration zone – in simple terms this is a legal fiction which results in parts of Australia being considered not to be parts of Australia at all, for the purposes of the migration law. That's a pretty effective legal barrier to migration, until of course it is challenged in the Courts and found to be illegal.

- Now, persons who seek to arrive by boat to Australia are not even processed in Australia. Australia has done deals, very expensive deals, with places like Nauru and Manus Island for those countries to process their refugee claims.

[13] "Australia in bid to strip terrorists of citizenship" *South China Morning Post* p.A10, 23 November 2018.
[14] Curtin air force base is located over 2,000 kilometres from the capital of Western Australia

- We have also invented other legal fictions such as referring to those asylum seekers who arrive by boat as "illegal maritime arrivals", and before that Australia even referred to them as "non-arrivals" even though of course there was no doubt they had arrived and sought protection.

- Asylum seekers of course face many administrative barriers in seeking protection in Australia. The forms they need to submit are formidable and daunting. The language difficulties are significant, even if government funded interpreters are provided. It is not uncommon for there to be significant interpreting failures. I recently became aware of a case where a Sri Lankan asylum seeker's interpreter gave the opposite answers to what the asylum seeker had said and had intended. It was only after the asylum seeker was refused protection that the refusal decision was appealed, and the asylum seeker was fortunate enough to engage an agent who meticulously reviewed the recording of the protection interview with the assistance of an independent expert interpreter, that these errors were discovered.

- This brings me to the issue of assistance for asylum seekers who apply for protection in Australia. In light of the barriers that are present in terms of the formalities, complex law, and procedures for refugee status determination, a further very significant barrier exists for non-English speaking asylum seekers who are not versed in Australian migration law and practice. Such people clearly need assistance in the interest of fairness and that great Australian tradition of giving "a fair go". It is my observation that the assistance provided by the Australian government has lessened over the years, and that presents a very significant barrier. In earlier times, the Australian government provided funding to Legal Aid centres who allocated funds to assist asylum seekers navigate their way through the maze which is the refugee law regime in Australia. Over the years, the Australian government imposed further conditions and restrictions on funding and funding tightened up. I have heard reports that some legal officers were representing and acting for five or more asylum seekers in interviews with assessing officers on particular days. The tightening up of legal assistance was argued to enhance accountability, for better 'targeting', and to achieve budgetary savings, amongst other things. Legal assistance was also commonly restricted to the primary application and not provided for the appeal. There was also funding provided to an entity known by the acronym IAAAS[15] which was set up to assist asylum seekers in their applications for protection in Australia, but in March 2014, the then Minister for Immigration, Scott Morrison, who of course is now Prime Minister of Australia, announced the end of taxpayer funded advice to illegal boat arrivals. He proudly announced that this would save Australians around

[15] The Immigration Advice and Application Assistance Scheme (IAAAS) was funded by the Australian Government to provide professional immigration advice and visa application assistance to non-citizens, who met specific eligibility criteria. IAAAS provided service is to vulnerable non-citizens who were either seeking a Protection visa in Australia or are minors for whom the Minister is guardian under the Immigration (Guardianship of Children) Act.

$100 million. In the same media release[16] the then Minister for immigration said, "*Australia's protection obligations do not extend to providing free immigration advice and assistance to those who arrived in Australia illegally*." The media release says that the cancellation of this assistance does not prevent those arriving illegally from accessing immigration advice and application assistance *pro bono*. The Minister said, "*If people choose to violate how Australia chooses to run our refugee and humanitarian programme, they should not presume upon the support and assistance that is provided to those who seek to come the right way….*"

- So legal assistance to the most vulnerable who might arrive in Australia without money and seeking protection now relies on the pro bono efforts of migration agents and lawyers who work in this field. While there are outstanding pro-bono results in this field, a great many impecunious asylum seekers have been denied legal representation by the ending of IAAAS funding. Add to this:

    - Relocation of asylum seekers to remote locations makes it very expensive for a lawyer of migration agent who is prepared to act pro bono to even meet face to face with the client; and

    - Of even greater concern are stories of lawyers being denied access, or having significant obstacles put before them when wanting to meet with their client asylum seekers located in remote locations and Nauru by the Nauruan authorities. There have been reports of the Nauruan government preventing migration lawyers seeing their clients where it has come to the Nauruan government's attention that the lawyer was going to mount a case against government decisions.

- Delays in processing migration applications is another significant barrier facing intending migrants, whether asylum seekers or otherwise. The Australian law imposes strict time limits on persons wanting to make an application for migration, and strict time limits for such things as responses to requests for further information from the Department of Home Affairs. Where an application for migration is refused, there is a strict time limit within which an applicant may be eligible to lodge an appeal to the Administrative Appeals Tribunal for merits review, and there has been no discretion to accept an appeal even if it is a day late, irrespective of circumstances. However, in practice, the time it can take for an asylum seeker to have their claims finally resolved can be years. Delays of this order raise many different sorts of other barriers depending on the asylum seeker's circumstances. For example, they might be held in immigration detention for years. I recently had an approach from the family of a detainee who had arrived in Australia and sought asylum. He has been held in immigration detention in Australia for almost 6 years.

[16] https://migrationalliance.com.au/images/easyblog_images/278/IAAAS-finished.pdf

In fact he advised me he has never set foot on Australian soil outside of an immigration detention centre since arriving on Australian territory. He continues to languish in detention having committed no crime. On the other hand, if an asylum seeker is fortunate enough to be permitted to live in the community, and to be fair this can but does not necessarily occur, then a further barrier may be imposed on them and that is a condition of their permission to live in the community is that they may not be permitted to work in paid employment. It goes without saying that in a country such as Australia, complete with its high costs of living, the denial of a right to work makes life extremely difficult for a person, and especially if they have dependents. If they have children dependents, then the question of education arises and further barriers may be imposed on children getting access to good education while their parents wait for a decision on their protection claim.

- Prior to 1992, Australian law permitted the detention of certain persons who were in Australia without a valid visa *but did not require it*. The introduction of mandatory detention laws in 1992 was a reaction to the arrival of 438 Vietnamese, Cambodian and Chinese 'boat people' to Australia's shores between November 1989 and January 1992. Concerns about another 'influx' spurred bipartisan support for increasingly tough measures on persons who arrived in Australia without a visa.

- The 1992 legislation both required mandatory detention of certain 'designated persons' and prevented any judicial review of detention by specifically providing that 'a Court is not to order the release from custody of a designated person'. However, the legislation did impose a 273-day time limit on detention.

