

The price of deterrence

Australia's path to maintaining
sovereign borders

In Search of Control
Australia Country Report

Anouk Pronk



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Netherlands Institute of International Relations



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About the author

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About the Project

In December 2022, the Dutch government initiated a [working group](#) focussing on the 'fundamental reorientation of the current asylum policy and design of the asylum system.' Its aim is to further structure the asylum migration process, to prevent and/or limit irregular arrivals, and to strengthen public support for migration. One of the [assumptions](#) is that the externalisation of the asylum procedure could be a feasible policy option through effective procedural cooperation, with a country outside the EU, that 'passes the legal test'. In other words, if it would be operationalized in conformity with (international) legal standards and human rights obligations. In that context, the working group expressed the need for more insight on how governments with other legal frameworks than the Netherlands, as an EU Member State, deal with the issue of access to asylum, either territorial or extra-territorial, in order to provide thoughts or angles for evidence-based policy choices by the Dutch government, at national and/or European level.

The purpose of this comparative research project, led by the Clingendael Institute, was to collect existing knowledge about the asylum systems of Australia, Canada, Denmark, the Netherlands, and the United States, and to complement this with an analysis of national legislation, policy, and implementation practices, focussing on access to (extra-)territorial asylum. While there are overlaps, each of the asylum and refugee protection systems in the research project operates in very different geographical situations and political contexts.

Beyond the five country case studies, a separate synthesis report that is based on a comparative analysis of the respective legal frameworks and the asylum systems of those countries addresses directions for Dutch courses of action. The synthesis report and the country case studies can be accessed [here](#).

The main question to be answered in the national reports is: *Which instruments are applied or proposed by Australia, Canada, Denmark, the Netherlands and the United States concerning or affecting access to asylum procedures and humanitarian protection?*

Therefore, the country research focuses on several central elements of the national asylum systems, including their access to, and implementation of, interdiction practices, border and asylum procedures and other legal pathways. These were put in a broader public, political and legal context, taking into account the countries' national policy aims and objectives.

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Introduction

Australia's Operation Sovereign Borders (OSB) has increasingly been referred to as an example of more restrictive asylum policies in Europe.¹ Throughout this operation, Australia has intercepted and turned back boats carrying asylum seekers – whom Australia calls 'unauthorised maritime arrivals' (UMAs)² – to either their country of origin or their country of arrival, often through (sometimes implicit) agreements with surrounding countries like Sri Lanka and Indonesia. Anyone who still arrives in Australian territory without a valid visa is put in immigration detention onshore or is placed in offshore processing centres in Nauru or Papua New Guinea (PNG). Despite the recent renewal of the three-year contract with Nauru, valued at A\$420 million, to maintain the possibility of offshore detention and processing until at least 2025³, the preceding nine years had witnessed no asylum seekers being sent to Nauru. During this period, the majority of asylum seekers who did stay there were either resettled in the United States, returned to Australia⁴, or returned to their country of origin.⁵ In October 2023, however, the Australian Border Force confirmed that 11 people have been sent offshore to Nauru, because they could not be sent back safely, aligning with the government's narrative that offshore processing remains an integral part of OSB.

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- 1 Amy Nethery, Azadeh Dastyari and Asher Hirsch, "[Examining refugee externalisation policies: A comparative study of Europe and Australia](#)," in *Refugee Externalisation Policies: Responsibility, Legitimacy and Accountability*, ed. Azadeh Dastyari, Amy Nethery and Asher Hirsch, (London: Routledge, 2022), p. 1.
 - 2 From early 2014 to March 2022 this group was referred to as IMAs: Illegal maritime arrivals, but this changed due to contention about the term illegal, as someone seeking asylum is not illegal under the Refugee Convention.
 - 3 Australian Government Tenders, "[Contract Notice View - CN3918654-A2](#)," 27 January 2023; the total costs of offshore processing are way higher, amounting to A\$1 billion on average per year between 2013 and 2022. See also: Madeline Gleeson and Natasha Yacoub, "[Cruel, costly and ineffective: the failure of offshore processing in Australia](#)," *Kaldor Centre for International Refugee Law* (Kaldor), 12 August 2021.
 - 4 The possibility to be returned to Australia only applied to arrivals coming prior to 19 July 2013, when the policy change prevented any unauthorised maritime arrivals to settle in Australia permanently.
 - 5 Refugee Council Australia, "[Offshore processing statistics](#)," 23 July 2023, p. 2.

Several European countries are currently exploring similar policies to establish offshore processing centres for asylum seekers.⁶ The UK is the most advanced herein, establishing plans for externalising their asylum processes to Rwanda. The ‘Stop the Boats’ slogan that has currently become famous in the UK has been used in Australia since the 2013 elections, where they now replaced it by a ‘Zero Chance’ slogan.⁷ This refers to the fact that individuals arriving illegally have no chance of getting to Australia and settle there permanently.

OSB’s aim is to deter irregular maritime arrivals and to disrupt people smuggling activities by breaking their business model, saving lives at sea.⁸ Interestingly, this was initiated even though around 90% of people asking for asylum arriving by boat between 2008 and 2012 were found to be refugees.⁹ Despite its significant costs, amounting to A\$1,49 billion per year at its peak, offshore processing did not directly lead to a decrease in maritime arrivals, but instead first saw an increase in the number of arrivals from 4,564 in 2011 to 20,587 in 2013 at its reinitiation under the Labor government.¹⁰ After the initiation of OSB under the Coalition government however, the readily existing offshore processing and the ban on permanent settlement was combined with returns at sea. These maritime interceptions saw a sharp decline in arrivals, with 450 people returned or sent offshore in 2014, and this number falling below 100 from 2016 onwards, all of whom were returned at sea.¹¹ This seems to show that interception was a more successful deterrent.¹² Nevertheless, it has attracted much international criticism as a policy that blocks asylum pathways and punishes those seeking protection.

6 Philippe Jacqu , “[Outsourcing asylum gains ground in the EU](#),” *Le Monde*, 10 March 2023; Laura Gozzi, “[Europe migrant crisis: Italy to build migrant centres in Albania](#),” *BBC News*, 7 November 2023; Jessica Parker, “[Germany agrees to consider UK-style plan on processing asylum abroad](#),” *BBC News*, 7 November 2023.

7 The Australian government provides information about this policy in a way to deter anyone from attempting the journey, see for Sri Lankan citizens: Australian Government, “[Zero Chance Campaign](#).”

8 Australian Press Office, “[Transcript of Joint Press Conference](#),” 19 July 2013.

9 Nikolas Feith Tan, *International Cooperation on Refugees: Between Protection and Deterrence* [Unpublished], May 2019, p. 32.

10 The first phase of offshore processing was initiated in August 2012. The number of arrivals over 2012 was at to 17,204.

11 Gleeson and Yacoub, “[Cruel, costly and ineffective](#),” *Kaldor*.

12 Janet Phillips, “[Boat arrivals and boat ‘turnbacks’ in Australia since 1976: a quick guide to the statistics](#),” Parliamentary Library, 17 January 2017.

The most severe concerns raised by several UN bodies,¹³ NGOs operating in the region,¹⁴ and legal scholars relate to Australia's non-refoulement obligations. This includes the forceful return of boats without assessing the asylum claim but also the health conditions of people in immigration detention facilities as part of Australia's 'policy of indefinite detention'.¹⁵

This report will examine Australia's policies over the years, going into its judicial system, national regulation surrounding asylum, and cooperation and externalisation policies on border control, refugee determination, and immigration detention. It also includes Australia's latest developments, as both the government and the High Court have recently made impactful decisions. The study indicates that Australia's ability to pursue policies freely, is facilitated by the lack of any supranational court and its remote location, being surrounded by states depending on Australia financially and politically. Though successful in its goal to reduce irregular arrivals, caution is therefore needed when studying its applicability in a European context. While Australia has an extensive resettlement programme, this is mostly offered instead of, rather than in addition to, facilitating spontaneous asylum applications. Through its resettlement programme, they offer additional, quicker pathways for refugees who are better suited to Australian life in terms of language and work opportunities.

The study has been executed in a relatively short period between July and November 2023, including most aspects of Australia's asylum system. This inevitably leads to a limited description of some parts of the system depending on its importance for this comparative study. The quality of the reports is protected by the inclusion and feedback of an Advisory Committee consisting of a group of country-experts on asylum and several experts on extraterritorial processing. In addition, interviews have been conducted with several people from the Kaldor Centre for International Refugee Law as well as with two senior officials working on immigration for the Australian Government. Lastly, a peer review has been executed by a former senior official of the Australian immigration services who has been actively involved in the development of these policies.

13 ["Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment,"](#) March 2015; [United Nations High Commissioner for Refugees](#), 24 July 2017; [United Nations Committee on Economic, Social and Cultural rights](#), 11 July 2017, 4; [United Nations High Commissioner of Human Rights](#), May 2015.

14 See: [Medicins Sans Frontiers](#), [Indefinite Despair: The tragic mental health consequences of offshore processing on Nauru](#), December 2018.

15 [Gleeson and Yacoub](#), ["Cruel, costly and ineffective,"](#) *Kaldor*.

1 Setting the scene: general background and relevant developments

Australia's policy throughout the years

Australia's asylum policy has been a central electoral issue in domestic politics since the beginning of the 21st century. This started with the *MV Tampa affair* in 2001, where Australia refused a boat on its territory that rescued 433 Afghan refugees from an Indonesian vessel. As this was seen as a threat to national security, the *Pacific Solution* was introduced that excised Christmas Island from the Migration zone, taking away the 'automatic' right to apply for asylum. This was introduced by the Liberal-National Coalition (LNC), the more conservative government led by PM Howard. Due to this measure, the Minister would have to 'lift the bar' to enable asylum applications from anyone outside the migration zone. However, this policy had an inverse effect as more asylum seekers started to go through even more dangerous routes to reach mainland Australia instead.¹⁶ Consequentially, once legally feasible, the entire Australian territory got excised.¹⁷ The *Pacific Solution* including offshore processing to PNG and Nauru was ended in 2008 by Labor, but reinitiated, again under Labor, in 2012 due to a higher number of arrivals. Initially, asylum seekers sent offshore would be sent to Australia once they were recognized as refugees. This first phase was executed under a policy of 'no advantage', in which asylum seekers were told to wait as long for their application to be assessed equivalent to what they would have experienced in UNHCR's resettlement process.¹⁸ Approximately 1,000 UMAs were sent offshore under this policy. However, refugee determination processes never occurred offshore for this group, instead

16 Interview legal expert at Kaldor.

17 For more information, see: Melissa Phillips, "[Out of sight, out of mind: excising Australia from the migration zone](#)," *The Conversation*, 17 May 2023; National Museum Australia, "[Tampa affair](#)," 28 September 2022.

18 Australian Human Rights Commission, "[Asylum seekers and refugees](#)," accessed 15 August 2023; Gleeson and Yacoub, "[Cruel, costly and ineffective](#)," *Kaldor*.

they were sent back to Australia to await their procedures there.¹⁹ This was done to create capacity for the new arrivals under the new policy, which started on 19 July 2013, after which the Labor government stated that no unauthorised maritime arrivals would be allowed to settle in Australia permanently.²⁰ Under this new policy, most men were sent to Manus Island in PNG, while all women and children (and some men who were part of families) were sent to Nauru. Including the 11 people sent to Nauru in September 2023, 3,138 people have been sent offshore to Nauru or PNG since 18 July 2013.²¹ At its peak in August 2014, 222 children were held in the immigration detention centre on Nauru.²² The Australian Human Rights Commission found the treatment of children in Nauru is in breach with the principles of the Convention on the Rights of the Child.²³ From October 2015 for Nauru and May 2016 for PNG respectively, the immigration detention centres became more open, giving people some more freedom of movement.²⁴

By initiation of the Medevac law, some people (called transitory persons) were temporarily allowed back in Australia more easily for medical treatment, which, due to poor health situations in the camps, led to 500 people being transferred back.²⁵ This was done primarily in the case of complex medical issues, as those treatments were not available in the offshore facilities.²⁶

Though there seems to be bipartisan support for OSB, Labor and LNC have historically fought each other on irregular immigration throughout the years, blaming the opposite party for causing higher arrivals and a backlogged

19 The process of returns for this cohort was completed in October 2015, Elibrith Karlsen, "[Australia's offshore processing of asylum seekers in Nauru and PNG: a quick guide to statistics and resources](#)," Parliamentary Library, 19 December 2019.

20 Australian Press Office, "[Transcript of Joint Press Conference](#)."

21 4,194 when including people sent offshore since 13 August 2012; "[Offshore processing statistics](#)," Refugee Council of Australia, 25 November 2023.

22 Karlsen, "Australia's offshore processing."

23 This concerns Article 37(b), concerning arbitrary deprivation of liberty and 3(1), concerning best interest of the child) of the Convention on the Rights of the Child (CRC). It also had serious concerns about breaches of 10 other articles of the CRC, Australian Human Rights Commission, "[National Inquiry into Children in Immigration Detention](#)," 12 February 2015, p. 195; OHCHR, "[Convention on the Rights of the Child](#)."

