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BACK TO THE FUTURE: AUSTRALIAN BORDER POLICING UNDER LABOR, 2007–2013

Michael Grewcock

This article was largely written in September 2013, immediately following the federal election, with some minor revisions in early December 2013.

Abstract: This article analyses the border policies of Australia's federal Labor governments between 2007 and 2013. It argues that the policies of externalization pursued by Labor inevitably led to the restoration of the Pacific Solution introduced by the previous Liberal-National Party Coalition government and reproduced similar forms of state criminality and resistance.

Keywords: Australian Labor Party; border policing; refugees; Pacific Solution; immigration detention

Introduction

In September 2013, the conservative Liberal-National Party Coalition led by Tony Abbott, comfortably won Australia's federal election. The Coalition's victory ended two terms of rule by the Australian Labor Party: between December 2007 and August 2010; and as a minority government between August 2010 and September 2013. During that period, Kevin Rudd was prime minister between 3 December 2007 and 24 June 2010, when his fellow Labor MPs replaced him with his deputy, Julia Gillard. However, with Labor trailing badly in opinion polls, Rudd was reinstated as prime minister via the same process on 27 June 2013.

Border policing was a prominent theme during the subsequent election campaign, in which Abbott pledged to "Stop the Boats". However, there were no significant differences of principle between Labor and the Coalition: the shrill rhetoric and ritual condemnations of each other's policies operated within a long-established paradigm of exclusion, deterrence and punishment directed at refugees attempting unauthorized boat journeys to Australia. Within this framework, any boat arrival becomes a "failure" of border policing, a concession to people-smugglers and their "business model", and an egregious breach of sovereignty. There is no acknowledgement of the systemic harm and structural violence associated with

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border controls. Obstructing safe travel, indefinite detention and forced removal become routine practices in pursuit of the organizational goal of denying refugees the ability to seek asylum in accordance with the 1951 Refugee Convention. The humanity of refugees, their needs for protection and the precariousness of their lives in transit states such as Indonesia are repeatedly denied through a political discourse that constructs refugees as a “problem” for the region to “solve”. This further legitimizes deterrence as a dominant rationale for an increasingly criminogenic border policing regime that systematically alienates, criminalizes and abuses unauthorized refugees – particularly through the use of mandatory detention and forced removal (Grewcock 2009).

Both the major political parties are committed to this approach and use border policing as a vehicle for reinforcing their own authority and asserting their capacity to rule. Rather than being an electorally necessary reaction to public sentiment, being able to “control the borders” has become a marker of political competence that, in turn, has shaped the terms of political debate. As I have detailed elsewhere (Grewcock 2009), current border policing practices do not constitute a reluctant, pragmatic response to a refugee crisis. Instead, since the 1970s, successive Coalition and Labor governments have introduced policies that have normalized abusive practices and continually reconstituted a sense of threat, if not moral panic (Cohen 1972), regarding unauthorized refugee migration into Australia. Within mainstream politics, this has created its own internal logic with both parties locked into a bidding war over whom is best equipped to “protect the borders”. This intensified as the Labor government became more unstable and sought to neutralize attacks from the Right over border policing.

Thus, within weeks of returning to office, Rudd unexpectedly signed agreements enabling the forced transfer of unauthorized refugees for processing and resettlement in Papua New Guinea¹ (PNG) and Nauru.² This meant that as of 19 July 2013, no unauthorized refugee would be resettled in Australia.³ This was clearly intended to wrong foot the Coalition in the run-up to the election but was also made possible by the decision by the Gillard government in August 2012 to re-open detention facilities and return to offshore processing on Nauru and Manus Island (PNG). Gillard’s decision effectively reintroduced the Pacific Solution implemented by the previous Coalition government under John Howard between 2001 and 2007. By the time of the 2013 election, refugees arriving without a visa were to be denied any prospect of resettlement or family reunion in Australia. This left approximately 33,000 people stranded in limbo in various forms of detention (both in and outside Australia) or destitute in the community.

The incoming Coalition government largely embraced this agenda. It immediately announced plans to expand detention capacity on Nauru by constructing a 2,000 bed tent-city with a permanent 5,000 bed facility to be

completed within five years. In October 2013, temporary protection visas were reintroduced retrospectively for all refugees not detained on Nauru or Manus Island. These visas require refugees to continually re-apply for protection and holders are denied family reunion rights.⁴ The government is also committed to the introduction of a “work for benefits scheme” for refugees living in the community on bridging visas while awaiting a decision on their protection application. Labor’s regime also provided the platform for the Coalition government to launch its military-led Operation Sovereign Borders, the main features of which include: the Australian navy towing boats back to Indonesia; the Australian government purchasing boats that might otherwise be sold to people-smugglers; the Australian Federal Police paying Indonesian citizens for information regarding smugglers; and heavy restrictions on the amount of information provided to the Australian public regarding boat arrivals.

At the time of writing, it is unclear how the Coalition’s strategy will evolve, not least because of the considerable opposition already expressed by the Indonesian authorities. Here, I want to focus on the experience of Labor’s period in office, especially its decision to return to an offshore processing and resettlement regime, and to highlight the continuities between Coalition and Labor policies. Moreover, I will argue that despite some differences between the two variants of the Pacific Solution, the revised version is replicating the systemic human rights abuses associated with its predecessor and generating similar forms of refugee resistance.

Reviving the Pacific Solution

When Labor won office in 2007 and formally abandoned the Pacific Solution, few unauthorized refugees were arriving by boat. In 2007, five boats carrying 148 passengers arrived; in 2008, there were seven boats carrying 161 people (Phillips and Spinks 2013: 23). However, from 2009, the numbers steadily increased (see Table 1). While tiny by international standards (UNHCR 2012), the arrivals intensified the government’s attempts to secure the cooperation of neighbouring states in preventing unauthorized refugees seeking their Convention rights in Australia.