- A further increase in boat arrivals and asylum applications in 1993 and 1994 resulted in the Parliament broadening the application of mandatory detention to all persons who either arrived without a visa or who were in Australia on an expired or cancelled visa.

- The 1994 legislation removed the 273-day time limit on detention and instead provided that an unlawful non-citizen could only be released from detention on the grant of a visa, or on removal or deportation from Australia. The 1994 amendments also introduced a non-compellable discretion in the Minister to issue bridging visas which would allow for the release of persons who were otherwise mandatorily detained. The limitations on judicial review of detention that were introduced in 1992 remained.

- The next major change to the mandatory detention policy occurred in September 2001 when a raft of amending legislation was enacted in reaction to what has become known as 'the Tampa crisis' and in pursuit of the so-called 'Pacific Solution'. Amongst the series of changes that were introduced by this legislation was the designation of Christmas Island, Ashmore and Cartier Islands and the Cocos (Keeling) Islands as 'excised offshore places'. The legislation enables the transfer of persons

who are intercepted at sea or who land on any of those excised offshore places, to processing centres on Nauru or Manus Island in Papua New Guinea. The legislation also prohibits those persons from making a protection visa application, other than at the discretion of the Minister.

The demonization of the asylum seeker in Australia

I have earlier in this paper referred to what I called the demonization of the asylum seeker in Australia. The terrorist attacks on the USA on September 11, 2001 impacted on our planet in many different ways. In Australia, a link was made, and even promoted by governments and others, between asylum seekers and terrorists. However, there has been little reporting on if, when and where asylum seekers have actually been found to be intending terrorists or refused entry or stay in Australia on character grounds as being a person who is a risk to the security of Australia because of the probability of committing a terrorist attack.

It is my observation that after September 11, 2001, we have seen a demonising of asylum seekers by certain sectors of the Australian community. We had a period of time when a former prime minister claimed there were reports of asylum seeker parents approaching Australian shores on boats and throwing their children overboard into the ocean in order to bolster their prospects of successful asylum. That was how it was reported at least. As you can imagine, such a story in comfortable, safe, secure Australia was not received well by the general public. People asked: "What sort of demons are these asylum seekers who approach our shores and who would throw their own children overboard into the ocean?" I am not suggesting that this view of asylum seekers is held by all Australians, or necessarily even by a majority. I hope not. However, it is difficult to tell. I have not seen any reliable studies on the question. However, it does exist if one reads and believes some of the newspaper articles and posts[17]. I think there is little doubt that this attitude presents a barrier to migration to Australia. I recall a person applying for asylum in Australia and who is of the Islamic faith telling me his wife expressed her concern to him after reading and hearing news and reports in the Australian media which gave her the impression that Australians don't like Muslims. She suggested to him that they, and their young children consider returning to the country they had fled and face the risk of death there.

Pushing refugees to the back of the queue

A significant barrier confronting some asylum seekers, even after they have been found by Australian authorities to be genuine refugees, is a Ministerial direction know as Directive 72.

To explain, refugees on permanent visas are able to sponsor family members to come to Australia. However, for many, the Australian government's policy to push such applications

[17] For example, an article in The West Australian Newspaper, 8 November 2018 "Migrant dilemma needs hard-headed approach"

to the end of the queue makes it almost impossible for them to reunite with their family. One of these policies is a Ministerial Directive which directs the DHA in relation to those who have been granted asylum and who came to Australia by sea to be placed at the end of the queue for family visas applications. As the government limits family visa grants to an annual quota, and as there are often insufficient places in the quota to grant visas to all eligible applicants, in practice this means that refugees who arrived in Australian by boat cannot in practical terms reunite with their family in Australia.

After a refugee challenged the original Ministerial Directive 62 in the Australian courts, in particular an Afghan interpreter who helped the Coalition forces in Afghanistan who had his application to sponsor his family placed at the lowest priority under Directive 62, the Minister issued a new Ministerial Directive (Directive 72). Directive 72 still puts applications for family members of people who came by boat at the end of the queue. However, officials can depart from this policy if there are special circumstances of a compassionate nature and compelling reasons.

Applications for family reunion by refugees who came by boat before 13 August 2012 are given the lowest priority for processing until they become Australian citizens. The same priority applies to all applications by people holding protection visas (including children and those refugees who did not come by boat). Applications for family reunion by Australian citizens fall into priority group 2, 3 or 4, depending on their relationship to the applicant. Directive 72 does not state which compelling and compassionate circumstances will allow an official to depart from the priority. The case law indicates that a test where the threshold is the existence of "compelling and compassionate circumstances" suggests that these conditions will be difficult to satisfy.

Profiling family members of refugees with similar characteristics as the refugee

A further barrier that may exist in the case of persons who have been granted refugee status or a protection visa in Australia arises in cases where they seek to sponsor an application for a visa for family members to travel to Australia to visit them. I have observed a concerning number of cases during my time as a Member of the MRT-RRT / AAT, and after as well, where it appears the Departmental official has somewhat uncritically assumed a profile for the refugees family members overseas and refused the grant of the visitor visa.

This arises in particular where the official is required to assess whether the visa applicant is in fact a genuine visitor with an intention to only temporarily visit Australia. In arriving at this assessment the official is guided by policy which requires the decision maker to consider such things as the presence of family members in their home country, whether they hold a job or conduct a business in their country of origin, whether they own property in the country, and such things as the presence of civil unrest, poor economic circumstances, or poor employment prospects, and other factors. I have rather too often seen such visitor visa applications rejected with little consideration given to the distinguishing circumstances between the refugee and his/her family members. For example, an Iranian person who fled

Iran years ago because of persecution due to his Baha'i faith applies to sponsor his mother and father to visit Australia to witness his marriage and to meet his newborn child. His parents' visa application is refused on the ground that the parents come from a country which is troubled by sectarian conflict, and depressed economic circumstances due to international trade sanctions. However, there was no evidence that the parents were in any way affected by these issues, and in fact evidence to the contrary, and they in fact were not even members of the Baha'i faith. In the absence of any clear reasoning or explanation of the actual reason for the refusal, one searches for possible reasons. One such reason appears to be that the Department profiles or associates family members of refugees as potentially also presenting a "risk" of arriving on Australian soil and making asylum claims.

Fortress Australia

The term "Fortress Australia" appears in the title of this paper and it is apt that I explain what I mean by this. Many may be familiar with the concept and may have also observed similar changes or developments in other countries. That is, the building up of the border protection efforts to prevent or to screen out certain would-be-migrants. In Australia, we have had a change from what was a fairly relaxed regime of border control, to one where it is as close to being as militarised as you can get, short of having the armed forces patrolling our borders airports and other points of arrival. The Australian media has commented on this. For example, there is a view that the Australian Border Force ("ABF"), which was formed in July 2015, is part of an international militarisation of national borders and the result of governments associating issues of migration and asylum seeking with crime, terrorism and national security.

