Immigrant Nations: A Comparison of the Immigration Law of the United States and Australia

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In my immigration practice in the United States ('US'), my goal in almost every case, is to assist my clients in either living temporarily or permanently in the US. My clients are migrating to a new land, often with their families. They are experiencing new rewards and challenges in trying to be successful while adapting to a new culture, not to mention complex immigration legal hurdles. I have something in common with almost every one of them. I too migrated to a new land and encountered many of the same challenges. In 1974, when I was only four years old, my family emigrated from the US to Australia because my father found an excellent opportunity to teach swimming in Australia.1 The Australian government assisted us because it was also an opportunity for it to fill a needed occupation. Today, while I have long since returned to the US, and now work with clients migrating to the US, I reflect on the many similarities between Australia and the US and their immigration systems. Most notable about the two nations is that they are both 'immigrant nations'.

This article will first discuss the political, legal and cultural similarities between the US and Australia. Second, it will present a brief overview of the immigration system in Australia and discuss some of the major issues and trends in Australian immigration law. Third, an overview of US immigration law and current immigration issues will be discussed. These discussions on the structure of the Australian and US immigration law will provide an introductory understanding of the structures of the US and Australian immigration systems. Finally, a discussion will ensue on the similarities and differences between the two systems.

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1 See also: Dennis Laurence Caddy, The Yanks are Coming: American Immigration to Australia (1977).
Australia and the United States as Immigrant Nations

Social, Political and Historical Similarities

Both Australia and the US are termed 'immigrant nations' because the vast majority of what constitutes the populations in the current political entities of the 'Commonwealth of Australia' or the 'United States of America' are immigrants. These immigrants have just arrived in the respective countries over the last, at most, two to three hundred years. They are immigrant nations. As will be discussed below, this article uses the term 'immigrant nations' not only for purposes of analogy, but also to remind those participating in Australian or American immigration policy that when they think of the term 'immigrant', 'alien' or 'non-citizen', they should remember that they or their families, unless they are a Native American or an Aborigine or Torres Strait Islander, were at one time aliens, immigrants and non-citizens. They are not 'natives'.

Australia and the US have many common traits. They are both rooted in the colonialism of the British Empire. The US won its independence by revolution over two hundred years ago and Australia gained its independence by more peaceful means when it became the Commonwealth of Australia one hundred years ago. Australia is an independent Republic in many respects, although Queen Elizabeth II remains at the symbolic head of state. Therefore, both are very young nations almost made entirely of immigrant people who have travelled vast oceans and continents in search of these lands.

Australia and the US, with their British heritage, also have what is commonly referred to in the US as an 'Anglo-American' or common law system of government. Scores of immigrants have sought to

2 'Nation' is used in the common sense of the previous proposition, in that it refers to what constitutes the present political boundaries of these two countries. It should not be considered that they are really in fact new 'nations', because they are very old nations. The aborigines and Native Americans are very old nations of thousands of years, but they have long since vanished in terms of present political geographies. See discussion, Australian and US Removal of Indigenous Populations for New Immigrants, below.

3 For sources pertaining to the history of Australia, see C M H Clark, A History of Australia (1963); Stephen Henry Roberts, The Squatting Age in Australia, 1835-1847 (1935); Rex and Thea Rienits, A Pictorial History of Australia (1969); Agnes Moffat Learmonth, The Australians; how they live and work (1973).

4 And if heritage, legal structure and constituency are not enough, Australia and the US are also very similar in size and shape. The total area of the US (including the District of Columbia) is 9,372,614 km² (3,618,770 mi²), of which 1,700,139 km² (656,424 mi²) are in Alaska and 28,313 km² (10,932 mi²) are in Hawaii. The area of
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enter both the US and Australia for promising economic or professional opportunities. Others migrate from countries at war, to escape poverty or to flee persecution because of their ethnicity or religious beliefs. Many people from all around the world have yearned to travel to these new worlds and both nations have a history of continued immigration over their periods of existence. The US has the Statue of Liberty poised looking out over the Atlantic stating:

Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tossed to me.
I lift my lamp beside the golden door.

The Statue of Liberty faces out to the Atlantic, and was meant to greet the new immigrants as they passed by her shores, on into New York. The Commonwealth of Australia is an even a younger political entity at the edge of Asia whose Asian population is growing. Large minorities of not just Asians, but also Europeans, such as Italians and Greeks, and peoples from the Middle East such as Lebanese and now, Iraqi, are also growing and are important and formidable portions of Australian demographics. The Minister of the Australian Depart-

the Australian continent alone is 7,636,233 km$^2$ (2,948,366 mi$^2$). Thus, if you subtract Hawaii and Alaska from the total area of the US, the US is 7,644,162 km$^2$ (2,951,414 mi$^2$); hence, Australia and the US are astonishingly almost the same size and they also have similarity in shape.

The US, Canada and Australia have been referred to as ‘major countries of immigration’. See R Katrina, ‘Gendered Aspects of Migration: Law and the Female Migrant’ (1998) 22 Hastings International and Comparative Law Review 47, 112, n 98). However, for the purposes of this article, only Australia’s and the US’ immigration systems are compared.

‘We were called racists, bigots, because anytime you play with immigration and your opponents run out of facts, they go immediately to the Statue of Liberty or Emma Lazarus’ poem, or ‘we’re a nations of immigrants‘. — a comment from a discussion at Suffolk University Law School in Massachusetts in Alan K Simpson, ‘Perspectives on Immigration and the Law’, (1998) 21 Suffolk Transnational Law Review 251, 255).

Earlier this decade and the previous decade, there were high rates of immigrants from Italy, Greece and Lebanon: ‘The highest rates of naturalization of immigrants in Australia for at least ten years (over 95%) are shown by people from Greece, Lebanon, Poland, Vietnam, and the Philippines’. Gianni Zappala and Stephen Castles, ‘Citizenship and Immigration in Australia’, (1999) 13 Georgetown Immigration Law Journal 288 citing Australian Bureau of Statistics, Australia in Profile (1993) 19. ‘The most common languages spoken [at home in Australia] were Italian (376,000), Greek (270,000), Cantonese (202,000), Arabic (178,000), Vietnamese (146,000), German (99,000), Mandarin (92,000), Spanish (91,000) and
ment of Immigration and Multicultural Affairs, Phillip Ruddock has stated that:

Australia is a country uniquely defined by its people, its land and its indigenous inheritance.

We have been able to build upon the richness and strengths of many cultures to create a nation of which we can all be justifiably proud. ... Our traditions of fair play and tolerance have given us a community as diverse in its origins, as it is united in its common humanity. ...

The National Multicultural Advisory Council, which I have appointed to ... is keen to ensure that our cultural diversity is understood as a unifying force for all Australians. ...

[Our culturally diverse society is not necessarily a common birthplace, but a common commitment to the things we value as a national community.]

Both Australia and the US are attractive nations for many of these immigrants because they are known to have much freedom, land resources, economic opportunities and diverse societies.

**Australian and United States Removal of Indigenous Populations for New Immigrants**

In the process of becoming new 'immigrant nations', the new immigrants of Australia and the US also both eradicated and assimilated the indigenous populations of their lands. The Aborigines and Na-

Macedonian (71,000). Id. at 276 citing Department of Immigration and Multicultural Affairs (Australia), Immigration Update: June Quarter (1997).

Currently, the highest immigrant levels appear to be coming from the following countries: Bosnia, China, Ethiopia, Croatia, Figi, Yugoslavia, Hong Kong, India, Indonesia, and Iraq. See Department of Migration and Multicultural Affairs, Settler Arrivals Table, Settler Arrivals by Selected Countries of Birth by Migration Stream for Financial Year 1998-1999, at *1, <http://www.immi.gov.au/statistics/statistical_tables/settlers/settab1pg1.htm> (2 September 2000).

8 Phillip Ruddock, Message from the Minister, ORAC, International Immigration Services, Ltd., Multicultural Australia, at *1, http://orac.co.nz/immigration/countries/Australia/Multicultural_Australia.htm> (3 September 2000).

9 Australia was promoted, in various forms of propaganda as an attraction for British migrants, as noted by Professor Michael Roe: 'Perhaps the best representative of Australian propaganda is Australia: The Land of the Better chance (1926). [These pamphlets'] title made its boast, amplified by an opening paragraph which spoke of 'infinite opportunity' in this rich and generous young country'. Michael Roe, Australia, Britain, and Migration, 1915-1940, A Study of Desperate Hopes (1995) 200.

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tive Americans that have survived, over time have been assimilated into the new cultures to make way for the new, predominantly European, immigrants.\textsuperscript{11} Ironically, the predominantly European immigrants,\textsuperscript{12} despite assimilating, performing ‘ethnic cleansing’ upon, or committing genocide upon the Australian and American native inhabitants, grew to become very protective against the immigrants who succeeded them. Subsequent immigrants,\textsuperscript{13} particularly non-white immigrants, were viewed as threats to the demographic or political stronghold of the new political entities of the US and Australia. Although the terms ‘genocide’\textsuperscript{14} and ‘murder’\textsuperscript{15} may seem too harsh or inappropriate for a discussion on immigration law, they are facts, which cannot be denied, and the issues are very relevant.

Native Americans and Australian Aborigines proliferated throughout the Americas and Australia, although, perhaps in most Australian and US history books,\textsuperscript{16} Australia and the US were described as being vast unpopulated expanses of land with rich resources that yearned for exploitation and ‘development’ by the colonists with perhaps some

\textsuperscript{11} For a discussion on the psychological consequences of emigrating to Australia, particularly for the British perspective, see Alan Richardson, \textit{British Immigration and Australia, A Psychosocial Inquiry} (1974). For a discussion on the sociological implications on second generation immigrants (not just the British), see Ruth Johnston, \textit{Future Australians, Immigrant Children in Perth, West Australia} (1972).

\textsuperscript{12} ‘International migration generally has continued along the lines established after the New World was discovered and certain European nations sought to extend their control there and to incorporate the vast new lands and their wealth into the imperial structure’. Brian Murphy, \textit{The Other Australia, Experiences of Migration} (1993) 60.

\textsuperscript{13} See ibid 58. ‘Immigration has become a parochial matter, it was seen usually as an intrusion into the existing scheme of things, a threat to the status quo of employment prospects and wage structures in which newcomers were takers rather than givers’.

\textsuperscript{14} Theodore Roosevelt mused that the extermination of the American Indians and the expropriation of their lands ‘was as ultimately beneficial as it was inevitable’. ‘Such conquests’, he continued in an evocation of Nietzsche’s ‘blond beast’, are ‘sure to come when a masterful people, still in its raw barbarian prime, finds itself face to face with the weaker and wholly alien race which holds a coveted prize in its feeble grasp.’ Hitler could not have put it better. Norman G Finkelstein, \textit{Image and Reality of the Israel-Palestine Conflict} (1995) 21.

\textsuperscript{15} Thomas Jefferson defensively declared that, if ‘constrained’ by the Indians resisting American expansion to ‘lift the Hatchet ..., we will never lay it down till the tribe is exterminated, or is driven beyond the Mississippi’. Ibid 106-7.

\textsuperscript{16} The ‘virgin land and wilderness’ image has, until very recently, dominated the historiographical literature on North America before European ‘settlement’. The first, crucial move was to reduce by perhaps as much as 90 per cent the actual population of North America in the pre-Columbian era, putting it at one million when the true figure is probably closer to ten million. Ibid 92.
natives living about. The natives were often described as being ‘warlike’ or ‘savages’ as opposed to the European colonists. However, vast numbers of Natives existed in these lands for thousands to tens of thousands of years and they were ‘developed’ nations. These ‘nations’ became victims of Western conquest and were subverted by their new, primarily, European masters. Only today, when the na-
tive populations are no longer a threat, are they romantically remembered. The US now has placed an Indian woman on their new dollar coin and it is politically correct to support and defend Native American exploitation on their reservations from the over-proliferation of gambling casinos and dumps for nuclear wastes (the Indians are so poor, monetary rewards from corporations seeking to dump nuclear wastes is very appealing). Australia now has its 'reconciliation process'\textsuperscript{20} with the Aborigines and it is becoming more politically correct to support Aboriginal rights.\textsuperscript{21} But again, natives are no longer a threat to the new political entities, natives are often glorified as romantic antiquities of the past, and both nations can now feel regret over their past crimes.

of Tasmania, from the severe and difficult climates of the central and western deserts, to the lush green abundance of the eastern seacoast ...

Australian Aborigines are perhaps the oldest known human culture. 'Traditional archeological evidence holds that Aboriginal culture has existed in Australia for 60,000 years, but more recent evidence indicates that the period is more like 120,000 to 150,000 years. The Aborigines rituals and beliefs and cosmology may represent the deepest collective memory of our race'. Ibid at 9.

The Australian government recently considered apologizing to the aborigines. In 1999, Reuters reported that 'Australia may finally apologize to aborigines taken away from their homes as children under a past government policy of cultural assimilation ... A 1997 Australian Human Rights Commission Report found that the policy was a form of 'genocide' and the so-called 'stolen generation' victims should be compensated'. Reuters News Service, 'Australia Government to Apologise to Aborigines' \textit{India Express Newspapers}, 24 August 1999, <http://www.expressindia.com/ie/daily/19990824/ige24007.html> 1-2. 'Under and assimilation policy which existed between the 1860s and 1960s, tens of thousands of mixed blood aboriginal children were removed from their parents and raised as white Australians'. Ibid.

\textsuperscript{20} The council for reconciliation, which acknowledges the 'many wrongs and injustices suffered by the Aboriginal and Torres Strait Islander peoples in the past continue today, flowing from their dispossession and dispersal from traditional lands', was established to promote true reconciliation between the Aborigines and Australia today. See Council for Aboriginal Reconciliation at <http://www.austlii.edu.au/au/orgs/car/media/reconciliationaustralia.htm> (7 August 2000).

\textsuperscript{21} See Reuters News Service, above n 19, 1-2. 'Australia may finally apologise to aborigines taken away from their homes as children under a past government policy of cultural assimilation...’ Ibid 1. 'Australia’s 386,000 aborigines represent 2.1 percent of the population, but are the most disadvantaged with a life expectancy almost 20 years less than the rest of the population'. Ibid. 'A 1997 Australian Human Rights Commission report found that the policy was a form of 'genocide' and the so-called 'stolen generation' victims should be compensated'. Ibid 1-2.
Remembrance for Past Crimes and Reflection when Developing Immigrant Policy

This article does not seek to dwell on some of the past crimes of Australia and the US. Rather, it seeks to comment on their positive aspects and utilise some of this tragic past in order to understand their ongoing immigration processes. Racism, genocide and ethnic cleansing, as it is now popularly called, are certainly not new phenomena, they have always been a significant issue in many of the major wars that have occurred and not surprisingly, they often raise their ugly faces in immigration law and rhetoric. Racism, genocide and ethnic cleansing exist on many scales in the world today.

22 'From the British in North America to the Dutch in South Africa, from the Nazis in Eastern Europe to the Zionists in Palestine, every conquering regime has invoked the same claim that the territory appointed for conquest was deserted'. Finkelstein, above n 14, 88.

23 The US, unfortunately is engaged in supporting forms of genocide indirectly for its own strategic and domestic political interests via political and financial support of Israel’s policies of ridding its territory of the Palestinians, despite the almost unanimous consensus of the international community that Israel’s occupation and settlement of the Occupied Territories is illegal. See, eg, Resolution Adopted by the General Assembly, 53rd Session, 76th plenary meeting 2 December 1998 <http://www.un.org/Depts/dpa/dpa/qpaj/je/-/html: 'Determines that the decision of Israel to impose its laws, jurisdiction and administration on the Holy City of Jerusalem is illegal and therefore null and void and has no validity whatsoever'). See also Israeli settlements in the occupied Palestinian territory, including Jerusalem, and the occupied Syrian Golan GA Res 53/55, 53 UN GAOR (Agenda Item 84), UN Doc A/RES/53/55 (1998), 1, <http://www.un.org/Depts/dpa/dpa/qpaj/je/-/html 'Reaffirms that Israeli settlements in the Palestinian territory, including Jerusalem, and in the occupied Syrian Golan are illegal and an obstacle to peace and economic and social development...'

Racism, genocide and immigration issues are not unique to the US, Australia, Canada, New Zealand and other former colonies. The only other comparable phenomenon of sudden migration into a land, while assimilating or displacing the indigenous population, is the situation of the new State of Israel, which too had the assistance of Britain. Britain played a role in the development of Israel and the immigration issues of the Jewish immigrants and the Arab emigrants. See, eg, Noam Chomsky, The Fateful Triangle, The United States, Israel and the Palestinians (1983). Professor Chomsky inter alia states: 'The Arabs of Palestine were overwhelmingly opposed to a Jewish state, or to large-scale Jewish immigration, which often led to their dispossession from their lands. They had not been consulted at any level in the preparation of European plans for the disposal of their homeland', 90. 'The opposition of the indigenous population to the Zionist project was never a secret. President Wilson's King-Crane Commission reported in 1919 that the 'Zionists looked forward to a practically complete dispossession of the present non-Jewish inhabitants of Palestine ...', 91. However, the situation is much different, despite some inconspicuous similarities, as well, the rate of immigration and emigration was perhaps much faster as is the alarming, high rate of indigenous displacement that is akin to genocide. Israel's actions during and
Tragedies are part of the human experience. It is important that we learn from them. It is indeed a fantastic concept that the US and Australia are becoming more and more ethnically diverse. The past should show Americans and Australians that these 'immigrants' are just like them. This does not mean that immigration should not be following the 1982 invasion of Lebanon were examples of the genocidal treatment of the Palestinians. See *Israel in Lebanon, The Report of the International Commission to enquire into reported violations of International Law by Israel during its invasion of the Lebanon* (1983) 194-198 (Lebanon Report).

One of the most serious allegations which can be made against a government is that it is either guilty of the crime of genocide or that its policies are genocidal in intent. The emotiveness of such an accusation, in the context of the invasion of Lebanon, is increased when it is recognised that the development of international rules and a moral sensitivity arose largely because of the experience of the Holocaust and the mass extermination policies of the Nazis towards racial or national groups.

The particular form of genocide applied to the Palestinians does not appear to be aimed at killing the Palestinians in a systematic fashion. It could be argued that if this was the intention, many more could have been killed. The specific form of genocide that can be said to apply is the adoption of all kinds of measures, short of killing, to destroy the Palestinian national culture, political autonomy and national will in the context of the Palestinian struggle for national liberation and self-determination.

The definition of genocide is not limited to the formula adopted by the United Nations in 1948. The legal concept of genocide is quite consistent with identifying policies designed to destroy the national culture, political autonomy and national will in the context of the Palestinian struggle for national liberation and self-determination. Lebanon Report, 194. It does provide a good example of what took place against the Native Americans and Aborigines of yesterday. Thus, today, one can see what took place in the US and Australia over the past two hundred years. Today approximately 3.5 million Palestinians are outside Israel in surrounding countries living in refugee camps and have been so for over fifty years, although they numbered ninety percent of the population in Palestine at the turn of the century and have lived there for 2000 years. See Finkelstein, above n 14, 21 Chapter 2, ‘A Land Without a People, *Joan Peter’s ‘Wilderness’ Myth*. ‘Settlers’ are settling the ‘wilderness’ of their land at alarming rates as the indigenous population, the Palestinians, look on from refugee camps and threats by the Israeli ‘Defense’ Force. See Finkelstein above n 14. Israel or Palestine was often touted as a vast wilderness to be exploited by the new immigrant Jews; however, just as the Native Americans and Aborigines, were prevalent, so too were the Palestinians, and so too were the Jewish immigrants surprised to see Palestinians living there when they arrived. Finkelstein, above n 14, 88, Chapter 4 ‘Settlement, Not Conquest’. Also, similarly, as the Native Americans and the Aborigines were touted as being warlike and savages, Palestinians, and often Arabs, have a similar predicament of being often called ‘terrorists’. This mentality justifies and eases the conscience with respect to any atrocities committed against the Arabs. As can be seen today with the romantic remembrance of the Aborigines and the American Indian, it has often been said that history will never forgive what happened to the Palestinians. However, as with the Aborigines and Native Americans now that the US. and Australia express regret; it will likely only be after the Palestinians are no longer a threat.
restricted or regulated, or that any person, who seeks to emigrate to
the US or Australia, should be allowed to do so. Instead, it should fuel
an understanding of the humanitarian needs of immigrants and an
objective attitude towards immigration policy, to look at the true facts
of immigration, not the fears. This is particularly true when, at this
point in time, the US and Australia particularly need skilled immi-
grants for their economies and for the well being of the new ‘natives’.
The US and Australia also are obligated to take their share of the
worldwide refugee burden.

Australia and the US, as governments, do have obligations to their
citizens first and these obligations should be weighed with the needs
of non-citizens or those in process of becoming citizens. However,
when a system degrades the rights of non-citizens within the bounds
of that system, it damages the integrity of that system, and eventually,
all the citizens. Later, it will be discussed how in the US and Austra-
lia, the fears of immigrants and consequences of immigration on citi-
zens is in fact harming not just the immigrants, but also the citizens.
Not only is there a fear of ‘immigrants’, but also there is a particular
fear of immigrants who are not of Western European or British an-
cestry. Because an immigrant may look different, acts differently or
belongs to a different race of humans, he or she becomes not just a fi-
nancial or logistical threat to another race, they become a racial threat
and the US and Australia are certainly not immune to racism, even in
the ranks of their own citizenship. A person, who is not a citizen is
even more vulnerable to racism.