Despite abandoning the Pacific Solution, Labor was never likely to fundamentally change Australia’s border policing practices. Mandatory detention (introduced by a previous Labor government in 1992) was retained and the Christmas Island detention centre opened. However, Labor’s strategic priority was to externalize Australia’s border controls by enticing neighbouring states to deploy policing strategies that would disrupt and punish unauthorized refugee movement into Australia. This involved ongoing diplomatic attempts through the Bali Process⁵ to secure a regional agreement for the interception and policing of people-smuggling

operations. There were also unilateral negotiations, including an unsuccessful attempt to persuade the government of Timor Leste to host a regional detention and processing facility for Australia-bound refugees in the region (Grewcock 2013).

Table 1 Unauthorized boat arrivals, 1 January 2009–30 June 2013

Year	Number of boats	Crew	Number of people (excludes crew)
2009	60	141	2,726
2010	134	345	6,555
2011	69	168	4,565
2012	278	392	17,202
2013 (to 30 June)	196	407	13,108

Source: Phillips and Spinks (2013: 23).

The failure of these negotiations led the Australian government to sign an agreement with the Malaysian government in July 2011 that allowed for the transfer to Malaysia of up to 800 unauthorized asylum seekers, including children, arriving after the agreement was signed. In exchange, the Australian government committed to resettling from Malaysia an additional 4,000 refugees over four years.⁶ No persuasive reasons were given for how the figure of 800 was reached, other than it being an estimate of the numbers of forced transfers required to act as a “disincentive” to smugglers. However, given that the UNHCR’s “population of concern” in Malaysia exceeded 212,000 in January 2011 (UNHCR Malaysia 2012), this did not represent a significant inroad into the region’s transit population of forced migrants.

Deterrence was a central rationale for the plan. Prime Minister Gillard described the agreement as a “big blow” to people-smugglers and warned that “[i]f someone comes to Australia, then they are at risk of going to Malaysia and going to the back of the queue” (AAP 2011). The government seemed determined to implement the agreement by force, refusing even to exclude unaccompanied children from the prospect of removal. Those identified for transfer would be held in a high security compound within the Christmas Island immigration detention centre where, according to one report, “a specialist federal police team [was] authorised to use bean-bag bullets, teargas, handcuffs and physical force if necessary to prepare and escort asylum seekers ... to Malaysia” (Taylor 2011).

The government also sought to neutralize concerns about the human rights of refugees in Malaysia by emphasizing that it was in discussions with UNHCR about how best to implement the agreement on the ground as part of a broader strategy of improving the circumstances of refugees in Malaysia. Guidelines for the implementation of the agreement also acknowledged the principle of non-refoulement.

ment; the right to asylum; the principle of family unity and the best interests of the child; protection against arbitrary detention; lawful status to remain in Malaysia until a durable solution is found; the ability to receive education, access to health care, and a right to employment.⁷

Leaving aside the Australian government's own questionable record in meeting such guidelines, there was no legal mechanism for their enforcement in Malaysia. This was noted by the High Court of Australia, which in declaring the plan invalid in August 2011, held that notwithstanding assurances from the Malaysian government, the immigration minister could not declare Malaysia a suitable destination for transfer given the Malaysian government had not signed the 1951 Refugee Convention and other relevant human rights instruments; and that as legal guardian for unaccompanied children, there would be a conflict of interest if the immigration minister authorized removal to Malaysia.⁸

Undeterred by the High Court decision, the Australian government immediately sought to reinforce the legitimacy of forced transfers, regardless of human rights obligations or the legitimate expectations of refugees. Legislation was introduced into parliament in September 2011 to enable the immigration minister to declare a state suitable for "offshore processing" without "reference to the international obligations or domestic law of that country".⁹ The proposed legislation stalled in the Senate when the Greens opposed it on principle and the Coalition refused to support it given their preference for re-establishing offshore processing on Nauru. In June 2012, a further bill¹⁰ introduced initially in February 2012 by Independent MP Rob Oakshott that would have enabled forced removal to signatory states of the Bali Process such as Malaysia and Nauru also failed to pass the Senate.

The impasse was broken in August 2012 when an amended and renamed version of the September 2011 bill was passed with the support of both major parties.¹¹ As a result, the *Migration Act 1958* was amended on 18 August 2012 to give the immigration minister the authority to designate a state as a regional processing country on the sole ground that it is in the national interest to do so and without regard to the minister's guardianship obligations.

Memoranda of Understanding were also signed with the governments of Nauru¹² and PNG.¹³ These cleared the path for the reintroduction of offshore processing on Nauru and Manus Island and the forced transfer of asylum seekers, including unaccompanied children, arriving unauthorized by boat in Australia after 13 August 2012.¹⁴ Moreover, in May 2013, legislation was passed that excised the Australian mainland from Australia's migration zone for the purposes of claiming asylum.¹⁵ This meant that anyone arriving after 13 August 2012 became liable to forced transfer and subject to the same offshore processing arrangements, regardless of whether they arrived on the Australian mainland or territories such as Christmas Island.

The Expert Panel on Asylum Seekers

The Expert Panel on Asylum Seekers provided the catalyst for the return to offshore processing. The panel was established on 28 June 2012¹⁶ following the failure of the Oakshott bill¹⁷ to pass the Senate. The impetus was created during the previous week when at least 90 people drowned after two boats sank within days en route to Christmas Island from Indonesia. This added to a growing death toll of unauthorized refugees that included approximately 105 off the coast of Java in October 2009; 50 when a boat foundered on the rocks at Christmas Island in December 2010; and 200 when two separate boats sank off the Indonesian coast in November and December 2011 (Weber and Pickering 2011; Kevin 2012).

Both the major parties responded to these events by attributing blame to unscrupulous people-smugglers rather than Australia's increasingly restrictive border controls. Both wanted a system of offshore processing introduced that would "break the smugglers' business model".¹⁸ For the Coalition, forcing the government into a humiliating back down over Nauru was the main priority, whereas the government maintained that "Malaysia and Nauru, implemented together, opened together, would provide a significant deterrent."¹⁹

However, the series of mass drowning incidents between 2009 and 2012 not only indicated the failure of deterrence in its own terms but also triggered a subtle recalibration of the ways both major parties sought to operate within the deterrence paradigm. Primarily, this was not, to paraphrase Prime Minister Howard when justifying the original Pacific Solution, a matter of "we will decide who enters Australia and under what circumstances".²⁰ Rather, vulnerable asylum seekers needed to be protected from both the smugglers and themselves. For their own good, refugees would be deterred from choosing to risk boat journeys to Australia rather than spending years stranded stateless in Indonesia or Malaysia, unable to work and with no security. Thus, the Expert Panel's primary term of reference was "how best to prevent asylum seekers risking their lives by travelling to Australia by boat" (Expert Panel on Asylum Seekers 2012: 9). Safety at sea became a dominant rationale for Pacific Solution Mark 2, providing punitive and discredited deterrent measures with a pseudo-humanitarian gloss.