24 Karlsen, "Australia's offshore processing."

25 UNHCR, "[UNHCR urges Australia to evacuate off-shore facilities as health situation deteriorates](#)," 12 October 2018.

26 Gleeson and Yacoub, "[Cruel, costly and ineffective](#)," Kaldor; Asylum Seeker Resource Centre, "[Medevac Bill explained](#)," accessed 2 October 2023.

system. However, both parties use strong rhetoric emphasizing the government's authority in deciding who can enter and place a significant focus on national security that remains visible in current policies.²⁷ The whole policy of offshore processing and boat pushbacks fed into the existing narrative of those reaching Australia irregularly, so, by boat, were 'jumping the queue'. Refugees arriving on the territory as part of a wider resettlement scheme are instead seen as 'deserving' of their spot.²⁸ In 2022, right ahead of the closing of the election polls, the Liberal party sent a news-alert to almost all phones, stating that Australian border guards intercepted a vessel at sea, with a link to vote for the Liberal party.²⁹ Even though elections are not automatically won on asylum policies alone anymore, it is evident the issue is still used for electoral gain.

Polling shows that in 2013, at the start of OSB, 42% of Australians judged the number of immigrants accepted into Australia as too high. In the 2022 survey by the same institute, this number dropped to 24%.³⁰ Research from the Australian National University showed that the issue of immigration was considered the least important voting priority in 2022, while it was considered the second most important electoral issue in 2013.³¹ In a 2022 polling, 18% considered boat turnbacks and asylum seekers to be a very important issue for the elections, ranking 7th (with cost of living found most important, reaching 47% ranking it very important). This can be explained by the fact that with everyone trying to reach Australian shores being intercepted, Australians no longer observe asylum seekers coming in anymore.³²

In Australia, voting at federal elections, by-elections and referenda is made mandatory.³³ This is why voter turnout in federal elections has always been high,

27 See for example *The Coalition*, "[Operation Sovereign Borders Policy](#)," July 2013.

28 Catherine Ann Martin, "[Jumping the queue? The queue-jumping metaphor in Australian press discourse on asylum seekers](#)," *Journal of Sociology*, 57(2), 25 February 2020.

29 Elise Worthington and Ariel Bogle, "[Liberal Party text alert warns voters about illegal boat interception](#)," ABC News, 21 May 2022.

30 James O'Donnell, "[Mapping Social Cohesion](#)," Scanlon Foundation Research Institute, November 2022, p. 59; Andrew Markus, "[Mapping Social Cohesion](#)," Scanlon Foundation, 2013, p. 3.

31 Brenton Holmes, "[Federal Election 2013: issues, dynamics, outcomes, Parliament of Australia](#)," Parliament of Australia, 22 January 2014; "[High cost of living top priority for most voters](#)," Australian National University, 6 May 2022.

32 Essential research, "[Importance of election issues](#)," 2 May 2022.

33 Australian Electoral Commission, "[Frequently asked questions](#)," 24 August 2023.

around 90%.³⁴ The Guardian speaks of a ‘seismic shift’ that is noticeable lately in Australian voting behaviour, where generations no longer vote right wing as they get older.³⁵ Increasingly, migration is seen as necessary to handle the aging population and employee shortages. This is also reflected in the announcement of an increase in total visas for regular arrivals, raised to 190.000 per year.³⁶

Labour migration

Though still tough on irregular migration, Australia has been using regular migration to fill in labour shortages. An example of this is the Priority Migration Skilled Occupation List, which offers faster procedures for those wanting to migrate who have experience in the listed jobs. For all these visas, prospective applicants first need to express an interest to apply. Application is then only possible after the person has been invited to apply by the Government. This includes Skill Independent visas (subclass 189) – enabling the family to move as well. In financial year (FY)³⁷ 2021-2022, 6,500 places were allocated for this stream. Like most permanent skill visas, it costs about A\$ 4,000, with additional costs (depending on their English skills) for family members brought along. Next to being invited to apply, you need to have the right skills, be under the age of 45 at the time of invitation, be competent in English, score enough points,³⁸ and fulfil the general requirements for visas.³⁹ Similarly, there is a Skilled Nominated Visa (subclass 190) for state-sponsored applications, adding some requirements regarding residency in the nominated state or territory for 2 years.⁴⁰

For temporary visas there are options for skilled applicants as well, specifically dedicated to those willing to live in regional areas. While the costs are lower here, the costs to include family members remain high.⁴¹

34 Australian Electoral Commission, “[Voter turnout – previous events](#),” 29 August 2022.

35 Matt Grudnoff, “[Millennial voters are bringing a seismic shift to Australian politics and it spells very bad news for the Coalition](#),” *The Guardian*, 4 January 2023.

36 Noël van Bemmel, “[Australië versoepelt migratiebeleid om grote tekorten op arbeidsmarkt aan te pakken](#),” *de Volkskrant*, 2 September 2022.

37 The Australian financial year starts from 1 July and runs through to 30 June of the following year.

38 Points are calculated on the basis of age, English proficiency, work experience, relevant education, skills of the partner, and community language skills, “[Australia Adds 22 Occupations to Priority Migration Skilled Occupation List](#),” IELTS, July 2021.

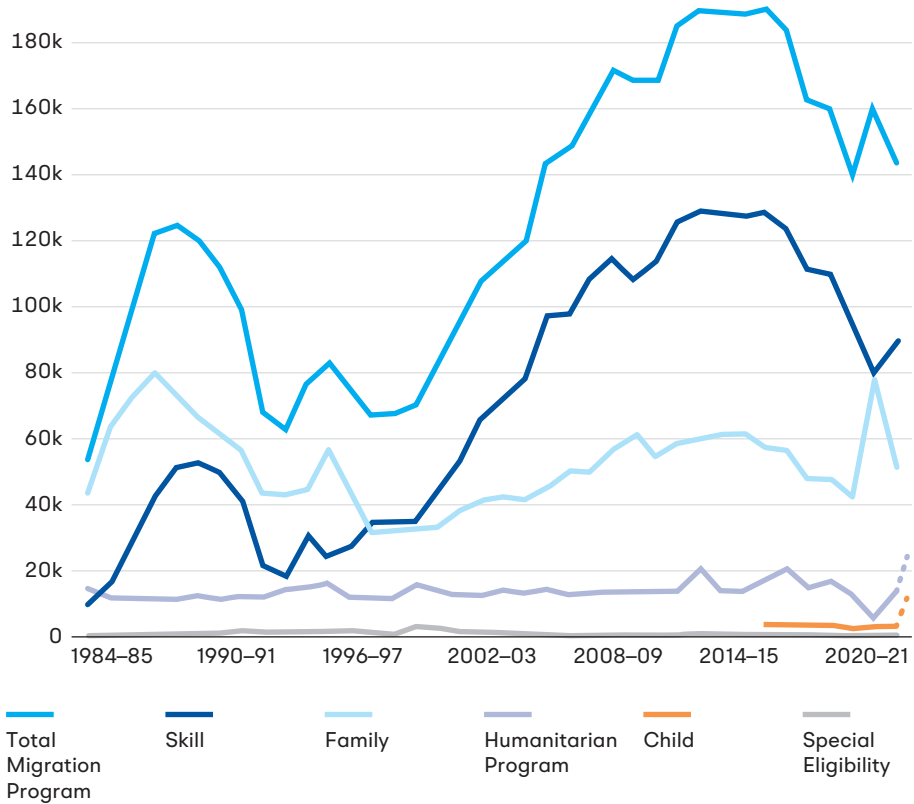
39 IELTS, “[Skilled Independent Visa: Subclass 189](#),” accessed 10 October 2023.

40 IELTS, “[Skilled Nominated Visa: Subclass 190](#),” accessed 10 October 2023.

41 IELTS, “[Skilled Regional \(Provisional\) Visa: Subclass 489](#),” accessed 10 October 2023.

As opposed to skills migration, the Australian humanitarian program has historically only made up a small part from the total migration program, with the percentage of this group as part of total migration also decreasing.⁴²

Migration and humanitarian program visa grants since 1984-5



42 Refugee Council of Australia, “How many refugees have come to Australia?” 11 August 2023.

2 International legal framework

Legal context

Australia has ratified the Refugee Convention and Protocol, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child. However, unlike Canada and the United States, Australia has not directly incorporated references to treaties relating to human rights and refugees in their domestic legal system. Due to its dualistic nature, this would be necessary to make it into national legislation. So, although Australia has signed such treaties and is therefore internationally bound by standards like non-refoulement, it is not possible to rely on these obligations in the domestic courts, nor is there a supranational court of which Australia is a member to which these cases can be brought.⁴³ This legal vacuum makes the Australian case almost incomparable to European states in legal terms, as domestic courts in Europe have far less judicial discretion to decide on asylum cases, and the possibility exists of appealing to a regional court if domestic remedies have been exhausted.

Applicability of international law

In *CPCF v Minister for Immigration*, the High Court confirmed that Australian domestic law applies regardless of the applicability of international law. This had to do with the on-sea detention of Tamil asylum seekers within Australia's contiguous zone for three weeks. The consideration concerning the applicability of contradictory domestic and international laws was as follows:

Australian courts are bound to apply Australian statute law “even if that law should violate a rule of international law”. International law does not form part of Australian law until it has been enacted in legislation. In construing an Australian statute, our courts will read “general words ... subject to the established rules of international law” unless a contrary intention appears from the statute. In this case, there is no occasion to invoke this principle of statutory construction. The terms of the Act are specific. They leave no doubt as to its operation.⁴⁴

43 Interview legal expert at Kaldor.

44 High Court of Australia, [CPCF v Minister for Immigration and Border Protection](#), 28 January 2015, para. 462.

Following the CPCF case, an amendment was passed to further enable the maritime enforcement power, with a possibility to use these powers even in the case of incompliance with international legal obligations.⁴⁵

The principle of non-refoulement

Nevertheless, Australia provides explanations of how it complies with these international standards, arguing that these treaties do not apply extraterritorially.⁴⁶ Ghezelbash interprets this perception as hyper-legalism, stating Australia hides behind too strict of an interpretation of international law to prevent accountability.⁴⁷ For its interpretation of non-refoulement, Australia looks at a U.S. case, where the Supreme Court found that the territorial scope of non-refoulement does not apply to the high seas, enabling pushbacks under non-refoulement obligations.⁴⁸ However, several supranational courts later opposed this argument, stating that effective control is enough for a state to have jurisdiction over an area.⁴⁹

For the general applicability of the non-refoulement principle for refugees, the High Court held that the Refugee Convention does not refer to 'asylum'; therefore the protection regime only entails people recognized as refugees by Australia.⁵⁰ However, due to the merely declaratory effect of refugee status determination,⁵¹ scholars like Hathaway and Tan state that Convention rights should apply to everyone that is a Convention refugee, also before the

45 Parliament of Australia, "[Migration and Maritime Powers Legislation Amendment \(Resolving the Asylum Legacy Caseload\) Bill 2014](#)," 23 October 2014.

46 The Committee Against Torture, [Concluding Observations on the Fourth and Fifth Periodic Reports of Australia](#), 23 December 2014; United Nations Human Rights Committee, [Concluding Observations on the Sixth Periodic Report of Australia](#), 1 December 2017.

47 Daniel Ghezelbash, "[Australia's boat push-back policy: hyper-legalism and obfuscation in action](#)," in *Refugee Externalisation Policies: Responsibility, Legitimacy and Accountability*, ed. Azadeh Dastyari, Amy Nethery, and Asher Hirsch, (London: Routledge, 2022), p. 74.

48 US Supreme Court, *Sale v Haitian Centres Council*, 1993.

49 Daniel Ghezelbash, "[Hyper-Legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees](#)," *American Journal of Comparative Law*, 4 March 2020, p. 4.

50 High Court of Australia, "Minister for Immigration and Multicultural Affairs v. Khawar," 11 April 2002; Ayse Bala Akal (2022) "[Third Country Processing Regimes and the Violation of the Principle of Non-Refoulement: a Case Study of Australia's Pacific Solution](#)," *Journal of International Migration and Integration* volume, March 2022.

51 UNHCR, "[Handbook on procedures and criteria for determining refugee status and guidelines on international protection](#)," HCR/1P/4/ENG/REV. 4, Reissued February 2019, par. 28.

Government provides them with that status.⁵² This has also been recognized by several supranational courts, and is laid down in EU Qualification Directive.⁵³

Going against the principle from the Convention on Law of Treaties,⁵⁴ Australian domestic law enables border officials to act against the country's international obligations:⁵⁵

Relevance of Australia's non-refoulement obligations to removal of unlawful non-citizens under section 198

(1) For the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.

