

Immigration and Refugee Law in Australia by Mary Crock [Sydney, Federation Press, 1998, 331 pages, ISBN 1 86287 290 2]

In the concluding section of this book, Mary Crock issues a call for a "cessation of hostilities"¹ between the courts and the Australian Government over immigration and refugee law. She does so particularly in light of the Howard Government's continuing attempt to almost entirely exclude judicial review of the decisions of the immigration and refugee tribunals. She comments that "[s]hould the present trends continue, the real risk is that immigration will become the political football of the 1990s."²

Her plea has gone unheeded. Both in its legislative plans and in its verbal barrage against the courts, especially the Federal Court, the Australian Government has stepped up the conflict. It is pushing ahead with the (1998) Migration Legislation Amendment Bill which seeks to use a sweeping privative clause to extinguish the right of appeal to both the Federal Court and the High Court by immigration and refugee applicants. There is one exception, namely, what the Minister for Immigration and Multicultural Affairs refers to as "narrow jurisdictional error and *mala fides*".³ The Amendment Bill would effectively ensure that neither the Minister nor his department has any obligation to provide visa application forms or information on the right to apply for refugee status, unless a refugee makes a request in quite specific terms. Additionally, where a detainee has not made a formal written complaint to the Human Rights and Equal Opportunity Commission or the Commonwealth Ombudsman, or asked for a lawyer, the Bill removes the rights of the detainee to receive communications from these groups.

As part of his campaign for this legislation, the Minister has railed against certain Federal Court judges in the most intemperate terms, accusing them of overstepping the line between judicial and merits review and of indulging in a "frolic of their own".⁴ Speaking in parliament, the Minister asserted that one or two judges had "a particular view of the world that is different to everybody else's".⁵ The Minister has also accused lawyers of

¹ At 296.

² At 299.

³ At 293.

⁴ Commonwealth Hansard, House of Representatives, 2 December 1998 at 1136.

⁵ The Australian, 30 November 1998 at 5.

unethically exploiting the desire of unlawful entrants to stay in Australia. Their alleged offence was to organise class actions whereby groups of largely impecunious refugees have been able to challenge the rejection of their applications.⁶

This offensive against the judiciary and the legal profession raises serious questions about the independence of courts and lawyers to speak on the fundamental legal rights of immigration and refugee applicants regarding their access to legal advice and the courts.

The Government's campaign also highlights the complexity of writing a text in the field of immigration law. It is a highly politicised and rapidly changing arena. A decent book for students, academics and those involved in the debate and practice of immigration law must provide an appreciation of the history, context and political and jurisprudential dynamics of the law, as well as a necessary level of detail.

There is no doubt that Crock's book provides a badly needed service in this regard. As the author says in her Preface, her book does not purport to provide the very latest details in law and policy. Various services exist for that more narrow need for practitioners.⁷ Instead, the author sets out to focus on the "main areas, themes and trends in this ever-changing specialty".⁸

Why has immigration law become a phenomenal growth area and a source of such bitter conflict between the executive and the judiciary? There are three inter-connected factors, and to assist their understanding, it would be helpful to place this contentious battleground in a wider historical and international setting.

The first is the growing global mobility of people and commerce, which is increasingly in conflict with the efforts of Governments internationally to prevent the flow of unwanted arrivals. Never before has the worldwide

⁶ See Commonwealth Hansard, House of Representatives, 11 November 1998 at 118-119.

⁷ See for example Goddard J, *The Immigration Kit* (1997, 5th edition, Federation Press, Sydney); Cronin K, *Australian Immigration Law* (1994, Butterworths, Sydney); Department of Immigration and Multicultural Affairs *Procedures Advice Manual*, 3rd edition, Canberra (continually updated).

⁸ At 5.

movement of people been so great, whether for employment, business, education, tourism, sport, entertainment, scientific and cultural exchange or social and political intercourse. More than ever, we live in a global village, linked electronically and also by air travel. In large measure, this is the inexorable product of the globalisation of economic life. National borders are more and more anachronistic.

The same economic processes are dislocating and devastating entire areas of the globe, producing extreme poverty and unemployment in places such as China, Indonesia, Russia and the Middle East. Civil wars triggered in the main by economic catastrophe, including those in Somalia, Rwanda, Zaire and the Balkans, have added to the tide of people seeking to escape and seek better futures. With the collapse of the Asian "economic miracle" and the imposition of International Monetary Fund restructuring measures in one country after another, this flood appears to be rising.⁹

Yet governments on every continent, but particularly in Europe and North America, have restricted their intakes of legal migrants and introduced increasingly harsh measures against refugees and asylum seekers, forcing them to resort to illegal means to escape poverty and persecution.