In this context, the Expert Panel was devised as a political circuit breaker, rather than a mechanism for a more critical analysis of border policing policy. After a month of hastily planned and often haphazard consultations, the panel published its report on 13 August 2012 (Expert Panel on Asylum Seekers 2012). The report contained 22 recommendations, the most significant of which were: an increase in the annual humanitarian resettlement programme to 20,000, including doubling the allocation of refugees to 12,000 (recommendation 2); legislation to support the transfer of people to regional processing arrangements to be introduced into

the Australian Parliament as a matter of urgency (recommendation 7); capacity to be established in Nauru and Papua New Guinea as soon as possible to process the claims of transferred asylum seekers (recommendations 8 and 9); further development of the agreement with Malaysia (recommendation 10); preventing those arriving through irregular maritime means accessing family reunion through the Special Humanitarian Program (recommendations 11 and 12); amending the *Migration Act 1958* to excise the Australian mainland from the migration zone (recommendation 14); and developing more effective strategies to facilitate removals and returns (recommendation 16).

The main principle underpinning the report was that asylum seekers would gain “no advantage” by “circumventing regular migration arrangements” (recommendation 1). Although the full implications of the principle were not spelt out, it clearly was meant to operate as a deterrent to refugees undertaking risky boat journeys. However, this was to be achieved through systematically punitive measures.

Virtually all the submissions to the Expert Panel, including by some Labor Party members, opposed a return to offshore processing (Rothfield 2013). An open letter to Prime Minister Gillard, signed by the main NGOs expressed concerns that the proposed changes would:

- Repeal the few human rights protections included in the offshore processing legislation passed in 2001.
- See any country designated for offshore processing, regardless of whether it is a party to the Refugee Convention.
- Punish asylum seekers who arrive by boat in breach of the Refugee Convention.
- Implement a return to assessing asylum applications in Nauru and Manus Island, ignoring past lessons regarding the mental health impacts of holding people indefinitely with limited freedom of movement.
- Facilitate the removal of child asylum seekers from Australia.
- Facilitate the transfer of unaccompanied minors who will have no guardian to act in their best interests, in breach of the Convention on the Rights of the Child.
- Prevent IMAs (Irregular Maritime Arrivals), whatever their age, from proposing family members for the Special Humanitarian Program (SHP), creating greater incentive for families who want to stay together to travel by boat to Australia.
- Leave open the possibility that boats may be turned back in the future, contravening the Convention for the Safety of Life at Sea (bullet points in original).²¹

The government took little heed of such criticisms. As noted above, within days an agreement was struck with the Coalition to pass legislation enabling offshore processing and the transfer of those arriving after 13 August 2012.²² In signing the legislative instrument designating Nauru to be a regional processing country, Immigration Minister Bowen declared it was in Australia's national interest, *inter alia*, because Nauru has given assurances that it would not breach the refoulement provisions of the Refugee Convention; that claims for asylum would be assessed in accordance with the Convention; and that designating Nauru "will discourage irregular and dangerous maritime voyages and thereby reduce the risk of loss of life at sea".²³ With the loosely formulated no advantage principle now the defining feature of the new policy, the view expressed by Labor's previous Immigration Minister Chris Evans that "[T]he Pacific Solution was a cynical, costly and ultimately unsuccessful exercise"(MIAC 2008), was quietly discarded.

"No Advantage" in Practice: The New Regime

While no advantage provided a simple slogan for the government's television advertising campaigns directed at asylum seekers such as: "Australia by boat? There is no advantage",²⁴ there was a lack of clarity about the full implications of the principle. According to then Immigration Minister Bowen, "the principle is that you will not receive a permanent visa [for resettlement into Australia] until you would have under regional processing arrangements" (ABC 24 2008). The Coalition suggested this should be a term of at least five years (Maley 2012) but as UNHCR advised the government in September 2012:

The practical implications of this are not fully clear to us. The time it takes for resettlement referrals by UNHCR in South-East Asia or elsewhere may not be a suitable comparator for the period that a Convention State ... should use. Moreover, it will be difficult to identify such a period with any accuracy, given that there is "average" time for resettlement ... Finally, the "no advantage" test appears to be based on the longer term aspiration that there are, in fact, effective "regional processing arrangements" in place.²⁵

Whatever no advantage meant, the government was intent on ensuring that those arriving by boat were subjected to inordinate delays in having their claims processed. As I discuss below, it also reflected a regime of forced transfers, bridging visas and the mass screening out of Sri Lankan applicants. These discriminatory measures failed to have a short-term deterrent impact. Between 1 September 2008 and 30 June 2013, approximately 44,250 asylum seekers arrived by boat.²⁶ However, the numbers spiked after 13 August 2012 with 19,048 arriving between

then and 24 May 2013,²⁷ with a considerable growth in the number of family groups driven largely by the new restrictions on family reunion.

Forced Transfers

Forced transfers to Nauru commenced on 14 September 2012 and to Manus Island on 21 November 2012. Transferees were treated little better than criminals. One of the women transferred recalled:

At 6.30 in the morning they came to take us to a “meeting”. I didn’t have time to brush my hair or change my sleeping clothes. We were taken to a room where there were a large number of Serco officers. They were big, muscular men who looked intimidating, carrying sticks and spray. They were different to the officers we had come to know at Christmas Island. They told us nothing, but did body checks and then put us on a bus. (cited in Bacon 2013)

Another woman wrote:

We were not allowed to see any of our friends to say goodbye. I was asked if I had any fears about going to PNG, I replied I was very scared about this ... [I was] searched again, even under my tongue, my hair, behind my ears, our belongings were packed. We never returned to our room ... Our property was not treated with respect. Clean things were thrown in with dirty things. Some items, important to us, were lost, and never arrived in PNG. (cited in Bacon 2013)

As at 27 May 2013, 430 asylum seekers were detained on Nauru and a further 61 had agreed to “voluntary” removal to their country of origin. On Manus Island, 302 transferees were detained and two had agreed to “voluntary” removal.²⁸ Arrangements for processing applications were not put in place with the same speed as the recommissioning of disused detention sites. Refugee status determination commenced on Nauru on 19 March 2013. By the time of the election, processing had not commenced on Manus Island nor had any decisions been made on the Nauru applications. There was also a backlog of at least 5,000 claims lodged prior to the 13 August 2012 cut-off for the new arrangements²⁹ and profound uncertainty about future resettlement prospects, given the agreements with PNG and Nauru signed in July 2013.