(2) An officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen.⁵⁶

However, in 2021, this article was amended to include the notion that, in general, there is no duty to remove an unlawful non-citizen – as set out in sub (3). This has been done following the *AJL20 v Commonwealth* case, in which the Federal Court ruled removal was required if someone had exhausted remedies but was owed protection obligations.⁵⁷ Australia's Human Rights Committee urged for full removal of article 197c to prevent confusion concerning duties and powers of border control officials, but the full article remained in place.⁵⁸ Australia's Law Council welcomed the amendment – as it aligns Australia's laws with its

52 James C. Hathaway, "[The Structure of Entitlement under the Refugee Convention](#)" in *the Rights of refugees under international law*, (Cambridge University Press, March 2021); Tan, *International Cooperation on Refugees*, p. 92.

53 Hathaway, "[The Structure of Entitlement under the Refugee Convention](#)," p. 179-180.

54 Vienna Convention on the Law of treaties, art. 31.

55 Kaldor, "[Kaldor Centre Principles for Australian Refugee Policy](#)," revised March 2022.

56 Migration Act 1958, [Sect 197C](#).

57 Kaldor, [Follow-up Civil Society Report on United Nations Human Rights Committee Concluding Observations 2017 – 2019: Australia](#), 31 January 2022, p. 2.

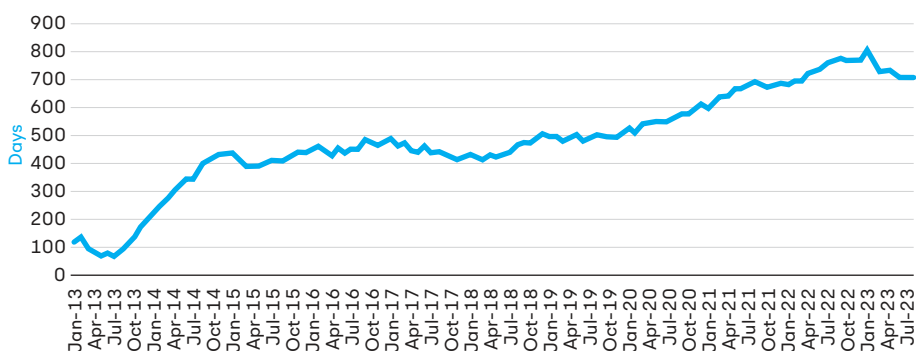
58 Australian Human Rights Commission, [Review of the Migration Amendment \(Clarifying International Obligations for Removal\) Act 2021](#), 20 June 2023, p. 13.

international obligations – but did note this can simultaneously lead to more rejected asylum seekers subject to indefinite detention.⁵⁹

Indefinite detention

Australia mandatorily detains anyone who arrives without a visa, irrespective of age or status, as well as anyone that is intercepted and cannot be sent back. The average time asylum seekers must remain in immigration detention facilities is 708 days, with some having to stay there for over 10 years.⁶⁰ This duration has increased from 445 days on average 5 years prior.⁶¹

Average number of days people are held in immigration detention facilities



Source: Department of Home Affairs, [Immigration Detention and Community Statistics Summary](#), August 2023.

According to art. 9 ICCPR, nobody should be subject to arbitrary arrest and detention, and fair and prompt procedures for trial should be accessible for anyone that has been detained. Only in the case of a public emergency can states derogate from this principle (art. 4 ICCPR). In the case of *Diallo*, the International Court of Justice (ICJ) held that the type of detention

59 Law Council of Australia, [“Migration Amendment \(Clarifying International Obligations for Removal\) Act 2021,”](#) 10 June 2021.

60 Global Detention Project, [Immigration Detention in Australia: Turning Arbitrary Detention into a Global Brand](#), February 2022; Refugee Council of Australia, [“Statistics on People in Detention in Australia,”](#) 8 January 2022.

61 Mary Anne Kenny, [“The High Court has decided indefinite detention is unlawful. What happens now?”](#) 10 November 2023.

(administrative or punitive) does not change anything about this principle.⁶² In addition, art. 31 of the Refugee Convention provides that states will not impose penalties on those that come to a state party's territory illegally.

The domestic legal basis for immigration detention can be found in the Migration Act, the Maritime Powers Act, and the Australian Border Force Act. These laws entail that any non-citizens residing unlawfully – asylum seekers arriving irregularly and people with temporary visas that expired or were cancelled – should be detained until they are provided with a visa or sent out of the country. In the *Al-Kateb v Godwin* case, the High Court judged the indefinite detention of a stateless person as lawful.⁶³ This was because section 196 of the Migration Act states that unlawful residing non-citizens can be freed from immigration detention in the case that a valid visa, deportation, or removal will follow. Art. 198(6) includes that this needs to be done 'as soon as reasonably practicable'. The uncertainty of whether anyone will admit this stateless person, made it – according to the majority of the Court – possible to detain Al Kateb until more certainty was given. Until then, removal was deemed impossible without an outlook on a change in the situation. Similarly, in the *AJL20 v The Commonwealth* case, the Court deemed 'removal as soon as reasonably practicable' not to be bound to a time limit and possible if the object and purpose of the Act were still fulfilled. That would ensure the detention is not punitive and make it compatible with the constitution.⁶⁴ However, on 8 November 2023, indefinite immigration detention was ruled unlawful by the High Court, overturning the 20-year-old *Al-Kateb* precedent. In this recent case of *NZQY*, the High Court ruled that detainment without any real prospect of removal practicable in the foreseeable future made the detention unlawful. This has required the release of 140 people from immigration detention as of 28 November already, leading the government to propose laws to counter further releases.⁶⁵

62 International Court of Justice, [Ahmadou Sadio Diallo \(Republic of Guinea v Democratic Republic of the Congo\)](#), November 2010, ICJ Rep. 639, 668, para. 77.

63 High Court of Australia, [Al Kateb v Godwin](#), 6 August 2004, par. 229 and 231.

64 Library of Congress, "[Australia: High Court Holds Indefinite Immigration Detention Is Lawful](#)," accessed 13 September 2023.

65 High Court of Australia, [NZYQ v. Minister for Immigration, Citizenship and Multicultural Affairs](#), 8 November 2023; Human Rights Law Centre, "[Indefinite immigration detention unlawful: High Court rules](#)," 8 November 2023; Hannah Ritchie, "[Australia indefinite detention unlawful, High Court rules](#)," BBC, 8 November 2023; Daniel Ghezelbash and Anna Talbot, "[High Court reasons on immigration ruling pave way for further legislation](#)," 28 November 2023.

Legal scholars and organisations pushed for a change of policy as indefinite detention has a significant mental impact on asylum seekers, caused mainly by insecurity about when or if detention will end and limited facilities for education and (mental) health support.⁶⁶ A report by Mediciens Sans Frontiers (MSF) showed that existing mental healthcare on Nauru was lacking, leading to issues for both refugees and asylum seekers as well as Nauruans that were living on the island. From the 208 people MSF treated in Nauru,⁶⁷ 60% had suicidal thoughts, 30% attempted suicide, and 62% suffered from moderate or severe depression.⁶⁸ The UN Committee on Torture has shared concerns about the health situation in detention facilities, stressing the practice of detainment of minors and unaccompanied children. In addition, it was concerned about “the use of detention powers as a general deterrent against unlawful entry rather than in response to individual risk”.⁶⁹

As of 31 August 2023, 1,056 people are held in (onshore) immigration detention, and 282 are detained in the community. Of those in immigration detention, 130 have been unauthorised maritime arrivals.⁷⁰ Most people are sent to locked detention centres privately operated by Serco. This group can not leave the detention facilities and is under high security. The other option is community detention, mainly used for more vulnerable groups. Legally, this group is still in immigration detention, but in practice, they are allowed to stay in special housing in the community where they can move freely. The government, however, still holds control over them through rules for reporting and night curfew. Additionally, this group is not allowed to work. Whether someone is put in immigration detention or in community detention depends on the case and the Government’s risk assessment.⁷¹ The biggest group currently in detention facilities has had their visas cancelled. This is a consequence of failing the character test, which will lead to cancellation when the visa holder has a substantial criminal record, can be a danger to the Australian community, or

66 Anna Copeland, “[SNS News Podcast](#),” 10 November 2023.

67 Lasting 11 months, after which on 5 October 2018, MSF was sent away by the Nauruan government. The patients included both Nauruans (22%) and refugees and asylum seekers (73%).

68 Mediciens Sans Frontiers, [Indefinite Despair: The tragic mental health consequences of offshore processing on Nauru](#), December 2018.

69 UN Committee against Torture, [Concluding observations on the sixth periodic report of Australia](#),” 5 December 2022.

70 Australian Border Force, [Immigration Detention and Community Statistics Summary](#),” 13 October 2023, p. 6.

71 Australian Border Force, [Immigration Detention in Australia](#),” Last updated 24 January 2024.

because the Minister decides so based on “their past and present criminal or general conduct.”⁷²

Strategic litigation

Due to the legal context mentioned above, strategic litigation in Australia cannot be based on human rights grounds. Therefore, lawyers need to find alternative sources of law. However, due to bipartisan support of Operation Sovereign Borders, parliament can pass legislation following or even during the ruling of a High Court judgement. This happened, for example, in the case challenging Australia’s lack of authority to fund and actively participate in detaining asylum seekers in Nauru before the High Court. Right after the hearing, retrospective legislation was passed, amending the Migration Act that would now make such funding legally possible.⁷³ The focus of the case was thus shifted to the scope of this new provision, looking at the Government’s legal authority and level of control. It was decided that even though Australia was necessarily involved in detaining the plaintiff, it was Nauru, and not Australia, that held the responsibility for detaining the refugee. The distinction arose from the fact that Australia could not authorize Nauru to make laws to detain the refugee.⁷⁴ After this case, more cases followed to understand Australia’s duty of care, in which the Federal Court ruled that such a duty of care for the government exists in the case of insufficient care that was available in PNG, since the treatment (abortion) was illegal and thus unsafe there.⁷⁵ Later, judgements like *SBEG v Commonwealth of Australia* ruled that while the duty of care expanded to the regional processing centres (RPC)⁷⁶, Australia did not have an obligation to release detainees in offshore processing centres, even when they are suffering and are in risk of further harm. Therefore, there was a limit to where strategic litigation could go.⁷⁷

72 Administrative Appeals Tribunal, [“The character test explained,”](#) Accessed 10 August 2023; Migration Act 1958, [Sect 501](#).

73 Ghezelbash, “Extraterritorial processing,” p. 124; [“Plaintiff M68/2015 v. Minister for Immigration and Border Protection,”](#) *High Court of Australia*, 3 February 2016.

74 Gabrielle Holly, [“Challenges to Australia’s Offshore detention regime and the limits of Strategic Tort Litigation,”](#) *German Law Journal*, April 2020.

75 Kaldor, [“Casenote Plaintiff S99/2016 v Minister for immigration and Border Protection,”](#) July 2016; Federal Court of Australia, [“Plaintiff S99/2016 v Minister for Immigration and Border Protection \[2016\] FCA 483,”](#) (referred to by the High Court of Australia for an urgent hearing), 6 May 2016.

76 Regional processing centres is the term used by the Australian Government to refer to the offshore immigration detention centres on Nauru and Manus Island.

77 Holly, McKenzie-Murray & Davidson, [“Challenges to Australia’s Offshore detention regime and the Limits of Strategic Tort Litigation,”](#) *German Law Journal*, April 2020.

3 Border management in policy and practice

Border policy

The border situation in Australia is peculiar and unique because of its location. Being isolated from others enables the country to be very strict in its visa policy and check anyone coming in. Anyone arriving, irrespective of their purpose, holiday, business, or protection, needs a valid visa. This is why Australia can comparatively manage its migration more easily than the EU, where possibilities to arrive on the continent by either land or sea are endless.

To fully stay in control over who comes into the country, Australia has moved a part of its border management offshore.⁷⁸ This is an important part of the policy in which asylum seekers are prevented from arriving in Australia irregularly by boat. Anyone attempting to do so will either be turned back to their country of departure or their country of origin or transferred to a regional processing centre. The ability to do so is enshrined in the country's Maritime Powers Act 2013, which has provisions on the possibility of detaining persons on vessels that seem to go against Australia's regulations, irrespective of any international obligations.⁷⁹

The operational aim of the interception policy is said to be taking down the business model of people smugglers.⁸⁰ Although the Government policy is not to comment on 'on water matters', since it could benefit these people smugglers, it does share the number of interceptions in their yearly administration of the immigration program.⁸¹ Here they state that between September 2013 and March 2023, the OSB 'intercepted and safely returned 1082 potential irregular

78 Alison Mountz, ["Externalizing Asylum: A Genealogy."](#) In *The Death of Asylum: Hidden Geographies of the Enforcement Archipelago*, (University of Minnesota Press, 2020), p. 36.

79 Maritime Powers Acts, art. 72(4) and 22A.

80 Henry Sherell, [The Central Role of Cooperation in Australia's Immigration Enforcement Strategy](#), Migration Policy Institute, March 2022, p. 5.

