Refugee Law in Australia by **Roz Germov** and **Francesco Motta** [2003, Oxford University Press, Melbourne, 821 pages + Appendices and Index]

More than any other area of law, refugee law is a raw nexus of the common law that exists in Australia and in other jurisdictions, statute law, and conventions. It is a complex topic of evolving concepts.

Following the atrocities of World Wars I and II, the international community recognised the need to define rights to protect people who cross borders to avoid persecution within their own states of nationality or, where they are stateless, within their state of residence. Although some regions such as Africa had their own informal systems to protect people crossing borders in search of safety, many states did not. To bridge this gap the 1951 Refugees Convention[1] and its 1967 Protocol[2] (together referred to as the Convention) were developed. The aim was to provide criteria by which a person's claim to refugee status could be determined, and the minimum obligations that would ensue for the state where the person had sought protection.

The basic principle of the Convention is contained in Article 1A(2):

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

Currently 140 states are signatories to the regime established by the Convention and/or Protocol[3], and the interpretation of the Convention

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[1] The Convention limited the general definition of a refugee to people effected by events that occurred before 1951.

[2] By acceding to the Protocol states agree to apply the substantive provisions of the Convention but without the 1951 deadline.

[3] This is a complex regime because of variations in state practice. For example (a) some states are party to the Convention only; (b) some states have signed the Convention only but limited its application to asylum seekers from certain regions of

varies between them.[4] Compared to most other signatory states, the number of on-shore asylum claimants in Australia has been few due to its geographical isolation. Australia has experienced increases in asylum seekers arriving with or without visas only when there have been situations of extreme human rights abuses in particular states. The most recent increases have involved persons fleeing the persecution of despotic regimes such as the Taliban and Saddam Hussein. Usually there is a small flow of people fleeing civil war states (for example Sri Lanka) or people who have transgressed the strictures of states such as China.

Refugee Law in Australia by Roz Germov and Francesco Motta is the first book that attempts to encapsulate the law in Australia on refugees. In the past books written for other jurisdictions have been used as legal references. They include those by Guy Goodwin-Gill[5] and A Grahl-Marsden,[6] and James Hathaway's seminal work.[7] Although some principles are universal they only serve as a starting point. Accordingly, research within the Australian context on case law and legislation was much needed.

When the earlier books appeared the body of Australian case law was not large and the domestic legislation on refugees was fairly static. To interpret the Convention, courts in Australia often had to look to cases

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the world; (c) some states have signed both the Convention and the Protocol without limitations; and (d) some states have signed both the Convention and the Protocol with limitations to both.

[4] For example concepts such as "agents of persecution" differ and may lead to different outcomes in different jurisdictions. Some states including Germany do not recognise non-state agents of persecution. Therefore if a group other than a government is persecuting the citizens of a state, Germany will not recognise the claims of asylum seekers from that situation as falling under the Convention. This may cause problems for asylum seekers from states where there is anarchy or no government, but where they face persecution from a non-government group. Australia is amongst the states that recognise agents of persecution to include non-state agents as well as state agents of persecution.

[5] Goodwin-Gill GS, The Refugee in International Law (1990, Clarendon Press, Oxford).

[6] Grahl-Marsden A, The Status of Refugees in International Law (1966, AW Sijthoff-Leydon, Netherlands 1966); see also UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status (1988, Office of UNHCR, Geneva).

[7] Hathaway JC, The Law of Refugee Status (1991, Butterworths, Toronto; 2nd edition 1996).

from other jurisdictions including Canada for precedents. The case law on other treaties such as the 1966 International Covenant on Civil and Political Rights was sometimes used. Those books are now old and in Australia are effectively superseded by *Refugee Law in Australia.*

Since the early 1990s increased political attention has been paid to the subject of refugees, and various amendments to the legislation[8] have ensued, including the introduction of a decision review system. This increase in legislative activity has coincided with an increase in arrivals of asylum seekers to Australia leading to an exponential increase in litigation on refugee issues. Consequently Australian common law on the interpretation of the Convention and associated legislation has developed rapidly.

Refugee Law in Australia is a welcome and much needed initiative and a person wishing to understand any aspect of the Convention and refugee law will not have to look further than this book. A person preparing submissions in relation to refugee law will also find the references provided there invaluable. The writers have logically and succinctly described concepts that are sometimes quite circuitous and hence confusing.