Secondly, it must never be forgotten that the consequences of adverse immigration decisions are often severe and traumatic, especially for those seeking to be reunited with their families or seeking employment, not to speak of those fleeing from persecution, poverty or civil war. Indeed, these are sometimes life and death determinations, with the victims of these scourges so desperate to escape from their plight that rejection can lead to suicide or perhaps even suffocation as a result of resisting forced deportation.¹⁰ As much as the Minister wishes to charge lawyers with unethically encouraging refugees to seek legal redress, many asylum seekers are anxious, for the most pressing reasons, to pursue every legal and political avenue to contest their rejection.

⁹ Three years ago, it was estimated that more than four million people were seeking refuge worldwide.

¹⁰ See for example the well-documented cases of Joy Gardner, strangled by British police on 28 July 1993, and Semira Adamu, suffocated by gendarmes in Belgium on 22 September 1998: "The death of Semira Adamu and deportation policy in Europe" at <http://www.ws.ws.ogr/news/1998/oct1998/blg-o06.shtml>. See also Anonymous, "A state murder exposed: The truth about the killing of Joy Gardner" (1996, Mehring, London).

The third factor is the political and legal backlash in the 1980s and 1990s against the period of political and social radicalisation of the 1960s and 1970s, that was partially reflected in the rise of the New Administrative Law. In Australia the Administrative Appeals Tribunal ("AAT") and the Federal and High Courts have tended to extend the doctrines of the New Administrative Law to immigration law, somewhat strengthening the legal rights of immigrants and refugees over the past 20 years, at least from the standpoint of procedural fairness. But in doing so, the judges have incurred the wrath of successive federal Governments. These Governments have reacted to every major decision with new restrictions, creating a rapidly changing legal minefield.

The author is often critical of the official political stance. Thus, she deplores the fact that the United Nations Human Rights Committee has had occasion to condemn as "arbitrary",¹¹ under the International Covenant on Civil and Political Rights, the automatic and indefinite imprisonment of unlawful entrants in detention centres such as that at Port Hedland. She states:¹²

If Australia does not respond in real terms to the Committee's rulings, the case may stand in this country as a testament to an increasing mood of national introspection and even isolationism from the world community.

It could be argued that this supposed "mood" is one that is aggressively cultivated by those who hold political office and by the media. The author frequently attributes anti-refugee sentiment to adverse public opinion, as if the views propagated by commentators and politicians merely reflect passively entrenched community attitudes. At times however, she notes instances of poor reporting and blatant scare-mongering in the media, such as the early 1998 reports about refugee claimants ("tourists") coming to Australia for a "\$30 work visa".¹³

The author tends to present the controversies surrounding immigration law from a purely national standpoint, arguing that it would be in Australia's "national interest"¹⁴ to pursue a more generous approach in some respects.

¹¹ At 32.

¹² Ibid.

¹³ At 163.

¹⁴ At 299.

This can lead to concessions to those who demand that selection criteria and indeed, judicial opinions, must be based on what is deemed beneficial for the national economy or the immediate commercial interests of the business sector, rather than on the democratic and human rights of applicants.

This national outlook can also lead to political pleading on the basis that the legal system or the "rule of law" is a necessary safety valve or control mechanism to prevent threatening social unrest. In her conclusion, the author writes:¹⁵

In my view, Australia has everything to lose by trying to cut judges and lawyers out of the migration administration. Legal professionals are critical to the promotion of the rule of law and to the balance that underpins the Westminster system of Government in Australia. It is to this system that Australia owes its great achievements as a nation that since Federation has never known serious internal unrest, even in times of great hardship and change.

Apart from a dubious interpretation of history, and in view of events such as the upheavals provoked by World War I conscription, the mass joblessness of the Great Depression of the 1930s, the post-World War II industrial strike movement, the Vietnam War, and the 1975 dismissal of the Whitlam Government, this argument can imply that the proper role of the courts is to secure political stability for those who rule rather than to afford justice.

That having been said, Crock does address the difficult task of combining the need for political and historical context with meticulous attention to detail. To give just one example, she makes a finely nuanced assessment of the High Court decision in *Chu Kheng Lim and Others v Minister for Immigration, Local Government and Ethnic Affairs*,¹⁶ where the majority took exception to the Government's attempt to oust curial review of the detention of the plaintiffs who had arrived illegally by boat from Cambodia. The court nevertheless upheld the constitutionality and legality of a new Part 4B of the Migration Act (Cth) 1958, which mandated the

¹⁵ At 299.

¹⁶ (1992) 176 Commonwealth Law Reports 1.

detention of boat people – referred to as “designated persons”¹⁷ – until they either left the country, were granted an entry permit, or had been in “application custody” for 273 days.¹⁸

Notwithstanding the ancient doctrine of *habeas corpus* and the constitutional notion of the separation of powers, the court sanctioned the concept of administrative detention, holding that the power to detain aliens was not the sole preserve of the judiciary. Brennan, Deane and Dawson JJ acknowledged that Australian citizens enjoy a “constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth”.¹⁹ However, this immunity, did not extend to immigration detainees because they were being incarcerated not by way of criminal sanction but to protect the national interest.