81 Daniel Ghezelbash, ["Australia's boat push-back policy: hyper-legalism and obfuscation in action,"](#) p. 77; Department of Home Affairs, [Senate standing committee on legal and constitutional affairs](#), February 2023.

immigrants' coming from 46 different vessels.⁸² The declaratory policy is that they only do this 'where it is safe to do so', but unclarity about how this is decided remains.⁸³

Since the initiation of OSB, the Government has chosen a military-led approach, with Rear Admiral Jones currently as the head of the operation. He is the commander of the Joint Agency Task Force that operates under the Department of Home Affairs. This Joint Agency consists of three groups: The Australian Federal Police leading the Disruption and Deterrence Task Group, the Maritime Border Command, supported by the Australian Defence Force, leading the Detection, Interception and Transfer Task Group, and lastly, the Department of Home Affairs and the Australian Border Force leading the Regional Processing, Resettlement, and Returns operations.⁸⁴

Maritime assessments

In some maritime cases, Home Affairs Protection Officers execute a pre-entry on-board screening, in which an enhanced procedure should clarify whether the principle of non-refoulement brings in obligations for Australia. In the case that Australia would have protection obligations based on this quick assessment, asylum seekers can be brought to a regional processing centre where they enter the standard protection assessment process.⁸⁵ If not, boats are returned – out of Australian waters – toward their country of origin or departure.⁸⁶ As these assessments are considered a matter of national security, the details of these processes remain disclosed.

82 Department of Home Affairs, [The Administration of the Immigration and Citizenship Programs](#), May 2023, p. 42.

83 In 2014, the Sydney Morning Herald reported this has been done through phone, in which a small group of passengers were asked some questions. This procedure has been criticized by legal scholars in a [statement](#) in 2014.

84 Department of Home Affairs "[Organisational Chart, Joint Agency Task Force](#)"; Sherrell, [The Central Role of Cooperation](#).

85 Australian Human Rights Commission, [Tell Me About: The 'Enhanced Screening Process'](#), June 2013.

86 The UNHCR criticises these enhanced procedures for being unfair and unreliable, with additional risks when executed at sea: UNHCR, "[High Commissioner's Dialogue on Protection Challenges: Protection at Sea - Background Paper](#)," 11 November 2014, par. 18.

Regional partnerships

Australia has cooperated at the regional level to prevent unauthorised maritime arrivals. The broadest example of this collaboration is the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, acting as a non-binding forum for the Asia-Pacific region on irregular migration since 2001. This organisation now entails 47 member states and 4 member organisations: the International Organization for Migration (IOM), UNHCR, the International Labour Organisation (ILO), and the United Nations Office of Drugs and Crime.⁸⁷ The foreign ministers of Australia and Indonesia chair the forum, with Ministerial Conferences held every two years. Its regional support office provides training and assistance with the interception of migrants travelling irregularly.⁸⁸ Australia has spent A\$13 billion to pay for such cooperation platforms between 2007 and 2017 alone, spent on training, data-sharing, modernization of border controls, campaigns, aligning stricter policies in the Pacific, and a returns programme under IOM.⁸⁹

Indonesia

Bilaterally, the agreements differ in formality and scope depending on the partnering state. Australia's most important regional partner is Indonesia, the country most asylum seekers transfer from in their attempt to reach Australia. The prominence arises from the challenge of controlling a land border that is stretched out over many islands.⁹⁰ Before OSB, Indonesia had visa-free travel for people from several war-zone states. Afterwards, Indonesia increasingly restricted its visa policy, partly through Australian lobbying, leading to fewer people using Indonesia as a point of transit.⁹¹ People still intercepted are mostly found during patrols around Christmas Island, an external territory of Australia. Located a mere 360 kilometres south of Java, the island brings the maritime borders of Australia far closer to Indonesia than mainland Australia. Boats found here are often unsuitable for longer travel, and thus people are taken aboard the coast guard's vessels where they can be quickly assessed on board. According

87 The Bali Process, "[About the Bali Process](#)", accessed on 25 September 2023.

88 Asher Lazarus Hirsch, "[The Borders Beyond the Border: Australia's Extraterritorial Migration Controls](#)," *Refugee Survey Quarterly*, 36 (2017), p. 70.

89 Hirsch, "[The Borders Beyond the Border](#)", p. 71.

90 Dastyari & Hirsch, "The Ring of Steel," *HRLR*, p. 439.

91 Interview former senior official Humanitarian and Refugee program.; James Robertson, "[Indonesia tightens visa restrictions](#)," *The Sydney Morning Herald*, 18 July 2013.

to the interviewee, this has not happened recently with people arriving from Indonesia.

Though an essential partner in maritime interdictions, Indonesia does not openly support these operations in their territorial waters. Through cooperation between the two states, Indonesia gets funding from Australia to prevent anyone from coming ashore in Australia. The main agreement, the Regional Cooperation Agreement (RCA), is conducted in direct cooperation with IOM. Under this agreement, Indonesian border guards (after Australian-funded training) intercept asylum-seekers trying to travel irregularly, and detention facilities are improved and extended for those who are found to transit through Indonesia.⁹² IOM provides assistance in the context of returns and is particularly active in promoting human rights in immigration detention centres. This includes the provision of food and medical assistance, as well as training for local immigration officials and promoting cooperation between different actors dealing with irregular migration.⁹³

Within the RCA, the two countries engaged in a Management and Care of Irregular Immigrants Project aimed to scale up detention facilities for people transiting through Indonesia to Australia.

Next to funding of all these projects, Australia additionally provides Indonesia with vessels, airplanes, surveillance equipment and offices for Indonesia's sea patrol.⁹⁴ Through the cooperation agreements, Indonesia has restricted its asylum policies too, seemingly copying Australia with regards to the detention of irregular arrivals.⁹⁵ However, the diplomatic relationship between the two countries has seen better times as a consequence of Australia carrying out unilateral pushbacks of boats with intercepted irregular migrants within Australian territory. Following such tensions, migrants are often left on the edge of Indonesian territory by Australian border guards, who then instruct them to

92 Savitri Taylor, "[Australian funded care and maintenance of asylum seekers in Indonesia and Papua New Guinea: All care but no responsibility?](#)" *UNSW Law Journal*, 33, no.2 (2010), p. 339.

93 IOM, [Offering New Beginnings and Promoting Development: Australia and IOM, Partnerships in Action](#), 2015.

94 Azadeh Dastyari, Asher Hirsch, "[The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy](#)," *Human Rights Law Review*, Volume 19 (3), November 2019, P. 442.

95 Dastyari & Hirsch, "The Ring of Steel," *HRLR*, p. 443.

return to Indonesian waters on their own. By adopting this approach, Australia ensures it adheres to the principle of ‘innocent passage under the International Law of the Sea’, although Indonesia may possibly perceive this as Australia breaching its territorial integrity.⁹⁶

Malaysia

A second important partner in border management is Malaysia. As with Indonesia, Australia has convinced Malaysia to implement stricter visa-regimes and work together to intercept and detain migrants travelling by sea.⁹⁷ Although Malaysia is cooperative on matters of border enforcement, refugee issues remain undiscussed due to Malaysia’s policy of not officially recognizing refugees and a lack of domestic policy managing refugee procedures.⁹⁸ This should also be seen in the light of Malaysia not being a signatory of the Refugee Convention (the only exception in Southeast Asia), which had implications on the possibility of offshoring agreements with Australia, discussed later in this paper. Despite the Government’s non-recognition, UNHCR is given extensive capabilities in Malaysia, leading one of the busiest UNHCR refugee status determination (RSD) processes, both in resettlement numbers and registrations.⁹⁹

Currently, this bilateral cooperation focuses on combatting crime, with Operation Redback as an operational example. The Australian border guards work with the Malaysia coast guard, increasingly focusing on using strategic communication to deter maritime smuggling ventures.¹⁰⁰ Vessels are provided for by Australia to support the anti-smuggling operations. As is the case for Indonesia, Malaysia has similarly restricted its visa policy, no longer providing visas on arrival to nationals from Iran, Iraq, and Syria. It can be assumed that Australian pressure influenced this decision.¹⁰¹

96 Violeta Moreno-Lax, Daniel Ghezelbash, and Natalie Klein, “[Between Life, Security and Rights: Framing the Interdiction of ‘boat Migrants’ in the Central Mediterranean and Australia](#),” *Leiden Journal of International Law*, 32, no.4 (2019), p. 732; Antje Missbach and Gerhard Hoffstaedter, “[When Transit States Pursue Their Own Agenda](#),” *Migration and Society*, 3, no.1, p. 4.

97 Maggy Lee, “[The externalization of border control in the global South: The cases of Malaysia and Indonesia](#),” *Theoretical Criminology*, 26, no.4 (2022) p. 544.

98 Lee, “The externalisation of border control,” p. 545.

99 Leonie Ansems de Vries, “[Politics of \(in\)visibility: Governance-resistance and the constitution of refugee subjectivities in Malaysia](#),” *Review of International Studies*, 42, no.5 (May 2016), p. 882.

100 Department of Home Affairs, “[Cooperation with Malaysia strengthens Australian borders](#),” The Hon Karen Andrews MP, 30 June 2020.

101 Hirsch, “[The Borders Beyond the Border](#),” p. 73.

Sri Lanka and Vietnam

Comparable strategic communication has also been used in Vietnam and Sri Lanka, extending the message of ‘zero chance’ across the borders. With Vietnam and Sri Lanka, Australia has also agreed on cooperation and ‘consensual arrangements’ through Memoranda of Understanding regarding the interception of boats. However, the border agencies have remained silent on the operational aspects of these pullbacks, and efforts to gain a better understanding through Freedom of Information provisions have failed.¹⁰² Australia has also funded military vessels to Sri Lanka for patrol, as well as other surveillance materials.¹⁰³

Australia has signed a Joint Declaration for a Strategic Partnership with Vietnam, with deepening strategic, defence and security cooperation as one of the three main pillars. According to the Australian Government, the two countries have had a longstanding cooperation regarding matters of immigration, border security, and law enforcement, working together to “prevent and deter people smuggling and address the challenges of irregular migration and civil maritime security.”¹⁰⁴

Perception and leverage third states

Australia presents its cooperation agreements with Malaysia and Indonesia as mutually beneficial; however, these states have increasingly tried to counter cooperation that does not necessarily improve their situation. Partly through a decrease in funding, Malaysia and Indonesia have become less receptive to Australia’s financial leverage.¹⁰⁵ This shift is rooted in a backlog in these countries, caused by limited willingness of third states to resettle refugees combined with Australia’s border closures. Consequentially, Malaysia and Indonesia have involuntarily become destination countries rather than transit countries. This potentially poses a bigger challenge for Australia, as the willingness to cooperate may decrease further if the number of refugees ‘stuck’ in Malaysia and Indonesia keeps rising while Australia keeps looking at cooperation

102 Moreno-Lax, Ghezelbash, and Klein, [“Between Life, Security and Rights: Framing the Interdiction of ‘boat Migrants’ in the Central Mediterranean and Australia;”](#) The Hon Peter Dutton MP, [Australia and Vietnam further cooperation to stamp out people smuggling,](#) Australian Government, 12 December 2016; Department of Home Affairs, [“Memorandum of Understanding between Government of Australia and Government of Sri Lanka concerning legal cooperation against the smuggling of migrants,”](#) 9 November 2009.

103 Hirsch, [“The Borders Beyond the Border,”](#) p. 75.

104 Department of Foreign Affairs and Trade, [“Vietnam Country Brief,”](#) accessed 29 October 2023.

105 Antje Missbach and Gerard Hoffstaedter, [“When transit states pursue their own agenda,”](#) *Migration and Society*, 3, no.1 (2020), June 2020, p. 67.

predominantly from a self-interested perspective.¹⁰⁶ Unlike Nauru (discussed below), Indonesia is not dependent on Australian investments. This factor could possibly influence its leverage power in the context of migration cooperation. The risks of such dependency became evident in 2015, with a threat from the Indonesian coordinating minister of political, legal, and security affairs to ‘release a human tsunami of 10,000 asylum seekers in Australia’.¹⁰⁷

106 Missbach and Hoffstaedter, “[When transit states pursue their own agenda](#),” p. 67.

107 Ben Doherty, “[Indonesia 'could release human tsunami of 10,000 asylum seekers on Australia'](#),” *The Guardian*, 11 March 2015.