The writers' experience as former members of the RRT is reflected in their practical knowledge and the book's layout. Both have had extensive experience in practice in refugee law and this is shown in the way they explain the applicable law and policy. This extends to their practice tips and procedural advice.[9] Ms Germov currently practises as a barrister in immigration and refugee law while Mr Motta, a former adviser to the Minister for Immigration, is Head of the Refugee Determination Section in UNHCR's branch office in Khartoum, Sudan.

This is an impressive book. It opens with the history and a comprehensive background of the Convention's development. It examines the interesting views of academics on the purpose of the Convention. An example is the controversy on whether the Convention

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[8] For example the 2001 Migration Legislation Amendment (Judicial Review) Act (Cth) introduced the privative clause in the new Part 8 of the 1958 Migration Act (Cth) that is explained in Chapter 16: at 707 et seq.

[9] At 513. Also, the processing system is explained in Chapter 3 at 65-85. This includes a description of the system and the steps in both tribunal and judicial review.

was designed to assist the large numbers of displaced and desperate refugees, or whether it was meant to limit the criteria on the meaning of refugee, which would correspondingly limit the number of persons for whom the signatory states would be responsible.[10]

More specifically the reader would find that the coverage of exclusion clauses under Article 1F of the Convention is brief. The authors do not examine this in detail, nor do they examine many Australian cases. The exclusion clauses apply to persons about whom there are serious reasons to believe that they have committed war crimes, crimes against humanity, serious non-political crimes or crimes contrary to the purposes and principles of the United Nations Charter. The brevity of this discussion probably reflects the fact that the Refugee Review Tribunal (RRT), where the authors were employed as members, has no jurisdiction over the exclusion clauses. This jurisdiction is reserved for the Administrative Appeals Tribunal (AAT).[11] Nonetheless the little that has been included provides an adequate explanation of the exclusion clauses. Much of the international case law on this topic has been codified in the 1998 Rome Statute establishing the International Criminal Court,[12] an area of law that promises to develop internationally and domestically.

When the book was being written, privative clauses had stalled the rate of litigation on matters concerning refugee status in Australian courts. This gave the authors the opportunity to take stock of the subject. Since the book was published in 2003 privative clauses have been read down continuously and litigation in this area is once again refining the definitions and concepts.

The final chapters of the book present a critique of refugee status determination processes in Australia. Unlike the scholarly approach of

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[10] See page 22.

[11] The RRT was established to function as a first tier of review of decisions that are made by the immigration bureaucracy. De novo decisions are made within the jurisdiction of the Convention's "inclusion" clauses whereas the "exclusion" clauses fall within the jurisdiction of the AAT.

[12] The Tribunals established to deal with crimes committed during the conflicts in the Former Yugoslavia and Rwanda have contributed extensive case law on this subject, as will other tribunals such as the Special Court in Sierra Leone and the International Criminal Court.

the rest of the book, this section presents some personal views of the authors. Nevertheless, the value of the book as an important reference remains. The many proposals and ideas of various writers, judges, and theorists are examined throughout. The authors also discuss various options to deal with the large number of refugee and migration cases clogging the Federal Court. Clearly their experience on the RRT has given them insight into the nature of appeal cases and led them to consider the merits and fairness of systems designed to filter out spurious claims.[13] However they defend the right of people affected by administrative decisions to seek review of government action.[14]

The book is footnoted extensively and written with the reader in mind. Extracts of policy documents and procedural directions appear throughout.[15] The index is thorough and easy to use.[16] Included are a glossary of acronyms and abbreviations at the start of the book to assist both the reader and the practitioner,[17] and a comprehensive table of cases, citations[18] and relevant legislation.[19] The bibliography is impressive[20] and provides an additional list of resources accompanied by their Internet addresses and brief explanation on the information found in those websites.[21] The book ends with convenient appendices including those on the Refugees Convention and its signatory states,[22] and relevant sections of the 1958 Migration Act (Cth) and its Regulations.

This book will remain valuable because it encapsulates the principles and concepts of Australian refugee law in a logical and well-written form. It is an excellent text for students studying the subject area and it provides a good guide for practitioners on the legislative and common law principles and citations, which may be further augmented on the Internet as noted above. It fills a huge void in the legal literature in

[13] At 818.
[14] At 821.
[15] For example in relation to Section 501 and Ministerial policy at 479, 486-487.
[16] At 890.
[17] At x.
[18] At xv.
[19] At xxxii.
[20] At 874.
[21] At 887.
[22] This is useful in relation to concepts on "effective" and "prior" protection.

Australia and its format could allow the authors to systematically review each area of the law. It is hoped that in their capacity as practitioners of refugee law they will undertake this periodically in supplements or bring out new editions every few years.

Even if this does not eventuate the book will remain a useful text for many years to come.

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