Ethnically Diverse Nations, with Internal Racism

The US has a history of black slavery and discrimination that is still
very pronounced in its culture. Australia had its infamous White
Australia Policy and perhaps parts of the US, Canada and New

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24 For a discussion in a series of essays in four areas, including one specifically about
the Minister of Immigration in 1995, see Brian R Opeskin and Donald R

25 For a more thorough and historical discussion of this issue, see Myra Willard,
*History of the white Australia Policy to 1920* (1968). See also Kenneth Rivett,
*Australia and the Non-White Migrant* (1975). The Australian governmental website
is one of the many examples of the discussion of this widely-known Australian
issue.

The origins of the ‘White Australia’ policy can be traced back to the 1850s, when
the resentment of white miners towards industrious Chinese diggers culminated in
violence on the Buckland River in Victoria, and at Lambing Flat (now Young) in
New South Wales. The Governments of the colonies of New South Wales and
Victoria introduced restrictions on Chinese immigration. Later, it was the turn of
Zealand have had similar white policies of their own on a less formal scale. However, these aspects are not necessarily the rationale behind both nations' immigration regulations, although some may argue that these injustices are the root of some of their immigration law. The immigration policies that are harmful are generally the result of unfounded fears of immigrants or misunderstanding of the effects immigration has on society and the economy or perhaps other illusory reasons that are masked over racism.

hard-working Kanakas in Northern Queensland. Factory workers in the south became vehemently opposed to all forms of immigration, which might threaten their jobs - particularly non-white people who they thought would accept a lower standard of living and work for lower wages. Some influential Queenslanders felt that the colony would be excluded from the forthcoming Federation if the Kanaka trade did not cease. Leading NSW and Victorian politicians warned there would be no place for 'Asiatics' or 'coloureds' in the Australia of the future. In 1901 the new Federal Government passed an Act ending the employment of Pacific Islanders. The new Immigration Restriction Act 1901 received Royal Assent on 23 December 1901. It was described as an Act 'to place certain restrictions on immigration and to provide for the removal from the Commonwealth of prohibited immigrants'. Among those it prohibited from immigration were the insane, anyone likely to become a charge upon the public or upon any public or charitable institution, any person suffering from an infectious or contagious disease 'of a loathsome or dangerous character'. It also prohibited prostitutes, criminals, and anyone under a contract or agreement to perform manual labour within the Commonwealth (with some limited exceptions). One of the ways restrictions were imposed was by introducing a dictation test, used to exclude certain applicants by requiring them to pass a written test in a specific language with which they were not necessarily familiar. The Act stated the migrant had to 'write out dictation and sign in the presence of an officer, a passage of 50 words in a European language directed by the officer'. Regardless of these severe measures, the implementation of the White Australia Policy was warmly applauded in most sections of the community. In 1919 the Prime Minister, William Morris Hughes, hailed it as 'the greatest thing we have achieved'.

There were economic reasons, mainly the fear of cheap labor competition. Racial prejudice was growing. There was the inarticulate formation of the Australian ethos, which could result from the existence of a large and permanently inassimilable minority … The ideal, the reasoning and the attendant problems are no Australian monopoly. An almost identical experience has taken place in the West Coast states of America, as it has in British Columbia and in New Zealand. A C Palfreeman, The Administration of the White Australian Policy (1967) 1.

There have been periods in Australia's history where perhaps it did not fear some immigrants enough. Mathew Lippman discusses the situation in 1948 how Australian immigration failed to stop some Nazi criminals from obtaining visas in ‘The Pursuit of Nazi War Criminals in the United States and in other Anglo-American Legal Systems’ 29 California Western. International Law Journal 1, 34–35.
Despite Australia and the US being leaders in the world in welcoming immigrants and being immigrant nations themselves, their immigration laws and policies are often designed to be anti-immigrant.\textsuperscript{28} As the US and Australia increasingly require the labor and skills of immigrants, almost to the extent that their very economies depend on immigrants, their immigration policies are becoming more stringent. As a result, the prejudices and fears of immigration are actually hurting not just the immigrants, but also the citizens in perhaps a very profound way; both the US and Australia are in great need of the professional and skilled labor that immigrants have to offer.\textsuperscript{29} Further, fears of refugees are unfounded as Australia and the US are obligated to accept humanitarian refugees under international law. This obligation has heightened importance in light of the fact that under-developed countries are often forced to undertake an unfair share of the refugee burden. Additionally, the value associated with cultural diversity and the philosophical implications also require more liberal immigration policies.\textsuperscript{30} Australia and the US are in effect populated

\textsuperscript{28} Some authors believe there are many migration and refugee waves occurring today which stir arousal in the area of immigration in many countries:

\begin{quote}
Presently at least one in every twenty-one people in the world is either a refugee or a displaced person. The resulting tides of migration and explosions of nationalism have led legislatures around the world to rewrite citizenship, immigration and asylum laws. Germany no longer promises asylum to 'people persecuted on political grounds'; Greece recently expelled more than 25,000 Albanians; and the United Kingdom now draws a distinction between British citizenship and British subjects, the latter having no right to enter Britain. The United States is no exception to this trend; the 105\textsuperscript{th} Congress alone, over one hundred bills relating to immigration issues were introduced. This immigration reform fervor has also caught the attention of the American public, and the recent increase in legislation is in large part fueled by growing anti-immigrant sentiment in America. Christine J Hsieh, 'American Born Legal Permanent Residents? A Constitutional Amendment Proposal' (1998) 12 Georgia Immigration Law Journal 511.
\end{quote}

\textsuperscript{29} This need for immigrant labor is nothing new despite the unique and highly developed characteristics of today's economies. Immigrant labor has been crucial for Australia's development since the British first arrived, as too, were fears that the immigrants might hinder 'preservation of the British character of the community'.

\textsuperscript{30} Many believe that the so called 'native' population of a nation deserves priority to the rights and resources of the nation that they were 'born' into and that because others were not born in the nation, they deserve a lower priority. While some may concede that 'citizenship' may certainly not be confined to being born in a country, but at least require some fairly difficult route to be taken to acquire citizenship and attaining a priority to rights and resources in a nation. The author does not argue with this precept, as long as the citizens are not hypocritical towards the natural concept and tendency for all persons to strive to obtain a better life, no matter where they were born, just as the forefathers of the present
by immigrants and the descendants of immigrants, who are often none too fond of immigrants.  

The Structure of the Australian Immigration System

Immigration Law Sources and Practice

Australian Immigration Law develops primarily from the Migration Act 1958 (Cth) along with subsequent amendments and regulations that have been enacted pursuant to this Act in the years since. One primary set of regulations that are referred to by migration lawyers are the 1994 Regulations and also the PAM3, which is the Procedures Advice Manual, Third Edition. Unlike the US system, discussed below, where many of the primary or basic legal concepts of basic immigration classifications are found in the US Code of Federal Regulations. However, the Australia permanent and temporary immigrant visa classification system is more complex; portions of the system are found in the 1958 Act, more are found in the Regulations and finally, significant portions are found in the PAM3 which is usually only available to migration attorneys. The Department of Immigration and Multicultural Affairs or ‘DIMA’ regulates migration law.

These sources of law, experience and practice along with access to migration software as well as internal DIMA memoranda provide the foundation for the basic migrant classification law in Australia. This complexity results from the transformation of regulations and amendments to the Act since 1989. The 1989 Regulations set out a very detailed format for each visa classification; however, the 1993

For a discussion on the negative effects of immigrants, particularly with those who entered illegally and their children, who correspondingly are ‘blessed’ with American citizenship, see Hsieh, above n 28. Hsieh states (at 529):

Through the current interpretation of the Fourteenth Amendment of the Constitution, the United States grants citizenship to all children born in the United States irrespective of the parents’ immigration status. The result is that the United states has over seventy-five thousand new Americans every year who are blessed with American citizenship simply because their mothers broke the law.

For an overview and comprehensive discussion of the formation of Australian immigration law, see Mary Crock, Immigration & Refugee Law in Australia (1998).
Regulations provided mainly a skeletal basis for many classification schemes and placed more of the detailed prerequisites of each category in the schedules. The 1994 Regulations discuss the general administration and regulation of the migration system, while the schedules provide the classes and subclasses of the visas.

Before delving more into Australia immigration law, there are some differences in terminology that must be addressed. First, more simply, is the use of the terms 'migration' and 'immigration'. This paper uses both terms interchangeably. American lawyers and the US system tend to use the term 'immigrant' or 'immigration'. The Australian system also uses these terms, but primarily uses the term 'migrant' or 'migration'. Another difference is the use of the word 'alien'. In the US system, 'alien' refers to all temporary or permanent persons who do not have citizenship. It is explicitly defined by statute. Even permanent residents are referred to as 'permanent residence aliens'. However, in the Australian system, the full meaning of 'alien' is developed through case law and there are three terms used: 'alien', 'non-citizen', and 'citizens'. The term 'alien', in a similar way to the US system, refers to both 'non-citizens' and all other migrants, or aliens and 'non-citizen' refers to all persons who are not citizens.

34 Ibid.
35 Ibid.
36 See Immigration and Nationality Act 1952 Pub L No 82-414, 66 Stat 163, 8 USC 1101 [Herein after INA] s 101(a)(3). The term 'alien' means any person not a citizen or national of the United States.
37 The term ‘alien’ is not defined in the Act. For some time, the definition of ‘alien’ in Australia was similar to that described by Blackstone. ‘Natural-born subjects are such as are born within the dominions of the Crown of England; that is, within the allegiance, or as it is generally called, the allegiance of the king; and aliens, such as are born out of it’. Case law stated that the reference to ‘aliens’ in s 51(19) of the Australian Constitution ‘should be read down in accordance with this definition [Blackstone’s] of the term alien’: Mary Crock, above n 32, 22. However, the High Court soon disagreed and held that Australian, not British, law should determine the definition of ‘alien’, and that ‘Parliament can ... treat as an alien any person who was born outside Australia, whose parents were not Australians, and who has not been naturalized as an Australian’. Mary Crock, above n 32, 22, citing Pochi (1982) 151 CLR 101, 109 (Gibbs CJ). Professor Crock states that this decision was affirmed in Nolan (1988) 165 CLR 178, 187 and Kenny (1993) 42 FCR 330, 346-47. Mary Crock, above n 32, 22. ‘[T]he law after Kenny leaves beyond doubt the fact that the aliens power in s 52(19) of the Constitution can be used as a basis of any laws made in respect of non-citizens both in Australia and outside’. Mary Crock, above n 32, 23.
38 See the INA, Part I, 5 Interpretation. ‘non-citizen means a person who is not an Australian citizen’. For immigration status’ see the Act ss 13-15.
Classification Scheme, Citizenship and Permanent Residency

While there are three main terms for migrants, there are five types of legal status in the Australian legal system:39 Australian citizen, permanent resident, temporary resident, overseas student and visitor.40 An ‘Australian citizen has an absolute right to enter Australia at any’ given moment and the duration of residency is indefinite.41 They are the ‘only persons who have an unqualified right to enter, live and work in Australia ...’.42 A citizen cannot be deported and ‘citizenship’ status is very difficult to lose; becoming a citizen of another country is the primary means by which it can be lost,43 although this aspect may be eventually changed, in light of recent recommendations, so that Australians may have dual citizenship.44 Citizens can also vote.45 Citizenship can be granted by birth, decent,46 adoption or grant.47 At one time, anyone born in Australia was a citizen.48 However, today, one becomes an Australian citizen by birth within Australia’s territorial control ‘only if one or both parents is an Australian citizen or permanent resident at the time of the birth’.49 If one is born outside of Australia’s territorial borders, citizenship can be granted if the birth is registered at an Australian diplomatic post before the child reaches

40 See ibid. at *1; see also Crock, above n 32, 52. See the Act s 28 et seq (Visas for non-citizens).
41 See Jones, above n 39, *3; also Crock, ibid.
42 Crock, ibid citing Air Caledonie International v Commonwealth (1988) 165 CLR 462 at 469; and s 166 of the Act.
43 See Jones, above n 39, *3
44 See text accompanying nn 249-252 below.
46 Jones, above n 39, *3.
47 See Crock, above n 32, 52
48 Jones, above n 39, *3. Before 20 August 1986, almost anyone born in Australia was an Australian citizen by birth. The only significant exception was for the children of foreign diplomats. Anyone born in Australia from 20 August 1986 onwards is an Australian citizen only if one or both of his or her parents was an Australian citizen or permanent resident at the time of the birth.
49 See ibid *3; see also Crock, above n 32, 52: ‘[C]hildren born in Australia of unlawful non-citizens do not acquire Australian citizenship at birth ...’ citing Australian Citizenship Act 1948 (Cth), Pt III, ss 10-15.
his or her eighteenth birthday.50 For a grant of citizenship, the citizen must go through an official ceremony and takes a 'pledge of commitment'.51 To qualify for the ceremony, the potential citizen must reside a minimum of two years in Australia as a permanent resident.52 This is the primary method of qualifying for citizenship.53

Like the citizen, a permanent resident may live and work in Australia indefinitely. Student residents pay the same fees as citizens and have similar access to Medicare and Social Security benefits.54 Permanent residents can lose their status and be deported primarily in two types of circumstances55 and in one rare type of circumstance.56 Section 200 of the Act confers this power upon the DIMA Minister.57 The first circumstance is when the alien provided fraudulent information in obtaining permanent residency58 or there is some irregularity 'relating to their entry or grant of visa'.59 The second is when the Minister determines that the alien is 'undesirable' for a variety of reasons including criminal activity,60 criminal association or 'stirring up community discord'.61 The third circumstance is if the non-citizen poses a threat to the security of Australia.62 Of course, revocation of permanent residency can be appealed via Administrative Tribunals and the court system.63

As a permanent resident, there is a limit on the time that can be spent outside of Australia before permanent residency status may be revoked. If a permanent resident does not return to Australia before his/her 'Resident Return Visa' expires, permanent residency may be revoked.64 However, this visa can be renewed without limitation.65

50 See Jones, ibid *4.
51 Ibid.
52 Ibid.
53 Ibid.
54 Ibid *6.
55 Ibid.
56 See Crock, above n 32, 231 'The Act allows for the deportation of permanent residents in three circumstances'.
57 Ibid.
59 See Pt 2, sub-Division C of the Act as cited in Crock, above n 32, 231
60 The Act, s 201 and Crock, ibid.
61 Jones, above n 39, *6; the Act, s 203 and Crock, ibid.
62 The Act s 202 and Crock, ibid 231
63 Jones, above n 39, *6. For a full discussion on the review of deportation decisions, see Crock, ibid 233 et seq.
64 Ibid.
Temporary Residents

A temporary resident is one who is given permission to work for a limited time primarily in a particular occupation. Medicare and Social Security benefits are more limited. An overseas student is allowed to reside in Australia to pursue a particular course of study and is limited to working twenty hours a week. Spouses may reside along with the student: however, they may not be permitted to work in some circumstances.

Visitors

A visitor resides in Australia for a relatively shorter period of time and may not be a student or obtain employment. A business visitor may work in some circumstances if it is his or her own business.

[T]here are limits on how long you can spend out of Australia without losing your PR [Permanent Resident] status.

When you first come to Australia, or first became a PR, you will have been given a 'Resident Return Visa' valid for up to five years. This doesn’t mean that you can only stay in Australia for that long, it means that during that period you can come and go from Australia as much as you like. At the end of the time, you must either be back in Australia or else you must have a new Resident Return Visa. ...

To get your first Resident Return Visa renewed you make an application to the Department of Immigration. Whether or not you get one, and how long it will be valid for, depends on how much time you have spent in Australia during the five years before you apply. There also certain concessions for people who have to travel for certain types of business. Ibid 6-7.

65 Jones, above n 39, *6-7.
66 Ibid *2; see also Crock, above n 32, 117 ‘All temporary business entrants are referred to as temporary residents’.
67 See Jones, ibid *2.
68 ‘An increasing number of international students from around the world are choosing Australia as their preferred study destination...’ See Visa, Students, at *1, <http://www.immicare.com.au/Visa.htm> (15 January 2000).
69 Jones, above n 39, at *2. See Sch. 2, 561 of the 1993 Regulations as cited in Crock, above n 32, 173. The twenty-hour-a-week working ability is allowed for category ‘A’ students. Category B students encompasses students engaged in short courses involving English language, minor business or skills training. Crock, above n 32, 172
70 See Jones, ibid *2. The ability of spouses to work depends on whether the Category A student is pursing a masters or doctoral degree program which would allow the spouse to work full time; otherwise, he or she may work only twenty hours a week as the spouse of category A and B students. Crock, ibid 173 citing Sch 3, Pt 022 of the 1993 Regulations.
71 Crock, ibid 170-71; Jones, ibid *2. The Australia government is presently making efforts to boost tourism and the attractiveness of Australia for business travellers.
Acquiring Permanent Residence

There are seven possible methods or categories for acquiring permanent residency in Australia: (1) Investor Migration; (2) Business Migration; (3) Senior Executive Migration; (4) Established Business in Australia; (5) Work Skills Migration; (6) Employer Sponsorship.

The Minister for Immigration and Multicultural Affairs, Philip Ruddock, today announced measures to boost tourism and to improve Australia's attractiveness to business travelers.

Mr. Ruddock announced single entry business visas would be issued free in the 31 countries with access to the Electronic Travel Authority (ETA) from early next year.


Australia welcomes business people. It offers existing business opportunities and it is a wonderful place for families.

Business migration has advantages both for business migrants and for Australia. As a place to live and conduct business, Australia offers a sophisticated business environment with access to the Asia-Pacific region. It boasts an open lifestyle, clean and safe surroundings and outstanding educational, health, recreational and cultural facilities. The establishment of new business helps boost an already buoyant economy, and assists in the country's export drive.


For a description of the required points on Work Skills Migration, see Migrate to Australia: NEW RULES: work skills migration: independent migration, how to qualify, <http://www.gnl.com.au/Australia_work_skills_migration_new_rules.htm> *1 et seq (15 January 2000).
sored Visas; and (7) Family, Fiancé and Spousal Migration. Investor Migration is ‘available to business people able to invest between $750,000.00 and $2,000,000.00 in Australian Government bonds’. Business Migration is available ‘for successful business people who own 10% or more of a substantial business’. The Senior Executive Migration category is available to ‘senior corporate executives of companies making a turnover equivalent to 50 million Australian dollars’. The Established Business in Australia category is available to ‘persons who have owned and managed a successful business in Australia for at least 18 months [or] a person who plans to do so’. Work Skills Migration, ‘also known as “Independent Migration”’ is available for those ‘aged between 18 and 44, who speak English and have a skilled occupation’. Employer Sponsored Visas are available ‘for skilled people who have job offers in Australia’. The category for Family, Fiancé and Spousal Migration is available ‘for people who have family in Australia or marry an Australian’.


82 Migrate to Australia, above n 80, *1. See also Crock, above n 32, 115 citing Investment Linked Visa (131 and 844).

83 Crock, ibid 116. ‘This is a points tested category for senior executives in a large company. It has points awarded for age, English ability and net personal assets’. Australian Visas, above n 81, *2. Senior Executives may be State or Territory Sponsored and if so, it has lower requirements.

84 Migrate to Australia, above n 80, *1.

85 Ibid. ‘These people are selected because they have good education and work experience. They are able to find work quickly and fit into Australian life without need for a relative or employer to sponsor them’. Migrate to Australia, ibid *2. See also Crock, above n 32, 108 et seq.

86 Crock, ibid 108-10.

87 Ibid.
Because Australia promotes migration of aliens with professional, technical or trade skills, the method of acquiring permanent residency without a business or family sponsorship is a method termed 'independent migration'.

The following occupations are in demand in Australia: Computer professionals, registered nurses, registered midwives, mental health nurses, pharmacists, radiographers, radiation therapists, sonographer and secondary school teachers, fitters, metal machinists, toolmakers, metal fabricators (boilermakers), welders, sheet metal workers, motor mechanics, automotive electricians and numerous others including carpenters, bricklayers, chefs, pastry cooks and hairdressers.

Over the past three years, Australia has seen a twenty-nine-percent increase in skilled vacancies. Although the growth slowed to just under six percent this past year, 'in recent months, skilled vacancies reached the highest level in a decade'.

Aliens make an application after first completing a 'Pre-Application Skills Assessment'. The qualifications and work experience are then sent to an assessment authority. Applicants are then considered [for] a points test, with scores for skills, English language and age. Extra points can be gained if [the] spouse has work skills, or if [one has] money to invest in Australia, or qualification in certain foreign


91 Ibid.

92 See Jones, above n 39, at *7. Australia is making efforts to increase particularly the migration of migrants with skills in information technology and telecommunication skills. 'Large-scale Australian employers are using the Government's streamlined skilled migration program to more aggressively target migrants with information technology and telecommunication skills...'. Philip Ruddock MP, Minister for Immigration and Multicultural Affairs, Minister Assisting the Prime Minister for Reconciliation, Employers Embrace Skilled Migration Changes, *1, <http://www.minister.immi.gov.au/media_releases/media99/r99125.htm> (7 December 1999).

93 See Jones, above n 39, *7. See also Crock, above n 32, 98 citing Reg 2.26 and Sch 6 to the 1994 Regulations.
Immigrant Nations

languages.'. Even if the points test is passed, standard health and character criteria are considered. However, even if the points test is failed, certain regions in Australia may nominate the individual based on a ‘skills matching’ test. The applications are submitted to regional authorities that nominate the applications for immigrant visas.

94 See ibid. For a detailed discussion of the point system, see also BCL Immigration Service, above n 88 * et seq.
95 See Jones, ibid.
96 Ibid.
97 Ibid.

The Minister for Immigration and Multicultural Affairs, Philip Ruddock, today announced the release of the Skill Matching Database on the Internet, part of a package of migration initiatives to ensure Australia gets the skilled workers it needs.