In Australia commentators have said the creation of the ABF "marks a key milestone in the process of change which has seen the Department of Immigration *shift its focus from nation building and migrant settlement, towards a greater emphasis on border security*."[18] [My emphasis). Commentators have opined that the whole exercise is about tying everything into a post-9/11 world where, we are told, constant external threats can only be dealt with by increasing state power and diminishing civil liberties. The deliberate association of refugees and immigrants with the risk of terrorism has long been used to stoke racism, especially Islamophobia[19].

ABF is the result of the recent merger between the Department of Immigration and Border Protection (previously just the Department of Immigration) and the Australian Customs and Border Protection Services (previously just the Department of Trade and Customs).

The birth of ABF in Australia takes place in a global context where in Europe the far right has grown significantly on an anti-immigration and anti-Muslim basis. In the US, the process of militarising borders has perhaps gone the furthest, with the ever-expanding Department of

[18] Harriet Spinks, Parliamentary Library
[19] https://redflag.org.au/article/construction-fortress-australia

Homeland Security now employing over 21,000 armed Border Patrol Agents. Its website sums up the approach:

> "The priority mission of the Border Patrol is preventing terrorists and terrorists [sic] weapons, including weapons of mass destruction, from entering the United States … [I]ts primary mission remains unchanged: to detect and prevent the illegal entry of aliens into the United States."

In 2012 alone, 364,000 such "aliens" were reportedly arrested, though not a single international terrorist.

The ABF seems to be modelled on the US Department of Homeland Security. It is reported as employing 6,000 armed agents who have powers of arrest. It is reported to have spent ten million dollars on rebranding, including military-style uniforms, new signage and even a supply of ABF stuffed-dog toys as gifts for foreign dignitaries.

Commentators have asked what these 6,000 agents are going to do with their time. In my view this entity will require significant monitoring. The agency considers its jurisdiction to be a wide one and that it has powers that can be exercised broadly on the basis of it being for the security of Australia. The ABF considers that its function in policing the "border" is not restricted to Australia's coastlines or airports. As the ABF website states, "We consider the border not to be a purely physical barrier separating nation states, but a complex continuum stretching offshore and onshore, including the overseas, maritime, physical border and domestic dimensions of the border."

It has been suggested that the way ABF has come into being, and the way it operates, is about creating a sense of insecurity as much as it is about preventing it.

Border control is indeed a legitimate and necessary activity of government. It has been so in the past, is so now, and is likely to continue to be in the foreseeable future. However, my proposition is that we need very careful control and supervision of entities such as the ABF. When one considers the barriers that exist to the future or intending migrant to Australia, one must consider the existence and culture of entities such as ABF.[20]

A Big Australia

A debate has been continuing in Australia for a number of years now on the question of how many people Australians want in their country. This debate has potential in my view to create a further barrier to intending migrants.

[20] For further opinion on Fortress Australia, see for example https://www.theaustralian.com.au/national-affairs/we-cant-return-to-fortress-australia/news-story/18f6fbd57f9b0e5b84c105f23c461413

On the one hand we had a former Prime Minister who talked of a Big Australia and that we should plan for a population of 36 million by 2050[21]. His successor claimed she did not support this and that such a population would not be sustainable.

The Big Australia advocates argue that it takes a broader view and one where the country is confident of its core values of individual freedom, fairness, compassion, creativity, enterprise – all anchored in the institutions of our democracy. It sees Australia's future lying in an expansive, inclusive, tolerant society, based on the abiding principles of mutual respect and the guarantees of equal rights and protections for all. The economy is driven by innovation, enterprise, fully wired to global markets, where small businesses are encouraged to become big businesses and then global businesses

It is argued by supporters of Big Australia that the alternative view, the Smaller Australia view, sees an Australia that is insular, judgemental and intolerant of diversity. A Smaller Australia is characterised, they say, by self-congratulatory arrogance of many of our corporate elites, whose mediocrity is such that in 100 years we/they have failed to produce a single, memorable, "made in Australia" global brand, content instead with the comfortable confines of a domestic market of 24 million, and content too with a market seen by the rest of the world as little more than "treasure island".[22]

The "Big Australia" debate, and in particular those who advocate for the "Smaller Australia" alternative, presents another barrier to migration, albeit perhaps rather more at the macro level than at the individual level. However, it adds to the complex web of issues and factors affecting Australia's immigration regime.

The effect of political views and dispositions

We in Australia are of course influenced by what happens in the rest of the world. We have recently had a Minister for Immigration who seems to have done as much as he has been able to stir up anti-immigrant debate in Australia. The Minister, Peter Dutton, has spoken out against the liberal immigration policies of governments of the 1970s. Minister Dutton has made it his confused and conflated mantra to declare that many foreign fighters getting involved in conflict zones were the children or grandchildren of migrants that came to Australia during the 1970s. His reasoning has therefore been that greater barriers and greater measures and greater restrictions and checks are required in the assessment of migration applications. The same Minister targeted youths of Sudanese background as terrorising Australian families to the point that he claimed they were no longer feeling safe to go out at night.

[21] Australia's current population is estimated to be around 25.1 million - http://www.abs.gov.au/ausstats/abs@.nsf/0/1647509ef7e25faaca2568a900154b63?opendocument

[22] Kevin Rudd: reflections on a troubled country and a troubled world - http://theconversation.com/kevin-rudd-reflections-on-a-troubled-country-and-a-troubled-world-70528

The same Minister has been highly critical of the body charged with reviewing the merits of decisions made by the Department of Home Affairs, that is the Administrative Appeals Tribunal ("AAT"). See below for discussion on the politicisation of the AAT.

However, there are mercifully rather more enlightened persons in the Australian community who continue to consider and discuss the topic more objectively and in a balanced way. For example[23], the more reasoned and reasoning commentators argue it is not in Australia's interest to be isolationists and say, "*We have to guard against the demonising of entire communities, because that's the kind of Fortress Australia mentality that led to the isolationism and monoculturalism of the White Australia policy*."

Mr Steve Bracks, a former Labor premier spoke at the end of a federal election campaign in which both major parties have rejected a "Big Australia", picking up on the public mood of resentment over inflated house prices, overcrowded public transport and road congestion, and in some cases over immigrant groups creating cultural enclaves within the big cities.