4 Access and national asylum procedures

Refugee status determination process

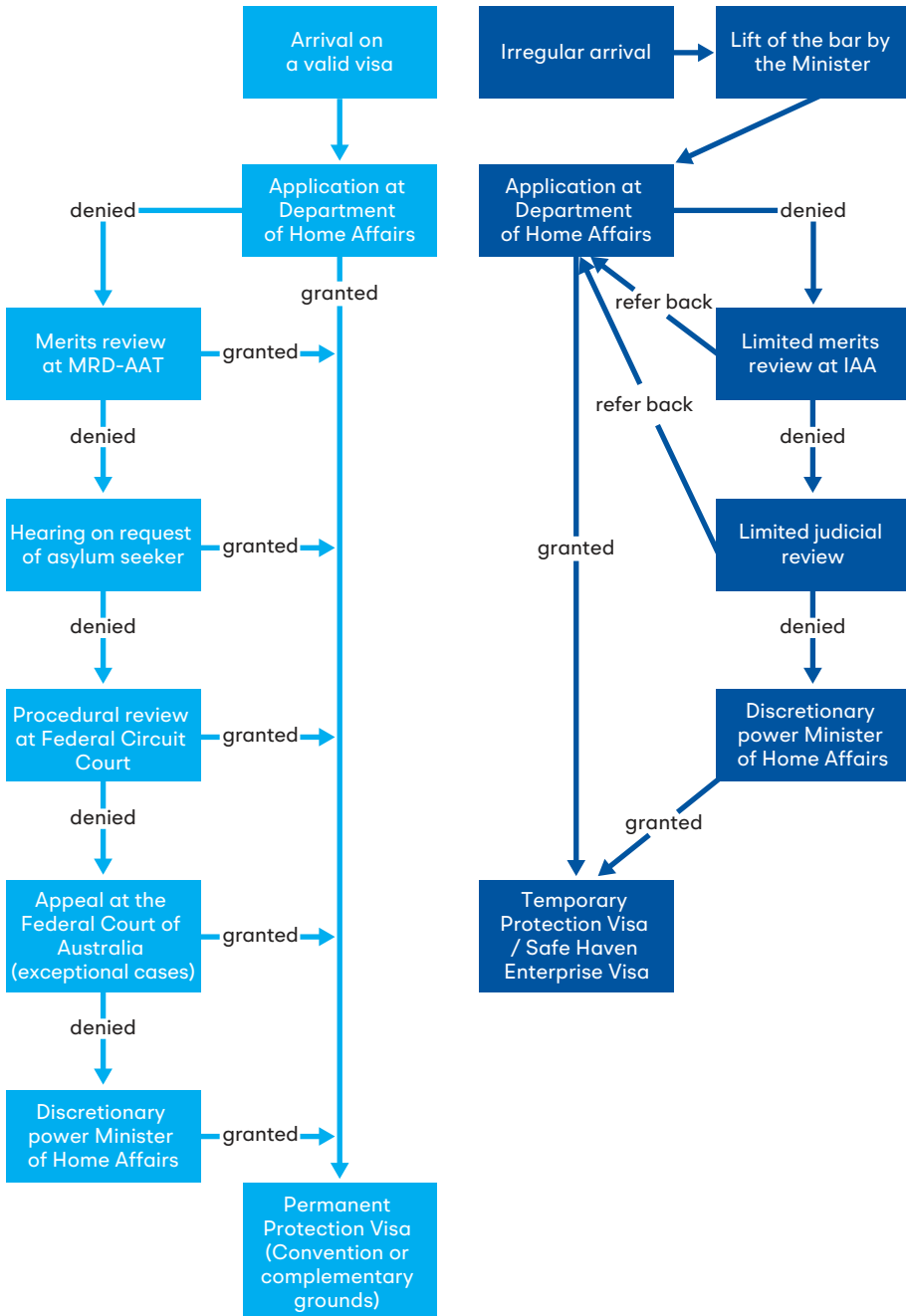
Possible pathways to protection in Australia depend on the mode of arrival.¹⁰⁸ Asylum seekers arriving on a valid visa go through the regular refugee status determination (RSD) process and can apply for protection. This group consists of asylum seekers who originally arrived on student, business or visitor visas, for example. Asylum seekers arriving irregularly are processed through a fast-track process instead. They can only apply for temporary protection, but due to OSB, spontaneous asylum applications on Australian territory are made impossible, as part of its *non-entrée policies*.¹⁰⁹ Therefore, most cases processed through the fast-track process still come from the *legacy caseload*, a term used to refer to the 31,918 people that arrived without a visa, mostly between August 2012 and January 2014, prior to the moment all boats were intercepted, that often had to wait for years to have their claims processed. Access to complementary protection is included for people not owed protection under the Convention but still face a real risk of significant harm, engaging Australia's protection obligations.¹¹⁰

108 In the research of the Refugee Council of Australia (RCOA) of 2022 for the [Refugee Response Index](#), the first pillar, access to asylum, was given the lowest score. This assessment looked at known cases of refoulement, measures to stop access to asylum, returns, protection-sensitive systems, and rights for specific groups, amongst other measuring entities.

109 The term *non-entrée policies* is proposed by James Hathaway to describe the way states legalize policies to prevent access for refugees in the states' territory, Hathaway, J. (2021). "[Rights of Refugees Physically Present](#)," In *The Rights of Refugees under International Law* (pp. 312-808). (Cambridge: Cambridge University Press).

110 Department of Home Affairs, "[Australia's protection obligations](#)," 21 August 2021.

Refugee Determination Process



Permanent protection

Anyone arriving regularly might qualify for the permanent onshore protection program, the smaller leg of Australia's Refugee and Humanitarian program. The Australian Department of Home Affairs is responsible for the application, leading to a primary decision based on an asylum seeker's assessed identity, credibility, and claim made. This way, it can be decided that someone is owed protection on either Convention or complementary grounds. Appeal to this primary decision is possible at the Migration and Refugee Division of the Administrative Appeals Tribunal (MRD-AAT). This is a merits review, in which a review procedure is executed under the same criteria as the original case, practically redoing the procedure. The Tribunal needs to provide the applicant with the possibility for a hearing in case the outcome is negative here, too. Due to increased applications and an existing (and increasing) backlog, processing times have been long for the MRD-AAT. Between February and August 2023, 95% of protection cases were finalised within 2,114 days, equalling to more than 5,5 years, while 50% of cases were finalised within 1,512 days, equalling 4 years.¹¹¹ As of 31 May 2023, the Tribunal still had 39,807 cases on hand for protection cases. Most of these cases came from nationals of Malaysia (38%), China (22%), and Vietnam (6%).¹¹²

In case of a negative outcome, there is still a possibility to appeal at the Federal Circuit Court of Australia, purely on procedural matters. The Federal Court of Australia is the next possible step for appeal, and in exceptional cases, the option of the High Court is open to applicants as well.¹¹³ The Minister always retains the discretionary power to decide on a more favourable outcome of any appeal procedures.¹¹⁴

Temporary Protection

The only open pathway for people arriving without a valid visa, mostly from the legacy caseload, and people who could return to Australia after being sent offshore to Nauru and PNG, is temporary protection. Due to the excision of the territory from the migration zone, these asylum seekers do not have automatic access to refugee determination processes and are instead dependent on a lift

111 For migration cases these amount to 1,577 days (95%) and 776 days (50%). "[Migration and Refugee Division processing times](#)," Administrative Appeals Tribunal, accessed 25 October 2023.

112 "[Migration and Refugee Division Caseload Report](#)," Administrative Appeals Tribunal, 3 June 2023.

113 Kaldor, "[Refugee status determination](#)," 2 November 2020.

114 Asylum Insight, "[Determining refugee status](#)," updated 2 August 2015.

of the bar by the Minister.¹¹⁵ For some people, this has meant having to wait up to four years to submit their first application.¹¹⁶ This group, the unauthorised maritime arrivals, are not able to settle permanently in Australia, as is made clear through the OSB website, press releases, and campaigns abroad.¹¹⁷ There are two pathways for temporary protection: a (3-year) Temporary Protection Visa (TPV) or a (5-year) Safe Haven Enterprise Visa (SHEV).¹¹⁸ These options also stay open when someone is refused immigration clearance at the border.¹¹⁹ The reintroduction of temporary visas happened through the Resolving the Asylum Legacy Caseload bill of 2014,¹²⁰ passed in December 2014. Other than in the permanent protection scheme, temporary visas offer no possibility for family reunification and overseas travel is only allowed after written permission. The difference between these two temporary visas, other than the duration, is that SHEV requires someone to work or study in regional Australia.

Once allowed to apply for asylum, these asylum seekers are subject to a 'fast track process'.¹²¹ This had been introduced in 2014 to handle the legacy caseload of more than 30,000 UMAs more efficiently.¹²² Through this process, the Department of Home Affairs assess the claim, with a possibility for review at the Immigration Assessment Authority (IAA), usually only reviewing the documents initially available to the Department, without a chance for a hearing or interview.¹²³ The IAA's only option is to confirm the Department's decision or to refer them back to Department to re-assess the application. The IAA does not have the power to substitute the decision, as is possible for the AAT in the regular determination process, as is described above. State-funded legal assistance has been abolished for this group, and the merits review process is

115 Ss 46A and 46B Migration Act 1958; Due to the current policy, regulation regarding UMA all date from before the boat interceptions. Also see page 4; Administrative Appeals Tribunal, "[Protection Visas](#)" in *Guide to Refugee law in Australia*, June 2023, p. 6.

116 Kaldor, "[Refugee status determination in Australia](#)," 2 November 2020.

117 E.g. the roadshow organised in Sri Lanka to inform communities on the impossibilities to enter Australia irregularly: Australian Border Force, "[Joint media release](#)," 19 September 2023.

118 Department of Home Affairs, "[Subclass 785 Temporary Protection Visa](#)."

119 Department of Home Affairs, "[About the program](#)."

120 Originally called the Migration and Maritime Powers Legislation Amendment.

121 Kaldor, "[Fast Track' Refugee Status Determination](#)," last update June 2022.

122 Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth).

123 Emily McDonald and Maria O'Sullivan, "[Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime](#)," *UNSW Law Journal*, 41, no.3 (2018), p. 1005.

not available to 'exclude fast track applicants': those whose claims are found to be manifestly ill-founded; in cases where fake identification has been used; when the applicant had access to effective protection elsewhere¹²⁴; or if someone made an unsuccessful claim for protection in another country or to the UNHCR.¹²⁵ They only have access to a limited judicial review through which legal errors can be corrected, but where the facts of the case or the fairness thereof are no longer looked at.¹²⁶

The Labor Party expressed the intention to abolish the temporary protection pathways, TPV and SHEV. Since temporary protection can "place refugees in an ongoing state of uncertainty and prevent meaningful settlement, creating hardship for refugees and denying Australia the benefit of their contribution", they would instead offer permanent protection to those in need of it.¹²⁷ They started with the Resolution of Status Visa, for which anyone who has received (and is still the holder of) a TPV or SHEV before 14 February 2023 is eligible to apply. The government expects to grant most of the temporary visa holders with the RoS- of which the majority should have their decision by March 2024.¹²⁸ The resolution of status prevents having to re-do the assessment process and can thus be an effective tool to move people to a permanent status quickly.¹²⁹ Most of those eligible to apply, around 19,000 refugees, have arrived prior to the 19 July 2013 prevention of permanent settlement for irregular arrivals.¹³⁰

Refugee determination

To be recognized as a refugee in Australia, asylum seekers must fulfil the requirements of the Migration Act 1958. According to this law, a refugee is

124 The Australian government has kept a lot of ministerial discretion to decide which countries fall under the scope of 'third safe country': Ghezelbash, "[Hyper-Legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees.](#)"

125 UNHCR, [The protection of Australia's so-called 'legacy caseload' asylum-seekers](#), 1 February 2018. Kaldor, [Fast Track' Refugee Status Determination](#), June 2022.

126 Kaldor, "[Fast Track' Refugee Status Determination](#)," June 2022. See for the concerns surrounding limited judicial processes for procedural fairness: Emily McDonald and Maria O'Sullivan, "[Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime](#)," UNSWLJ 1003, 41(3), 2018.

127 Australian Labor Party, "[ALP National Platform](#)," March 2021.

128 Department of Home Affairs, "[Resolution of Status](#)," 19 October 2023.

129 Interview former senior official Humanitarian and Refugee program.

130 Nour Haydar, "[Thousands of refugees to be granted permanent visas as Labor moves to fulfil election promise](#)," ABC News, 12 February 2023.

someone who is outside of their country of nationality or, in lack of nationality, of former habitual residence and is, owing to a well-founded fear of persecution, unable or unwilling to return to their home country or to seek protection of that country based on their race, religion, nationality, membership of a particular social group or political opinion.¹³¹ This is written in similar wording as can be found in the Refugee Convention's definition of a refugee, just like the grounds for a well-founded fear of persecution. Since December 2014, the Australian government included these reasons in its legislation instead of referring to the Convention, deleting any reference to it.¹³² The differences since then include that the meaning of a 'particular social group' has been specified and that these reasons must be shown to be the 'essential and significant reasons' for the persecution. A mere causal relation is not sufficient, but due to the absence of a straightforward test to prove this, this depends on the judge's discretion.¹³³

In addition, there are possibilities for complementary protection for those who face significant harm¹³⁴ but cannot be recognized as refugees based on the five persecution grounds mentioned in the Act. Since 2012, protection possibilities for this group have been laid down in Art. 36 of the Migration Act, falling under the humanitarian program.¹³⁵

People already in Australia that want to ask for protection can apply at the Department of Immigration and Border Protection, who will process their application. Applicants who arrive in Australia are without a valid visa are instead put in immigration detention facilities where they must wait for their claims to be decided on. Arrivals whom the border forces suspect will ask for asylum after

131 Migration Act 1958, art. 5H; "[Asylum seekers and refugees](#)," Australian Human Rights Commission, accessed 9 October 2023.