The Skill Matching Database enables migrant applicants overseas to have details of their occupational qualifications listed on an electronic register.

'Employers and State/Territory Governments can then nominate people from the Database to come to Australia, depending on the types of skills and experience that they are seeking', Mr. Ruddock said.

'People listed on the Database have met key threshold criteria relating to skill, age and English language proficiency, which ensures that they are highly employable'.

The ‘skill matching’ concept has been designed to help regional areas overcome skill shortages by attracting migrants to settle in parts of Australia where their skills are in demand.

Mr. Ruddock announced, at the same time that the first Regional Australia Summit was being held at Parliament House, that it was highly appropriate for an important resource such as the Skill Matching Database to be made more accessible to employers and development agencies in regional Australia.

'Nominations from the Skill Matching Database are only done on the basis of skill shortages, where vacancies cannot be otherwise filled through the local labour market', Mr. Ruddock said.

'This is closely monitored by key Commonwealth and State/Territory agencies and safeguards the employment and training opportunities of Australian residents'.

Other measures introduced by the Government include a diverse range of visa categories designed to:

- help employers find suitable skilled workers when their job vacancies cannot be filled locally;
- encourage people with business skills to consider starting a business outside of major cities like Sydney, Brisbane and Perth; and
- attract skilled people from overseas to settle in less populated areas.

Persons with 'successful business backgrounds' are usually able to obtain visas and permanent residency in Australia. However, the structure of this business immigration in Australia is somewhat complex and has undergone many changes. The main category of this method is 'business owner' or the subclass 127 visa.

**Family Immigration**

Family immigration is one of the most significant sources of immigration. Until March 1996, over one half of all migration to Australia was based on family sponsorship. Once an immigrant arrives in Australia, he or she may sponsor a relative to immigrate. This sponsorship requires an assurance of support. The sponsorship itself is a legally binding obligation by the permanent resident or citizen to sponsor the relative; however, the Australian government has found it difficult to enforce these sponsorships. The more formal arrangement that has developed is the assurance of support. This assurance lasts for two years and obligates the promisor to pay back the government any money the government has paid the sponsored relative in various forms of social security. Often, a bond must be deposited at a Commonwealth Bank as a guarantee. The sponsorship and assurance of support may be provided by separate people.

A permanent resident or a citizen may sponsor a spouse, same sex partner or fiancé to immigrate to Australia even if the permanent

98 See Jones, ibid *7.
100 Jones, ibid.
101 Crock, above n 32, 68.
102 Ibid. (The changes were due to changes in government policy and migrant classification and changes within the categories.)
103 See Jones, above n 39, *8.
104 Ibid. See also Crock, above n 32, 56 citing Div 2.7 of the Regulations.
105 See Jones, ibid. See also Crock, ibid (discussing assurances of support).
106 See Jones, ibid. See also Crock, ibid: 'As economic conditions in Australia have deteriorated and the immigration levels have been reduced, the government has firmed its resolve to extend the notion of 'user-pays' in the migration process'.
107 Jones, ibid.
109 See Jones, ibid.
resident is younger than eighteen if his/her parent or guardian becomes the sponsor.110 Children can be adopted in many circumstances.111 Parents may be sponsored by either an Australian citizen or a permanent resident;112 however, sponsorship of parents is more complex.113 First, the parents must pass the ‘balance of family test’ and the sponsor must be ‘settled’.

The balance of family test requires that the sponsored parents have at least half their children as at least permanent residents in Australia or they must have more children who are permanent residents in Australia than in any other country.115 To be ‘settled’ the resident or citizen must have lived in Australia for three or more years.116 A person under eighteen may sponsor a parent if the sponsorship is pursued by other individuals or community groups.117

Family reunion migration law allows Australian citizens or permanent residents to sponsor siblings, nephews, nieces, parents or non-dependent children.118 The parent may be an adoptive parent or step-parent and the child may be a natural (biological) child.119 The difficulty in this category is that the relative being sponsored must have an occupation on the Skilled Occupations List and pass the same points test as independent migrants.120 Extra points are simply awarded for the sponsorship.121 Special concessions are provided for applicants living within certain areas of Australia, but assurances of support are required in all cases.122 ‘There are also some family members who may fall into the ‘preferential family category’,123 specifi-

110 See ibid. See also Crock, above n 32, 79 et seq citing inter alia r 60 of 1991 Regulations. For a discussion on the qualifications for family immigration, see Family Migration, How to Qualify, *1 et seq., <http:www.gnl.com.au/Australia_family_migration.htm> (15 January 2000). See also Migrate to Australia, above n 80, *3.
111 See Jones, ibid; Crock, ibid 85.
112 See Jones, ibid; Crock, ibid 84.
113 See Jones, ibid *9.
114 See Jones, ibid; Crock, above n 32, 84 citing r 365 of the 1989 Regulations and s 11ZD of the Act for the balance of family test.
115 See Jones, ibid.
116 Ibid.
117 Ibid.
118 Ibid; Crock, above n 32, 68.
119 See Jones, ibid; Crock, ibid.
120 Jones, ibid.
121 Ibid.
122 Ibid *10. See also Crock, above n 32, 89.
123 Ibid;
cally: aged dependent relatives, special needs relatives, remaining relatives and orphan relatives.\textsuperscript{124}

**Humanitarian Immigration\textsuperscript{125}**

Permanent migration actually falls into two categories.\textsuperscript{126} The Migration Program as described above is one category and the Humanitarian Program is the other.\textsuperscript{127} ‘The Humanitarian Program is for refugees and those experiencing war and crises in their home country, which involve the need for international peacekeeping initiatives, diplomacy and aid’.\textsuperscript{128} Refugees are accepted in Australia and once they have established permanent residency or citizenship, they may sponsor relatives or other refugees outside their own country, and in some cases, those remaining in their home country who face danger.\textsuperscript{129} Community organizations can also provide sponsorship in certain cases.\textsuperscript{130}

**Temporary Residence**

Temporary Residence is available in the categories of Temporary Business Visas,\textsuperscript{131} Retirement Visas\textsuperscript{132} and Employer Sponsored Vi-

\textsuperscript{124} Jones, ibid.

\textsuperscript{125} The Migration Act provides for the humanitarian program in more detail or has provisions that greatly affect the program and entry of asylum seekers. See ss 176 \textit{et seq} ‘Certain non-citizens to be kept in immigration detention’; ss 188 \textit{et seq} ‘Detention of unlawful citizens’.

\textsuperscript{126} See Australian Visas, Permanent Migration Visas, *1, <http://www.iinet.net.au/~migrate/visas/permanent.html> (20 January 2000). For a more complete discussion of the Australian humanitarian program, see Crock, above n 32, 123 \textit{et seq}.

\textsuperscript{127} See ibid.

\textsuperscript{128} Ibid.

\textsuperscript{129} See Jones, above n 39, *10.

\textsuperscript{130} Ibid.

\textsuperscript{131} There are several categories of Temporary Business visas. The following categories of visa under this sub-class are available for qualified applicants sponsored and nominated by qualified sponsoring companies: Employees entering Australia under a Labour Agreement with the Australian Government; an employee to be employed in an Australian Regional Headquarters; sponsorship by an Australian Business (key and non-key personnel); sponsorship by an overseas Business, Independent Executives; Service Sellers employed by an overseas business: Temporary Business Entry into Australia (457), *1, <http://people.entrada.com.au/~gililient/page7.htm> (15 January 2000).

Skilled workers and their families can be sponsored to work in one's business for a period of up to four years 'if they have trade, technical or professional skills not readily available in Australia'. Senior executives and other temporary employees who will require special training or 'occupational training' may also be sponsored. Temporary residents must have approval before they can change employers.

Employees and business partners can migrate on a permanent basis: however, they must meet the definition of 'highly skilled'. 'Highly skilled' requires that the alien 'must be in an occupation requiring

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133 See Migrate to Australia, above n 80, *1. Employer Sponsored Visas are similar for both the Temporary Residence and Permanent Residence categories; for a description of the required points on employer sponsored migration, see Australia: employer sponsored visa, above n 79, *1 et seq.

134 See Jones, above n 39, *10.

135 Ibid.

136 Ibid *11.

137 Ibid.


There are five categories of migrants in the Skilled Scheme:

**Independent Skilled Migrants.** These people are selected because they have good education and work experience. They are able to find work quickly and fit into Australian life without need for a relative or employer to sponsor them.

**Skilled Migrant - Australian Link.** These people have family members in Australia who are able to sponsor them. They are assessed on their skills, age, English language ability and family relationship.

**Skill Matching Scheme.** Introduced in 1999, provides real opportunities for people to come to Australia cheaply. It is not points tested, and the initial fee is only $150 for application to go on the skill matching database.

**Distinguished Talent.** This is a small category for especially talented people, particularly in the arts or in sports.

**Australian Nomination.**

As well as the Skill Matching Scheme, where migration applicants can apply to have their names, listed on a database to be nominated by an employer or a State or Territory Government, there are three other Australian Nomination classes for skilled migrants.

These are not points tested.

**Employer Nominated Migrant**

Employers may nominate skilled people from overseas to fill an Australian job vacancy when no one local has suitable skills for the job.

**Regional Sponsored Migration Scheme**

If your Australian employer, who wants to nominate you, is in a remote area outside metropolitan districts, he or she can sponsor you through this scheme.

**Labour Agreement.**
both three years minimum training and three years post-qualification experience'. It will also have to be shown that several attempts were made to fill the position from Australian citizens or permanent residents.

The processing of permanent and temporary visas may be accelerated for certain international business and Asian-Pacific region businesses operating in Australia.

**Issues in Australian Immigration Law**

Australia always had strong immigration policies; they went from being directed from the British government upon the outset of the Australian colonies where they were established for British convict goals, to Australian political movements demanding an end to the British controlled immigration policy. Australia then developed many movements against the migration policies imposed by Britain that tended to give higher regard for the well being of Britain, rather than Australia. It was strongly opposed at many social levels and Britain finally levelled off all official assistance to Australia by 1870; immigration was curtailed and attention was turned to the immigration of Chinese and Pacific Islanders. 'After the fall of Singapore during World War II and the threat of Japanese invasion that followed, Australian immigration policies changed ..' and 'immigration from the whole of the European continent was sought, and in the late

This is a tripartite arrangement between an Australian Employer, the Unions and the authorities to import workers with skills in demand, either permanently or on a temporary visa. Ibid.

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139 See Jones, above n 39, 11.
140 Ibid.
142 Since 1788, the potency of immigration has remained high with several chapters of particular intensity.

In establishing its first Australian colonies as convict gaols, Britain showed how government imposed migration could help resolve problems in the metropolis ... While convictism still proceeded (to 1853 in eastern Australia, 1868 in Western Australia) Britain began to assist the migration of other common people. The aim, just as much as penal transportation, was to diminish social conflict arising from Britain's industrialization.

Roe, above n 9, 5.
143 Ibid 6.
144 Ibid.
1940s and early 1950s some of the tight restrictions on non-European settlement were relaxed slightly. Before, during and after this period, a series of immigration laws was passed by the Australian government, often in response to certain events of immigrant arrivals, immigrant riots and citizen concerns over the threats and problems with immigrants. Finally, in 1958, the *Migration Act* was passed along with subsequent amendments that reflected the policies, rhetoric and politics of the times that had pushed the amendments through into enactment.

**Immigrant Quotas: Declining Migration Annual Levels Over the Past 100 Years**

Australian immigration policy is today becoming more restrictive despite its claim that it is becoming more liberal because immigration rates have increased slightly in recent years. In Australian immigration policy, there is a lot more concern for immigrant quotas than in US immigration policy. The immigrant intake for the Fiscal Year 1999-2000 was expected to be 70,000, excluding refugees. 84,100 aliens migrated permanently to Australia in 1999, which is a nine percent increase from the previous year and the government also calculated that ‘net overseas migration’ is 117,335, ‘the highest numbers since 1989-90’. Some commentators argue even that the permanent immigration figures are flawed because ‘long term’ means twelve months or longer and that instead of the Immigration Department’s 1998-99 figure of 117,335, the figure is actually a net gain of only 48,962.

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146 See Crock, above n 32, 11-20.
In the year 2000, up to 88,000 migrants will be accepted. The overall figure represents a continuation of the Government's election commitment to an immigration policy, which seeks to balance social, economic, humanitarian and environmental objectives. 2000 figures reflect a 5,000-place increase in the Skill Stream, which further shifts the balance of the migration program toward skills. This policy is actually very restrictive in comparison with immigration rates in Australia over the past hundred years. It does reflect, however, the need for skilled workers in the economy.

In comparison with the past hundred years, present immigration rates are becoming very restrictive in real terms and restrictions against humanitarian immigration, which are not included in the annual immigration numbers, are certainly becoming more restrictive. Statistics for permanent arrivals from 1978 until 1999, demonstrated that current figures are at their lowest. From 1985 to 1992, permanent arrivals ranged from 92,590 to 145,316, and 107,391 to 145,316 from 1986 to 1992.

The current rate of immigration is very close to immigration numbers back in 1927, when Australian immigration was approximately 67,078 annually, and in 1925, when it was 66,477, although it dropped considerably in subsequent years to be as low as 9,441 before 1940. Also significant percentages of those who immigrated, sometimes over half, were British immigrants. In terms of immigration relative to the population, immigration has significantly dropped over the past 50-100 years. In 1947, when the post war migration of British People to Australia got under way, the total population of Australia was only 7,579,358; slightly less than the population of London at that time. Thus, 10,000 to 70,000 immigrants entering Australia per year before 1947 is significantly more in

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152 Ibid.
153 Ibid.
154 Ibid.
156 Roe, above n 9, 3.
157 Ibid.
158 Richardson, above n 11, 1.
real terms than the 70,000 allowed in today. The Australian population doubled in 1971 and Australians born in Australia of 'British stock' decreased from ninety percent in 1947 to eighty percent. The proportion of immigrants coming from Britain or a Commonwealth country was dropping as well. The Australian resident population in 1998 was 18.9 million.

**Boat People and Xenophobia**

In August 2000, 'The Australian Associated Press ('AAP) reported that the rioters set fire to buildings and tried to tear holes in the fence around the center' and 'about 100 people were involved in the violent action and many of them were recently refused refugee status'. "A total of 250 guards and 50 police men used mobile water cannon and tear gas to repel the rioting refugees".

The immigration issues of 'boat people' are highly charged in Australia. There is some lingering fear of immigration, particularly of Chinese immigrants, which roots back to the founding of British colonies in Australia. Some of this fear is based in reality; most is attributable to xenophobia. New Zealand, which shares some of this fear, recently reacted to reports of a boatload of Chinese immigrants

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159 Ibid.
160 Ibid.
163 Ibid.
164 See text accompanying nn 206-08 below.
heading south to New Zealand. New Zealand quickly initiated and passed a law to deal with the new immigrants or rather, as Colin James wrote in the Far Eastern Review of Hong Kong, was ‘hastily rammed through .... to deal with them.’ Mr James writes that ‘many ordinary New Zealanders harbor suspicions about Asian migrants’. Amnesty International reports that this ‘law’ was actually part of a ‘comprehensive reform package of laws, policies and regulations’. The fabled boat of Chinese immigrants never arrived. For the boat people who did arrive, they suffered the consequences of a law that ‘allowed for the indefinite detention in prisons of people arriving in the country, without proper travel documents, including asylum seekers’. Canada, which allows more immigrants to enter through its borders annually in relation to its population than the US or Australia, has introduced new legislation to combat illegal immigration. It passed the Immigration and Refugee Protection Bill in response to fears of Chinese boat people arriving illegally in British Columbia, many of which, along with other immigrants, head towards population centers in Canada which already harbour very high percentages of ‘non-whites’ which raises fear in the white majority.


168 See Giarelli, ibid *2.

169 Ibid.


171 Ibid.


174 For a discussion on the specific effects of new Canadian immigration law, particularly with non-refugee elements, see Benjamin J Trister, ‘Canada
Australia has also reacted to news of immigrant boats destined for its shores. Australia has been increasing its detention facilities for illegal immigrants and additional efforts have commenced to stop illegal immigration trafficking. In November 1999, the Border Protection Legislation Amendment Act was implemented which was designed to ‘stem the surge in undocumented migration to Australia, particularly by persons from the Middle East’. Phillip Ruddock ‘warned that “whole villages in Iran are on the move” and were headed for Australia’. The legislation contains measures that limit asylum eligibil-

Some authors, such as Stephen Legomsky, believe that curbs in judicial review caused by statutory impediments restrict refugee rights and justice in Australian immigration law. Professor Legomsky states: ‘There is much more at stake for Australia than the procedure for adjudicating refugee claims. At stake is that nation’s very commitment to a justice system worthy of the name’. Stephen H Legomsky, ‘Refugees, Administrative Tribunals, and Real Independence: Dangers Ahead for Australia’ (1998) 76 Washington University Law Quarterly 243, 253. For a specific discussion on this issue of lack of judicial review of administrative decisions, see Henry E Velte, III, ‘Recent Development, Mansour v. INS: Sixth Circuit Hold Judicial Review of Final Orders of Deportation Against Certain Criminal Aliens Available Solely Through Habeas Corpus Proceedings’ (1998) 6 Tulane Journal of International and Comparative Law 671.


177 Ibid.
This legislation was sharply criticised by human rights groups.\textsuperscript{179} Some of the additional fear is from the rumour that potential immigrants have false hopes that the Olympic games\textsuperscript{181} will provide additional chances to them of finding work and an opportunity for residency through amnesty grants from the coming century as well as the Commonwealth's possible change to a Republic (which is, for now, unrealised and which would have been unlikely to have had an impact in any case).\textsuperscript{182} An 'amnesty' is when the government grants legal status to alien(s) by an act or decree, even to those aliens who may be in an illegal status or unable to obtain legal permanent or temporary residency by other means. False rumours of new amnesty programs in the US are almost identical; the US has had such an amnesty program for aliens who meet certain requirements, such as being physically present in the US on a certain date, even if their initial entry into the US was illegal and these amnesty acts always lead to hopes and expectations of new ones in the future.\textsuperscript{183} Giarelli writes that:

\textsuperscript{179} Ibid \textsuperscript{*2},

\textsuperscript{180} 'Human rights and church groups sharply criticized the law, saying it contravened the UN Refugee Convention and would prevent some refugees from obtaining protection'. Ibid.

\textsuperscript{181} See Giarelli, above n 167, \textsuperscript{*2}.

\textsuperscript{182} See Giarelli, above n 167, \textsuperscript{*2}.

\textsuperscript{183} Similar to the fantasy rumours of possible amnesty grants from the Olympics in Australia, I have heard almost identical statements from clients before 2000. They would call and inform me that they heard of an upcoming amnesty by the US government upon the coming of the new millennium or century, as they did the last century. Of course, the amnesty never came, and I am unaware of any amnesty...
Australia is also targeting violent criminal gangs, operating immigration rackets out of Bangkok in an attempt to stem the growing number of foreigners arriving illegally at Australian airports. There are criminal syndicates that specialize in fake documentation for mainly Middle Eastern and African nationals. Australian federal police are investigating overlaps between immigration fraud, drug running, and prostitution rings.

Despite the continuing traditional fear of Asian, particularly Chinese, immigrants heading, and the strong precautions taken against them entering Australia, many Chinese immigrants continue to risk dangerous voyages in the hopes of attaining refuge in Australia. The World Press Review reported that many Chinese would risk the 3,000 mile sea voyage to Australia by using forged documents in 1999. Now the flow of boat people has come from other parts of Asia, such as Iraq and Afghanistan; other parts of the Middle East and the Orient, such as India. About 12,000 refugees are admitted on a yearly basis as a humanitarian measure. 'Boat people' are only one class of refugees. Most enter being designated as 'refugees' in advance and the Australian government has agreed to take them in coope-
tion with other governments or the United Nations High Commissioner for Refugees. 'Boat people' are people who arrived without agreement by Australia to take them as 'refugees'. They usually attempt to apply for refugee status with the Australian government via the Department of Immigration. The Minister for Immigration, currently Mr Philip Ruddock, processes them and determines whether they have a valid claim for refugee status or asylum. This process can take months, and some doubt whether the process adequately allows refugees to make their claims. Also, the refugees are often detained in prison for long periods of time and many have their claims denied, as noted by the riots that have recently occurred.

It was expected that 68,000 migrants would enter from Taiwan, China, Hong Kong and Southeast Asia in 1999. Many refugees make a considerably shorter journey to Australia by first landing on Christmas Island, Ashmore Reef or another territory of Australia further to the North. Actual numbers of boat people varied depending on the source and time during 1999 and 2000. Sources approximate that between six and seven thousand boat people over the

188 I remember working with an Iraqi refugee helping him adjust to life in the US. He escaped from the Iraqi army during the Persian Gulf war and was kept with thousands of others in refugee camps in Saudi Arabia. He stayed there for seven years. Then one day, he told me, they were gathered together and they saw their names posted on a big board designated to go to certain countries. Some were listed to go to Australia, others, New Zealand as well as other countries. And he and several others, by chance, were designated to go to the US. He therefore entered the US as a 'refugee' and the US had agreed to take him. Others must escape by their own means and somehow physically get into the US and then they can apply for asylum to be designated as a 'refugee'.


The recent arrivals have come from southern provinces of China, South Asia (Pakistan, Sri Lanka, Bangladesh) and the Middle East (Iraq, Iran, Turkey, Afghanistan), via Indonesia. Some come with the aim of bypassing immigration clearance and working illegally in Australia. Included amongst these are the boat people from China who landed on the eastern coast in April and May 1999 .... Most of the recent arrivals however have come with the purpose of claiming refugee status. They head directly for Ashmore Reef or Christmas Island, and do not attempt to avoid detection. Once ahsore they make an application for asylum in accordance with the 1951 UN Refugee Convention, that is they seek refugee status. They are taken to the mainland where their case can be heard and where they are detained pending this determination. Ibid * 4 (citations omitted).
last ten years have arrived in Australia.\textsuperscript{191} This would average less than a thousand per year, however, many sources state that almost half of these boat people have arrived since 1999.