Mr Bracks argues that greater diversity in the Australian community, especially that brought about by large number of immigrants, may be unnerving when it's dwelled upon as a point of difference. However, he rightly also argues that is no excuse for backing away from what is in our best interests as a people. He argues that the current political leaders should heed the lessons of the recent past in that every Australian government since 1973 has stayed true to the principle behind multiculturalism. That is, that diversity is a strength, not a weakness, and that we have far more to gain than fear.

We can expect these claims and counter-claims to continue amongst politicians and others in Australia, especially those from the far right, such as Pauline Hanson from the One Nation Party, and her colleagues and others of the same mindset. They are also likely to grow as the major political parties put forward increasingly isolationist policies in their quest to claw back the voters who abandoned them for the extremism of Pauline Hanson and her kind.

The hardening of the "Character Test"

In line with the proposition that I am making in this paper, that is that Australia has moved into a Fortress Australia mindset, we have seen the government toughen up the laws governing the grounds under which visas may be cancelled to persons who have been involved in criminal activities. Essentially, to be eligible for most visas in Australia one must satisfy what is known as the "Character Test" enshrined in the Migration Act 1958. In

[23] https://amp-theaustralian-com-au.cdn.ampproject.org/v/s/amp.theaustralian.com.au/national-affairs/we-cant-return-to-fortress-australia/news-story/18f6fbd57f9b0e5b84c105f23c461413?amp_js_v=0.1&usqp=mq331AQICAEoATgAWAE%3D#origin=https%3A%2F%2Fwww.google.com.au&prerenderSize=1&visibilityState=visible&paddingTop=54&p2r=0&horizontalScrolling=0&csi=1&aoh=15404983718543&viewerUrl=https%3A%2F%2Fwww.google.com.au%2Famp%2Fs%2Famp.theaustralian.com.au%2Fnational-affairs%2Fwe-cant-r

simple terms, the character requirements are set out under Section 501 of the Migration Act 1958. The Department of Home Affairs Website states "They [that is the provisions of the character test] help us decide if you are of good character", and "You must meet the character requirements if you are applying for a visa."[24]

However, we have seen a tightening and hardening of the laws in this area with the latest being the *Migration Amendment (Strengthening the Character Test) Bill 2018* currently before the Parliament.

The character test provisions in the Australia law

The 'Character test' is defined in s.501(6) of the Migration Act and is defined in a negative way that sets out circumstances where a person "does not pass" the character test. Specifically, and in summary, it provides a person does not pass the character test where:

- the person has a substantial criminal record (as defined by subsection (7)); or
- the person has been convicted of an offence that was committed:

(i) while the person was in immigration detention; or

(ii) during an escape by the person from immigration detention; or

(iii) after the person escaped from immigration detention but before the person was taken into immigration detention again; or

- the person has been convicted of an offence against section 197A; or
- the Minister reasonably suspects:
  - that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and
  - that the group, organisation or person has been or is involved in criminal conduct; or
  - the Minister reasonably suspects that the person has been or is involved in conduct constituting one or more of the following:
    - an offence under one or more of sections 233A to 234A (people smuggling);
    - an offence of trafficking in persons;
    - the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery or a crime that is otherwise of serious international concern; whether or not

[24] See https://immi.homeaffairs.gov.au/help-support/meeting-our-requirements/character

the person, or another person, has been convicted of an offence constituted by the conduct; or

- having regard to either or both of the following:
    - the person's past and present criminal conduct;
    - the person's past and present general conduct; the person is not of good character; or in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would:
        - engage in criminal conduct in Australia; or
        - harass, molest, intimidate or stalk another person in Australia; or
        - vilify a segment of the Australian community; or
        - incite discord in the Australian community or in a segment of that community; or
        - represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way; or
        - a court in Australia or a foreign country has:
            - convicted the person of one or more sexually based offences involving a child; or
            - found the person guilty of such an offence, or found a charge against the person proved for such an offence, even if the person was discharged without a conviction; or
            - the person has, in Australia or a foreign country, been charged with or indicted for one or more of the following:
                - the crime of genocide;
                - a crime against humanity;
                - a war crime;
                - a crime involving torture or slavery;
                - a crime that is otherwise of serious international concern; or

- the person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the Australian Security Intelligence Organisation Act 1979); or
- an Interpol notice in relation to the person, from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community, is in force.

The term "substantial criminal record" is defined in the Migration Act 1958 for the purposes of the character test, as where:

(a) the person has been sentenced to death; or

(b) the person has been sentenced to imprisonment for life; or

(c) the person has been sentenced to a term of imprisonment of 12 months or more; or

(d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more; or

(e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or

(f) the person has:

(i) been found by a court to not be fit to plead, in relation to an offence; and

(ii) the court has nonetheless found that on the evidence available the person committed the offence; and

(iii) as a result, the person has been detained in a facility or institution.

For the purposes of the character test, a sentence imposed on a person, or the conviction of a person for an offence, is to be disregarded if the conviction concerned has been quashed or otherwise nullified; or the person has been pardoned in relation to the conviction concerned; and the effect of that pardon is that the person is taken never to have been convicted of the offence.

The impact of the hardened character test

As a sovereign nation Australia, and subject to its international obligations under treaties and conventions to which it is a signatory, Australia is free to determine who it lets in, who can live there, and who it will expel. However, the narrative pushed by several conservative Ministers for Immigration in Australia goes like this: Australia expects its citizens to be law abiding, and expects people who want to come or live in Australia also to be of good character and law abiding. The law then provides if a person has been convicted of a criminal offence and has been sentenced to more than 12 months imprisonment then they prima facie fail the character test. They therefore do not qualify for a visa. However, more perversely, someone's visa can be cancelled if they have run foul of the criminal law and have been sentenced to more than 12 months imprisonment. Why I say it is perverse, is that the person has been punished and served their time, and arguably repaid their debt to society. It is therefore difficult to characterise this regime as anything other than a double jeopardy where the person is punished twice for the same offence. Once through the criminal justice system, and then again after that by the migration law system.

We have seen, for example, a significant number of New Zealanders who have lived in Australia since they were infants or young school children, get into trouble with the law, serve a prison sentence, and then have their visa cancelled which means they must leave Australia, and return to New Zealand where they have no family, no job, no connections.

A non-discriminatory migration program?

There is much articulated publicly within Australia as to our immigration program being non-discriminatory. There are many provisions in the Australian immigration laws and regulations which are aimed at promoting a non-discriminatory migration program. However, there are also those within the Australian community who question whether in fact our system is as free from discrimination as it is professed to be. Indeed, there are some who warn that the principle of non-discrimination, particularly in the humanitarian program, seems to be eroding[25].