Bridging Visas

Notwithstanding the shift to offshore processing, the lack of facilities on Nauru and PNG ensured the majority of unauthorized refugees remained in Australia. The overcrowding in the Christmas Island and mainland immigration detention centres had already prompted the government to commence the phased release of detainees into the community on bridging visas in November 2011 (MIAC 2011).

In May 2013, the government further announced that all families with children under 16 would be released into the community (ABC News 2013b). Those who arrived by boat were therefore subject to a range of detention measures, depending partly on the timing of their arrival. Of the approximately 39,500 to arrive between 1 September 2008 and 30 April 2013, 8,300 were in detention; 2,800 were in community detention; and 10,300 were living in the community on bridging visas. The remainder were either in regional processing centres; had been removed to their state of origin; had been imprisoned; or were deceased.³⁰

Those who arrived after 13 August 2012 and were released on bridging visas into the community were still subject to the no advantage principle. This meant that they were ineligible for normal welfare benefits; instead, they received a special assistance payment based on 89 per cent of the unemployed benefit rate. More importantly, they did not have the right to work. As of 30 April 2013, over 5,000 people were in this position³¹ – virtually destitute, with little means of support and facing the prospect of waiting years to have their protection claims processed.

Screening Out

The post-August 13 spike in arrivals was characterized also by a considerable increase in the numbers arriving from Sri Lanka. Over 3,000 arrived between August and October 2012, compared to 16 for the same period in 2011.³² In April 2013, 66 even managed to make it to the mainland port of Geraldton in Western Australia (ABC News 2013a). In October 2012, the immigration department introduced a system of “enhanced screening” for Sri Lankan boat arrivals, including children. Under this process, Sri Lankan nationals were interviewed within days of arrival. They were asked about their reasons for travelling but not specifically about the substance of any asylum claim. Explanations such as seeking work or seeking a better life – entirely rational responses to persecution, could be interpreted as having no claim. Interviewees were not told they were able to request legal advice; those that did request it were provided with a telephone book, a telephone and, if necessary, an interpreter. The decisions of the interviewing officers were reviewed by a senior officer but rarely overturned. By 27 May, 2,596 were screened through this opaque process and 965 removed, mostly against their will.³³

The Labor government was committed to propagating an official culture of disbelief in relation to Sri Lankan asylum claims. They maintained close relations with the Sri Lankan regime and declined to support calls for investigations into possible Sri Lankan government war crimes (Evans 2012). The establishment of a screening process specifically for Sri Lankans reportedly occurred following pressure from the prime minister’s office (Cooper 2013). Moreover, Labor government ministers made several public statements questioning whether there were grounds for Tamils and others to continue to claim protection, and

sustained a narrative that these are primarily economic migrants, whose increased numbers are due entirely to the activities of smugglers (MTP 2013). In December 2012, Foreign Minister Bob Carr held high-level discussions with Sri Lankan government ministers designed to increase naval cooperation, intelligence sharing and the policing of smuggling operations (MFA 2012).

By contrast, the Labor government undertook no monitoring of those removed despite returnees routinely being arrested for the criminal offence of leaving Sri Lanka without official documents (Doherty 2012), reports of individual returnees being tortured (Ewart 2013) and evidence from organizations such as Amnesty International of ongoing human rights abuses (Amnesty International 2013; Human Rights Watch 2013).³⁴ Instead, the imagined deterrent impact of removal was emphasized. Thus, announcing the decision to return 38 of the Geraldton arrivals in April 2013, Immigration Minister O'Connor stated, no doubt with an eye to the domestic audience:

Returning this group to Sri Lanka sends the powerful message that people who pay smugglers are throwing their money away and risking their lives in the process ... There is no fast track to Australia ... if they do not engage Australia's protection obligations, they will be returned home (MIAC 2013).

Offshore Detention

Under the original Pacific Solution, the offshore detention centres were widely condemned as sites of organized human rights abuses, particularly in relation to the physical and mental health of detainees (Grewcock 2009: 152–241). There was little reason to believe the experience would be different the second time around. Detention on Nauru and Manus Island under the no advantage principle immediately translated into an indefinite period in limbo with limited access to lawyers, the media and civil society. As sovereign nations, both Nauru and Papua New Guinea are outside the jurisdiction of the Australian Human Rights Commission (AHRC) even though the centres are funded by and operate at the direction of the Australian government. An amendment to the *Migration Act 1958* proposed by the Greens in May 2013 to enable the AHRC the same access to Nauru and Manus Island as it has to mainland detention centres was opposed by both Labor and the Coalition.³⁵

Media access was similarly restricted. After being refused official access by the Nauru government following intervention by the immigration department in Canberra, the ABC's *Four Corners* programme was only able to obtain footage of the centre with the assistance of disaffected centre staff and hidden cameras in April 2013 (Whitmont and Cohen 2013). SBS's *Dateline* programme encountered

similar difficulties, including threats from local police and security staff, when it attempted to access the Manus Island Centre in May 2013 (Davis 2013). Nevertheless, and notwithstanding restrictions on internet access imposed as a result, detainees managed to publish online some accounts of the conditions in the camps and a handful of independent observers were allowed access.³⁶

These accounts raised immediate concerns about the lack of infrastructure and the high-risk environment. There were few permanent facilities on Nauru when the transfers began in September 2012. After visiting the temporary camp operated by the Salvation Army and Wilson Security in November 2012, Graham Thom of Amnesty International wrote:

For people seeking our protection, the accommodation is totally inappropriate. There were 14 men sharing large tents, and five in smaller tents where there was little room inside to do anything but attempt sleep. The oppressive heat and humidity made staying in the tents during the day impossible and when it rained, tents leaked forcing men to sleep on soaking beds. They showed us painful skin conditions caused by the heat and damp. On average, 85 people a day visit the medical facility. (Thom 2012)

Facilities on Manus Island were equally deficient, especially given the PNG government had not agreed to permanent construction on the site when transfers began. In December 2012, a group of detainees complained to the immigration department: “People are being bitten and have sores all over their arms and legs ... Water [is] not hygienic [and] not [of a] high quality standard. [We have] run out of water” (cited in Hall 2013a). In February 2013, UNHCR’s regional representative described the conditions as “harsh, hot, humid, damp and cramped” (cited in Santow 2013). A doctor at the site complained to *Four Corners* about the “[h]eavy rain, no air conditioning and ... and when it rained a faecal smell of inadequately ... drained sewage effluent” (cited in Whitmont and Cohen 2013). The same programme reported that: “Nearly 200 men have spent four of five months in these tents. There’s no privacy, the ground is often flooded and the camp has to be constantly sprayed, called ‘fogging’ to keep away mosquitoes. There’s often no power, and or no water” (cited in Whitmont and Cohen 2013).

In March 2013, an immigration department submission to the Parliamentary Committee on Public Works argued that the need for a permanent facility on Manus Island was underlined by the “problematic living arrangements and limited amenity” in the temporary centre; “health and well-being risks given the climatic conditions”; “limited recreational facilities”; “a potential for increased tension and problematic behaviour”; and “inefficient processing” (DIAC 2013: 8). It also noted:

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Manus Island infrastructure is generally old, requires modernisation and does not meet Australian standards, current safety requirements, building or environmental standards. There is no town sewerage system, power is intermittent, there is no public waste collection or control, road maintenance is occasional, and port and harbour facilities are limited. (DIAC 2013: 12)

In its submission to the same committee, the AHRC restated its opposition to offshore processing but outlined the necessary human rights standards that should apply to the construction of a permanent facility (AHRC 2013). Similarly, Paris Aristotle, a member of the Expert Panel that recommended offshore processing, stated that the centre should be shut down if it did not comply with “international obligations” (Lateline 2013).

The inadequate medical facilities and lack of provision for children generated the most criticism of the Manus Island facility. The UNHCR condemned the regime for children as inadequate, complaining particularly that they “have been sighted far too close to single males” (Santow 2013). In February 2013, Greens Senator Sarah Hanson-Young released drawings done by some of the 34 children in the camp showing “high wire fences and children helplessly standing beside their weeping and prostrate mothers” (Hall 2013b). Medical professionals complained of the inadequacy of the medical facilities. One doctor explained that he asked for supplies of “oxygen, antibiotics, bladder catheters, suckers, tracheostomy equipment, anaesthetic agents, sedatives, morphine, ketamine ... and these things didn’t arrive.” He was concerned that “(w)e had very little in the way of paediatric equipment ... and worst of all this established 24 hour delay between calling for a medical evacuation by air and the plane arriving and getting the sick person out is just too long for kids.” He voiced “alarm” when realizing that “among the first arrivals were a severely anaphylactic young boy and a nine year old girl with anaemia and a reported history of blood transfusions” and “a young woman with ureteric and kidney stones on both sides” (cited in Whitmont and Cohen 2013).

Detention, Abuse and Resistance

While the physical amenities of detention centres are plainly lacking, it is the indefinite nature of immigration detention, the uncertainty of the determination process and the constraints on individual liberty that make detention inherently abusive. For many refugees, detention compounds the trauma of war and persecution. A Salvation Army worker on Nauru described the impact on an Afghan refugee of the news that two bomb blasts killed hundreds of Hazaras in Pakistan in January:

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He was laying on the floor in a foetal position. He couldn't control his bowels. I think of a crazy person who cannot control himself who has no power over his actions then I'm thinking of him. I think back about people in a mental asylum who have no will of their own, who have no control. (cited in Whitmont and Cohen 2013).

There is extensive evidence that for over 20 years, Australia's mandatory detention processes have caused high levels of stress, mental illness and self-harm across the detention network. Methods of self-harm typically have included body slashing, swallowing razor blades, drinking washing powder, overdosing on medication, hangings and digging mock graves (Grewcock 2009; Commonwealth Ombudsman 2013). By June 2013, there were at least a dozen serious suicide attempts, including multiple attempts by three individuals, on Nauru and Manus Island.³⁷ A nurse who worked in the Nauru detention centre health clinic recalled:

The very first night that I was on duty there ... there was a person who attempted to hang himself, and it finished up this poor soul was crawling on the floor like an animal looking at me saying please let me die, and that made a big impression on me. (cited in Whitmont and Cohen 2013)

However, self-harm and suicide can reflect more than just victimization. The personal despair voiced by detainees often reveals a profound tension between defeat and defiance. Saeed, a detainee who attempted suicide on Nauru in late November 2012, posted online:

What is the meaning of attempting suicide. I am not hopeless but this is the last stage of objection because of the worst condition and unjust law of Australian Government. Attempting suicide is not easy because man loves himself too much as compared to the rest of the things of the world.

In Nauru Australia has not open [sic] a detention center but they have opened a slaughter house.

I am not hopeless from life the worst conditions [sic], bad situation of Nauru detention center and unjust law of Australia compels me to attempt suicide.

We hope from the Australian government that they will treat all the asylum seekers the same.

Please save our lives and future and not let us go crazy. Take us back to Australia.³⁸

Another Nauru detainee asked:

Why did I burn myself? Well I felt sad and mad. I didn't know what to do. So I felt like I was going to stay here for life or something.