132 The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Act 2014 (Cth) (No 135 of 2014) amended s 36(2)(a) of the Act to remove reference to the Refugees Convention and instead refer to Australia having protection obligations in respect of a person because they are a 'refugee'. See: Administrative Appeals Tribunal, "[Guide to Refugee Law](#)," Chapter 4, p. 2.

133 Administrative Appeals Tribunal, "[Guide to Refugee Law](#)," Chapter 5, p. 3-4.

134 [Art. 36 \(2A\)](#) of the Migration Act describes the cases in which a non-citizen will suffer significant harm.

135 Australian Government "[Refugee and Humanitarian Program](#)," Department of Home Affairs, 10 February 2023.

coming in on a temporary visa that is not protection-related can have their visas cancelled, after which they are subject to immigration detention, too.¹³⁶

After someone has been qualified as a refugee or in need of on complementary protection under the Migration Act with protection obligations by the Australian government, this person needs to undergo health, security, and character checks.¹³⁷ A possible reason for not passing these checks would be involvement in serious criminality or being a danger to the country's security.

Specific situations

For nationals from Ukraine and Afghanistan, Australia has made separate arrangements. For Afghan nationals, after the Taliban takeover, 26,500 dedicated places were made available in the Humanitarian Program. Next to the humanitarian program's standard reasons for priority, Afghan nationals have more chance for a visa when they are former locally engaged employees, have immediate family members holding a humanitarian visa already, have been referred by the UNHCR, or belong to identified minority groups.¹³⁸ Australia has granted 11,500 visas to Ukrainian nationals still residing in Ukraine since February 2022, after which almost 11,400 have come to Australia. Until 31 July 2022, they were offered a temporary humanitarian stay.¹³⁹

On 10 November 2023, the Australian government announced it would allow 280 people a year to migrate to Australia from Tuvalu, a Pacific Island state threatened by rising sea levels. This agreement was also made to ensure the security in the Pacific, as through this agreement, Tuvalu would need approval of Australia first when it wants to close deals on international security with other states like China.¹⁴⁰

Safe (third) country

The Migration Act provides exceptions to the duty of protection through sections 36(3)-(7). If a non-national that satisfies the criteria for being a

136 Interview Kaldor, see: Law Institute Victoria, "[Visa Cancellation under s 116](#)," January 2018.

137 Department of Home Affairs, "[Character requirements for visas](#)," updated 3 March 2023.

138 Department of Home Affairs, "[Afghanistan update](#)," 9 October 2023.

139 Department of Home Affairs, "[Ukraine visa support](#)," 19 October 2023.

140 Kirsty Needham, "[Australia signs security, migration pact with Pacific's Tuvalu](#)," Reuters, 10 November 2023; Daan de Vries, "[Bewoners Tuvalu krijgen klimaatasiel in Australië, eilandengroep ernstig bedreigd door stijgende zeespiegel](#)," *de Volkskrant*, 10 November 2023.

refugee or in need of subsidiary protection has the option of residing in a safe country¹⁴¹ outside Australia, Australia is deemed to have no protection obligations.¹⁴² The applicant needs to have taken all possible steps to obtain this right. This can either be a temporary or a permanent right to stay in another country, with no minimal requirements for the duration of the temporary right.¹⁴³ There are no requirements for any connection to such a country like there are in the EU Directives. Though often interpreted as a safe *third* country, this law also applies to the country of which the non-citizen is a national.¹⁴⁴

Administrative capacity

In 2014, the Coalition reintroduced temporary visas for irregular maritime arrivals after the party's attempt to do so was repeatedly opposed by the opposition parties.¹⁴⁵ This decision, for which UNHCR expressed deep concern due to the impossibility of family reunification and the hindering of refugees' ability to integrate and start a new life,¹⁴⁶ led to 30,000 claims of unauthorised maritime arrivals that needed to be processed. Most of these claims have been resolved, but as of September 2023, 1.336 people of the legacy caseload are still waiting for an initial decision.¹⁴⁷

Next to the legacy caseload and appeal cases described above, backlogs are noticeable all through Australia's migration system. Recently, the Government announced an investment of A\$160 million to "restore integrity to Australia's refugee protection system, providing a fair go to genuine asylum seekers and helping to break the business model of people who seek to exploit the system."¹⁴⁸ A recent 'Nixon Review' was set up to look at the challenges and

141 Where there is no risk of persecution or real risk of serious harm and there is no well-founded fear of deportation from that safe country.

142 Migration Act 1958, [Sect. 36](#).

143 SZQPS v. Minister for Immigration and Citizenship showed that an applicant having two months left on his permit was considered sufficient for Australia not to have protection obligations: Administrative Appeals Tribunal, "[Third Country Protection](#)" in *Guide to Refugee Law in Australia*, p. 5, 9.

144 Administrative Appeals Tribunal, "[Third Country Protection](#)," p. 4.

145 Elibritt Karlsen, "[Developments in refugee law and policy: 2014 in review](#)," 8 January 2015.

146 UNHCR Australia, "[The protection of Australia's so-called 'legacy caseload' asylum-seekers](#)," 1 February 2018.

147 Department of Home Affairs, "[UMA Legacy Caseload](#)," 26 October 2023.

148 Department of Home Affairs, "[Restoring integrity to our protection system](#)," The Hon Clare O'Neil MP, 5 October 2023.

risks of the current system and found that the delays were allowing people to take advantage of the system.¹⁴⁹ The newly announced investments are meant to invest in the processing of priority applications, improve the AAT by adding 10 members to the appeals board, and appoint 10 extra judges.¹⁵⁰ Lastly, extra money has gone to the legal assistance of applicants.

Covid-19 caseload

On 31 August 2022, 4,800 people holding a Refugee and Humanitarian (XB) visa were waiting to be resettled to Australia, after having gained their visas between 1 July 2019 and 15 December 2021. This had to do with covid-19 restrictions that made it impossible to travel there. Unauthorised arrivals are not counted in the humanitarian program numbers, also because that is a separate category of only temporary visas.

149 Department of Home Affairs, [Rapid Review into the Exploitation of Australia's Visa System](#), 31 March 2023.

150 In addition to the already added 93 new members, Law Council of Australia, ["Investment to reduce migration backlog welcomed,"](#) 6 October 2023.

5 Extraterritorial access to asylum

Introduction

This chapter will focus on third country protection and resettlement policies, both providing access to extraterritorial asylum in varying ways. For resettlement, this entails offering permanent protection for a pre-decided number of refugees who have been ‘picked out’ to settle in Australia. UNHCR recommends refugees for resettlement. However, it is the Australian Department of Immigration and Citizenship that decides who is offered a place.¹⁵¹

On the other side there is third country protection, which only provides limited access to asylum procedures and protection, outside of Australia’s territory, without chances to settle in Australia afterwards.¹⁵² Tan describes such third country protection as a transfer of asylum seekers out of the destination state’s jurisdiction, usually in the Global North, towards a third state in the Global South for protection through bilateral agreements.¹⁵³ This does not imply a return to a country of origin or departure, and consists of more than just a transfer, instead including involvement of the departure state in organizing protection pathways in the third state.

Malaysia solution

Before the second phase of offshore processing in 2012, the Australian government tried to arrange a third country agreement with Malaysia. This would be an arrangement to send people who arrived in Australia irregularly by boat to Malaysia in return for the resettlement of UNHCR-acknowledged refugees

151 Elibritt Karlsen, “[Refugee resettlement to Australia: what are the facts?](#)” 7 September 2016.

152 Any type of connection criterium we know from European law does not apply in any form to Australian legislation. This has made it possible for Australia to send asylum seekers offshore, to Nauru and PNG. Scholars speak of ‘fourth country processing’ since the refugees did not have any such connection to these countries before being sent there: Shani Bar-Tuvia, “[Australian and Israeli Agreements for the Permanent Transfer of Refugees: Stretching Further the \(Il\)legality and \(Im\)morality of Western Externalization Policies,](#)” *International journal of refugee law*, vol. 30 no. 3, 2018.

153 Tan, *Refugee Protection*, p. 267.

from Malaysia in Australia. Differently than the offshoring plan with Nauru and PNG, the asylum seekers arriving in Malaysia would get a temporary permit automatically, with no further proceedings needed.¹⁵⁴ A phrase in the Migration Act stated that the Minister can declare whether a country of transit provides 'effective' procedures and protection, but the High Court opposed the statement that this could be done merely on basis of good faith.¹⁵⁵ Without any jurisdictional proof, shown by domestic legislation or international obligations that such requirements were met (Malaysia is no party to the Refugee Convention nor its Protocol), the High Court ruled such powers were outside of the Minister's power and thus not possible in the case of Malaysia.¹⁵⁶ For this reason, such an agreement with Malaysia never took off, but led to alternative arrangements with Nauru and PNG instead.

Offshore processing to Nauru and PNG

Australia reinitiated its policy to send asylum seekers to Nauru and PNG in September 2012, by moving the reception, RDP and detention (partly) offshore. The policy implemented in 2012 was only slightly different than the policy executed since 2001, since now all maritime arrivals coming ashore Australian territory were now subject to being sent offshore, instead of only those arriving at Australia's offshore excised places like Christmas Island.¹⁵⁷ Transfers only occurred between 2012 and 2014, after which the detention centres offshore became too full. A big concern was the lack of structures in place in both countries to assess refugee applications, as neither country had experience with refugee status determination.¹⁵⁸ The Australian Human Rights Commission warned beforehand such policies might have 'devastating impacts on the health, mental health and wellbeing of the people subject to it.'¹⁵⁹

After the transfers, both Labor and LNC started pulling back from the offshore policy, aiming at solving the problems evident in Nauru and PNG by first emptying

154 Ghezelbash, Extraterritorial processing in: *Refuge Lost*, p. 117.

155 Migration Act 1958, article 198A(3)(a).

156 High Court of Australia, [Plaintiff M70/2011 v Minister for Immigration and Citizenship](#) ('Malaysian Solution Case'), 31 August 2011; Ghezelbash, Extraterritorial processing in: *Refuge Lost*, p. 118.

157 Ghezelbash, Extraterritorial processing in: *Refuge Lost*, p. 121; Human Rights Committee Australia, ["Transfer of asylum seekers to third countries,"](#) Last updated 6 January 2016.

158 Gleeson and Yacoub, ["Cruel, costly and ineffective,"](#) *Kaldor*.

159 Australian Human Rights Commission, ["Inquiry into Australia's agreement with Malaysia in relation to asylum seekers,"](#) 14 September 2011.

the detention facilities, rather than continuing sending people there. This led to only a handful of people left in Nauru detention facilities and 64 people still held in PNG as of November 2023.¹⁶⁰ In 2017, detention facilities in Manus Island, PNG, were closed following a Papuan Supreme Court decision deeming the detainment of asylum seekers unconstitutional, violating detainees' basic right to liberty.¹⁶¹ Although the Australian High Court disagreed, the government officially closed the detention facilities in late 2017. Most of the detainees were forcibly relocated to alternative, more open, accommodations on the island, pending a final resolution of their situation. As for the recognized refugees, some were offered resettlement in the United States under the 2016 agreement explained below. Those whose claims were rejected were told to return to their countries of origin.¹⁶²

Nauru, on the other hand, kept the detention centres in place and Australia recently renewed this contract, which gives the country immigration detention facilities to fall back on.¹⁶³ As of February 2023, the Government statement by Pezzullo, Secretary of Home Affairs was as follows:

It has been almost nine years since the last successful people-smuggling venture to Australia. (...) Operation Sovereign Borders, OSB, remains postured to counter maritime people-smuggling and preserve the safety of life at sea. Regional processing remains a key pillar of Operation Sovereign Borders. The number of transitory persons in Nauru has been reduced to 66, as of 1 February 2023, down from 111 as at 31 August 2022. Once this caseload is resolved through third-country resettlement, the regional processing capability will remain ready to receive any new unauthorised maritime arrivals, should that occur.¹⁶⁴

160 Including the transfer of 11 asylum seekers to Nauru in October 2023, there are 16 people in immigration detention in Nauru. Of those sent offshore to PNG, 64 are still in PNG; Refugee Council of Australia, "[Offshore processing statistics](#)," 25 November 2023.

161 Supreme Court of Papua New Guinea, [Namah v Pato](#), 13; SC1497, 26 April 2016.

162 See Library of Congress, "[Australia/Papua New Guinea: Supreme Court Rules Asylum-Seeker Detention Is Unconstitutional](#)," 2 May 2016; Maria Giannacopoulos & Claire Loughnan (2020) "['Closure' at Manus Island and carceral expansion in the open air prison, Globalizations](#)", 17:7, p. 1118-1135; Christine Inglis, "[Australia: A Welcoming Destination for Some](#)," MPI, 15 February 2018.

163 Asylum Seeker Resource Center, "[Albanese Government working with US prison company until 2025 to hold refugees in Nauru](#)," 27 January 2023.