Their argument considers such public statements made by the now Australian Prime Minister, Malcolm Turnbull, and Minister for Immigration, Peter Dutton, where it was proposed to develop a visa program to provide special provisions to allow white South African farmers to seek humanitarian visas in Australia. There is little doubt there may be many White South African farmers who may benefit from migration out of their present circumstances. However, that same might surely be said to apply to non-White South African farmers, and to others.

[25] https://www.theguardian.com/australia-news/2018/apr/05/australia-says-its-immigration-policy-is-blind-to-race-what-do-the-facts-show

Some commentators in Australia argue that evidence emerging suggests that the principle that has guided Australia's recent migration, that is post-Immigration Restriction Act 1901, that it should be blind to race, ethnicity and religion – appears to be eroding. It is argued that this can be seen in the application of the humanitarian program, where the need for protection must be the foremost selection criterion. They argue that white South African farmers face violence in a country that is ravaged by widespread violence. But the question must also be asked if they are at greater risk of attack than other citizens of South Africa, particularly where that country's authorities suggest the crime statistics show young black males living in poor urban areas face a far greater risk of being murdered.

It has been pointed out that the Rohingyan ethnic minority in Myanmar are also largely farmers. It also appears that they face a persecution from their country's military that according to the United Nations "bears all the hallmarks of genocide". However, Australia has not yet suggested special measures for this cohort of persons.

A further observation made by commentators is that Australia's additional humanitarian intake of 12,000 refugees from the long-running Syrian-Iraqi conflict was another successful example of Australia's humanitarian efforts. However, it has been suggested that 80% of those settled under that special program were Christian, from a part of the world that is overwhelmingly Muslim. Once again, and like the dangers and risks faced by white South African farmers, it is undoubted that Christians in Syria have suffered persecution at the hands of Daesh (Isis). But Muslims have been persecuted too. Further, Christians make up less than 1% of the Iraqi population, and 10% of the Syrian. It has also been observed that Australia's intake is disproportionate to the proportion of Christians among the region's displaced. Put another way, the UNHCR estimates the number of Christian refugees from Iraq at 15%, and from Syria it is less than 1%. What explains such a high rates of Christians in the cohort of persons resettled in Australia through this program?

Ben Doherty points out that the Community Support Program is a minor element of Australia's broader humanitarian intake and allows community groups, businesses, families or individuals to sponsor and support a refugee to come to Australia. This year there are 1,000 places. However, he also points out that certain nationalities that previously had been able to access the program during its pilot stage are now excluded. Community leaders from South Sudan, Somalia and Iran argue that exclusion of these countries is based on discrimination.

Like other commentators on this topic, it is not my contention that Australia's migration program is infected by racism to any significant extent. Nor do I suggest that there is a formal racial discrimination barrier to intending migrants to Australia. There is much evidence to suggest that generally there is not. However, there is also evidence that suggests that it is not a perfect system and that where imperfections of this nature may arise, it is essential they be examined and investigated effectively and urgently.

Australia's migration regime and those affected by disabilities

A significant barrier faces intending migrants to Australia if they have certain disabilities. Although Australia's *Disability Discrimination Act* aims to protect individuals from unfair treatment on the grounds of their disability, this does not extend to those seeking certain visas in Australia. We therefore see cases that demonstrate discrimination on the grounds of disability are not unlawful under the *Migration Act 1958*.

By way of background, to be granted certain visas such as skilled permanent residency visas, the Migration Regulations 1994 prescribe a number of "Public Interest Criteria" (PIC) that must be satisfied by both the applicant, and any family members migrating with them. In particular, PIC 4005 and 4007 stipulate that the visa applicants must be free from a disease or a condition in relation to which the provision of the health care or community services would be likely to result in a significant cost to the Australian community in the areas of health care and community services or prejudice the access of an Australian citizen or permanent resident to health care or community services.

In assessing what constitutes a "significant cost to the Australian community", the Department of Home Affairs implements a policy that deems "significant cost" to be $40 000 throughout the visa applicant's stay in Australia (the length of their visa). The cost for permanent visa applicants is assessed over a five year period. A visa applicant whose projected care costs exceed this amount can be refused a visa on the grounds of failing to meet the Public Interest Criteria, unless they are able to obtain a waiver (in PIC 4005). Significantly, this cost ceiling applies regardless of whether the health care or community services will actually be used by the applicant.

It is not uncommon for visa applicants with disabled children to be rejected for temporary or permanent residency visas on the basis that the projected cost of their care would exceed this threshold. Persons in this category may seek a review of the merits of the decision by the AAT, and subsequently apply for intervention by the Minister for Immigration, however, the latter results only rarely in a favourable decision by the Minister.

The Disability Discrimination Act 1992 of Australia prohibits differential treatment of a person on the basis of their disability. Section 3 of the Act sets out the objects of the Act, which seek to eliminate, as far as possible, direct and indirect discrimination on the grounds of disability across a wide range of areas, including employment, education, access to premises, and in the provision of goods and services. However, discrimination on the grounds of disability is not unlawful under the Migration Act 1958, as it is specifically exempt from the operation of the Disability Discrimination Act.

The framework of Australian migration law often forces visa applicants with disabled children to rely upon appeals subject to the discretion of the Minister for Immigration. Such an appeal is not compellable and the Minister may or may not choose to intervene to waive the relevant Public Interest Criteria. This sets up a barrier for visa applicants who have neither certainty or consistency in relation to the grant of a visa.

The barriers facing those with HIV AIDS and who wish to migrate to Australia need to also be considered in the context of Australia's health and Public Interest Criteria. The Australian government's ratification of the Convention on the Rights of People with Disabilities in

2008, resulted in the review of some migration laws with respect to their health criteria and resulted in some positive amendments. There have been significant changes for people with HIV in obtaining temporary visas. However, those changes do not apply to those with disabilities who are seeking permanent visas. People with HIV AIDS, like people with other disabilities or medical conditions, will have to demonstrate that are not a threat to public health or a danger to the community; that their condition would not prejudice access to health care or community services; and that their condition would not be likely to pose a significant cost to the Australian Community. In some cases these barriers may be overcome based on the particular circumstances of the applicants, whereas in other cases they will not.

I argue, as have other observers, that it is time for legislative review and change in Australia with the clear aim that visa applicants afflicted with disabilities be governed by a regime that is not only in the interests of the Australian community, but which also treats those persons with dignity, fairness and compassion.