These ‘illegal’ boat people are serving as a ‘poster child’ for proponents of anti-immigrant rhetoric although they are extremely insignificant in relation to the Australian population and ‘illegal’ immigrants.\textsuperscript{192} Most illegal migrants are people who have overstayed their visas, or had a legal entry. Although boat people have increased greatly over the past year, there has only been a five percent increase from 1998 in ‘illegal’ migrants.\textsuperscript{193} Despite the insignificance of illegal boat people migration and illegal migration in general, Australia’s Immigration Minister, in perhaps his efforts to appease anti-immigrant or nationalist groups,\textsuperscript{194} has spent a lot of Australian tax


The year 1999 was the first in which more unauthorized migrants arrived by boat than air: 750 in the first six months and 3,300 in the second. In the first five months of 2000, some 1,240 arrived ... Since 1989, about 8,000 unauthorized migrants have arrived by boat ...

DIMA, Fact Sheet 88, above n 186, *1: ‘Since July 1999, more than 4,000 people ... have arrived in Australia by boat’. Taylor, above n 186, *1: ‘So far this year 849 people have tried to enter Australia illegally by boat.’ (dated 28 March 2000).

\textsuperscript{192} Millbank, above n 190, *3:

The boat people who arrived in 1999 represent numerically only a tiny fraction of non-citizen entrants, and a small proportion of Australia’s ‘illegal’ population. In the financial year 1998-99, besides the over 3 million visitors who entered Australia. There will be about 110 000 legal temporary residents, including 67 000 students. At the end of June 1999, the calculation of people resident illegally [sic] was 53 143.

\textsuperscript{193} Ibid *3-4:

Australia’s illegal population has increased in recent years; the latest figure is an increase of 5 percent over the December 1998 figures of 50,600, and compares with 46 232 at June 1997. ... The great majority of ‘legals’ have arrived legally, and overstayed their tourist student or other short-term visas.

\textsuperscript{194} Australian, New Zealand, Migration News, Other, above n 191, *1: ‘Many observers say that the government is acting tough to preempt support for the One Nation party, which has said ‘unless we are seen to be getting tough we will see a flood of boat people coming here’. World: Asia-Pacific, ‘One Nation: cut Australia’s immigration numbers’, BBC News Online Network, *1, (25 August 2000) <http://news6.thdo.bbc.co.uk/hi/english/world/asia-pacific/newsid_124000/124041.stm>:
payers’ money on expensive propaganda campaigning against these 7,000 plus people over a ten year period. Note some of the reports of these efforts by the Immigration and Multicultural Affairs Department:

Between January and June 2000, no foreigner arriving illegally by boat was granted refugee status in Australia. Immigration Minister Philip Ruddock said that in the last nine months Australian taxpayers had paid A$55 million to support illegal boat people.195

It seems that the biggest cost of immigrants is that of processing and confining them after their arrival in Australia. Little is said about the actual cost to the current Australian ‘legal’ population of absorbing these ‘illegal’ migrants into Australian society. It almost seems that $55,000,000 is inefficiently spent on less than 4,000 illegal boat people (assuming these figures are at least approximate). Note also Mr Ruddock’s media campaign against these boat people:

Australia launched a TV ad campaign in the Middle East and Central Asia with a tag line warning viewers not to go to Australia illegally by boat. The ads emphasize that, if the migrants do not die at sea, they will: (1) be detained in camps; or (2) face dangers that include poisonous snakes, spiders and crocodiles.196

It is true that boat people should be aware of the detention camps and there is no need for Mr Ruddock to advertise this fact.

In June, about 500 refugees escaped from the Woomera Detention Center in South Australia and refused to return, claiming human rights abuses and delays in processing their refugee applications ... Similar es-

The leader of Australia’s right-wing One Nation Party, Pauline Hanson, says the number of immigrants entering the country should be cut drastically. Ms. Hanson – the party’s only member of parliament – rejected multiculturalism, saying she did not want to see Australia Asianised.

See also Mary Crock, ‘Judicial Review and Part 8 of the Migration Act: Necessary Reform or Overkill?’ (1996) 18 Sydney Law Review 267. Note Dr Crock’s opening paragraph to her article in which hints at the anti-immigrant sentiment that exists in Australia today (267):

While we often celebrate our nation’s multicultural identity in food, dance and song, many Australians remain profoundly ambivalent about the government’s immigration program. This disquiet is given voice by rather extreme groups such as the Australians Against Further Immigration and various maverick members of Parliament’s virtual fixation with immigration control, and the increasingly extreme measures that have been taken to ensure that the government has the last say in who may or may not enter or remain in the country.

196 Ibid.
capes and protests were held at several other detention centers in Australia.\textsuperscript{197}

Many international groups, as well as the US State Department, have noted the poor treatment of refugees in the asylum process. The US State Department Human Rights practices for Australia, reported that:

The majority of asylum seekers are detained for the duration of the often-prolonged asylum process. The detention policy has led to extensive litigation initiated by human rights and refugee advocacy groups, which charge that the sometimes-lengthy detentions violate the human rights of the asylum seekers. The UN Human Rights Commission (UNHRC) stated in April 1997 that Australia had violated the rights of a boat person by detaining him for more than 4 years while his applications to remain in the country were being considered. The UNHRC stated that his detention was arbitrary and in violation of the International Covenant on Civil and Political Rights. In an April 1997 report to Parliament, the federally funded but independent Australian Human Rights and Equal Opportunity Commission also condemned the Government's treatment of asylum seekers as breaching international treaty obligations.\textsuperscript{198}

According to news reports, in reaction to the bad press from human rights groups over detention of both refugees and aborigines, the Australian government, 'unhappy with past UN criticism of its treatment of Aborigines and asylum seekers, foreshadowed a complete overhaul of its dealings with the UN treaty system'.\textsuperscript{199}

Mr Ruddock has been touring the countries sending large numbers of immigrants to Australia and complains of the heinous crime of people smuggling:

Mr Ruddock, who returned earlier this week from a visit to five countries in the Middle East, said the removal of the illegal arrivals showed once again the value of cooperation between countries that are determined to end people smuggling rackets.

The return of the 73 illegals demonstrates the strong relationship that exist between the Australian and Chinese governments - and China's support in the major crackdown on the people smuggling trade,

\textsuperscript{197} Ibid.
Mr Ruddock said.

This undertaking was given to me during my visit to China last year'.

After my recent discussions with officials in Jordan, Syria, Pakistan, Turkey and Iran, I am more than ever convinced that it is possible to take concerted global action against the heinous crime of people smuggling. ...

The return of the latest batch of illegal entrants should send a strong message to the world that Australia intends to fight people trafficking and that it will work with all countries of a like mind,' he said.200

This rhetoric of protecting Australia from incoming boat people and preventing even the ‘latest batch’ of ‘illegal entrants’ could be perceived by one as the Immigration Minister protecting Australia from an onslaught of boat people illegally entering and harming Australia. He states that they are costing Australia tens of millions of dollars, and instead of discussing the reasons of the sudden surge in boat people or the characteristics of these boat people, he only attributes it to illegal human smuggling operations which are very lucrative to their ring leaders.201 However, let us look at the facts. First, the total number of boat people is not that large over the past decade by most measures. The number appears incommensurate with the large amounts of resources invested with regards to preventing them from coming, such as the Immigration Minister’s time to participate in such an extensive publicity campaign against boat people. Second, little or no mention is made of the seriousness of this issue or the negative impact of the boat people on the Australian economy or social structure. Attention is mainly drawn to the expense of processing boat people and campaigning against them by the Migration Department.202 No real harm to the Australian economy or sociology is quantified outside of the immigration administration expenses. It


201 ‘Recent arrivals have come from origins well outside our region ... and are highly organised by people smugglers. The going rate for passage to Australia are reportedly in the range of $10,000 - $40,000 ...’ Millbank, above n 190, *4. It is reported to be a billion dollar industry. Millbank, above n 190, *8.

202 This proposition makes no claim that migrants should not enter legally or the cost is so low or unknown that the illegal entry should be tolerated, the proposition merely claims that response should be in proportion to real threats and humanitarian concerns balanced with the real threats particularly when a sizeable proportion of these boat people are seeking humanitarian refuge, are in fact granted such status, are relatively low in numbers and the negative impact on Australian society has not been quantified.
would also be almost impossible to make such a determination of the effects of the migrants on Australian society over the past year especially considering when, as of the writing of this article, the Migration Department has been reacting to the boat people before all of them have been processed. Furthermore, the other refugees over the past two years from the same countries as most of the boat people that have arrived over this past year have been granted asylum or refugee status. Boat people over the past decade may be in such low numbers and so many have been returned that to produce a reliable analysis of their impact on Australia may be difficult. This difficulty is enhanced by the fluctuations and different cycles of boat people from different countries, educational backgrounds and variations in the impacts that they have on the Australian economy and in their ability to live and work in Australia.

Third, the facts of the recent arrivals over the past year have not warranted extreme measures or justifiable fear regardless of whether they were part of people smuggling rings. It can never be assumed that refugees are unlike any other person - they are not all honest and pure. They often come from corrupt governments where bribery is common, particularly within the government. Many countries fall into this category. More importantly, if their lives are in danger, and they are living with their families in terrible living conditions or are experiencing civil strife or war, they, like any other person, will do everything they can to get away to some place better, which will certainly include paying a smuggler for a way out and fabricating documents. Smuggling has no relationship to the validity of refugee claims.²⁰³ If governments are not helping people and not helping

²⁰³ There is a reality in the US, and presumably in other countries, as I see in most of my asylum cases, such as in the case of Somalis, which presently constitute the biggest bulk of my asylum practice. At this stage of the Somali predicament, most Somalis are now entering the US with fraudulent documents and have paid a smuggler to get them to the US – there are few other ways to get out of Kenya where many Somalis are now. Despite being smuggled in and being part of the illegal human smuggling rings, most of them are granted asylum by an Immigration Judge that I have seen. Many of them also tell half-truths in their stories on certain issues, accentuate part of their stories on other issues and minimise evidence on other issues such as perhaps travelling through third countries on their way to the US (because they know, or soon learn, that if the Asylum officer or Immigration Judge believes they could have sought refuge in another country, it lessens their chance of being granted asylum). Many asylum applicants have also learned to be distrustful of governments and thus are not likely to be completely open and honest with the US or Australian governments in comparison with perhaps most US citizens and Australians because, relatively speaking, they tend to be less corrupt than China, India, or Pakistan, African
them seek refuge, there is always someone who will help for a fee and many who will make a way of life being in the business. How else would a refugee seek passage to Australia or the US without governmental support? Moreover, there are few other 'pure' or legal ways to seek refuge in Australia, Canada or the US via Australian, Canadian or US consulates in or near their home countries because these countries typically have low return rates for entry visas and thus, will likely not be granted any sort of visa.

Let us look more at the facts with common sense. Refugee arrivals are not going to be regular every year. Common sense dictates that from year to year, different events are occurring in the world and country conditions will vary. The Australian Department of Immigration and Multicultural Affairs states that since July 1999 to approximately July 26 2000, ‘more than 4,000 people, mainly from Iraq and Afghanistan, have arrived in Australia unlawfully by boat’. First, little or no consular action is taking place in those countries by the US and Australia. They are perhaps two of the most desperate countries in the world in terms of war and subterfuge of human rights by both their own governments and outside governments. Iraq has been bombed by the US and NATO for over ten years, subjected to economic sanctions which have brutalised, killed or deprived the Iraqi people over the same period of time along with a dictator who himself is murderous and brutal. Afghanistan goes beyond mention in its experience with invasion, civil war and monstrous subjugation of its people's civil rights. However, let us not just look at the basic situations, let us glance at the statistics. Adriane Millbank reports:

People from countries affected by civil war and political conflict, known as 'hot spots' such as Iraq, Iran or Lebanon, receive high rates of accep-

countries and many others, for example. These circumstances do not lend any less credibility to their asylum claims. They are trying to survive.

Most of the Middle Eastern countries where the current boat people entering Australia are coming from, have poor consular relationships with nationals. It is very difficult for most nationals to acquire even a visitor visa to Australia or the US if the consulate has records of low return rates. The intending visitor must often demonstrate substantial ties to his or her home country, mainly in terms of financial ties to demonstrate their intent to return back to their home country from Australia or the US and many refugees will certainly not possess such financial strength; if they could, they probably not need to seek refuge. Moreover, many of these countries, such as Afghanistan and Iraq have practically no consular services available. Even if they did, or if those seeking refuge could reach a consulate in a third country, they will likely not have the money, expertise or social connection to obtain more complicated or permanent visas.

DIMA, *DIMA Fact Sheet 88*, above n 186, *1*.
It seems, therefore, that the government's quick reaction to sudden numbers of these types of refugees is more heinous than the smuggler operations; it should be no surprise that a billion-dollar industry exists to get people from countries in turmoil or oppressive regimes to more stable countries. If it is shown to actually hurt Australians, then maybe a reaction can be justified. However, first it must be weighed against humanitarian concerns. It is also a different matter and should be cited.

What is perhaps most ironic about Mr Ruddock's campaign against such actions as Iranian villages on the move to Australia, the recent influx of boat people as well as the heinous human trade, is that the government of Australia participated in the same sort of trade over a hundred years ago. Australia would import poor, underclass Asians and Indians out of necessity, often in a very crude fashion, while trying to maintain the White Policy when feasible and when British labor was not available. Therefore the present Immigration Minister must take some responsibility for his mindset that it is somehow

206 Millbank, above n 190, *4.
207 See Willard, above n 25, 1-16.

[T]here is no complete record of the number of Chinese brought. It must have been fairly large, however, for the British Consul at Amoy wrote in 1852 that 2666 Chinese has been taken there to Australia ... As early as 1849, 270 had been brought. Captain Town seems to have been the chief promoter of this Chinese immigration to New South Wales. He was responsible for seven or eight shipments of about 300 each. ... Colonists were willing to send to India and China for labour were naturally willing to try the cheaper and more quickly obtainable labour from the Pacific ... Some of the pastoralists, especially of the Riverina, eagerly tried the experiment of this unencumbered Polynesian labour, and Boyd [Benjamin Boyd, organizer of branches of the Royal Bank of Australia] filled out vessels to supply the demand .... (12-13 (citations omitted)).

208 Ibid 10-11 (citations omitted):

[T]he British Government knew that the importation of Chinese had in 1851 recommenced in New South Wales ... Was the transport of these coolies fairly conducted? The Colonial authorities were asked to exercise great care, and, if necessary, severity, to ensure safe transport and a reasonable amount of comfort for the unfortunate Chinese. There proved to be cause for Britain's anxiety. So many of the Chinese brought to Sydney arrived in 'a wretched, sickly state, and so many dies on one of the vessels during the voyage, that the Immigration Agent of New South Wales (Captain H H Browne) formed the quite erroneous idea that 'their constitutions are of so delicate a nature as to render them wholly unable to bear any severity of temperature'.

209 Ibid 10: 'British emigration again flowing to the colony, however, was rapidly satisfying the demand for workers'.
planted into the minds of these recent Asian and Middle East immigrants that there is refuge for them in Australia, for ‘escaping’ to Australia is a very old concept, instigated in part, by the Australian and British governments. This past also evidences that it is not so much ‘immigrants’, but immigrants particularly of another race.

Finally, the issue with the recent boat people, is only an excuse or an effort to obscure what has been occurring over the last two decades. The detention of boat people has been an issue since the 1980s, when there was a heated battle between the courts and the government over the issue of boat people detention that created a plethora of case law.210 Judicial review of decisions denying refugees status created such a conflict with the government that migration cases were put ‘at the cutting edge of administrative law jurisprudence’.211 Legislative amendments have attempted to codify decision making to a high extent, and to take judicial review out of the mainstream, and into High Court review.212 This judicial and legislative activity was taking place while total boat people entry was at a very low level. The current influx of refugees was perhaps all that Mr Ruddock needed to push harsh legislation through.

Despite these facts, the increase of refugees213 has caused stricter immigration policies.214 Immigration Minister Philip Ruddock introduced215 and is promoting a bill designed to restrict the rights of refugees in seeking judicial review.216 Removing many of the rights of

210 Dr. Mary Crock, above n 32.
211 Ibid.
212 Ibid 267-68 and 301-03.
214 Similar to the US, Australian immigration law is gradually eroding the discretion of judges and judicial review of administrative decisions and statutory mechanisms. See Legomksy, above n 175, 247-48.
215 Peter Chen, 'Illegal Immigration Becoming as Big a Problem as Drugs in Australia', Central News Agency (Taiwan), 5 May 1999, 1999 WL 17718782, *2.

Purpose: The Migration Legislation Amendment Bill (No 2) 2000 amends the Migration Act 1958 (the Migration Act) to restrict access to the courts for judicial review of migration decisions. The Bill does this by preventing class actions in migration matters before the Federal and High Courts, by changing
refugees\textsuperscript{217} once they are in Australia may be the result of or an emotional reaction to the very real problem of illegal immigration, which has been heralded as great a problem as drug trafficking.\textsuperscript{218} Most of the immigrants come from China and other Asian countries and some purportedly have paid up to $17,000 US dollars to the smuggling racketeers for illegal entry into Australia.\textsuperscript{219} In 1997 to 1998, Australian officials apprehended approximately 1,555 illegal immigrants at airports.\textsuperscript{220}

The Need for Skilled Workers

As mentioned above, Australia requires the labor that immigrants provide regardless of any policy to the contrary. This need for workers and immigrants in the modern economy has been well recognised in the literature since the 1970s;\textsuperscript{221} the discussion of the need for labor today in Australia is nothing new, but has been occurring since the 1970s, or even a hundred years ago. However, one difference may be that, whereas over one hundred years ago only cheap labour was needed, today, not only is cheap labour, but also highly skilled labour is needed. Continuous pressure by the business community has forced the yearly quota of immigrants to be increased further.\textsuperscript{222} The 1999-

\textsuperscript{217} The Australian government helps many groups of people from countries encountering many difficulties on a temporary protective basis. See, eg, Philip Ruddock MP, Minister for Immigration and Multicultural Affairs, Minister for Assisting the Prime Minister for Reconciliation, *East Timorese Evacuees Opt to Go Home*, \url{http://www.minister.immi.gov.au/media_releases/media99/r99172.htm} (7 December 1999).


\textsuperscript{220} Ibid *1.

\textsuperscript{221} ‘Our traditional sources of migrants are now so short of labour that they are competing with us in seeking “guest” workers from other countries ... ’ Hew Roberts, *Australia’s Immigration Policy* (1972) 3. ‘Australia is now placed in a position in which it must develop pull factors. This is not so much a question of selling ourselves in the settler market place, but of improving the range and content of what we offer prospective migrants’.

\textsuperscript{222} ‘The Australian government has announced a slight increase in its immigration intake for fiscal 1999-2000, resulting in demands for an even bigger quota from Victoria Premier Jeff Kennett and the business sector’. Ibid.
2000 quota is approximately 2,000 more than that of 1997-1998.223 As mentioned above, the 2000-2001 quotas allow 5,000 more skilled workers. The increase is not only the result of pressure from business and industry, but also from local governments.224 Victoria and members of the Australian Liberal Party are strong proponents of a greater immigration quota.225 These groups hope that a bigger quota will boost the economy.226 Jeff Kennett, former Premier of Victoria has stated that 'Australians needed to spread the word to families, friends, and employees about the need for more immigration, given Australia's aging population227 and declining fertility rate'.228 'The Victorian government has called for skilled migration levels to be more than doubled in a bid to increase Australia's population to 28 million by 2060 from 18 million in 1998'.229 Many groups are against the increases because of employment230 and environmental reasons.231 At the same time, the Australian government is instituting new initiative for employers to detect illegal workers.232 Despite pressures from business and industry, since 1996 Australian immigration policies have reversed the liberal trend that developed to alleviate the White Policy.233 The previous Minister of Migration had described earlier governmental agendas on citizenship as

224 Ibid.
225 Ibid *2.
226 Ibid.
227 For a discussion on population leveling or decline in developed countries such as Australia and the US, see Leslie E Schafer, Immigration Project, 'The Population Implosion of the Developed World: Changing Attitudes Toward Immigration to Support Aging Societies' (1998) 6 Indiana Journal of Global Legal Studies 357.
228 'Australia Unveils Immigration Quota', above n 223, *2.
229 Ibid.
230 Contra Schafer, above n 227, 368. According to Schafer immigration would ensure a stable workforce, as she states: 'Promoting immigration in developed countries may be the best way of ensuring a stable workforce in nations where fertility levels are on the decline'.
231 'Australia Unveils Immigration Quota', above n 223, *2.
233 Australia and the US are not the only nations that have had xenophobia or fears of the breakup of their homogeneous populations—Japan has restrictive immigration policies—
anti-migrant, anti-cultural diversity ... (that) would take us back to the 1960s, and the years of the White Australia Policy, when migrants who were British subjects simply had to register as Citizens, while migrants from anywhere else had to wait up to [fifteen] years for citizenship.234

However, Phillip Ruddock, the current Immigration Minister, has not only instituted efforts to curb refugee rights,235 but also other anti-immigrant measures that break with the principle of equal treatment regarding social rights. He has proposed ‘to admit parents of immigrants only as temporary entrants, so that they will have no access to medical and social benefits’.236 Some legal scholars believe that Australian government policies on multiculturalism and racism are vague, hindering liberal immigration policies further.237 Professors Gianni Zappala and Stephen Castles point out the specific instances on the vagueness in the government’s past and present policies:

With a remarkably homogenous population and no tradition of refugee protection, immigration or assimilation of foreigners, Japan would presumably be eager to purchase and discharge its large protection obligations from another country—perhaps Australia, New Zealand or another Pacific Rim state—and at a high price, reflecting both its high cost of living and its determination to maintain its ethnic homogeneity.