You see many guys here do suicide or hurt themselves, just because they don't want to harm others. They just harm themselves because of bad situation, or because they show – they want to show their feelings. (cited in Whitmont and Cohen 2013)

The resort to self-harm on Nauru and Manus Island added to the many acts of resistance mounted by detainees since the late 1990s to Australia's abusive detention practices (Grewcock 2012a, 2012b). These have ranged from the deeply personal to the overtly political with refugee agency necessarily constrained and shaped by the circumstances of detention. Within days of the first transfers, protests were taking place on Nauru. Some of these took the form of conventional political protests, such as demonstrations where banners bearing slogans such as "We are not criminals", "Nauru the same as Guantanamo", "Close Nauru" and "Freedom" were raised.³⁹ A number of detainees wrote letters to the Australian government demanding, *inter alia*, the commencement of processing, proper medical care, inspections by human rights monitors, access to the media and better camp facilities.⁴⁰ A website⁴¹ was established on which Nauru detainees posted messages, although this was subject to periodic censorship from the camp authorities, who used internet restrictions as a form of sanction against protests (RAC 2012a). In January 2013, Manus Island detainees were deprived of all internet access and phone contact for three days after posting online the first publicly available pictures of the centre (Riemer 2013).

However, hunger strikes quickly emerged as the core method of protest. In September 2012, a prolonged hunger strike commenced on Nauru that at one stage reportedly involved approximately 300 people.⁴² One Iranian asylum seeker, Omid Souresheh, declared:

I will not stop my hunger strike until they transfer me back to Australia or I will die here [on Nauru]. What is the difference between me and others who come [to Australia] after 13th August [and who will] be given bridging visas and be released to Australia. But me and 399 more must stay here in a very bad situation. (cited in RAC 2012b)

Omid's strike was replicated by others. In November 2012, an immigration officer on Nauru wrote a case note revealing: "six ropes, shaped as nooses were found inside a client tent ... A cardboard cut-out of a person was displayed hanging outside the tent." Five mock graves were found in the recreation area and written on a table, "Hunger strike till we die. Freedom of death [*sic*]" (Hall 2013c). Repeating a pattern seen in mainland centres for many years, some of those on hunger strike symbolically stitched their lips. One camp worker described how:

They had needles, which they got from somewhere and they, they put the needles through their lips and some of them pulled their lips tight so they couldn't drink or eat or talk in any shape or form. Now others they left small gaps so they could drink with a straw and they could mumble ... and when they were mumbling their thread cut into their flesh, yeah. I ... have problems talking about it. (cited in Whitmont and Cohen 2013)

Some also self-harmed while on hunger strike. Omid Souresheh reportedly cut his neck and arm after 42 days.⁴³ Another cut his neck after refusing food for 27 days.⁴⁴ A sense of the atmosphere inside Nauru at that time was given by one detainee in late November 2012:

Things are really bad over here. People have been separated and checked regularly, threatened and sometimes roughed up/beaten. Some are self-harming, others suicide, others yelling overnight in tents ... It's horrific. People are at their wits ends. Some are hallucinating. They also call in the police regularly for no apparent reason. My own behaviour is out of my control now. They woke everyone up two nights ago at 3am for a head count I have not been this humiliated in my life. The situation has to be seen to be believed. The police presence is to apparently stop further suicide attempts, yesterday someone hanged himself in the laundry, and chaos followed. 5 people have now been quarantined and they are not allowed to speak to anyone, they are not allowed to see anyone. We have no news whatsoever from Omid.⁴⁵

As Omid's strike reached its final stages, detainees wrote an open letter:

His body getting paralysed and the internal function of his body is going to stop soon. He is in extreme stage of internal bleeding. He has let the security and medical staff know that his death bring all of them to the court of justice. The Nauru hospital doctor staff had observed and analysis him [sic]. They found out that it's late to treat him. They reject him to be admitting in hospital [sic]. They left him in the tent in the hand of God ... Is this the object of killing him to teach the others to stop the hunger strike? No we commit that the death of Omid will drag more asylum seekers to choose the same way. The bitter reality of Nauru's detention centre will shock the world.⁴⁶

Omid refused food for 52 days, by which time he was suffering kidney failure and was described by a nurse witness as looking "like somebody in the end stages of cancer ... he was totally wasted away" (cited in Whitmont and Cohen 2013). He was then secretly flown to Brisbane, where his condition was stabilized before being returned forcibly to Nauru five weeks later (Hall 2012; Packham 2012).

Omid's desperate act of personal resistance was an attempt by an individual detainee over whom the state had assumed physical control to at least seize control of his body. As a form of protest, there are clearly limits to this – death or permanent incapacity is poor measure of success. Moreover, the Gillard government was willing to make a tactical decision about whether he should be allowed to die. Once Omid had almost passed the point of no return medically, when his personal agency was reduced virtually to an abstraction, the authorities publicly made a point of reviving him so he could be returned as an example of their resolve.

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Whether or not this acted as any form of deterrent, the Labor government's response to detainee resistance amounted to a form of institutional denial (Cohen 2001) that sought to portray the victims of its policies as manipulative and self-serving. A range of government ministers and immigration officials condemned the hunger strikes. Prime Minister Gillard declared: "It doesn't get you anywhere. The only thing that happens for people in our asylum seeker facilities is there is a proper assessment of whether or not they are a genuine refugee" (Hall 2013d). Gillard's response was somewhat disingenuous given that no processing of claims had commenced on Nauru at the time. Nevertheless, her intransigence disclosed a willingness to enter into an endgame in relation to hunger strikes and suicides that had almost fatal consequences for Omid Sorousheh.

The treatment of Omid Sorousheh reflected the uniformly punitive responses to detainee protests. These ranged from internal camp sanctions imposed by camp operators to criminal charges. Following one protest on Nauru in September 2012, 10 detainees were charged with riot and wilful damage. In defending the charges, the detainees effectively mounted a constitutional challenge to the validity of indefinite detention on Nauru (Wilson 2013) and at the time of writing, the outcome of these cases was unknown. However, if the men are convicted, recent amendments to the *Migration Act 1958* enable the immigration minister to deny them protection visas.⁴⁷ This does not mean they can lawfully be refouled if they are otherwise found to be refugees,⁴⁸ but it does mean they can be stranded indefinitely if they are not resettled.