The emphasis on temporary skilled visas and the creation of a low-paid working class of visa holder

Australia's current migration program focusses its permanent visa grants on those applicants holding particular skills that are in demand in the Australian labour market. However, a recent titled "Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia"[26] by Bassina Farbenblum and Laurie Berg, and other recent studies, paint worrying pictures of the use of temporary skilled visa holders as low paid workers in Australia.

Recent studies report that temporary migrant workers comprise up to 11% of the Australian labour market. Underpayment within this workforce is both widespread and severe. In 2017, the report *Wage Theft in Australia: Findings from the National Temporary Migrant Work Survey* revealed that a substantial proportion of international students, backpackers and other temporary migrant workers were paid roughly half the legal minimum wage in their lowest paid job in Australia. The scale of underpayment of migrant workers in Australia is significant. For example, 7-Eleven's wage repayment program alone repaid over $150 million in unpaid wages to its mostly international student workforce.

The widespread underpayment of migrant workers in Australia reported in the above report needs to also be considered in conjunction with a further report on the topic by the Australian Senate Education and Employment References Committee titled "A National Disgrace: The Exploitation of Temporary Work Visa Holders – March 2016". That report also found widespread abuse and exploitation of temporary migrant workers.

In considering barriers to migration to Australia, the treatment, or perhaps more accurately, the mistreatment, in the workforce of temporary and permanent migrants by Australian employers presents as a significant barrier. In some cases, the migrant worker might

[26] https://migrationalliance.com.au/images/easyblog_images/278/Wage-theft-in-silence.pdf

consider themselves still to be in a better position than they would have been had they remained in their own country where they might not have been able to find employment at all. However, this cannot excuse or justify the mistreatment and underpayment of migrant workers in Australia.

The "Fast-tracking" appeal process of asylum seekers arriving by boat

The Australian government has implemented a separate system of review of asylum claims made by persons who arrived onto Australian territory by boat, as compared to those who have arrived by air-craft or other means. The system which has been in place involves an entity known as the Immigration Assessment Authority (IAA) largely reviewing the Department's decision "on the papers". The IAA was established as part of a range of immigration reforms approved by parliament in late 2014 to deal with the backlog of 30,000 undetermined cases of people who arrived in Australia by boat in the first half of the decade. It was intended to fast-track the lengthy process of the Administrative Appeals Tribunal, which still conducts merits review of refused protection applications made people who arrived in Australia by means other than boat. Unlike the Administrative Appeals Tribunal, the IAA does not have the ability to consider new material when conducting a review, except in exceptional circumstances. An applicant must therefore present all information and documentation supporting his or her case at the point where it is being assessed by a departmental official.

Commentators, including Legal Aid Victoria, have argued that this "fast-tracking" of appeals from this cohort of asylum seekers is unfair and that such persons are treated as second-class[27].

Legal Aid Victoria appealed the case an Iranian who arrived in Australia by boat in 2012. His application for asylum was rejected by the Department of Home affairs who decided it was not convinced the applicant faced harm for reasons of his conversion to Christianity. Part of the evidence relied on by the Department included evidence obtained after speaking to the reverend of the church, who informed that the asylum seeker did not attend church as often as he had claimed. The asylum seeker had claimed that he had regularly attended a church in suburban Melbourne since arriving in Australia. A department official rejected the visa application in April 2016. The Department noted the asylum seeker claimed he attended church regularly but found he attended in order to falsely strengthen his protection claim. The Department did not accept the man had genuinely converted to Christianity, or would be perceived as having genuinely converted to Christianity by Iranian authorities in the event he returned.

This decision was reviewed and approved by the IAA in May 2016.

[27] https://www.theguardian.com/australia-news/2017/dec/07/fast-track-assessment-fundamentally-unfair-to-refugees-high-court-told

The appeal by Legal Aid Victoria argues that the Iranian asylum seeker was not given the opportunity to explain why he had attended church less frequently in the years between his arrival in Melbourne and his visa application. It was submitted that the man had moved to another suburb, which made it more difficult to travel to the church, but could provide letters of support from other Christians confirming his commitment to Christianity.

It is argued that in cases such as this case, where new information arose in the course of that assessment, the fast track process is fundamentally unfair.

A migration law expert with the Castan Centre at Monash University, said that limiting procedural rights was a trade-off made by parliament in order to clear the backlog of immigration cases. The argument is that procedural rights are restricted in order to accelerate the processing of applications and reducing the backlog. However, such an accelerated system raises significant risks for asylums seekers, who often have poor English skills and often do not have legal assistance, to provide all possible relevant documentation and evidence upfront.

While the fast-tracking regime, and its weaknesses, is currently limited to a comparatively small cohort numbering some 30,000 asylum seekers who arrived by boat during a specified period of time, there are significant concerns that this regime may be expanded to other asylum seekers, and possibly also to the general migration cohort. In this respect, earlier this year the government commissioned a review of the migration review regime and this review is expected to report and make recommendations in the coming weeks. Some have rung the alarm that the government may introduce a similar system of fast-tracked reviews in a wider range of migration cases, if not all. The objective would be to reduce the backlog chocking the Migration Review Division of the AAT at the present time.

The introduction of a fast tracked appeal mechanism to all asylum seeker claims, and possibly to all migration cases, would create a very significant barrier to the intending migrant to Australia. The barrier is in the form of a reduced right to present an appellant's case in a face-to-face hearing with a Member of the AAT, or to present evidence of circumstances that have developed since the original decision was made. The risks to undermining the objective or achieving the correct and preferable migration decision are substantial.

Privatisation of the Australian visa processing regime

In a discussion on the barriers that face intending migrants to Australia, it is necessary to consider how future policy and administrative changes may affect such persons. There is currently discussion on foot that might result in some or all of the visa processing regime in Australia being taken away for the public hands, that is from the government department which presently handles this, and sold off to the private sector in Australia.

It is difficult to provide anything more than an outline of this proposal at the present time since the contemplation of this proposal by the present Australian government appear to be occurring behind closed doors on the basis of what we are told are commercial-in-

confidence issues. The government first announced its intentions in the 2016-17 Budget through a measure titled 'Reforming the Visa and Migration Framework'. This promised significant savings to the Australian taxpayer.

What little information is publicly available about this initiative, includes information that the government forecasts significant increases in visa application numbers in the years to come. Reports suggest the Department of Home Affairs predicts applications will increase by around 50 per cent by 2026-27. This, that is mere growth in applications, can hardly be a basis in itself for outsourcing or privatising an essential government service. In any event, there are serious grounds to doubt such projections[28].