The Council supports the view that an important measure by which a civilisation should be judged is its treatment of minorities. It could be argued that the welcome and assistance Australia’s governments and people have given to new settlers, including refugees, reflect our commitment to such a principle: because it is the right thing to do and because the values of justice and equity are deeply embedded in our democratic principles. These new settlers, in return, have contributed greatly to Australian society, often in the face of major difficulties. The combined goodwill of all has been crucial in the evolution of our harmonious multicultural society which is a major achievement of Australian democracy.

Ibid *1.

234 Zappala and Castles, above n 7, 310-11.

235 On the more positive end, especially regarding the Olympics in Australia, the Minister of Immigration has gone to great lengths in ensuring Australian safety, see Simons, above n 181, 754-55.

236 Zappala and Castles, above n 7, 311.

237 Ibid. (referring to authors Zappala and Castles—Gianni Zappala is a Visiting Fellow with the Political Science Program and Research School of Social Sciences at the Australian National University and Stephen Castles is a Professor of Sociology and Director of Migration and Multicultural Studies Program at the Institute of Social Change and Critical Inquiry at the University of Wollongong).
Prime Minister Howard studiously avoids the term of multiculturalism, and has refused to dissociate himself from racist statements (especially from the Queensland Independent Member of Parliament Hanson) on the grounds that she had the right to free speech. The Coalition Government has effectively abandoned the previous ALP Government's measures to reshape the relationship between ethnic differences and citizenship. Some official statements indicate a desire to return to a more traditional focus on common heritage, presumably based mainly on British traditions. It is not clear how this would include Australians of other origins. However there has been no clear policy statement. This leaves something of a vacuum in current official thinking on a key dimension of citizenship at the present time.²³⁸

This trend in immigration policy is interesting considering that in Australia ‘two out of five people are immigrants or children of immigrants’ and that ‘[m]ost recent opinion polls indicate support for the principles of a multicultural society’.²³⁹

**Australian Citizenship**

Citizenship²⁴⁰ is proving to be an interesting issue, not just to immigrants, but also to Australians in general. Because of Australia’s colonial roots, there was not really a strict legal definition of what it meant to be ‘Australian’ because being a British national was the real issue in the British Empire and then the Commonwealth²⁴¹ Australia, gained its official nationhood in 1901,²⁴² and it was not until 1949 that ‘Australian Citizens’ came into being with the Nationality and Citizenship Act of 1948.²⁴³ Full formal citizenship of the Aborigines

²³⁸ Ibid.
²³⁹ Ibid.
²⁴¹ Ibid 278.
²⁴² As argued by some as the official beginning of statehood
²⁴³ Zappala and Castles, above n 7, 278. The following passage describes changes Australia went through in immigration policy after the passage of this Act:

The Australian government gradually introduced measures to reduce the administrative complexity, lower fees, and simplify procedures, but this proved insufficient to boost naturalization rates significantly. By the end of the 1960s, the government finally began to realize that discrimination against immigrants and the failure to take their needs into account was a major deterrent that discouraged migrants from seeking to become Australian citizens. To make newcomers feel as Australians would require a new understanding of what it meant to be Australian that could accommodate the immigrants’ own distinct interests and heritage. Toward this end, the government eliminated from its citizenship law special privileges and exemptions for British immigrants that
was just achieved in 1983. In 1996, the Australian Council on Citizenship was called upon to provide advice and review of the Australian *Nationality and Citizenship Act* particularly with issues of: (1) The meaning and value of citizenship; (2) residency, language, cultural, age, and other legal and community requirements for citizenship; (3) drafting a New Citizenship Act and reviewing the current Pledge; (4) dual and multi-citizenship issues; (5) the relationship of citizenship to immigration and settlement policies; and (6) how best to celebrate the fiftieth anniversary of Australian citizenship in 1999.

had at least symbolically reflected Australia's self-understandings as ethnically British. As the government began to address deeper structural problems in the 1970s, naturalization rates rose. By 1991, Castles and Zappala report, 70% of eligible overseas-born residents were Australian citizens.


Full formal citizenship for Indigenous Australians was achieved as recently as 1983 when their electoral participation was subjected to the same rules as other citizens. However, as Mick Dodson has argued, Indigenous Australians still do not enjoy full citizenship, since they remain politically, economically, and culturally marginalized.

Professor McCallum discusses the value of citizenship in Australia in the labor context as well as some of the roots of citizenship in the changes to the Australian Constitution:

Over the last 20 years, English political scientists and lawyers have built upon the writings of Thomas Marshall and have written about the concept of citizenship. By citizenship, these writers mean the bundle of rights and obligations which democratic polities should bestow on citizens. In particular, it is argued that women and various minority groups have not been granted full citizenship. Marshall wrote from the 1940s onwards, in that optimistic time after World War II when the British government was building its welfare state and when it was assumed that poverty and insecurity could be eliminated. Over the last decade, these ideas on citizenship have been taken up in Australian legal and political science circles. However, this Australian debate has focused almost exclusively upon issues like immigration, social welfare rights and the needs and aspirations of women and Aborigines. Scarcey any attention has been paid to the role of citizenry at work. In my view, insufficient attention has been paid to the work of the English political scientist Harold Laski who in 1938 wrote about the rights of citizen workers. The British labour law scholar Professor Ewing has made the Laski connection and has argued for political citizenship to encompass industrial citizenship. In my recent Whitlam Lecture, I have tried to further this aspect of citizenship debate in Australia.


The determination of these issues will significantly impact upon immigrant rights because the determination might either make citizenship more restrictive for immigrants or create an environment more conducive to immigration. Immigration itself may not be affected because, as in the US, naturalization (the change of permanent resident aliens into citizens) is promoted while the 'adjustment of status' of 'non-immigrants' into permanent resident aliens is not promoted. Although citizenship may or may not affect other categories of immigration, it does state something deeper about our society and the intent behind immigration laws and policy. The resolutions of Australian citizenship laws will be reminiscent of the attitudes and beliefs towards migrants. Professor Kim Rubenstein has voiced concern that the legal consequences of the *Nationality and Citizenship Act 1948* (Cth) do not impede the rights of non-citizens.\(^{247}\) Professor Rubenstein stated: 'We must take extreme care that if we invest citizenship with legal consequences in the *Nationality and Citizenship Act Act 1948* (Cth), we do not invest non-citizens in the common cause of humanity'.\(^{248}\) This observation provides an interesting note, as will be discussed later in that what seems to be happening in the US system — although the US has policies that seem to promote citizenship and this promotion seems to favour pro-immigrant policies, rights of immigrants may be taken away for those who have yet to make citizenship or those who never will or chose not to become citizens. The divisions of rights would widen between citizens and non-citizens.

The Australian Citizenship Council Report was released on 18 February 2000, and fortunately, it did not make significant modifications in granting or taking away citizenship rights.\(^{249}\) It is important to note, that the Council in Recommendation 17 recommended 'that there be no widening of the current differential in responsibilities and privileges between Australian citizens and permanent residents'.\(^{250}\) However, it did recommend that 'citizenship' be added to the name of the Australian Department of Immigration and Multicultural Affairs.\(^{251}\) This is similar to the US Immigration and Naturalization Service, which includes 'immigration' and 'naturalization'. The rest of


\(^{248}\) Ibid 527.


\(^{250}\) Ibid 84.

\(^{251}\) Ibid 85.
the recommendations primarily make minor changes and relate to the organization of the statute, parts of the statute are left to stand as drafted, such as provisions providing for the loss of citizenship if a citizen enlists in an army which is at war with Australia.252

The Structure of the United States Immigration System

Sources of Immigration Law

United States immigration law comes from the primary authority of the Immigration and Nationality Act as amended, which of course, falls under the authority of the US Constitution. The Immigration and Nationality Act, or INA, was implemented in 1952.253 Before the INA came into existence, the 'McCarran-Walter bill of 1952, Public Law No 82-414, collected and codified many existing provisions and reorganized the structure of immigration law'.254 Since 1952, the INA has been amended many times, just as the Australian Immigration Act 1958. (Cth) has been amended.255 These basic precepts can be found described, as well as much of the relevant law published, at US government websites.256

The INA is divided into titles, chapters, and sections. Although it stands alone as a body of law, the Act is also contained in the US Code ('USC'). The code is a collection of all the laws of the US. It is arranged in fifty subject titles by general alphabetic order. Title 8 of the USC is but one of the fifty titles and deals with 'Aliens and Nationality'.257 Then under the USC or the Act, there is a main body of regulations within the US Code of Federal Regulations ('CFR'). Most immigration regulations pertaining to the US Immigration and Naturalization Service ('INS') are found in volume eight of the CFR. The INA and the CFR provide the general basic outline of the immigrant visa categories. The finer details in immigration law are established via INS operating instructions, Board of Immigration Appeals Decisions, US court decisions, local INS practice and other memoranda of the INS

252 Ibid.
254 See ibid.
255 See Ibid.
257 INA, above n 253, *1.
that may or may not be published. Often, important INS policies can only be found in the conversations and transcripts in liaison meetings between the INS and immigration attorneys.  

**Immigrant and Non-Immigrant Classification**

There are two basic categories of immigrants in the US system. There are 'immigrants' and 'non-immigrants'. 'Immigrants' are permanent resident aliens who by definition, have the intent to live in the US perhaps on a permanent basis. There are no subcategories in this classification; one is either an immigrant or one is not, although there are several ways in which one can become a Permanent Resident Alien. 'Non-immigrants' are a more diverse classification of immigrants who are deemed to have the intent to remain in the US on a temporary basis for certain purposes.

**Acquiring Permanent Residence**

One may obtain permanent residence in processes related to five basic categories: family, employment, humanitarian, diversity and in-

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258 Some other sources of law, are the Department of Labor's Board of Alien Labor Certification ('BALCA') which issues findings that are helpful in determining how to submit a labour certification, such as type of employment, job description, etc. see eg Matter of Bethke Landscaping, Inc 99-INA-82 (BALCA 5 May 1999) (discussing the issue of certifying officer denying labor certification on the ground that the work of a landscape gardener cannot be performed during the winter months, and therefore cannot be considered full time employment) (4 January 2000) 77 Interpreter Releases 9.

State Department Advisory Opinions are another source of immigration law and procedures, although they are often difficult to acquire, and only a few are publicised in immigration attorney publications. See eg ‘DOS Cable, Inspected Canadian Entrants Should Be Treated Same as Duration-of-Status Cases, 98 State 20796 1, Consular Affairs/Visas’, (1999) 18 American Immigration Lawyers Association Monthly 927:

A State Department Advisory Opinion indicates that, for purposes of INA s 212(a)(9) bars a Canadian or Commonwealth citizen residing in Canada who entered the United States with inspection but was not issued an I-94 should be treated the same as an F-1 or J-1 in duration of status. Such an individual, the DOS explains, would not be considered to have accrued unlawful presence unless and until a violation is found by an immigration judge or INS officer in the course of adjudicating a benefit.


260 See eg I AILA Handbook, ibid 20, 22.

261 See INA s 101(a)(15).

vestment.263 Except for some cases in family immigration or an entry in the case of a person classified as a ‘refugee’ by the United Nations High Commissioner for Refugees, immigration for permanent residence can be very time consuming and complex.264 Often, immigrants enter the US via non-immigrant routes which allow them enough time to be physically present in the US while they pursue permanent immigration status via employment, which can take several years, or wait for visa availability via family petitions.

**Employment**

To get permanent residence via employment, the alien must have his or her US employer first petition the United States Department of Labor for Labor Certification, which demonstrates that there is no available US worker to fill the position.265 Second, the employer must then submit the labor certification and petition the INS via Form I-140 to classify the alien in a preference category for employment and the ability to file for permanent residence via form I-485.266 The INS reviews the labor certification and other application materials which include the qualifications of the alien and requirements of the job, salary and other information and the alien, if not denied, will be classified upon the approval of form I-140 in an EB-1, EB-2 or EB-3 category.267 These are categories related to the skills of the alien. Unless the alien is from China or India, or sometimes the Philippines or Mexico, the category makes little difference.268 There are certain

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263 See above n 259.
264 See also I AILA Handbook, above n 259, 654.
265 The requirement for an individual labor certification is found at INA s 212(a)(5)(A).
266 See INA s 203(b)(1), 8 USC s 1153(b)(1); INA s 203(b)(2), 8 USC s 1153(b)(2); INA s 203(b)(3), 8 USC s 1153(b)(3).
267 See ibid and above n 253. But see below text accompanying n 358. EB-1 are first preference or priority workers. They account for 28.6 percent of the total number of employment-based immigrant visas available. EB-1 comprises workers of extraordinary ability, outstanding researchers and professors and multi-national executives and managers. EB-2 is reserved for workers who are members of the professions holding advanced degrees or aliens with exceptional ability in the sciences, arts or business. Third preference, or EB-3, is for skilled workers, professors and other workers. Both EB-2 and EB-3 have 28.6 percent of the visa allocation. See also US Department of State, Bureau of Consular Affairs, *Visa Bulletin*, vol VIII, no 23, *2, <http://travel.state.gov/visa_bulletin.html> (27 August 2000). There is also the EB-4 and EB-5 categories which have only 7.1 percent of the visas of this category. EB-4 is used for certain special immigrants and EB-5 is used for investor aliens. They both are very uncommon.
268 See *Visa Bulletin*, ibid *3. As one can see from the recent *Visa Bulletin* (numbers change little from month to month), most categories are current except for second
numerical restrictions for immigrants from countries around the world; there are only a limited number of visa numbers available per year and since the countries listed above have such high rates of immigration to the US, they often have to go on a sort of waiting list, until visa numbers become available.\(^{269}\) If one is from China or India, whether they are classified as EB-2 or EB-3 can make a big difference because, only when a visa number becomes available can they apply for permanent residence on form I-485, the third step of the three-step process of obtaining permanent residence via employment.\(^{270}\)

Employment immigration can take several years.\(^{271}\) Labor certification can take one month to several years depending on the state in which the labor certification is obtained because the labor certification is first submitted to the State Employment Security Agency ("SESA") and then, the SESA forwards it to the US Department of Labor for final processing.\(^{272}\) The I-140 can take from six to twelve months for processing. Once the I-140 is approved, only then can the alien apply for permanent residence and only then is the alien able to stay in the US as part of the immigration process. Until the I-485 is submitted, referred to as 'adjusting status', the alien must be in a non-

and third preference for China and India and third preference 'other workers' category for all countries. Earlier in 2000, all countries were suddenly current, because the labor certification process has been so slow. To establish a date and understand how the Bulletin works, an alien receives his approved I-140 and looks to his classification (it is usually the one he or she requested because the I-140 requires one to request a category and at the labor certification stage, the attorney can make a good estimate of what category the alien will meet) and look at the priority date, which is the receipt date, most of the time, of submitting the labor certification application. Then if the alien is from China and EB-2, he can see that the Visa Bulletin for, say, September 2000, and note that EB-2s for China are being processed for March 1, 1999. Therefore, he can probably expect to wait approximately eighteen months from September 2000 before he can file his I-485. If it said 'C' for 'current', he could immediately file his I-485.

\(^{269}\) Visa Bulletin, ibid. As of the writing of this article, this problem will be less of an issue because new legislation enacted 17 October 2000, see below n 355, has addressed per country limitations, see generally s 6.3 and text accompanying below n 358. However, the entire employment-based immigrant cap has not increased, thus, there possibly could be a waiting period for some categories regardless of the alien's country of citizenship.

\(^{270}\) Visa Bulletin, ibid.


The labor certification process is a source of frustration for employers and attorneys as the DOL [Department of Labor] struggles to deal with a large backlog of cases—the result of serious funding cuts and resulting staffing shortages at the DOL regional and SESA offices … In some states, SESAs are taking over two years from the date the application was filed to issue an assessment notice or notify the employer to begin the recruitment phase.

\(^{272}\) Ibid.
immigrant classification and acting pursuant to the terms of that category in order to remain in the US and apply for adjustment of status. Thus, if one is from India or China, and in EB-2 or a lower category, one still may have a long before one can apply for permanent residence, and temporary work visas (discussed below) have lifetime limits of six years.273 Employment based immigration, therefore, can take two to five or more years to process. Maintaining status is important to adjust status because one can only adjust status if one is in status. If one is not in status, generally, one must process at a US consulate and not have any of the bars to adjust. Thus, someone in illegal status cannot adjust and if someone has been present illegally for six or more months, they may have a three to ten year bar from reentering the US. The State Department issues a Visa Bulletin on a monthly basis to show the dates it is processing the various EB categories.274

The process of filing the I-485 is somewhat similar in all cases. The I-485 is submitted and it can take one to three years before a permanent resident alien card is actually received. One files the application, receives a notice to get fingerprints, goes in to the INS to have their fingerprints taken, and then waits for a notice for an interview. Many applications based on employment do not require interviews, while marriage and asylum always do. Many times, a decision is made at the interview and the permanent residence card follows after several months. The examiner may issue a temporary stamp in the alien’s passport in the meantime.

Diversity Program

The Diversity lottery program is designed to increase immigration from countries that have lower immigration rates.275 If an alien comes from a certain country and meets certain requirements, they can apply for the lottery, with no charge.276 Winners are selected randomly at a certain time and more winners are chosen than allowed, so, aliens must hurry to process their applications or they will become time

273 See above n 265.
274 See ibid.
275 See eg Fragomen et al, above n 259, 11A-3 et seq.
276 See eg ibid. For example, for the Diversity Lottery 2000, the eligible countries are the following: All countries in Africa; all of Asia except for India, Pakistan, the Philippines, South Korea and Vietnam; all of Europe except for Great Britain and all dependent territories; all countries in Oceania including Australia; and all countries in South America except for Colombia, the Dominican Republic, El Salvador, Haiti, Jamaica and Mexico. Countries vary from year to year. For example, Canada was included on the eligible list last year in DV 2001. See below n 277.
Winners are eligible for permanent residence. However, they must also be in status in the US or apply at a US consulate abroad for permanent residence.

Family Immigration

Family immigration can be immediate or take over ten years. The immediate family of US citizens, meaning spouses, children under 21 and parents, can immigrate immediately or they have immigrant visas immediately available. Other relatives of US citizens and permanent residents have a preference category similar to the employment categories. Unmarried children over 21, of Untied States citizens, are in a first preference and, unless they are from China, India, Mexico or the Philippines, have approximately a 19-year wait to immigrate. Spouses and children under twenty-one of permanent residents are in a second preference category, and have a four-to-seven-year wait because the second preference category is divided into two levels. There is also the third preference category for married sons and daughters of United States citizens, which currently has about a four-year wait and a fourth preference for brothers and sisters of US citizens, which currently has an approximately waiting period of 11 years and up to a 21-year wait if the petitioner is from the Philippines. Regarding the requirement to be in status to adjust in this category, the INS is more forgiving. If a person is in illegal status and he or she is an immediate relative of a US citizen, they may still be permitted to adjust status. The monthly Visa Bulletin also publishes current processing dates for family immigration.

Asylum

Asylum is a category in which one can be in illegal status to apply and a requirement is that one must be physically present to apply for asy-


278 See above n 267.

279 See Visa Bulletin, above n 267. Family-based preferences and order of consideration are found at INA s 203, 8 USC s 1153.

280 See ibid.

281 See ibid.

282 See ibid.

283 See ibid.

284 See discussion accompanying nn 341-344 below.

285 See above n 279.
Boat people would only enter the US via this process or some other type of humanitarian parole at the admitting INS officer's discretion. The process can take from a few weeks to several years depending on the location. An I-589 application is submitted to the INS regional office, and then the regional office forwards the application to local INS offices for adjudication and thus, the proximity of the local office determines whether the application takes weeks, months, or more than a year.287 Previously, the initial filing of the I-589 application enabled an alien to obtain immediate employment authorisation. However, due to abuses in the system, one must wait five months before one can apply for employment authorisation. The alien goes through an interview with the INS Asylum Office from a few weeks to more than one year. If asylum is granted, the alien is granted permission to remain in the US and work and may apply for permanent residence one year after asylum is granted. If asylum is not granted, as would also happen in the case of marriage, the case is referred to an immigration judge for a hearing. This process can take one or more years before a decision is made if it goes before an Immigration Judge. Some asylum cases, for example Somalis and some other nationalities, seem to be always referred to the Immigration Judge, most likely because of some unpublished policy within the asylum office. Only about twenty percent of asylum cases in the US are granted.

Investment

There is also the investor visa, which is classified as EB-5 and can be categorised under employment or its own separate category.288 Basically, it requires an investment of one million dollars, which creates at least ten full-time permanent jobs, or $500,000 in a rural area.289 This category will not be discussed because it is seldom used, and even if someone is qualified to apply, the INS has a strong policy of searching for any real or imagined problem with the application to deny it because it is negatively characterized as a method for the rich to buy permanent residence.290

286 See INA s 101(a)(42)(A), 8 USC s 1101(a)(42)(A) et seq provides the basic overview of the asylum regulations.
287 See eg I AILA Handbook, above n 259, 674-76.
288 See INA s 203(b)(5), 8 USC s 1153(b)(5).
289 Ibid.
290 For a discussion about the EB-5 category, see Stephen Yale-Loehr, 'EB-5 Immigrant Investors' in I AILA Handbook, above n 259, 398.
Temporary Immigration

The other types of immigration classifications are the non-immigrant categories of A, B, C, D, E, F, G, H, J, K.