164 Legal and constitutional affairs legislation committee, [Senate Estimates](#), 13 February 2023, p. 29.

In October 2021, PNG and Australia ended their regional resettlement agreement. This was done through a confidential bilateral agreement with PNG, handing over the responsibility for the management and permanent (re)settlement of refugees and asylum seekers remaining in PNG.¹⁶⁵ The funding involved caused disputes between the two states, leading to protest by PNG, whose Chief migration office calls it an ‘abandonment of refugees’. If Australia does not fund the housing and care of the 70 refugees still in PNG, the officer threatened to send these refugees back to Australia.¹⁶⁶

As of 23 October 2023, the Australian Border Force confirmed during the Senate Estimates, a parliamentary inquiry session taking place multiple times per year, that 11 refugees have been sent to Nauru. This is the first transfer to Nauru in 9 years and comes only months after almost all refugees were sent elsewhere after years of detention in Nauru. In accordance with the Border Force’s secrecy policy surrounding such matters due to being “operationally sensitive”, no further information is shared about this group, so unclarity remains about nationality, the place of interception, or the age of these people.¹⁶⁷

Influence of RPC on Nauru and PNG

The offshore processing policy has significantly influenced small island communities in Nauru and Manus Island (PNG). In both Nauru and Manus Island, the placement of big detention centres have given rise to incidents between the local community and the asylum seekers, even leading to asylum seekers asking to be detained to ensure their safety.¹⁶⁸

Australia’s cooperation with Nauru and PNG is based on an unequal relationship, as both states used to be under the colonial administration of Australia, either as a protectorate or colony, and are highly dependent on Australian aid investment. Investments in these states thus go beyond providing detention and processing

165 Parliament of Australia, “[Finalisation of the Regional Resettlement Arrangement](#),” 6 October 2021.

166 Rebecca Kuku, Ben Doherty and Paul Karp, “[PNG threatens to send refugees back to Australia unless it keeps funding humanitarian program](#),” *The Guardian*, 7 October 2023; Tim Swanston and Hannah Meagher, “[More than 60 refugees fear eviction as PNG and Australia disagree over ‘outstanding invoices’](#),” *ABC News*, 11 October 2023.

167 Paul Karp and Eden Gillespie, “[Labor accused of ‘outrageous secrecy’ as border force confirms 11 asylum seekers sent to Nauru](#),” *The Guardian*, 23 October 2023.

168 Brian Opeskin & Daniel Ghezlbash, “[Australian Refugee Policy and its Impacts on Pacific Island Countries](#),” *The Journal of Pacific Studies*, 16 February 2017.

centres, influencing the freedom with which these states can bargain with Australia. Locals have expressed disappointment with the limited amount of funding they have reaped the benefits of, and the deployment of expats to work in these centres in a country grappling with high unemployment was poorly received. Similarly, a form of 'brain drain' occurred, where well-educated professionals left their jobs in the Nauruan public service and transitioned to better-paying roles with the Australian government in the RPCs. Management positions were filled by expats, and development aid could no longer be effectively allocated to the community. The treatment of refugees in Nauru that has been widely criticised internationally also impacted the image of Nauruans, framing the inhabitants as 'cruel abusers of refugees'.¹⁶⁹ Nauru, being the world's smallest island state with less than 10,000 inhabitants, has been named 'effectively a client state' for Australia, considering the big investments made and Nauru's dependency on the country.¹⁷⁰ During the peak of asylum seekers transferred to Nauru, these refugees amounted to 12% of the total population, being already a densely populated state.¹⁷¹ Nauru received a large part of its national income by managing Australia's refugees, making it dependent on Australia's financing.¹⁷² In 2021, 15% of the workforce on Nauru was working at the regional processing centre, while an even larger part worked in the industries related to the centre.¹⁷³

On Manus Island, both the Australian and Central Papuan governments have been criticised for failing to consult local leaders on the island before opening the processing centre, which would house hundreds of exclusively male asylum seekers. The securitisation of the refugee population and the security personnel themselves have fuelled fear and violence on Manus Island.¹⁷⁴ Much like the people of Nauru, the self-image of the island's inhabitants has been affected

169 Julia Morris, "[As Nauru Shows, Asylum Outsourcing Has Unexpected Impacts on Host Communities](#)," Migration Policy Institute, 29 August 2023.

170 Paul Farrell, Nick Evershed and Helen Davidson, "[The Nauru files: cache of 2,000 leaked reports reveal scale of abuse of children in Australian offshore detention](#)," *the Guardian*, 10 August 2016; CIA, "[Nauru- the World Fact Book](#)," last updated 3 October 2023.

171 Opeskin and Ghezelbash, "[Australian Refugee Policy](#)."

172 Fiona Adamson and Kelly Greenhill, "[Deal-making, diplomacy and transactional forced migration](#)" *International Affairs*, Volume 99(2), March 2023.

173 Morris, "As Nauru Shows".

174 Natasha Yacoub, "[Australia's 'offshore processing' for refugees as neo-colonialism in Papua New Guinea](#)," *Asylum Insight*, January 2022.

by both Australian personnel and asylum seekers calling the place a disgrace.¹⁷⁵ Also on Manus Island, international companies received the majority of funds, rather than benefit the local communities.¹⁷⁶

Resettlement

Regarding resettlement, Australia is both a destination country and a country of origin. This concerns the governmental claim to not settle any irregular arrivals permanently on the territory. Those arriving through resettlement schemes are welcomed, but anyone in need of protection who arrived irregularly is mainly left in limbo, except the group resettled to (mostly) the US or back to their countries of origin.

Resettlement to Australia: The Offshore Humanitarian Program

Australia focuses its protection obligations on enabling resettlement. In 2022, 17,325 people were resettled from other countries, placing Australia third in the ranking for resettlement numbers overall, and second in ranking per capita, next to the United States and Canada. It should be noted, however, that resettlement worldwide protected only 1% of the refugee population, which is why scholars stress it should be a complementary pathway to protection.¹⁷⁷

Australia is extending the number they accept through this route every year, capping the number to 20,000 for 2024.¹⁷⁸ Such a visa for permanent protection in Australia can be provided through the Refugee and Humanitarian Program, set up in 1977. Due to its policy of deterring spontaneous arrivals, the largest part of the Refugee and Humanitarian program applies to the resettlement of refugees and others in need of protection, with 62,7% granted under the Refugee program and 37.3% under the Humanitarian program in FY 2021-2022. This is executed through different programs. A decline is visible in the selection of refugees through referral by the UNHCR, which selects the most vulnerable refugees. UNHCR referrals in FY 2011-12 and 2012-2013 amounted to 74% and 80% of

175 Steffen Dalsgaard and Ton Otto, "[From Drifters to Asylum Seekers](#)," *The Contemporary Pacific*, 32 (2), 2020.

176 Yacoub, "[Australia's 'offshore processing'](#)," *Asylum Insight*, January 2022.

177 Bernd Parusel, "[Why resettlement quotas cannot replace asylum systems](#)," *Forced Migration Review*, November 2021.

178 UNHCR, "[UNHCR welcomes Australia's increase in refugee resettlement](#)," 11 August 2023.

resettlements respectively, while in FY 2017-2018 and 2018-2019 it amounted to 25% and 23% respectively.¹⁷⁹

Humanitarian visas for those in risk of human rights violations who have a link to Australia, can receive protection through the *Special Humanitarian Program* visa. Here, the strength of community links seems to be a decisive factor for protection, with family relations rather than need being the main priority in resettlement.¹⁸⁰ This priority makes this form of resettlement in Australia look more like a family reunification program, almost unreachable for people without such connections.¹⁸¹

A specific *Humanitarian stay visa* invites certain foreign nationals to come to Australia and apply for a Refugee or permanent visa. This process was used to evacuate Afghan nationals who used to work with the Australian government or were in other ways in more significant danger. The government of Australia applies these visas only in very limited situations. Next to 4,125 places for Afghan nationals, Australia provided 12,250 offshore places through the Refugee and Humanitarian program in FY 2022-2023, of which 1,400 places through the Community Support Program (see below), a rise of 650 places since FY 2021-2022.

Community refugee sponsorship

Like in Canada, Australia has a policy for refugee sponsorship that has been in effect since 2017 when the Community Support Programme started. Through this policy, individuals, community groups and companies can fund humanitarian visas for people they have a connection with to come to Australia. There are many requirements however, on top of the required Global Special Humanitarian Visa criteria. This means that in addition to being outside Australia and one's home country and fearing substantial discrimination in one's home country, this person needs to be between 18 and 50 years old, have a decent proficiency in English, and have job opportunities or resources to be financially independent of the State for the first 12 months after arrival. This application process happens in cooperation with Approved Proposing Organisations (APO) that offer

179 Refugee Council of Australia, "[Less than one third of refugees in Australia's humanitarian program are resettled from UNHCR](#)," 6 May 2020.

180 Refugee Council of Australia, "[Less than one third of refugees in Australia's humanitarian program are resettled from UNHCR](#)."

181 Refugee Council of Australia, *Refugee Response Index Australia*, p. 24.

workplaces.¹⁸² The yearly limit of these kinds of sponsorships is set at 1,000 per year, ‘taking away’ from the total accepted amount of 17,875 (FY 2022-2023) humanitarian visas per year.¹⁸³ This is contrary to the principle of additionality, adhered to in for example Canada.¹⁸⁴

Criticism has especially been voiced on the principle of additionality since it enables people with enough resources to access visas more efficiently and quickly than through other programmes. The same goes for those with family in Australia already, leading to a possible ‘de facto family reunification programme’. Another criticism is that suitability for integration outweighs the protection needs, negatively impacting possibilities for refugees most in need.¹⁸⁵

In 2022, a new pilot started for those without existing family linkages in Australia, the Community Refugee Integration and Settlement Pilot (CRISP). Herein, the problem of high fees for sponsors is reduced by capping it at A\$ 7,760 per application, irrespective of the number of people included in the application. 1,500 people can be resettled through this programme, again as part of the total number of humanitarian resettlements.¹⁸⁶

Bilateral resettlement agreements

Apart from resettling refugees on Australian territory, the country also cooperated with other states that would take over refugees from Australia or Nauru. This mostly had to do with the promise not to provide permanent settlement for those arriving irregularly, thus needing a different place for recognised refugees. In 2014, Australia tried to agree on a resettlement deal with Cambodia, in which, next to paying A\$ 15 million for resettlement costs, Australia offered A\$40 million for development aid when Cambodia would resettle refugees from Nauru. Because transfers could only be done voluntarily, especially following big protests amongst refugees in Nauru, Australia only managed to

182 Australian Department of Home Affairs, “[Community Support Program](#),” 6 December 2022.

183 Australian Department of Home Affairs, “[Refugee and Humanitarian Program](#),” 10 February 2023.

184 Kaldor, “[Complementary refugee pathways: private and community refugee sponsorship](#),” June 2020.

185 Kaldor, “Complementary refugee pathways,” p. 2.

186 Asylum Insight, “[Private and Community Sponsorship](#),” 24 December 2022.

successfully resettle 7 refugees. Though unsuccessful, scholars argue this has formed an example for the UK-Rwanda deal.¹⁸⁷

In September 2016, the United States agreed to resettle recognized refugees from offshore processing centres in Nauru and PNG. That the US agreed on a seemingly unequally profiting agreement and stuck to it even during the Trump administration (although Trump called it ‘a dumb deal’¹⁸⁸) shows the importance of the bilateral relationship with Australia.¹⁸⁹ The first transfer happened in 2017, and though delayed by Covid-19, 1084 of the agreed 1250 refugees were resettled by 31 August 2023.¹⁹⁰ There has been criticism that refugees are left with big debts from their journeys and are offered very limited help in their new home country.¹⁹¹ As is the case of other Australians cooperation agreements, the specifics of the deal with the US have remained secret and negotiations went by silently.

New Zealand also agreed to resettle refugees subject to Australia’s regional processing arrangements in Nauru or staying in Australia temporarily. The deal included 150 spots per year for a duration of three years, beginning in 2022.¹⁹² This had been a longstanding offer from New Zealand, previously held off because of concerns refugees would still travel to Australia afterwards because of the countries’ free movement policy.¹⁹³

187 Adamson and Greenhill, “[Deal-making, diplomacy and transactional forced migration](#),” National Legislative Bodies, “[Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia, relating to the Settlement of Refugees in Cambodia](#),” 26 September 2014.

188 Ben Winsor, “[It’s hard to imagine how the US-Australia refugee deal could have been handled worse](#),” *the Guardian*, 13 December 2020.

189 Claire Higgins, “[Australia’s Refugee Resettlement Agreement with the United States: The Diplomacy and Uncertainty of a “Very Big Deal”](#),” *Australian Journal of Politics and History*, August 2022, p. 1.