As already discussed, parts of Australia's visa processing regime is characterised by serious backlogs and time delays. It is not axiomatic that these are a result of the inefficient operation of the regime by the officers of the Department of Home Affairs. However, those who advocate for the privatisation of the visa processing regime tend to suggest that is the primary cause. Rather, it is, in my opinion, due to combination of complex and uncertain visa design factors, insufficient resourcing of the relevant Home Affairs functions; and perhaps even cultural and staff morale issues.

If the government is simply wanting to speed up the processing of visa applications and to clear backlogs, it should not fall into thinking that privatisation will deliver the solution without significant risks. There is in fact a very real chance that privatisation may well increase the costs to the Australian taxpayer, and to the intending migrant. I agree with commentators who have questioned why in circumstances where the revenue collected by government from visa charges is three times higher than the administrative cost, should the regime be sold off to the private sector?[29] If the Australian government proposes to sell off the visa processing regime to the private sector, while at the same time insisting on a dividend be paid to it from the private sector for the privilege of operating such a service, and if as can reasonably be expected the private sector will want to maximise profit from such a service, then one outcome is likely: costs to the end user, and quite likely the Australian taxpayer, will rise. That appears to give rise to further future barriers to the intending migrant to Australia.

Assistance to overcome the barriers to migration in Australia

This paper has discussed a sample of barriers that face the intending migrant to Australia. While the statistics suggest that many intending migrants successfully overcome the barriers and gain successful entry to Australia, whether temporary or permanent, there are sources of assistance for those who find the barriers daunting**.**

The *Migration Act 1958* provides a regime of regulated migration agents who may provide migration assistance. The *Migration Act 1958* requires that for a person to be able to give

[28] https://www.themandarin.com.au/99686-privatising-visa-processing-the-alarm-bells-are-ringing/

[29] See the Australia Productivity Commission report in 2016 which considered this issue and made this finding.

migration assistance, they must be qualified and registered with the Migration Agents Registration Authority (MARA)

Migration Agents assist people who want to visit or reside in Australia with visa applications and provide related information. While some voluntary organisations and non-profit firms provide services at no charge, most agents work for private companies and charge fees. Some migration agents operate as lawyers and provide additional services, such as legal representation in court if a visa is refused and other legal advice regarding a visa application. Although migration agents can advise a client whether a visa application is likely to succeed, the actual decision is made by the Department of Home Affairs, so the use of a migration agent or migration lawyer does not guarantee a successful visa application or result.

A report by IBISWorld published in May 2018 states that the excluding basic short-term visitor visa applications and returning resident visa applications, migration agents are expected to be involved in approximately one-third of all visa applications each year in Australia. Temporary worker visa applications and providing assistance for temporary worker visa applications is the industry's largest service segment. From March 2018, the main visa in this segment is the Temporary Skill Shortage (TSS) visa, which replaced the Temporary Work (Skilled) visa (subclass 457 visa).[30] IBISWorld also reports that the industry revenue is in the order of $887 million annually and employs some 8000 people and has shown a 6.2% growth rate in the last five years.

Anecdotally, there is evidence that the migration agent sector has assisted many thousands of migrants with negotiating some of the barriers discussed in this paper. However, there are also many reports of cases where intending migrants has been left dissatisfied with the service, have complained about excessive fees and unprofessional or improper services. Redress or remedy may, to an extent, be available from insurances held by migration agents and lawyers. However, while these may provide some financial compensation, they do not provide what the intending migrant initially engaged an agent to obtain. That is, either the grant of a visa or citizenship, or the reversal of a visa cancellation or some other decision made by the Department administering the immigration laws of Australia.

There is a further perspective on the issues of immigration assistance where it has been argued that certain migration agents, or indeed certain migration lawyers, are part of the problem rather than the solution[31]. This is illustrated in the protection visa scam applications that have been lodged in great numbers by, in particular Malaysian nationals. In September this year, it was reported that criminal syndicates are using counterfeiting networks in Malaysia to smuggle people into Australia, exploiting a relaxed visa agreement between the countries and about 10,500 people from Malaysia are in Australia unlawfully —

[30] https://www.ibisworld.com.au/industry-trends/specialised-market-research-reports/advisory-financial-services/migration-agents.html

[31] See *Criminals faking Malaysian identities to obtain Australia visas, exploiting cosy international relationship* By Nino Bucci, ABC Investigations https://www.abc.net.au/news/2018-09-16/criminals-faking-malaysian-identities-to-obtain-australia-visa/10237506

significantly more than any other country. The report suggests that people smugglers have helped nationals of other countries assume fake Malaysian identities so they can enter Australia the same way. Australia not uncommonly sees agents and lawyers prosecuted and found guilty of fraud and scams.

What this suggests is that a migrant intending to migrate to Australia might be faced with a choice if using a migration agent or migration lawyer. On the one hand, such an agent or lawyer who acts with integrity and in accordance with the law will not offer to act for a person in an application which is fraudulent or fictitious. However, regrettably, not all such agents or lawyers necessarily act with integrity. The barrier to an intending genuine migrant is to find a bona fide agent or lawyer and not fall victim to one who is deficient in integrity.

The review of migration decisions – politicisation of part of the process

Since 1975, Australia has had a system of independent administrative merits review of a range of decisions made by immigration officials. The right of appeal is created in Australian law by the *Administrative Appeals Act (1975)* and is currently delivered by the Administrative Appeals Tribunal (AAT).

The range of reviewable decisions includes where the immigration officials decide to refuse the grant of a visa, or decide to cancel someone's visa, or decide to refuse the approval of a sponsorship, and certain other migration decisions. This independent administrative review which has been available at a relatively low cost, currently AUD$1,764 per appeal[32], has a statutory obligation to operate in a way that is fair, just, economical, informal and quick[33].

The right of appeal created by the Administrative Appeals Act has enabled those affected by such adverse decisions to appeal against the decision and to present new evidence and argument as to why the decision should be changed. This has been in the form of the Administrative Appeals Tribunal Act generally, and the *Migration Act 1958* has also provided for review of administrative decisions by a tribunal. This review function was undertaken by the Migration Review Tribunal – Administrative Review Tribunal (MRT-RRT) and its predecessors, and more recently by the Migration and Refugee Division of the Administrative Appeals Tribunal (AAT). These tribunals operate on the basis of appeals being heard *de novo* and decided by adjudicators called "Members" who are appointed for fixed terms and who are given powers under the law to set aside vary, or affirm decisions made by the original decision-maker in the immigration department.