The Failure of Deterrence

Labor's dismal reprise of offshore detention highlighted the underlying contradiction within a border policing policy focused on deterrence that assumes a degree of agency and personal choice; and measures designed to strip refugees of any decision-making not considered legitimate by the state. This contradiction is rooted in the Western construction of the refugee as someone whose legitimacy can only be bestowed by the receiving state. Rights to move and engage with civil society are not vested in the refugee. Forced migrants are not just compelled to flee their immediate sources of danger and persecution but are also expected to travel on terms set by receiving and transit states. Within this paradigm, deterrence is construed as an imperative that protects the monopoly of receiving states over what constitutes a legitimate refugee (Grewcock 2009).

In the Australian context, this means instituting a policing regime that forcibly denies refugees' decision-making outside of passive compliance with capricious resettlement processes. For over 20 years, that regime has operated along a continuum that includes mandatory detention, forced transfer, offshore processing

and removal. For the successive Australian governments, the imperatives to corral, detain, restrain, forcibly move and otherwise restrict the movements and decision-making capacities of refugees supersede any other formal or ideological commitments to human rights.

Moreover, the Labor government's willingness to abandon formal human rights commitments in the wake of the High Court's decision on the Malaysia Plan, and to push ahead with detention centres on Nauru and Manus Island in the knowledge that systemic harm to refugees would result, reflected the government's determination to neutralize meaningful free choice by refugees. Under Labor's regime, refugees were not entitled to identify themselves by arriving in Australia and claiming their rights to determination under international law. Instead, they were punished for not making choices approved by the Australian state.

The failure of the punitive measures deployed by the Labor government to significantly deter refugees migrating into the region should be understood as a form of rational choice rather than inherent refugee deviance. Refugees must exercise choice on their own terms in order to be refugees. The choices inevitably are constrained by the conditions from which they are fleeing but if refugees lose all capacity to choose, they remain where they are – vulnerable, prone to victimization and without refuge. This is the existential reality for the refugee that the dominant border policing paradigm denies – a social world characterized by an absence of official queues, orderly migration processes and personal security. In these circumstances, the escalation of border policing reinforces the resort to informal means of travel requiring non-compliance, illicit arrangements and the necessary use of smugglers. As the spike in boat arrivals after 13 August 2012 demonstrated, for refugees, restrictions imposed by states such as Australia are obstacles to overcome, not deterrence.

Conclusion

It remains to be seen whether the numbers arriving by boat decline in the medium term. However, any decline ought not to be conceived as a validation of deterrence. Even before the election, the revised Pacific Solution had failed in its own terms. A measure of this failure came in early June 2013 when another boat sank near Christmas Island, with a loss of up to 60 lives (O'Brien et al. 2013). The boat had been spotted over two days before but no attempt was made to rescue those on board. Instead, priority was given to intercepting other boats that might be in the area, even to the point where after the boat sank, the Australian authorities declined to retrieve the 13 bodies that were found (Jabour 2013).

The gratuitous cruelty of this response – it is inconceivable that passengers aboard a stricken cruise liner would be treated in the same way – underlined

Labor's myopic focus on preventing boat arrivals and belied its rhetoric about safety at sea. However, it should not be assumed that there was hegemonic support within the community for this approach or that there is something peculiar to Labor's traditional working-class constituency that pushed Labor in this direction. While there is a strong undercurrent of xenophobia in Australian politics that has often come to the surface in the debates surrounding refugees (Grewcock 2009), there is little evidence to support the proposition that border policing was crucial to defining attitudes towards the Rudd and Gillard governments. Rather, it seems that as the government's popularity declined, the more determined it became to elevate border policing as an issue. An indication of this was provided by the Australian Broadcasting Commission's "Vote Compass" programme established during the federal election campaign.⁴⁹ Findings based on 250,000 respondents (over 500,000 entered data) indicated that nearly 30 per cent of people identified the economy as the most important issue of the election campaign. Approximately 13 per cent identified asylum seekers, but given this included potentially people who voted for the Greens on the basis that they opposed key elements of current policy such as mandatory detention and offshore processing, it cannot be assumed that public attitudes are either uniform or inherently hostile to refugees.⁵⁰

There is little to suggest following the election that Labor has any appreciation of such nuances or inclination to break from its established approach. Instead, it remains locked within a dynamic of its own making, trying to outbid the Coalition as the most effective opponent of people-smuggling, but with no coherent explanation for why boats continue to come. As a result, Labor remains central to an institutional response to refugee movements that amounts to state crime. The processes of alienation that delegitimize refugees and reduce them to the status of illegal, rightless outsiders; criminalize them through detention and their association with people-smugglers; and punish and abuse them for travelling in breach of increasingly restrictive border controls, are inherent to Labor's strategy.

However, forced migration is a complex phenomenon that cannot be policed out of existence and it is possible for Australian governments to take a different approach. Despite its limitations, resettlement does offer an alternative to the enormous human and financial costs of policing unauthorized boats. The enormous resources devoted to offshore processing could fund a significantly expanded resettlement programme and facilitate safe travel to Australia for those stranded in the region seeking protection. The resources devoted to maintaining detention centres could be used to support refugees in the community. This necessarily will require a sharp break from the dominant deterrence paradigm and a willingness to open the borders to those seeking protection under the 1951 Refugee Convention. It will also save lives; prevent systemic abuse; and acknowledge the humanity and rights of refugees.