The A category is general for visitors coming to the US for work in connection with their government. This class includes: A-1: diplomatic or consular officers, and members of their immediate family; A-2: other foreign government officials or employees, and members of their immediate family; and A-3: attendants, servants, and personal employees, and members of their immediate family. See 22 CFR s 41.12.

The B-1 category is for business visitors who will temporarily do business in the US. The regulations for this category are found at s 101(a)(15)(B), 8 USC s 1101(a)(15)(B); 22 CFR s 41.31(a), (b)(1). The B-2 category is for visitors for pleasure, basically the tourist visa. The regulations for this category are found at INA s 101(a)(15)(B), 8 USC s 1101(a)(15). Often consulates issue these visas as ‘B1/B2’.

The C visa category is for aliens in transit or passing through the US in travelling towards a foreign destination. The regulations for this category are found at INA s 101(a)(15)(C), 8 USC s 1101(a)(15)(C); 8 CFR s 214.1(a)(ii); 22 CFR s 41.71.

The D Visa classification is for alien crew members which allows them to work on their vessels in US ports if the work has a direct relationship to the normal duties aboard the vessel; they have temporary granted shore leave and must depart from the US within a certain period of time. The regulations for this category are found at INA s 101(a)(15)(D), 8 USC s 1101(a)(15)(D); 8 CFR s 214.2(d); 8 CFR ss 251, 252, 253 and 258.

The E classification provide entry for aliens who are treaty traders or investors if the aliens’ country of nationality has a treaty of commerce and navigation with the US or a bilateral investment treaty. The aliens may enter the United States if the company, ie the petitioner’s foreign corporate counterpart, does substantial trade with the US or invests a substantial amount of capital in the US. Aliens who are the same nationality as the petitioner also qualify. See INA s 101(a)(15)(E)(i), (ii); 8 USC ss 1101-1524; 8 CFR s 214.2(e).

The F classification is for students. See INA s 101(a)(15)(F), 8 USC s 1101(a)(15)(F).

The following categories of aliens are eligible for this category: G-1: Principal resident representatives of a recognised foreign member government to an international organisation, their staff, and members of their immediate family; G-2: Other representatives of a recognised foreign member government to an international organisation, and members of their immediate family; G-3: Representatives of a non-recognised or non-member foreign government to an international organisation, and members of their immediate family; G-4: International organisation officers or employees, and members of their immediate family; G-5: Attendants, servants, or personal employees of G-1, G-2, G-3 and G-4 classes, and members of their immediate family. Charles Gordon, Stanley Mailman and Stephen Yale-Loehr, Immigration Law and Procedure (2000) 19.02 [1][a]. The regulations governing this section are found at INA s 101(a)(15)(G), 8 USC s 1101(a)(15)(G).

The H classification is the temporary worker category. The H-1A and H-1C subcategories are for professional registered nurses. H-1B is the most popular category for professional workers. The H-2A classification is available for temporary agricultural workers and the H-2B classification is available for temporary seasonal workers in non-agricultural work. The H-3 classification is for
There are also subcategories of each temporary trainees, leaving the H-4 classification for dependents. The regulations for the H classification can be found at INA ss 101(a)(15)(H), 212(m), 212(n), and 214(g), (h), and (i); 8 USC ss 1101 et seq. For a discussion of new changes to this category, see s 6.3 below.

The J classification is for exchange visitors who are either students, short-term scholars, trainees, teachers, professors or research scholars, specialists, physicians, international visitors, government visitors, camp counsellors and au pairs (child care providers for US families). There must be a program sponsor and often funding from US or foreign government sources are involved. Also, there is often a requirement pursuant to INA s 212(e) that the visitor must return to the home country for a minimum of two years, and it is extremely difficult to get out of this requirement. The regulations for this category are found at INA s 101(a)(15)(J), 8 USC s 1101(a)(15)(J).

The K category is for alien fiancés of US citizens. They can enter the US if they have met the US citizen and they have a bona fide intent to marry within ninety days of entry. The regulations for this category can be found at INA s 214(d), 8 USC s 1184(d), 8 CFR s 241.2(k). This visa is actually a hybrid visa because although it is a non-immigrant visa, the intent is for application for permanent residence very soon after entry.

The L classification allows multinational companies to transfer high-level and essential employees from overseas to perform similar duties in the US See INA s 101(a)(15)(L), 8 USC s 1101(a)(15)(L); 8 CFR s 214.2(L).

This is similar to the F category, except that the alien is a student at trade of vocational school instead of a traditional academic college, school or university. See INA s (a)(15)(M), 8 USC s 1101(a)(15)(M).

‘The US is a party to the North Atlantic Treaty and has also ratified the Agreement on the Status of the North Atlantic Treaty Organization (NATO)’. Ibid. 19.04[a]. The US has ‘agreed to permit the temporary entry of certain representatives and international staff from the participating nations.’ Ibid citing Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces (NATO Agreement on Status of Forces), 19 June 1951, 4 UST 1792, 199 UNTS 67.

The O category is for aliens of extraordinary ability in the sciences, arts, education, business or athletics. It has many advantages over H classification because there is no wage maintenance feature and there is no cap. The regulations for this category are found at INA s 101(a)(15)(O); 8 USC ss 1101 et seq; 8 CFR s 214.2(o); 22 CFR s 41.55.

The P visa category is for entertainers or athletes who need to enter the US perhaps for a shorter duration than the O classification and P visas are easier to obtain. The regulations for this category are found at INA s 101(a)(15)(P); 8 USC s 101(a)(15)(P); 8 CFR s 214.2(o)(16), (8)(ii).
visa and varying regulations on the dependents that the holder of each classification may bring. Generally, most classifications, except for B, allow for children and spouses to accompany the alien. Generally, they may not work, but they can go to school. However, J-2 dependents can seek employment.313 The most popular forms are the B, F and H-1B classifications. The B classification is for the business visitor (B-1) or visitor for pleasure (B-2).314 This classification is only available in increments of six months upon entry and extensions must be requested. One is usually granted and subsequent ones tend to be denied. And it often takes over ten months for the INS to approve or deny a six-month request (though one has permission to remain until a decision is made). The F classification is a student classification and the primary requirements are that the student is enrolled in a full time program at an accredited INS approved college or university and have at least the resources to demonstrate that living expenses and

307 This category is similar to the J category; however, it pertains to cultural exchange visitors and was created primarily with the Walt Disney Company and other businesses who feared that some aliens may not have the skill level to qualify for the J classification, if the program was audited. See INA s 101(a)(15)(Q), 8 USC s 1101(a)(15)(Q).

308 The R visa classification allows for workers to work temporarily in the US in religious occupations and to receive compensation. The regulations governing this category are found at INA s 101(a)(15)(R), 8 USC s 1101(a)(15)(R); 8 CFR ss 214.1(c)(3)(iii), 248.2(b); 8 CFR s 245.1(b)(2).

309 The S Visa classification is for witnesses and informants and allows the US Attorney General to admit alien witnesses and informants to enter the US and provide assistance in criminal investigation and prosecutions. The regulations for this category are found at INA s 245(j), 8 USC s 1255(j); 8 CFR ss 214.2(t), et seq.

310 The TN category is based upon the North American Free Trade Agreement (NAFTA) between the US, Canada and Mexico. It serves as a comparable and sometimes easier category to the H-1B category for Mexican or Canadian professionals because an alien can obtain the classification upon entry at certain INS border posts and it can be renewed many times with no certain time limit, although it must be renewed annually. The regulations can be found in NAFTA, INA s 101(a)(15)(B) and CFR s 214.2(b)(4) et seq.

311 The TWOV category is similar to the C classification; it means ‘passengers in transit without official visas. The regulations for this category are found at INA s 212(d)(4), 8 USC s 1182(d)(4); 8 CFR s 214.2(c)(1).

312 There is also the Visa Waiver Pilot Program which is an exception to the visa requirement and allows nationals from certain countries to enter the US under limited conditions, for a limited period of time, without first obtaining a visa from a US Consulate. The regulations provide for certain dates for this program to be valid and that the program must be signed into law periodically. For a discussion on this issues, see Denise C Hammond, ‘Uncommon Visas: C TWOV, D, R and S Nonimmigrants’ in IAILA Handbook, above n 259, 306-07.


314 See above n 292.
tuition are covered for a year without employment.\textsuperscript{315} The school
issues form I-20, with which the student applies for the F classification.\textsuperscript{316} There is no expiration date as long as the student remains in
status throughout the term of the classification and enrolled in school
full time. Employment is severely limited in this category. There is
also the M category for students at a vocational or trade school.\textsuperscript{317}

The J classification is similar in many ways to F classification, and is
somewhat popular, however, it is an exchange program and many
holders of this classification must return for two years to the country
where they last held permanent residence.\textsuperscript{318}

The H-1B category is the temporary worker category.\textsuperscript{319} There are
other classifications in the H category, as one might guess by the no-
menclature, however, they are more complicated and used less often.
The H-1B classification has a limited lifetime of six years.\textsuperscript{320} This
category requires that the alien has a job offer and the employer petitions for the alien on form I-129. The prime requirements for H-1B
classification are that the alien must have at least the equivalent to a
four-year college degree from an accredited institution in the US,
that the job requires a minimum of a college degree and that the de-
gree and job are appropriately related.\textsuperscript{321} These visas are actually
processed relatively fast, between two weeks to six months. If the
alien is present in the US in another non-immigrant classification,
they may be eligible for changing status to H-1B classification. If they
are abroad, notice of the I-129 approval can be cabled to the appro-
piate US consulate where the alien will apply for the visa.

There is one important difference between the US system and other
systems. Under the US system, the term ‘visa’ can mean two different
things. It should be referred to as ‘visa’ and ‘classification.’ In the US,
a visa, is the document that actually allows the alien to cross the US
border. It is issued only by the State Department (which manages US
Embassies and consulates). It is attached to the alien’s passport. The

\textsuperscript{315} See 8 CFR s 214.3(k).
\textsuperscript{316} Ibid.
\textsuperscript{317} See above n 302.
\textsuperscript{318} See above n 299; s 212(e) of the Information and Educational Exchange Act Pub L
No 80402, 62 Stat. 6 (1948) (Smith-Mundt Act).
\textsuperscript{319} See above n 298.
\textsuperscript{320} See INA s 214(g)(4), 8 USC s 1184(g)(4); 8 CFR ss 214.2(h)(9)(iii)(B)(1),
\textsuperscript{321} The occupation must be a ‘specialty occupation’. See INA s 214(i)(1), 8 USC s
1184(i)(1).
expiration date on the visa is not important in relation to the validity of an alien’s status while in the US. It is only relevant to the alien’s entry into the US. One could have one’s visa expire, and have permission to remain in the US. B visas, for example, can be issued by a US consulate with an expiration date of five years, but upon entry, only increments of six months are allowed. Once an alien enters the US, the INS agent inspects the visa and issues form I-94 and usually staples the form next to the visa in the passport. Form I-94 actually governs the alien’s classification in the US; the visa could expire the very next day, it is irrelevant to permission to remain or the terms of their stay. If an alien petitions for an extension or change of status in a non-immigrant classification, the INS, if it determines that the alien is in legal status, issues a new form I-94 with the approval. Thus, if the alien entered the US with an F visa, and changes to H-1B classification, they must obtain a new visa from the State Department at a consulate abroad to re-enter the US.

**Issues in United States Immigration Law**

**Mexican Wetbacks and Xenophobia**

The US is very similar to Australia in the attitudes towards immigrants possessed by the general populace and the government’s immigration department. However, instead of the Asian or Chinese immigrants, ‘it is those Mexicans who are causing the US so much trouble’. I can hear now my relative’s comment over the dinner table within a dissertation on the major problems that the US has with Mexican immigrants and that the problems that plague the US are a result of vast numbers of illegal Mexican immigrants. The source of these perceptions, of course, is newspapers, television and movies. The newspapers’ sources: anti-immigrant politicians and perhaps journalistic biases. One can hear it from one’s relatives, from one’s friends. Another time I remember telling a former fellow law student that I now practiced immigration law, and he responded, ‘you work with them illegals?’ This is not uncommon and somewhat of an exaggerated response, but some variation of it is common. Of course their understanding of immigrants mainly comes from the media and human societies always have viewed other humans, especially those who look or act different, as potential threats and a source to blame for problems. There was a similar occurrence in the 1980s when there was significant Japanese and American competition and there was a fear that because the Japanese economy was growing at a faster rate than the US economy and the Japanese were opening factories and investing in the US, that they would ‘take over’ the US, despite the
real fact that Europeans and the Dutch owned greater proportions of American corporations than the Japanese could ever hope to, even after a long period of time. No one made mention of the European investment, only the Japanese.

This attitude of immigrants is common in the general population of the US who are unaware of the true situation of immigration in the US or who only read the major newspaper headlines. The common perception is that the term ‘immigrant’ refers to the terms ‘illegal immigrant’ or the ‘Mexican’ who manages to cross the US/Mexico border and that American jobs are being taken away by immigrants. They come to believe that ‘immigration’ means illegal Mexicans and that many other ‘third world’ countries are included in similar analogies — rather, everyone desires to come to the US to gain some advantage at the expense of US citizens. Unfortunately, this attitude towards immigration has found its way into US immigration law. It is not only grossly inaccurate, but it actually is very harmful to the US and even more so to the immigrants who are the law’s victims.

One large divergence in the prevailing issues in US and Australian immigration law, is that the issues of US immigration law tend to be involved with the workings of the migrant system, rather than immigrant quotas. Australia, being more of an ‘island,’ is more concerned about refugees, it seems, because the refugee ‘threat’ has a much broader spectrum of possibilities. They can come from all of Asia and Oceania and each shipment of boat people carry with them different issues in country conditions. They also come at different rates. However, in the US, except for some boat people from South America, it is relatively more immune to Asian migration. It has two very large borders contiguous with Canada and Mexico. Illegal migration from

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Using macrodata for the United States, researchers demonstrate that the intensity of feelings toward immigrants is closely linked to economic conditions and suggest that racial prejudice is stimulated in economic recessions. In addition, some have concluded that opposition to immigration rises and falls with the unemployment rate, whereas measures of ethnic intolerance exhibit a secular decline that is relatively insulated from economic conditions. This suggests that the American public might prefer lower levels of immigration if they believed that immigrants took jobs away from native workers, that immigrants were more likely than natives to require public assistance, or that most recent US migrants were in the country illegally.

Valetk, below n 323, 145-46.
Canada is not really an issue, and border arrangements between the two countries are very relaxed. Illegal migration from Mexico is the main problem. However, the problem is more one of border control. US immigration law currently provides for few if any options for illegal entry and refugee status or asylum for Mexicans is far from reality; Mexico’s main dilemma is an economic one. Thus, illegal Mexican immigrants are virtually outside the immigration system, and yet, the lawmakers in Congress design the law to be punitive and the immigrants controlled by the system are punished.

In comparison to Australia, the US has taken many steps to promote immigration at a higher level, or at least, the ideal that it welcomes new immigrants. This is perhaps rooted in the fact that there was less British migration to the US than Australia, because Australia is part of the Commonwealth and the US had a more violent separation from Britain over two hundred years ago. The US attempts to pride itself on the waves of immigrants that have come to start a life in the US - the Irish, the Italians, the Chinese and presently, Hispanics are becoming a larger and larger portion of the population. There is a well known self-identity in many that our ancestors are immigrants and came to the US to start a new way of life and many Americans pride themselves on this fact.

1996 Legislative Changes, their Aftermath and the Rising Need for Skilled Migrant Labor

Today, the negative perception of immigration, as reflected in the comments above, has gained enough strength so as to be reflected in immigration law. In 1996, the US law changed and became even more anti-immigrant.\textsuperscript{323} Congressional Representatives, such as

\textsuperscript{323} A major portion of this recent law refers to the \textit{Illegal Immigration Reform and Immigration Responsibility Act} Pub L No 104-208, 110 Stat 3009 (1996) referred commonly to as ‘IIRIRA’.

[IIRIRA], regardless of whether it is further amended to fit our volatile political climate, aggressively attacks undocumented immigration on several fronts. In doing so, however, some of its measures impinge upon important rights and raise serious policy and constitutional concerns. The statute is an extremely complex piece of legislation containing many provisions affecting all types of immigrants, even though it is purportedly directed against undocumented and criminal aliens. The IIRIRA completely revises many sections of the Immigration and Nationality Act (INA), creates new programs, and changes legal standards that had been in place for decades. Moreover, the IIRIRA revises a number of current grounds of visa ineligibility under the INA and adds new grounds of visa ineligibility.

Ibid 142-43.
Lamar Smith from Texas,\textsuperscript{324} make matters worse by appealing to those in the US believing in the stereotypical ‘illegal’ or ‘Mexican’ immigrant by favouring more and more restrictive immigration legislation against the feared Hispanics\textsuperscript{325} and how ‘illegal immigrants’ are living off the welfare system and public funds.

The reality of immigration in the US is that the US desperately needs immigrants. The horror stories of the US welfare system feeding immigrants or that immigrants are taking the jobs from US citizens, are false\textsuperscript{326}. The real immigrants are computer programmers, engineers and other professionals of whom the US does not have enough. As in Australia, such factors as declining population and birth rates, make the demand for labor great. Moreover, there are some low-skill jobs that US workers simply will not take. Some of these jobs may be farm labour or manufacturing jobs\textsuperscript{327} that only immigrants are willing

\textsuperscript{324} A typical anti-immigrant attitude by the Honorable Mr. Smith, is his reaction to the current issue of H-1B visas. As of the writing of this article, there is a cap of 115,000 of these temporary work visas per year and the INS has miscounted between 4,500 to 20,000 of these visas the last fiscal year. Mr. Smith believes that the INS is incapable of regulating immigration and that a great deal of fraud exists in issuing H-1B visas and that shortage of labour does not exist. See Judith Golub and Gary Merson, ‘Advocacy Update, INS Miscounts H-1Bs, May Affect FY 2000 Cap’ (1999) 18 American Immigration Lawyers Association Monthly 901.

\textsuperscript{325} ‘The countries that are the source of the largest number of illegal aliens [in the US] are Mexico (by far the largest), El Salvador, Guatemala, Canada, Haiti, the Philippines, Honduras, Poland, Nicaragua, and the Bahamas.’ Charles Wood, ‘Losing Control of Americas Future—The Birthright Citizenship and Illegal Aliens’ (1999) 22 Harvard Journal of Law and Public Policy 465, 522 n 86.

\textsuperscript{326} For samples of the various myths and unknown statistics of American immigration, see the American Immigration Law Foundation’s Immigration Policy Reports, Our Most Recent Reports, <http://www.ailf.org/polrep/reports.htm> * 1 et seq. (updated 27 January 2000) (discussing and providing links to the following topics: Newcomers Help Massachusetts Economy; Revitalized Cities and Industries Reap Rewards, American Immigrants Win Nobel Prizes; Third of All US Winners Born Abroad, Here for a Reason; It’s America’s Responsibility to Protect Refugees, Immigration Barriers Harmful to World Economy; Skilled Immigrants in Particular Increase Wealth for Americans, Skilled Immigrants and Silicon Valley; New Study Shows Importance of California-Asia Linkages, NASA and Foreign-Born Astronauts; In Space, Diversity is Strength, H-1B & Labor Certification Programs Keep America Globally Competitive; Recent GAO and DOL Audits Flawed, The High-Tech Labor Shortage: Truth or Myth? Studies Indicate America Needs More Workers to Stay Competitive, and Immigration Levels Lower Than Critics Claim; Effect on Wages Also in Doubt).

\textsuperscript{327} The visas for temporary or agricultural workers are the H-2A temporary or seasonal agricultural workers in short supply or the H-2B temporary non-agricultural worker in short supply. The regulations governing H-2A temporary workers are found at 8 CFR s 214.2(h)(5) (INS), 20 CFR Part 655, Subpart B (Department of Labor) and 22 CFR s 41.53 and 9 FAM (Department of State). The regulations governing H-2B workers are found at 8 CFR s 214.2(h)(6), (16).
To work in the US is difficult. To obtain a temporary work permit, or H-1B classification and visa, one must have at least a four year college degree or its equivalent and, additionally, there must be an employer offering the position who is willing to pay a $500 or $1000 fee which the immigrant may not pay, even if he or she wanted to, because of penalties. Moreover, the alien worker must be paid 95% of the prevailing wage for the occupation in the area of the nation that the position is available. Sometimes the processing of H-1B petitions is so uncertain and unforgiving on both the immigrants and the supporting companies that many companies are losing a lot of money in simply trying to hire people for occupations in respect to which there is a shortage of available employees. Attorneys who assist US corporations with immigration matters concerning their employees are often left shaking their heads at the end of the day wondering why these influential companies do not write to their Congressmen and a change in the law or effective efforts to correct the 'those darned Mexicans' immigrant mentality of the US.

There are few other, albeit difficult, alternatives to the H-1B classification. Some migrants can seek 'unskilled' jobs with H-2A or H-2B classifications and visas, however, the employer must show that there are no available American workers willing or capable of taking the position offered and that the job is only temporary or seasonal in nature. Industry that employs aliens unauthorized to work are typically those positions, such as the meat packing industry, that the employer cannot find enough Americans to work the job. Recently,

328 See Valtek, above n 323.

In the United States, business has always depended on cheap foreign labor, and many analysts argue that the United States could not have become a wealthy industrialized power in the early nineteenth century without both slave labor and immigrant workers. The railroads, for example, were largely built by Chinese immigrants brought in by US development barons for this very purpose.

Valtek, above n 323, 163.