Clearly the effectiveness and integrity of decisions made by Members of the AAT relies on the skills and qualifications of its Members. In the past, here has been advertising of vacancies for Members, and a transparent and open selection process to determine appointments to the position of Member of the AAT. However, in the past three years, we have seen the appointment of a significant number of Members whose qualifications or

[32] 50% of this fee may be reduced in cases of hardship, and 50% of the appeal fees are refunded where the AAT makes a decision in favour of the appellant.
[33] Section 2A of the Administrative Appeals Tribunal Act

experience has been highly questionable. The appointments have not been made by an open of transparent selection committee or process. Rather, they have been made by, we assume, a tap on the shoulder, by the Attorney General and the Minister for Immigration.

It is of grave concern that the Minister for Immigration at the time of these recent appointments mounted a campaign of criticism of previous AAT Members' decisions. The Minister, Peter Dutton, claimed the Members were out of touch with community expectations and in conjunction with the Attorney General decided not to renew the appointment of many experienced Members of the MRT-RRT / AAT. He is also reported to have claimed that the AAT required "more like-minded people" and that they should take a harder line in their decision making. In the place of experienced and qualified Members, a significant number of former politicians, ministerial advisers, conservative political party hacks, and others with little or no relevant qualifications or experience have been appointed as Members to determine crucial appeals which in most cases affect an appellant's life profoundly.

There has been public comment recently on this politicisation of the appeal process. For example, in a recent article titled *Political stacking leaves appeals tribunal in chaos*[34], one commentator writes:

> *The number of cases lodged with the tribunal in 2017-18 increased dramatically, while the number of cases dealt with fell. As a result, the tribunal now faces an enormous backlog of appeals, dating back to 2014. "... the total number of applications we have on hand has grown to exceed 53,000 at 30 June 2018," the report said.*
>
> *The crisis centres on one sector covered by the tribunal: immigration. "Approximately four-fifths of this pending caseload are applications in the Migration and Refugee Division," the report said.*
>
> *This chaos is in large measure the government's own doing. Since coming to power five years ago, it has run down the AAT, purged the body of experienced people, abandoned any pretence of merit-based appointment and stacked it with political appointees, including scores of former conservative politicians, failed candidates, former staffers, party members, donors and other mates. Some of them – although not all – lack any relevant experience and are either unwilling or unable to do the job.*

A very serious consequence of this move to appoint unqualified and inexperienced persons and political friends and others to these highly responsible Member positions, and which this article highlights, is that some of the new appointees attempted to meet their decision targets by simply "overturning decisions of the department because it's the easier thing to do". The reason for that being that if a Member decides against an applicant, that applicant

[34] The Saturday Newspaper, November 24030, 2018, https://www.thesaturdaypaper.com.au/news/politics/2018/11/24/political-stacking-leaves-appeals-tribunal-chaos/15429780007187

is likely to appeal for judicial review to the Australian Courts[35]. The proposition is that affirming a decision made by the Department of Home Affairs requires greater thought and effort to stand scrutiny by the Federal Court. However, setting aside the decision of the Department and finding in favour of the appellant is less likely to result in an appeal by the Department, due to amongst other things inadequate resourcing to mount an appeal, even if the decision suffers from weak reasoning.

The politicisation of the membership of the AAT as the merits review appeal body presents a very significant barrier to the intending migrant to Australia, irrespective of the class of visa such a person seeks. It is of concern that there has been such a significant appointments of "like-minded people" to take a harder line in these appeal cases and that this presents a further barrier to migrants seeking to migrate to Australia. That there are now such unprecedented delays in the appeal process, is further cause for great concern for the Australian community, and for the intending migrant.

The appointment of Members to this important Tribunal and without an open or transparent process undermines the credibility and independence of the AAT. It is an unhealthy thing in government for appointments to be made on the basis of past favours and cronyism. However, it is even worse that such appointments are made with the understanding that appeals which ought to be conducted with an open mind and independence be made in a particular way that is satisfies the Minister that a harder line has been taken.

The Minister justified his overhaul of the AAT's membership by claiming that its past decisions were out of touch with community expectations. However, the test of "community expectations" is a notoriously slippery thing and one prone to be subjective and uncertain. Further, isn't the law supposed to reflect the community expectations and should not a merits review tribunal apply to law without fear or favour or other subjective influence? The present government's handling of the appointment process in the AAT over the past two years has done much to undermine the AAT's independence and credibility. We live in hope that despite the government's politicisation of the AAT, those appointed will rise to the occasion and truly act in accordance with the spirit of independence and fairness.

Conclusions

In the abstract of this paper I referred to the report of the World Economic Forum which published a report "Which countries do migrants want to move to". The report is based on a Gallup survey which surveyed around 587,000 people aged over 15 in 156 countries between 2013 and 2016 to come up with its figures. It shows the USA is named by one in five potential migrants their preferred destination. Following the USA, Germany, Canada, the United Kingdom, France, Australia and Saudi Arabia came in next (in descending order) appeal to at least 25 million adults each.

[35] A decision of the AAT can be appealed on a point of law to the Federal Circuit Court of Australia in the first instance, and again to the Federal Court of Australia, and then by leave to the Australian High Court.

I would suggest that despite the barriers I have discussed in this paper, Australia will continue to be a desirable place to which many millions of people around the world will want to migrate.

Many of the barriers that I have referred to in this paper have evolved or were put in place for different reasons. Many of the legislative barriers in place are aimed at achieving various policy objectives as decided by the government of Australia, and therefore to the extent that the barriers represent the will of the Australian people, they arguably represent the will of the majority. Some of the barriers discussed, and others, exist for good reason, including those in place and aimed at preventing the admission of persons who are likely to harm Australians and Australia. The prevention of entry by such persons of course is a difficult administrative challenge. For example, it has been argued in Australia that those seeking refugee status need to be screened and carefully investigated to reduce the risk of admitting terrorists into Australia. However, we are not informed of what the actual probability is of a person admitted as a refugee committing a terrorist act. It is important to maintain perspective and proportion in these matters. Some of the barriers discussed might also be built on shaky foundations. For example, one might question whether asylum seekers are any more likely to be would-be-terrorists than a person who chooses to apply to enter Australia as a student, or as a tourist, or as a skilled worker, or under some other category of visa.

This paper discussed some of the barriers facing persons wishing to migrate to Australia. It could have just as easily been a paper on the incentives to migration to Australia. The fact that it is not a paper on incentives is not to be interpreted as suggesting that Australia is anti-immigration. Notwithstanding that certain recent polls suggest a degree of anti-immigrant sentiment, and notwithstanding the presence of a range of barriers, Australia continues to have a planned and targeted and comparatively large immigration program. That program admits a significant number of people who face a wide range of different circumstances and who come from a wide range of different countries, despite the barriers in place.

End.