Notes

1. See Transcript of Joint Press Conference, 19 July 2013, available at: <http://www.pm.gov.au/press-office/transcript-joint-press-conference-2>; and Regional Settlement Arrangement between Australia and Papua New Guinea, available at: <http://www.dfat.gov.au/issues/rra-png.pdf>.
2. See Transcript of Joint Press Conference, 3 August 2013, available at: <http://www.pm.gov.au/press-office/transcript-joint-press-conference-3>.
3. Department of Immigration and Citizenship information sheet, available at: <http://www.immi.gov.au/visas/humanitarian/novisa/byboatnovisa.pdf>.
4. Temporary protection visas (TPVs) were first introduced by the Howard government in 1999 and abolished by the Labor government in 2008. On the impact of TPVs during the Howard government, see Leach and Mansouri (2004). They were reintroduced in October 2013 through the *Migration Amendment (Temporary Protection Visas) Regulation 2013*. In December 2013, the Greens and Labor used their combined majority in the Senate (which they hold until June 2014) to disallow the regulation (*Senate Hansard*, 2 December 2013, at 106). The immigration minister responded by freezing the issue of any further protection visas until 30 June 2014 (IMMI 13/156, issued pursuant section 85 *Migration Act 1958*, 2 December 2013). The impact of this decision was that some 33,000 refugees awaiting decisions on their protection claims would remain either in detention or in the community on bridging visas.
5. See <http://www.baliprocess.net/>.
6. Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement, 25 July 2011.
7. Arrangement between the Government of Australia and the Government of Malaysia, Annex A.
8. *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32.
9. Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011.
10. Migration Legislation Amendment (The Bali Process) Bill 2012.
11. *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*.
12. Memorandum of Understanding Between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues, 29 August 2012.
13. Memorandum of Understanding Between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to and Assessment of Persons in Papua New Guinea, and Related Issues, 8 September 2012.
14. *Schedule 1, Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*.
15. *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013*.
16. Prime Minister and Minister for Immigration, Transcript of press conference, Canberra, 28 June 2012, http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/2048153/upload_binary/2048153.pdf;fileType=application%2Fpdf#search=%22media/pressrel/2048153%22 (accessed 1 December 2013).
17. Migration Legislation Amendment (The Bali Process) Bill 2012.
18. Prime Minister and Minister for Immigration, Transcript of press conference, Canberra, 28 June 2012, as cited above.
19. Prime Minister and Minister for Immigration, Transcript of press conference, Canberra, 28 June 2012, as cited above.
20. Prime Minister John Howard, Coalition Election Policy Speech, 28 October 2001, <http://australianpolitics.com/2001/10/28/john-howard-election-policy-speech.html>. (accessed 1 December 2013).
21. Letter to Prime Minister Gillard, 15 August 2012, circulated by Asylum Seeker Resource Centre. Copy in author's possession.

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22. *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012.*
23. *Instrument of Designation of the Republic of Nauru as a Regional Processing Country Under Subsection 198AB(1) of the Migration Act 1958, para 13.*
24. See http://www.immi.gov.au/managing-australias-borders/border-security/irregular-entry/no-people-smuggling/_pdf/no-advantage-brochure-english.pdf (accessed 1 December 2013).
25. Letter of Advice from United Nations High Commissioner for Refugees to Minister for Immigration and Citizenship of Australia, 5 September 2012, <http://unhcr.org.au/unhcr/images/120905%20response%20to%20minister%20bowen.pdf> (accessed 1 December 2013).
26. Martin Bowles, Opening statement to Legal and Constitutional Affairs Committee, Supplementary Budget Estimates Hearing, 19 November 2013.
27. Senate Legal and Constitutional Affairs Committee, Budget Estimates Hearing, 27 May 2013. Unless otherwise stated, statistics are drawn from information provided by the Department for Immigration and Citizenship to the Senate Legal and Constitutional Affairs Committee, 27–29 May 2013.
28. Senate Legal and Constitutional Affairs Committee, 27 May 2013.
29. Senate Legal and Constitutional Affairs Committee, 28 May 2013.
30. Senate Legal and Constitutional Affairs Committee, 27 May 2013.
31. Senate Legal and Constitutional Affairs Committee, 28 May 2013.
32. Senate Legal and Constitutional Affairs Committee, 28 May 2013.
33. Senate Legal and Constitutional Affairs Committee, 28 May 2013.
34. In September 2013, shortly after the Coalition returned to office, the United Nations High Commissioner for Human Rights called on the Sri Lankan Government to institute a “credible” national inquiry into human rights violations (Alberici 2013).
35. Proposed amendments to Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, *Commonwealth Hansard*, Senate, 16 May 2013, sheets 7349, 7350 and 7383.
36. Shortly after the 2013 federal election, UNHCR conducted a monitoring visit to Nauru and concluded that the processing regime constituted arbitrary and mandatory detention; did not provide a fair, efficient and expeditious system for assessing claims; did not provide safe and humane conditions of treatment in detention; and did provide for adequate and timely solutions for refugees (UNHCR 2013).
37. This is a very conservative estimate based on reports from the Refugee Action Coalition, <http://www.refugeeaction.org.au/>; and private communication with refugee advocate, Ian Rintoul, 10 June 2013.
38. Posted on the Nauru refugees’ website, 1 December 2012, <https://naururefugees.wordpress.com/2012/12/01/saeed-speaks-out/>.
39. See photos posted at <http://www.refugeeaction.org.au/?p=2165>, 28 October 2012; <http://www.refugeeaction.org.au/?p=2159>, 28 October 2012; and video footage posted at <http://www.smh.com.au/opinion/political-news/we-want-justice-view-from-nauru-20121121-29q24.html>, 21 November 2012.
40. For example, a letter dated 17 October 2012 signed by over 150 detainees. Copy in author’s possession; “Latest statement from Nauru refugees”, 29 October 2012, <http://www.refugeeaction.org.au/?p=2184>.
41. See <http://naururefugees.wordpress.com/>; and the Facebook site: <http://www.facebook.com/ASYLUMSEEKERSINNAURU>.
42. “Nauru hunger strike drags on”, *ABC News*, 7 November 2012, <http://www.abc.net.au/news/2012-11-07/nauru-hunger-strike-drags-on/4358490>.
43. Nauru Website post, 22 November 2012, <http://naururefugees.wordpress.com/2012/11/page/4/>.
44. Nauru Website post, 28 November 2012, <http://naururefugees.wordpress.com/page/14/>.
45. Nauru Website post, 30 November 2012, <http://naururefugees.wordpress.com/page/12/>.
46. Nauru Website post, 26 November 2012, <http://naururefugees.wordpress.com/2012/11/page/3/>.

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47. S. 501(6)(aa)(i) *Migration Act 1958*. For further discussion of this amendment, see Grewcock (2012a).
48. Article 1F(b) United Nations Convention on Refugees 1951 enables a State to refuse protection to a refugee who has committed a serious, non-political crime. The types of offences alleged against protesting detainees are very unlikely to fit into that category. See Gilbert (2003).
49. ABC Vote Compass, <http://www.abc.net.au/news/2013-08-09/vote-compass-data-results-important-issues/4872896> (accessed 3 December 2013).
50. The Greens polled approximately 8.4 per cent of the primary vote in the federal election.

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