329 For the $500 fee, see 8 CFR s 214.2(h)(4)(iii)(A), (C); 8 USC s 1184(c)(9)(A). Effective 17 November 2000, the fee will be increased to $1000.00. See n 361 below.

330 The term 'alien' is consistent with the term alien in the Australian Constitution; where it refers to one who is not a citizen of Australia or been naturalized. See Alexander Reilly, 'Critique and Comment, Reading the Race Power: A Hermeneutic Analysis' (1999) 23 Melbourne University Law Review 476, 498 at n 43.

331 See INA s 212(n)(1)(A), 8 USC s 1182(n)(1)(A).

332 See above n 327.
there was a 'sting' operation by the INS\textsuperscript{333} to investigate the unauthorized employment of alien workers in the meat packing industry in states such as Nebraska and eventually Illinois and other suspect states. The meat packing industry was angry at the INS, not because of penalties they face, because the INS was simply aiming to find the workers and teach the industry to unveil workers with false documents, but it was angry because it would face a shortage of workers.\textsuperscript{334} Most employers do not want to pay $500, $1000 or go through the complex, regulation-laden process of hiring an alien worker if there were US workers available. Thus, the perception that immigrants are taking jobs is simply an unfounded fear; some jobs are jobs Americans are unwilling to work; others are reflective of worker shortages in high-tech industries because not enough Americans have computer science or engineering degrees to meet the labor demand.

There is yet a cap on H-1Bs per year - currently, only 195,000 are available and they are taken fast.\textsuperscript{335} H-1Bs are temporary and one can only work up to six years in this classification.\textsuperscript{336} Permanent resident alien classification or a 'green card' that is based on employment, can

\textsuperscript{333} For a discussion on the INS and the need to reorganise the INS, see David Jones, 'Note, US Immigration—A Legacy of Reform and Reorganization: Problems and Possible Solutions' (1997) 11 Florida Journal of International Law 409.

\textsuperscript{334} Most commonly referred to as Operation Vanguard, the operation raised many complaints as a result. For examples of discussions on this issue see eg <http://www.usbc.org/info/jobs/vanguardhalted.htm> \textsuperscript{*1 et seq.} (last modified 14 August 1999). For a discussion of Operation Vanguard in general and its affect on Nebraska’s labor supply, see <http://migration.ucdavis.edu/rnn-archive/jd-l999-01.html> \textsuperscript{*1 et seq} (7 December 1999).

\textsuperscript{335} Until 17 October 2000, as of the writing of this article, the H-1B cap was set at 115,000. This number actually varied. In Fiscal Year 1998, 65,000 were allowed, then in 1999, 115,000; in 2000, 115,000 will be allowed, but then only 107,500 in 2001 and 65,000 in 2002 and each succeeding year after. See 8 USC s 1184(g)(1)(A)(i)-(v). \textit{American Competitiveness in the Twenty-First Century Act} 2000, see n 355 below and generally s 6.3, increased the H-1B cap from 115,000 to 195,000 over the next three fiscal years, see n 356 below.

take up to four or five years to acquire because of the long complicated process involved, including labor certification with the Department of Labor.337 Because of the great demand in certain areas, such as engineering and computer technology, a new process called ‘RIR’ or ‘Reduction in Recruitment’ is available to speed up the labor certification process. However, this process can still take six months to a year with the Department of Labor and another two and a half to three years to finally acquire permanent residence with the INS.338 The only available alternatives to permanent resident status in the US are asylum339 or marriage to a US citizen or other familial relation (immediate family with brother and sister being the farthest and this can take years to be eligible for a visa).340

Marriage to a US citizen or other relationships to US citizens or permanent residents, once known as the ‘easy’ routes to permanent resident status, are no longer a safe refuge for aliens who have entered the US unlawfully.341 If the alien entered into the US illegally

337 For an example of a discussion on this issue, see Laura J Mazel, ‘The Labor Certification Process’ [1999-00] 1 Immigration and Nationality Law Handbook 379.

338 For an example of a discussion on this issue, see Eleanor Pelta, ‘Survey of Advertising Requirements for Reduction in Recruitment Cases’ [1999-00] 2 Immigration and Nationality Law Handbook 379.

339 Authority for claiming asylum is found at INA s 101(a)(42)(A), 8 USC s 1101(a)(42)(A) (defining ‘refugee’), INA s 208, 8 USC s 1158 (authority and time limit discussion); INA s 235(b)(1), 8 USC s 1225(b)(1) (procedural discussion); INA s 241(b)(3), 8 USC s 1231(b)(3) (discussing Attorney General’s power of withholding of removal; and 8 CFR s 208 et seq. as discussed and cited in Sarah Ignatius, ‘Asylum and Withholding of Removal’ in Immigration and Nationality Law Handbook, ibid 690. For an examination of refugee rights and their decline, see Joan Fitzgerald, ‘The End of Protection, Legal Standards for Cessation of Refugee Status and withdrawal of Temporary Protection’ (1999) 13 Georgia Immigration Law Journal 343.

340 Currently, it is taking twelve years for the brother or sister of a US citizen to immigrate. It takes seven years for the spouse of a permanent resident to immigrate and over four years for a minor child of a permanent resident to immigrate. For an example of a discussion on the issue of family sponsored immigration, see Austin T Fragomen, Jr, Alfred J Del Rey, Jr & Steven C Bell, ‘Family Sponsored Permanent Residence Petitions’, Immigration Procedures Handbook (1999 ed) 11-3 et seq.

341 Prior to the 1996 changes in US immigration law, an alien could enter the US illegally, then, if they have a legal basis for adjusting status to that of a permanent resident, such as marriage to a United States citizen, under s 245(i), they could pay a $1000 penalty and the illegal entry would not be a bar to adjustment. Today, there is no s 245(i) and illegal entry can be a bar to adjustment, the alien must leave the US and apply for adjustment via a consulate and they may be subject to the three and ten year bars to re-entry for being unlawfully in the US for three months or more or one year or more respectively. See ibid. See also INA s 212(a)(9)(B)(i)(I), 8 USC s 1182(a)(9)(i)(I).
or overstayed beyond the expiration of their classification, they may be barred from adjustment in the US unless they leave the US and apply via a consulate; and still then they may be subject to the three and ten year bars on re-entry.\textsuperscript{342} Marriage can 'save' those aliens who overstay and marry US citizens as long as they entered the US legally, but this exception does not apply to other family relationships. Those who entered the US without inspection or who overstayed their classification, could adjust their status without having to leave the US if they filed a petition or approvable labor certification before 14 January 1998 because s 245(i) of the INA\textsuperscript{343} allowed them to adjust status if they simply paid the $1000 penalty. However, after the passage of the \textit{Illegal Immigration Reform and Immigration Responsibility Act} of 1996, the ability to pay the $1000 penalty and adjust in the US was allowed to lapse on January 14, 1998 and was not renewed.\textsuperscript{344} The other alternatives are asylum,\textsuperscript{345} which is very difficult depending on

\textsuperscript{342} These aliens cannot adjust or change their status and are inadmissible. See INA s 235, 8 USC s 1225 (1999).


\textsuperscript{344} See ibid.

\textsuperscript{345} For a discussion of the elements of asylum, see above n 286. Female circumcision is becoming an accepted ground for seeking asylum and I have seen in our own asylum cases, judges focus on this issue among other circumstances of persecution,
which country and issue\textsuperscript{346} are applied and, if the application is found to be frivolous, the alien can be permanently barred from coming back to the US\textsuperscript{347} The Diversity Immigration Program is one good alternative, depending on an alien's country of origin.\textsuperscript{348}

Again, regarding marriage and familial relationships, they are not categories available only as a route for immigrants to jump the hurdles of US immigration law. They exist for the same reason they exist in Australian law - family unity. One must keep in mind that there is a US citizen or permanent resident who would like to unify their family. One could see few other reasons behind the existence of any law and surely a US citizen, Australian citizen or permanent resident is entitled to the right of unifying their family. However, marriage to a US citizen or being a US citizen's child is not guarantee of permanent residence in the US.

Regarding public assistance, if an immigrant or non-immigrant ever accepts public assistance, it can be a bar from adjusting to permanent resident classification or naturalising.\textsuperscript{349} Since 1996, aliens have not


\textsuperscript{347} 'A noncitizen who knowingly makes a frivolous application for asylum, after receiving notice of the consequences of doing so, is permanently ineligible for any benefits under the [immigration law]'. Sarah Ignatius, 'Asylum and Withholding of Removal' Immigration and Nationality Law Handbook, above n 337, 706 citing 8 USC s 208(d)(6).

\textsuperscript{348} The 'Diversity Lottery' program is a program where 55,000 annual immigrant visas are allotted to certain aliens from countries that have a lower immigration rate to the US For example, Mexico, China and India are countries which do not qualify. An alien literally submits an application and picture and names are drawn for permanent residence. For a discussion on this issue, see Fragomen Jr, Del Rey Jr and Bell, 'Permanent Residence Based on Diversity Immigration Program', Immigration Procedures Handbook, above n 340, 11A-1.

\textsuperscript{349} 'An alien who at any time is likely to become a public charge, in the opinion of either the consular officer when the alien applies for a visa, or the Attorney General when the alien applies for admission or adjustment of status, is inadmissible.' Douglas S Weigle, 'Grounds of Inadmissibility' in [1999-00] 1
been eligible for most forms of public assistance, although the public perception is to the contrary. It is a question asked on the respective applications and the applicant must state when and how much public assistance has been given. I have seen both sides of these issues. I spend most of my days processing H-1B petitions for major engineering, information technology and telecommunication companies. I see how difficult it is for them to find qualified applicants. Many of the applicants not only have the same basic undergraduate engineering or information technology degrees as the American applicants who are qualified, but they also have masters and doctors degrees with extremely impressive credentials from countries such as India, China, Mexico, Canada (usually with TN visas for Canada and, sometimes, Mexico which has similar regulations) and Jordan, Africa, Malaysia and many others. Employers even pay the immigration legal fees because the industries are so competitive for these workers. Even smaller engineering and computer companies pay annual salaries with $10,000 to $20,000 more in US dollars to attract these workers and everyone becomes panicked that the H-1B quota is going to be met before they have a chance to apply.

_Immigration and Nationality Law Handbook_ 601 citing INA s 212(a)(4)(B), 8 USC s 1182(a)(4)(B).


351 If some in the US are fearful about the US in world-wide competition or about the negative effects of immigration on the US economy, they might want to promote immigration of highly educated professionals and outstanding researchers because it can be a ‘brain drain’ on the world work force and this, of course, is global perspective criticism I have heard many times—but on the respective country or the immigrants themselves?

Question: Probably two of the major trends in immigration law recently have been first, to increase the number of slots for employment-related categories. Contrary to a previous questioner, I think you have to realize that in fact, we tend to take people in those categories from developing countries. We’re regarded as engaging in a ‘brain drain.’ So I would say, it is much more the United States taking from developing countries that it is groups of those people coming over here, finally getting permanent residency, and turning around and going back again. We are the ‘taker’ in those categories, but the numbers for those categories have gone up quite significantly in recent years. I’d be interested when you began to comment on it in your last remarks by saying that when the economy is good, that’s fine, but when the economy goes down. Of course, most economists who have looked at that tend to agree with your remarks—namely, that the people that get hit hardest are in fact the US citizens and permanent residents that are already here in low skill areas. They essentially get bottomed out in the market in that respect. I would be interested whether you would, for example, propose cutting back generally on the number of slots specifically related to immigration.
When I volunteer at a local community center, I work with a different population; the immigrants who have few skills and little or no job experience in a particular area and/or have entered the US illegally or ‘without inspection.’ There is very little to be done for them. Without s 245(i), they cannot adjust after illegal entry and if they are lucky enough to have a relative, it can take years for the relative to petition for them and a visa becomes available because only citizens can sponsor their spouses, parents and minor children who are eligible to immigrate immediately: brothers, sisters and spouses and children of permanent residents must often wait from four to eleven years to emigrate to the US. Moreover, there is no right to remain in the US while waiting for immigrant numbers to be available. For example, a brother or sister of a US citizen, once the petition by the US citizen is filed, has no right to remain in the US until an immigrant visa is available for an application for adjustment, which can take eleven years to become available. US immigration law does not cover the so-called problematic immigrants, they are not a part of it; and there are few if any remedies for them.

The demand for H-1B workers is so great that Bill Gates has threatened that Microsoft will move its headquarters out of the US if the cap was lowered or more restrictions imposed.\(^{352}\) Citizenship of per-

Simpson, above n 6, 265.

\(^{352}\) See eg, Bill Gates, Ask Bill, Bill Gates Web Site - Columns (20 December 1995), <http://www.microsoft.com/BillGates/columns/1995q&a/Oa951220.htm> 1-2 (12 August 2000). Bill Gates in a question and answer article, responded to questions from the curious as to whether Microsoft plans to move ‘more software development outside the US, where software expertise may be more cheaply obtained.’ Mr Gates responded inter alia (emphasis added):

Microsoft does the great majority of its software development in the United States, but that could change in the future. Our motive would not be to save money, however. We create software for the world and our success depends on drawing on a world of talent ... [I]t is absolutely critical that we have an environment in which great minds from many countries can work together. We rely on skilled foreign workers for the math, science and creative abilities as well as their cultural knowledge, which helps when localizing products for world markets. By having ninety percent of our software development in one place, we achieve quick time-to-market and high quality ... An immigration bill before Congress [presumably referring to IIRAIRA or one of many similar bills] would make it extremely difficult for Microsoft or any other US company to hire skilled foreign workers. It is entirely possible the bill will pass. If so, the United States seems destined to become the country where skilled foreigners can’t even get short-term work permits and where companies cannot easily sponsor employees for permanent residence even after proving no US workers are available to do the job. These restrictions will really put pressure on us to do a major portion of our software development outside the United States, in a country that welcomes well-qualified workers from abroad. If the US is not going to let talented people in, or let
manent residents is promoted and more money has been allocated by Congress to naturalise permanent residents, but the road to permanent residency is difficult in the US. Many bills are pending and being introduced that increase the H-1B quota. However, there is much resistance. Mr Smith from Texas will cite that there are many abuses in the H-1B system, although, I have not seen these abuses and the studies showing abuses have been debunked. There are more restrictions to aliens receiving public assistance and often the due process protections of the Constitution are not implemented because removal (formerly ‘deportation’) is not considered a ‘punishment.’ To prove the message of the need for skilled workers in the US, as this paper was completed, Alan Greenspan, Chairman of the Federal Reserve, has stated the dire need for high-tech workers in the US and the

their spouses and children come with them, it makes foreign research and development in a single site a lot less attractive.

353 The AILA Essential Worker Mailing List (<essentialworker@lists.aila.org>) related the recent news of Greenspan’s testimony to Congress:

Congress should let more foreign workers into the United States and guard against growing protectionism to keep the economic prosperity going, Federal Reserve Chairman Alan Greenspan said yesterday. Citing the nationwide labor shortage as the greatest threat to the record-long economic expansion, Mr Greenspan for the first time called on Congress to increase the cap on skilled workers who are allowed into the country, saying that would act as a ‘safety valve’ to keep the economy from overheating.

The Fed chairman endorsed a bill sponsored by Sen Phil Gramm, Texas Republican and chairman of the Senate banking committee, that would raise from 65,000 to 195,000 the number of high-tech workers who could immigrate to the United States annually and exempt American-educated workers with higher degrees in technical areas from all immigration caps. While acknowledging that Congress must deal with sometimes strong sentiment against foreign workers and trade, Mr Greenspan told the banking committee that economists see only benefits from the ‘internationalisation’ of the economy. ‘The benefits of bringing in people to do the work here, rather than doing the work elsewhere, to me, should be pretty self-evident,’ he said, because the economy can keep growing only if American businesses have the workers they need to keep expanding. Shortages of skilled workers have been especially acute in rapidly growing high-tech areas.

Mr Greenspan also urged Congress to resist the movement for protection from foreign imports, saying they also have been an important escape valve for the red-hot economy because imports have been filling consumer demand for goods that American businesses do not have the resources to produce. ‘The forces against globalisation can significantly undercut this remarkable surge in prosperity that we are observing’, Mr Greenspan warned, noting that the feelings of insecurity that prompt Americans to oppose increased trade and immigration are on the rise, as evidenced by the breakdown of the world trade talks in Seattle last year. ‘As we are creating an ever more complex, sophisticated, accelerating economy, the necessity to have the ability to bring in resources and people from abroad to keep it functioning in the most effective manner increasingly strikes me as relevant policy.’ Few senators at
AFL-CIO, which originally asked for sanctions against alien workers years ago, has asked for amnesty for six million alien workers, most of them, low skilled, to help with the extremely tight job market and to boost union membership.354

the hearing yesterday defended the anti-trade sentiment seen in Seattle, but several questioned the Fed's recently announced goal to impose higher interest rates to keep Americans from loosely spending the wealth they have been accumulating in the stock market. Mr Greenspan last week laid out a new theory that is guiding the Fed's actions. He said today's technology boom has caused a surge in productivity and higher prices for the stocks of American corporations that benefit from the new technologies.

Soaring stock prices, in turn, have sharply increased the wealth of American households to unprecedented levels in the 1990s. Although that is one reason Americans feel so prosperous today, Mr Greenspan said, it presents a problem for the Fed because consumers are furiously spending down their wealth.

The spending binge has caused personal savings to drop to record lows and the trade deficit to burgeon at record rates that cannot last for much longer. That is why the Fed is trying to slow spending and the economy, he said.

Republicans and Democrats questioned the new theory behind the Fed's actions and whether the central bank is correctly addressing the problem. Sen Connie Mack, Florida Republican and chairman of the Joint Economic Committee, suggested that the Fed should stick to eliminating inflation, which Mr Greenspan acknowledged has been largely absent, and stop worrying about the growing wealth of Americans.

That prompted an exasperated response from Mr Greenspan, who said unprecedented developments in the economy are forcing the Fed to change its focus. 'We have a new economy. It is different. It is behaving differently, and it requires a different type of monetary policy to maintain its stability of growth than we had in the past,' he said.

Other legislators questioned whether the Fed should be 'targeting' the stock market, which the chairman emphatically denied he was doing. At one point, Mr Greenspan said the Fed was only ratifying increases in interest rates already seen in the credit markets, particularly in the rates on corporate bonds.

Sen Paul Sarbanes, Maryland Democrat, said Mr Greenspan was endangering the job prospects of minorities, who have just begun to climb the ladder of success, by using the 'blunt instrument' of higher interest rates to stifle what appears to be excessive spending by a minority of well-to-do Americans. But Mr Greenspan denied that the Fed intends to drive up unemployment. He asserted that the poorest Americans have benefited the most from the expansion because they are finding jobs and seeing their incomes grow for the first time in decades.

Greenspan's prepared testimony is at: http://www.senate.gov/~banking/00_02hrg/022300/grnspan.htm


In a significant policy shift, organized labor today called for amnesty for an estimated 6 million illegal immigrants and repealing current law that imposed
Immigrant Nations 129

2000 Legislative Changes: the 'American Competitiveness in the Twenty-First Century Act of 2000'; Congressional Response to Skilled Worker Demand

As of the writing of this article, the US Congress had finally responded to some of the employer demands and the other arguments listed above to improve the mechanism for attracting and incorporating skilled workers into the US economy and improving some problematic areas in the processes for aliens obtaining permanent residence. On 17 October 2000, President William Jefferson Clinton signed into law, the *American Competitiveness in the Twenty-First Century Act*. Presently, some of the issues surrounding the Act remain uncertain, including the implementation of certain provisions and other issues that may develop. However, the basic changes are that the Act amends the INA by increasing the cap of H-1B temporary workers from 115,000 to 195,000 for the next three fiscal years. It also removes certain H-1B workers from being subject to the cap. The Act removes the quota system where there were limits on the immigration for permanent skilled workers from certain countries.

sanctions on employers that hire them. Labor helped enact the original sanctions 15 years ago as part of the last major amnesty under the federal immigration act, and business lobbyists reacted favorably today to the policy resolution, which was approved unanimously by the AFL-CIO executive council. The AFL-CIO's announcement coincides with an extremely tight job market, with labor unions finding their best chance to boost union membership is among recent immigrants.

355 S 2045, 106th Congress, 2d Session, as passed by US Senate and House.
356 Ibid s 102(a)(2):
(a) FISCAL YEARS 2001-2003- Section 214(g)(1)(A) of the Immigration and Nationality Act (8 USC 1184(g)(1)(A)) is amended—(1) by redesignating clause (v) as clause (vii); and (2) by striking clause (iv) and inserting the following: '(iv) 195,000 in fiscal year 2001'; '(v) 195,000 in fiscal year 2002'; and '(vi) 195,000 in fiscal year 2003'.
357 Ibid s 103:
Section 214(g) of the Immigration and Nationality Act (8 USC 1184(g)) is amended by adding at the end the following new paragraphs:
'(5) The numerical limitations contained in paragraph (1)(A) shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 101(a)(15)(H)(i)(b) who is employed ... at —
'(A) an institution of higher education ... or a related or affiliated nonprofit entity; or
'(B) a nonprofit research organization or a governmental research organization.
358 Ibid s 104. This provision does not actually limit the overall limit to grants of permanent residence based on employment, however, if visas are available that were not used for other countries, these numbers may be applied to those countries whose limits have been reached.
Workers from China, India and the Philippines would often have to wait years to apply for permanent residence. The new changes also allow for extensions in H-1B classifications beyond the six-year limit in certain situations. The employer fee for H-1B petitions is increased from $500 to $1000. Interestingly, there was not much debate on the fee increase from the employer standpoint, because many employers reasoned that the fees were simply the cost of doing business. Also, the fee is supposed to speed up H-1B processing times and be applied to scholarships for US students studying the sciences. There is increased mobility for workers to change employers in both non-immigrant status and when applying for permanent residence. All these changes are some of the more important changes

(a) Special Rules—Section 202(a) of the Immigration and Nationality Act (8 USC 1152(a)) is amended by adding at the end the following new paragraph:

'(5) Rules for employment based immigrants—

'(A) Employment-based immigrants not subject to per country limitation if additional visas available - if the total number of visas available under paragraph (1), (2), (3), (4), or (5) of section 203(b) for a calendar quarter exceeds the number of qualified immigrants who may otherwise be issued such visas, the visas made available under that paragraph shall be issued without regard to the numerical limitation under paragraph (2) of this subsection during the remainder of the calendar quarter.