After reviewing the legal content of the decision in *Lim*, the author provides the following somewhat apologetic observation, which cautions the reader to pay close attention to the political sensitivities involved in immigration judgments, no matter how carefully they are clothed in jurisprudential reasoning:²⁰

In *Lim* the High Court drew back from striking down a legislative regime aimed at deterring unlawful migration. Given the normative impact that such a ruling would have had on the Government’s border control measures, it is perhaps not surprising that the High Court decided on a relatively conservative approach to the legislation under question. The vehemence of the Government’s feeling on the issue may have contributed to the pressure on the court to defer to Parliament and to the doctrine of separation of powers.

In the first three chapters, the author briefly places immigration law in the context of perceived policy considerations such as business requirements, family values, international relations, the racist history of the White Australia policy, and the sharp shift in immigration law after 1989. Following this date, the previously vague ministerial discretions were largely codified in legislation, regulations and guidelines.

¹⁷ 1958 Migration Act (Cth) section 54R.

¹⁸ Ibid section 54Q (1) and (2).

¹⁹ See para 24 of their joint judgment.

²⁰ At 24.

In line with the wide interpretation that the courts have given the "immigration" and "aliens" powers in sections 51(27) and 51(19) of the Australian Constitution, the book presents a wide coverage of the law. This includes health and character rules, family reunion, business migration, refugees, students and visitors, detention and deportation, the appeal tribunals, and judicial review. However, citizenship and nationality are not dealt with, a gap that will hopefully be remedied in future editions. Nor does the book review the provisions relating to the registration and regulation of migration agents, one of the fastest growing fields of legal and semi-legal practice.²¹

In the light of the dramatic implications of the creation of a global labour market, the author makes a number of pertinent observations about divergent trends in skill-based and business migration. One concerns the granting of employers with freer access to temporary recruitment of overseas workers, whereas restrictions have been tightened on the granting of permanent residency status on the grounds of skills or employment. As the author comments:²²

In more recent years, the move toward a more laissez-faire, market driven economy has brought with it significant policy changes.

One of them is a "quiet revolution"²³ in the entry of temporary workers. One could draw the conclusion that employers are being afforded more ready access to labour with needed skills or other attributes, but the workers concerned are being denied residency rights.

This discrepancy between the rights of employers and employees is apparent also in the Government's active promotion of business migration. Those with large sums of money to invest are positively encouraged to immigrate. The author describes this as "perhaps the most unusual aspect of the economic migration program".²⁴ While the Government ever tightens the restrictions and limits on family reunion and refugee immigration, it has gone to considerable lengths to attract corporate entrepreneurs. The previous Government effectively privatised the

²¹ See Migration Institute of Australia at <http://www.mia.aust.com>.

²² At 92.

²³ Ibid.

²⁴ At 113.

selection process even, relinquishing control over it to Accredited Business Migration Agents who profited by recruiting applicants. After the emergence of predictable problems with an over-abundance of agents chasing lucrative possibilities, the Government adopted a points system, since enhanced by the present Government, that gives highest priority to "major investors"²⁵ with at least \$750,000 to invest.

The book summarises the principal developments in both merits and judicial review. Perhaps more could be said on the composition and limited independence of the Immigration Review Tribunal and Refugee Review Tribunal. At one point the author notes, remarkably without comment, that in December 1996 the Minister issued press releases threatening the Refugee Review Tribunal members with non-renewal of their contracts should they continue to interpret the 1951 Geneva Convention relating to the Status of Refugees²⁶ to cover family members fleeing domestic violence.²⁷

The book features a perceptive examination of the trends, controversies and possibilities in curial review. The courts have undeniably had a far-reaching impact on the legislative framework and administrative practice in immigration over the past 20 years, however it is arguable as to whether the changes may be described as "revolutionary".²⁸ All too often, the right to procedural fair-ness has proven to be illusory, having little impact on the fate of the individual plaintiffs concerned, or on the overall shape and thrust of immigration policy.

On a technical note, the book includes a comprehensive and invaluable bibliography; helpful tables of cases and legislation; and a reasonable index. Perhaps in future editions more use could be made of statistical data, tables and charts. It is always important to assess the law against the available information such as quotas, intakes, countries of origin, countries determined to be "risk factors", detention numbers, and appeal rates.

Finally, there are some irritating repetitions. For example, the reader is told three times that the AAT overturned only 15 deportation orders out of 157

²⁵ At 115.

²⁶ The Convention entered into force on 22 April 1954; for the text in various languages, see 189 United Nations Treaty Series 137.

²⁷ At 148.

²⁸ At 270.

between 1993 and 1997. There are occasional proofing errors also, which point to the need for more rigorous sub-editing and proofing by Federation Press and publishers of law books in general.

Nonetheless, the book is a welcome and pioneering work in a field that is rapidly growing both in volume and significance.

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