190 Department of Home Affairs “[Regional processing and resettlement](#),” 5 October 2023.

191 Winsor, “It’s hard to imagine”.

192 New Zealand Immigration, “[New Zealand – Australia Resettlement Arrangement](#),” 7 April 2022.

193 NPR, “[After criticism, Australia accepts New Zealand’s offer to resettle boat refugees](#),” 24 March 2022.

6 Return in the context of migration cooperation

Australia has faced challenges with sending back people whose application for protection has been rejected, especially concerning nationals from Iran or Afghanistan, or stateless persons. An agreement with Iran in the past has proven ineffective, as the work and holiday visas that were offered in return led to subsequent asylum applications from Iranian nationals.¹⁹⁴ The inability for current workable solutions on these returns plays a role for the group living in seemingly infinite mandatory detention, as discussed above in the court case of Al-Kateb. Agreements with Sri Lanka and Vietnam have enabled some returns, with criticism regarding non-refoulement obligations.¹⁹⁵

Recently, an agreement with India has been signed, possibly opening more extensive lawful access for Indian citizens in return for India taking back its own citizens after the procedure.¹⁹⁶ Due to secrecy around it, it is currently impossible to provide a more detailed overview of the content of any such agreements.

Cooperation with Indonesia is complemented by IOM offering assistance for returns under the Assisted Voluntary Return and Reintegration program, through which, IOM returned 5,255 irregular migrants between 2000 and 2017.¹⁹⁷

194 Interview legal expert Kaldor Centre.

195 Sherell, [The Central Role of Cooperation](#), p. 6.

196 Interview senior official Australian permanent mission; Meryl Sebastian, "[Modi in Australia: Albanese announces migration deal with India](#)," 24 May 2023.

197 Dastyari and Hirsch, "The Ring of Steel," *HRLR*, p. 458.

7 Statistics

In 2022, Australia received 29,555 protection applications, of which 1,500 were for temporary protection. In the same year, 3,923 refugees were recognised as such.¹⁹⁸ Among the various visas that refugees can apply for, namely Subclass 866 (Permanent Protection Visa, PPV), Subclass 785 (Temporary Protection Visa, TPV) and, lastly, Subclass 790 (Safe Haven Enterprise Visa, SHEV), individuals intending to work or study in regional Australia,¹⁹⁹ recognition rates were at 11,2% for the PPV (between July 2021 and June 2022),²⁰⁰ 64,4% for TPV applicants, and 67,4% for those applying for SHEV. Recognition rates for those applying for protection onshore (11%) are much lower than those arriving by boat (around 65% recognition).²⁰¹

Statistics permanent onshore protection

Through Australia's visa policy regulating access, the countries of origin for (onshore) permanent protection visa applications reflect the countries that can enter Australia legally. Only 0.27% of the total amount of Temporary visas granted between 2014 and 2022 led to such a subsequent onshore protection application.²⁰²

Malaysia has been the main country of origin of applicants overall between 2013 and 2022, after which India and China follow. This pattern has remained stable in the past 5 years.²⁰³

These countries score very low on visa grants. Overall, the grant rates for permanent protection were around 10% (11.2% in 2021-2022) with a clear outlier

198 Refugee Council of Australia, [Is Australia's Response to Refugees Generous? An analysis of UNHCR Global Trends statistics from 2013 to 2022](#), p. 11-13.

199 Department of Home Affairs, ["Safe Haven Enterprise Visa,"](#) last updated 26 October 2023.

200 Department of Home Affairs, ["Onshore Humanitarian Program 2021-22,"](#) last updated 30 June 2022.

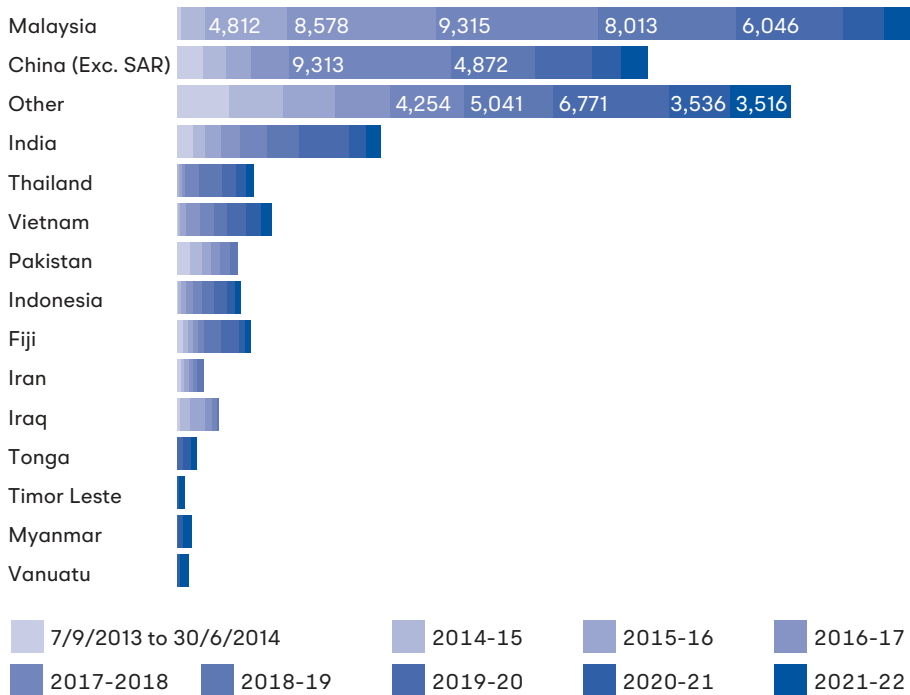
201 Refugee Council of Australia, [the Refugee Response Index Australia Review](#), Sydney, March 2023, p. 16.

202 Department of Home Affairs, [The Administration of the Immigration and Citizenship Programs](#), p. 34.

203 Refugee Council of Australia, ["Statistics on people seeking asylum in the community,"](#) 17 September 2023, p. 3.

in 2015–2016, when the grant rate was at 32%.²⁰⁴ The Humanitarian program 2021–2022 granted permanent visas to 13,307 people. 11,545 visas thereof were for the resettlement program, and 1,762 for the onshore program, for those already residing in Australia with a valid visa.²⁰⁵ This is 9.27% of the total amount of permanent visas in 2021–2022.²⁰⁶

Top 10 permanent protection visa lodgments by country of citizenship



204 Refugee Council of Australia, “Statistics on people seeking asylum” p. 4.

205 Department of Home Affairs, The Administration of the Immigration and Citizenship Programs, p. 31.

206 Department of Home affairs, 2021 – 22 Migration Program Report, p. 15.

Through an amendment aimed at limiting the asylum caseload, the number of permanent protection visas can be capped, leading to recognized refugees not receiving a visa until the following financial year. This has led to people having to wait years for (a decision on) a visa. On 31 August 2023, 29,246 people were awaiting their decision on their permanent protection status. The average number of days that applicants need to wait for a decision on their permanent protection application has been rising, amounting to an average of 903 days in 2022. At the same time, 75,430 people were still awaiting deportation after a negative decision on their application. In appeal, the number of unresolved cases was at 5,747 on 31 March 2023.²⁰⁷

Of the people arriving by boat, most are now living in the community on a Bridging Visa E, a way to rectify someone's status when they are planning to leave or waiting for a decision.²⁰⁸ At the end of December 2022, 27,745 people held such a visa.²⁰⁹ These visas are mainly held by people from Sri Lanka, Iran, and Bangladesh.²¹⁰

The net overseas migration forecast for the period until 2025-2026 is currently set at 235.000 per year.²¹¹ This only includes visa holders within Australia staying for more than 12 months in a period of 16 months. Since 2006, migration has been the main driver of Australia's population growth. Throughout Covid-19, the numbers starkly dropped, but this has been made up for quickly.²¹²

Statistics temporary protection

On 31 August 2022, there were 22,986 people in Australia on a temporary protection visa, amounting to 1,12% of the total amount of temporary visa holders.²¹³ At the end of August 2022, there were 1,146 'transitory people' on Australian territory. This group, according to the Migration Act, consists of people who have been taken to a regional processing country as part of OSB,

207 Refugee Council of Australia, "[Statistics on people seeking asylum](#)," p. 5.

208 Department of Home Affairs, "[Bridging visa E \(BVE\)](#)," 18 March 2021.

209 Refugee Council of Australia, "[Statistics on people seeking asylum](#)" p. 6.

210 Refugee Council of Australia, "[Statistics on people seeking asylum](#)" p. 7.

211 Susan Love, "[Immigration Budget resources](#)," Parliament of Australia, May 2023.

212 Department of Home Affairs, [The Administration of the Immigration and Citizenship Programs](#), p. 34.

213 Department of Home Affairs, [The Administration of the Immigration and Citizenship Programs](#), p. 9-10.

but were brought to Australia temporarily. Medical conditions were often cited as the reason for this return. These people are still considered unlawful non-citizens and, therefore, detained upon arrival. After the care they need has been provided, these people are expected to return to the processing country, but this process has been held back through active litigation. The government stresses that permanent settlement in Australia is not an option for these people. However, resettlement to the US, New Zealand, Canada or return to their home country is encouraged.²¹⁴

At the end of September, 62% of the legacy caseload of 31,934 people was granted a temporary (or later RoS) protection visa and 4% is still on hand at the Department as of September 2023. 25% of the legacy caseload got their visas cancelled or refused, of which the majority (64%) is currently at merits or judicial review. The granting rates of this group of maritime arrivals thus is way higher than the permanent onshore applications. For the whole legacy caseload, main countries of origin are Afghanistan, Iran, Pakistan, and Sri Lanka.²¹⁵

214 Department of Home Affairs, [The Administration of the Immigration and Citizenship Programs](#), p. 47.

215 Mary Anne Kenny, Nicholas Procter and Carol Grech, [“Temporary Protection Visas in Australia: A reform proposal.”](#) Kaldor, June 2022, p. 6.

Conclusion

In addition to strict visa requirements for those wishing to enter the country, Australia heavily relies on cooperation with partner countries for all key components of its immigration policy: the prevention of people smuggling, offshore processing, resettlement opportunities, and boat interceptions.²¹⁶ Australia's objective for its immigration policy is very clear: to provide protection to an exclusive chosen group of people while deterring spontaneous arrivals from seeking asylum on its territory. At present, access to Australia for irregular asylum seekers is made virtually impossible through interception and return procedures – with the Nauru processing centre as a back-up if anyone manages to arrive, as has happened in October 2023 with 11 asylum seekers. Throughout Operation Sovereign Borders, asylum seekers were sent offshore to Nauru or Manus Island (PNG) in order to curb boat arrivals at the borders. However, the results of this policy proved less than successful, with the number of arrivals by boat reaching a new record since the 1970s shortly after its implementation began in 2012-2013. However, a notable shift occurred when Australia started turning back boats, leading to a decrease in the number of asylum seekers arriving in Australia by boat.

Australia could therefore say that it has achieved its objective by successfully stopping unauthorised maritime arrivals, dismantling the business model of people smugglers by eliminating the 'product to sell'. Nevertheless, main aspects of Operation Sovereign Borders, such as offshore processing on Nauru and PNG, have proved more harmful and inefficient than effective. It has been detrimental to the refugees sent there, who have endured long periods of detention in appalling conditions, with serious consequences for their health. This situation has resulted in profound challenges, including suicides and serious health issues, exacerbated by the absence of a foreseeable permanent solution. Australia's policy of secrecy around these detention centres, with staff having to sign non-disclosure agreements and media not allowed into the camps, seems to indicate that the government was aware of the criticism it could receive. In addition, these policies have proved harmful to local society, with no preparation for the sudden influx of refugees, no effective procedures, and no sense of

²¹⁶ Sherell, [The Central Role of Cooperation](#), p. 1.

Australian responsibility for this group. The substantial investments have failed to benefit the local population that instead suffered from the situation, grappling with the island's bad international image and their dependence on Australia. Internationally, the policy attracted much attention and could have cost Australia its good reputation – as it breaks with international norms on, for example, non-refoulement and arbitrary detention – which the government proved was a price it was willing to pay.

The situation in Australia has proven practically incomparable with the situation in Europe, as well as being inapplicable, due to a very different geopolitical and legal situation. The lack of a supranational court to rule on human rights cases and the absence of a reference to human rights in national legislation gives Australia a great deal of leeway in processes such as offshoring, border cooperation and boat pushbacks. Policies that, under European legislation, could not be passed due to stricter procedural and safety standards for asylum seekers. In addition, in Australia, bipartisan support for the OSB means that legislation can be passed, sometimes retrospectively, to 'correct' legislation to reflect policy, preventing a court ruling from forcing a change in policy. This independency in regulation and legality should be noted when looking at the Australian case.

Geopolitically, Australia's long (colonial) history, with PNG and Nauru as former colonies or protectorates, gives it more power to impose laws that affect the migrant situation in surrounding countries. The controllable borders, like around Christmas Island, and relative willingness of several Asian transit states to help halt irregular maritime migration toward Australia can offer an example of effective cooperation on irregular migration, but with caution. The success of such policies highly depends on these states' willingness to cooperate, that, when not offered anything in return, can cause uncertain dependencies.

Though Australia has managed to gain more control over arrivals applying for protection through extraterritorial approaches in cooperation with surrounding states, Europe should consider the high societal, political, financial, and procedural costs and (unintended) consequences of such deterring policies before considering its policies as an example to be followed.

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