See discussion accompanying nn 267-274 above.

See, eg, American Competitiveness in the Twenty-First Century Act, S 2045, 106th Congress, 2d Session, as passed by US Senate and House, s 106(b): ‘The Attorney General shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one-year increments until such time as a final decision is made on the alien’s lawful permanent residence.’

This is a separate bill that goes into effect two months after President Clinton signed S 2045 into law (17 October 2000). HR 5362, 106th Congress, 2d Session, as passed by US Senate and House, s 1: ‘Section 214(c)(9) of the Immigration and Nationality Act (8 USC. 1184(c)(9)) is amended—... (2) in subparagraph (B), by striking ‘$500’ and inserting ‘$1,000’.’

American Competitiveness in the Twenty-First Century Act s 105 ‘Increased Portability of H-1B Status’: ‘A nonimmigrant alien ... who was previously issued a visa or otherwise provided nonimmigrant status ... is authorized to accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant ...

See ibid s 106(c):

Job Flexibility for Long-Delayed Applicants for Adjustment of status to Permanent Residence—a Petition [for Permanent Residence] for an individual who application for adjustment of status ... has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.
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in the Act. Some of the other provisions are outside the scope of this article.364

Australian and American Analogies

General System Characteristics

The US and Australian immigration systems are very similar in many respects, although they are organized very differently. In the different systems, you can see the same basic types of purposes and categories for immigration and temporary residence. Of course the US has the unique diversity lottery system. It is quite true, however, any immigration system will have the same characteristics regardless of the characteristics of the legal system—humanitarian, business need, family unity, and of course, investment: where any prospective immigrant pays enough money to a government, the government will certainly let him or her stay permanently. Although all countries will have these characteristics, the history and sociological and political structure will greatly affect how it regulates each category. Canada, Australia and the US take in a larger number of migrants for humanitarian reasons and they also have huge needs for employment, and their immigration policies are slowly reflecting that need. Further, despite contradictory, and perhaps discriminatory immigration policies as well as major criticism in this article, they are relatively conducive to a greater diversity than many other more ancient political entities. The discussion will now turn to a direct comparison between the basic components of Australian and US immigration law and some of the issues involved.

Legal Structure

In the over all structure of the two legal systems, there are similarities. The US and Australian systems originate first with a Constitution, beneath which are the major legislative acts that comprise the statutory law governed by the Constitution. The Australian major legislative act is the Migration Act 1958 (Cth) as it has been amended since 1958.365 The US counterpart is the Immigration and Nationality

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365 See heading ‘Immigration Law Sources and Practice’ above.
Act, or INA, which was enacted in 1952 along with its subsequent amendments. The US Act is also categorized in the US Code.

After the INA in the US, comes the next more definitive level of regulation, the Code of Federal Regulations or CFR. In the US system, the CFR defines most of the permanent and temporary immigrant categories rather evenly and straightforwardly. For example, each non-immigrant visa category is listed systematically, and the designation of ‘B’ or ‘H’ classification is in direct correlation with the subsection in the INA. For example, the ‘B’ visa is listed as INA s 101(a)(B) and H classification is categorized as INA s 101(a)(H).

The corresponding level to the CFR in the Australian system, also termed ‘regulations’ are the 1994 Regulations. However, the level of definiteness varies from that in the US system, because, while some types of classification are defined clearly in the Migration Act itself, other categories are defined clearly in the regulations, and yet other categories are defined only definitely in other hierarchically lower legal categories such as in PAM3 and other sources. The Migration Act has been described as the source of ‘power’ for the regulations, and the regulations provide for the general administration of the system. These aspects of the Australian system can make it exceedingly difficult for a non-expert in Australian immigration practice to find systematically the basic structure of Australian immigration law, whereas in the US system, the CFR can provide the basic overview. For example, some visa categories are defined in the Migration Act itself instead of the regulations as found by Professor Crock:

These are the transitional (permanent) and (temporary) visas created by the Migration Reform (Transitional) Regulations 1994; and the special visas set out in ss 32-37 of the Act which cover New Zealand citizens, ex-Australian citizens; long-term unlawful non-citizens or ‘absorbed persons’; refugees; bridging visas; and criminal justice visas.

At the levels of regulation below the CFR and 1994 Regulations, US and Australian law become more similar. They both have a wide array
of formal and informal sources for the basic and intricate workings of
the systems. Immigration practice is only effective if the respective
lawyers have access to the wide array and changing law. Immigration
law in both countries is uncertain in many areas, vague in others,
constantly changing and always subject to great policy debate as this
paper discusses. Immigrant quotas become the source of contro-
versy in many political campaigns and policy debates and reactive to
changes in migration, such as the onslaught of Middle-Eastern boat
people to Australia or the economic needs for migrants that both the
US and Australia are experiencing. As discussed below, the complex-
ity of 'Immigration' law in the US and 'Migration' law in Australia
necessitates close networks of immigration and migration experts to
keep up with the ever-changing complicated law. In Australia, the law
requires such groups of experts; in the US, they develop out of ne-
cessity.

Immigration Law and Migration Law Practice

Migration law practice in Australia requires a licensed migrant
agent, whereas, in the US, any attorney admitted to at least one
State bar and licensed to practice law, may practice immigration law.
Thus, on its face, the immigration law practice in both countries
seems very different. The very fact that Australia requires a licence to
practice migration law immediately conjures up a system where mi-
gration agents have certain access to information, whereas other
groups, even migrants, do not and it may even limit alien participa-
tion or even self-practice in Australian migration law. It could also
promote a tendency in common behaviour that is either conducive or
inhibitive to alien rights. Although these facts are beyond the discus-
sion of this article, they are possible issues. Thus, the very structure
of the Australian system in its lawyer practice, could have a significant
impact on the workings of the system. However, the widespread
growth of this industry in Australia probably marginalises these pos-
sible effects. Further, the growing complexity of today's economies
and influential sectors of the Australian economy, such as the business
sector, demanding more skilled immigrant labor, also significantly

374 See, eg, ibid 1: 'If the migration legislation in America has been described as a
"hideous creature" ..., the Australian equivalent is not far behind.' (citation
omitted).

375 See Migration Act s 280(1): '[A] person who is not a registered migration agency,
must not give immigration assistance.' See also DIMA, DIMA Fact Sheet 72,
influences Australian immigration legislation and minimised governmental control of migration agents.

The US system, in reality, is perhaps not that much different from the Australian system. Although the Australian immigration practitioners are *de jure* regulated into 'migration agents', the US immigration practice is also compartmentalised *de facto*. United States immigration practice is somewhat rather a closed practice because immigration practitioners are rare and the law requires a type of camaraderie and expertise because of the characteristics and the nature of the adversary, the US government. United States immigration law is ever changing and the consequences of the changes are often difficult to determine. There are innumerable sources of immigration law. The INS is very difficult to even contact for basic information such as the case status of an application and it takes often a very unreasonable amount of time to process basic cases. For a minor example,376 for visitor (B) visa classification extensions, which are limited to six months, the INS takes often at least ten months to process them. Thus, the alien does not know whether the extension has been granted until the initial period of the extension has already expired. Therefore, the practitioner must not only deal with the basic legal requirements in the already difficult logic puzzles, he or she must calculate into the equation long processing times and then try to assess INS policies and procedures in the consequences of such delays.377

376 There are countless examples of INS time delay, the visitor visa is a relatively less problematic case, although if she was barred for six months, see below, it is a serious problem.

Today, the American Immigration Law Foundation (AILF), the National Immigration Law Center (NILC), and the Immigrant Legal Resource Center (ILRC) are filing a national class action lawsuit against the Immigration and Naturalization Service (INS) over the California Service Center (CSC)'s failure to adjudicate applications for voluntary departure and employment authorisation under the Family Unity program. See AILA InfoNet, 24 August 2000, *1, <http://www.aila.org/infonet/> (members only website, 2 September 2000). Another good example is in the case of national interest waivers. The INS has not granted national interest waivers to physicians for reasons not legally sound. National interest waivers are for EB-2 petitions that, if granted, would not require a labor certification if the position is in the national interest. Congress enacted legislation to specifically direct the INS to adjudicate these petitions in favour of the physicians, and after several years, the INS still has not made decisions, or granted even one petition after the legislation was enacted. Some immigration attorneys in St. Louis have recently filed suits against the INS. Discussions at 2000 AILA Annual Conference in Chicago, Illinois (mem).

377 An example of the simple visitor visa extension problem, is when I was working on making a motion to reopen a visa denial for a client. The client entered the US in B classification, requested an extension of the B classification in a timely fashion,
A US lawyer has difficulty in even contacting the INS. For regional INS offices, lawyers must use the same telephone number as any client. The lines are so busy, an attorney must continuously redial, preferably on several telephone lines, for sometimes over thirty minutes, just to get through. Then, they are on hold from ten minutes up to several hours before they can talk to an information specialist, who at most, can only tell them at what stage their case is. They can only say that it is with an examiner, still pending, that information has been requested, and, at most, they can tell you a few days in advance of a decision or action before the attorney receives notice of the action in the mail. At the local INS level, where the INS has offices in larger cities and process different types of applications, such as family petitioners at the interview level, one can only call into a national 800 number. To talk to the INS about a case, an attorney must physically go to the INS and wait in line with everyone else, although some local office set aside time for attorneys and are more accessible via telephone for certain matters and cases. In the US system, where the alien or attorney has managed to elicit the support of State or Congressional Senator or Representative, they rarely accomplish much, if even able to speed up the processing of a case.378

Immigration practice in the US has a unique characteristic in comparison to other law practices. Instead of other lawyers and clients and then before she knew of the decision within the six month extension period, she applied for a change of status to F classification. The change of status is not problematic assuming the first extension was granted. However, over ten months after she applied for the extension, her B visa extension request was denied, and then, of course, her F change of status request was denied. The major problem was not just the denial, but she was barred from returning to the US for three years. The rule is that when an alien makes a timely bona fide request for an extension or change of status, they have 120 days permission to remain in the US after the date of the expiration of their current classification. Thus, almost four months. However, if they are past this period for six months, they incur a three year bar from returning to the US Thus, in my client’s case, by the time the INS made the decision, she has already incurred a three year bar through no fault of her own only because the INS took so long in making the decision, she incurred this stiff penalty. Fortunately, the INS just made a change in policy by a memorandum that stated that their policy was now that the alien applicant had permission to remain until they rendered the decision. This is a good memorandum; however, there are many who suffered the previous consequences.

An example: Our firm had one high profile case with a famous performer, whose parents’ applications for change of status applications were denied for reasons that clearly contradicted the law, and had the attention and aggressive help of a US Senator. The Senator contacted an INS agent in Washington, DC, who contacted us instead of its own agency, in trying to track down our motion to reopen the case; the case was denied again by the same examiner and now it is on appeal, which means the case is virtually dead, since appeals routinely almost take two years.
being potential adversaries, in immigration practice, the only real ‘adversary’ is the INS. Thus, attorneys tend to work together in immigration practice; it is a common cause for all practitioners. This is not only the case at the local level, but at the national level. Also, most US immigration attorneys are members of the American Immigration Lawyers Association (‘AILA’), which has over 6,000 members. The reason for the high rates of membership in one immigration professional organisation is that AILA is a source of education on immigration law, updates, publication provider and network for attorneys. Each year, they hold an annual conference lasting almost a week for classes on immigration subjects and almost half the membership attends this conference. This is one of the few sources of structured education on immigration law for most lawyers. United States law schools are offering more immigration law classes, however, they are more from a constitutional or due process perspective. AILA is very active in promoting immigrant rights in the US and rallying immigration attorneys behind it to promote legislation, education and, if necessary, suing the INS in forcing compliance with the law.

The result of the US systems is that a similar network of attorneys has developed in comparison with the migration agents in Australia. Although the Migration Institute of Australia licenses migrant agents in Australia, their paying clients are the aliens, which forces a similar pro-immigrant mentality towards migrants as exists in the US. Instead of Migrant Agents in the US, most immigration attorneys are members of AILA, although AILA is very political. Perhaps a more accurate analogy is one of state bars, such as Texas and California, which are creating immigration attorney certifications. These certifications require attorneys to meet certain levels of knowledge of immigration law. One primary difference remains; aliens have more ability in the US to practice their own immigration work and have perhaps, a marginally better ability to access legal information, such as the CFR. However, the complexity of the law and lack of legal education of these would be per se aliens, would severely limit their success without the advice of an attorney.

**Immigrant and Citizen Classification Schemes**

The immigration and citizen classification schemes are organised according to the Australian system and analogised to the US system in the discussion within each category.

**Primary Classifications**

Australia has four different primary classifications of legal statuses for aliens: permanent resident, temporary resident, overseas student and
The US system has the same concepts, but they are grouped in two primary categories, immigrant and non-immigrant. The immigrants are the permanent residents and the non-immigrants are the other categories. Student and visitor are also classifications in the US system, but they are grouped under the 'non-immigrant' category.

Citizenship

Both systems have the 'citizen' as the next category. Like in the Australian system, citizenship in the US can be by birth, grant, adoption and descent. Citizenship is very difficult to lose in the US system, except for cases where 'naturalisation' was based on fraud or where the person was not lawfully admitted as a permanent resident. Citizenship brings with it the ability to vote in both systems as well as relief from regulation by the DIMA or the INS. The primary differences are in instances of birth. In the US, if the individual is physically born in the US, he or she is automatically a US citizen, whereas, in Australia, although it had a similar law in the past, the parents must fall within certain criteria.

The US and Australian systems are also similar in the grant aspect of citizenship, although the time allocations are different. The US also requires a ceremony and oath of allegiance, but the residency requirements are longer. In Australia, one must be a permanent resident for two years, whereas in the US, one must be a permanent resident for five years. There are some exceptions to this rule. If

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379 See above n 39.
380 See heading 'Immigrant and Non-Immigrant Classification' above.
381 See ibid and above n 368.
382 See headings 'Temporary Residents', 'Visitors' and 'Temporary Immigration' above.
383 See heading 'Classification Scheme, Citizenship and Permanent Residency' above; above nn 46 and 47 and INA ss 301, 311, 318, 320; 8 USC ss 1401, 1429, 1422, 1431.
384 See heading 'Classification Scheme, Citizenship and Permanent Residency' above; INA s 318; 8 USC s 1429.
385 See heading 'Classification Scheme, Citizenship and Permanent Residency' above and above n 45.
386 See heading 'Classification Scheme, Citizenship and Permanent Residency' above; above nn 52-53 and accompanying text; INA s 322 et seq; 8 USC s 1433 et seq.
387 See heading 'Classification Scheme, Citizenship and Permanent Residency' above; INS Interpretation 316.1(h)(3)(iv).
388 See heading 'Classification Scheme, Citizenship and Permanent Residency' above; INA s 334(b); 8 USC s 1445(b).
the permanent resident has been married to a US citizen for three years, then he/she is eligible for naturalization.389 If a child is born overseas to at least one US citizen parent, they must also apply for naturalization before their eighteenth birthday as in the Australian system.390

Permanent Residency
Both the US and Australian systems allow for permanent residents to live and work in the respective countries indefinitely and they both have access to social entitlements.391 The ability to lose permanent residency is similar in both systems. In both systems, permanent residency can be lost by fraud, crimes, and threats to national security.392 Appeals can be made to the Board of Immigration Appeals and the Federal court system in the US and to the Administrative Tribunals and court system in Australia.393 Also similar to the Australian system, US permanent residents may have their status revoked if they remain outside the US for a long period of time.394

Visitor Classification
In Australia the visitor classification scheme is a separate category of classification, whereas in the US, it is one of many categories under the ‘non-immigrant’ classification. In both countries, a visitor may only visit for a shorter period of time, may not work and may not seek employment except in limited circumstances.395 In Australia, the visitor may only work in some circumstances if it is his or her own business, and in the US, the alien may only work if compensated by a non-US entity or if in training programs with certain parameters.396

389 See INA s 319(a); 8 USC s 1430(a).
390 See heading ‘Classification Scheme, Citizenship and Permanent Residency’ above; INA ss 320-21; 8 USC I 1431-32.
391 See heading ‘Classification Scheme, Citizenship and Permanent Residency’ above. See, eg, American Immigration Lawyers Association, Introducing the 1996 Immigration Reform Act (1996) 123 explaining access of permanent residents to social entitlements.
392 See heading ‘Classification Scheme, Citizenship and Permanent Residency’ above; See, eg, American Immigration Lawyers Association, ibid, 62 et seq.
393 See text accompanying above n 63.
394 See heading ‘Classification Scheme, Citizenship and Permanent Residency’ above.
395 See heading ‘Visitors’ above; 9 FAM s 41.31, above n 4.
396 See heading ‘Visitors’ above.
Permanent Migration Schemes

Permanent migration schemes in Australia are in two main categories. One category is humanitarian. The other category has seven main avenues for acquisition of permanent residences: investor migration, business migration, senior executive migration, established business in Australia, work skills migration, employer-sponsored visas and family migration. The US system has five primary migration schemes and the humanitarian category is within that scheme and the others are organised slightly different; however, there are almost the identical elements. The four methods for immigrating to the US are: investment, family, asylum, diversity and employment. 'Refugees' enter the US classified as refugees, whereas asylum applicants seek to meet the legal definition of refugee. The employment method in the US has some of the same elements within the category that are similar to the Australian separate classifications. As discussed above, employment immigration has five preference categories. The ‘EB-5’ category is the investor equivalent and really, as was described above, it is almost so entirely different from the other preferences, that it is almost in a category of its own. The ‘EB-1’ category, has three categories of aliens eligible for such status, and one being executive managers in a US company; ‘EB-1’ classified aliens can forego labor certification. Employment also can require employment sponsorship and skills migration. Employment immigration has five preference categories. The ‘EB-5’ category is the investor equivalent and really, as was described above, it is almost so entirely different from the other preferences, that it is almost in a category of its own. The ‘EB-1’ category, has three categories of aliens eligible for such status, and one being executive managers in a US company; ‘EB-1’ classified aliens can forego labor certification. Employment also can require employment sponsorship and skills migration.

Family immigration is very similar in both systems. Both systems require financial support to minimize the prospect of public assis-
tance. The US requires an affidavit of support, and Australia requires an assurance of support; both are legally binding for the promisor to pay back the government if the government is forced to pay social support for the alien. However, in the Australian system, the familial and financial sponsor cannot be the same, whereas in the US system, they usually are the same.

In the US, there is no balance of family test or requirements regarding a sponsor’s children or for the petitioner to have lived in the US for so many years, only classification as refugee, permanent resident or citizen is relevant. Australia also requires the relative to have skills on a skills occupation list and pass the same points test as independent migrants in certain categories; the US system only requires status of the petitioner and relation to the beneficiary: there is no other employment or skill related criteria for the beneficiary. However, in the US system, only parents, children, spouses and brothers and sisters of US citizens may petition for family. In Australia, nephews and nieces may be petitioned for as well as ‘domestic’ partners. Also, a child only need be eighteen to petition for a parent, whereas, in the US, they must be at least 21.

Humanitarian Migration

In Australia, refugees are accepted by almost the same methods as in the US because both adhere to the UN Convention relating to the Status of Refugees which defines refugees. According to this

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404 See text accompanying above nn 103 to 109; INA s 212(a)(4)(C).
405 See ibid.
406 Ibid.
407 See generally heading ‘Family Immigration’ above.
408 Ibid.
409 See text accompanying above n 118.
410 See supra text accompanying above n 110; INA s 201(b)(2)(A)(i), 8 USC s 1151(b)(2)(A)(i).
411 Convention was ratified in 28 July 1951 (See Aust TS 1954 No. 5, 189 UNTS No. 2545, 137). The Protocol was signed on 31 January 1967, and ratified on 13 December 1973. (See Aust TS 1973 No. 37, 606 UNTS No. 8791, 267) as cited in Crock, above n 32, 123 n 1.
412 A refugee is one who:

    owing to a well-founded fear of being persecuted for reasons of race, religion, nationality or membership of a particular social group or political opinion, is outside the country of his nationality or of habitual residence, if stateless and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

    See Crock, ibid. 123 citing Refugee Convention, Art1A(2); and the Protocol, Art 1(A)(2).
Convention, refugees must have similar rights such as the ability to seek employment, protection of the law and access to social services. Both systems allow for sponsorship of relatives who also may be in danger of the same harms the admitted refugee experienced. However, in the US system, refugees are eligible to petition for their relatives only within the first two years of entry as refugees, and the process is greatly expedited for their admittance, even more so than permanent residents. After the refugee becomes a permanent resident or citizen, they have the same petitioning capabilities as others in the same category; however, in Australia, refugees may only petition for their relatives after they obtain permanent residence or citizenship. However, they may petition for non-relatives if they are in danger and in similar circumstances.

Temporary Residence
Temporary residence in Australia is very limited in comparison to the US, which has multiple categories, and there is not an equivalent to the retirement visa in the US system. The H classification scheme within non-immigrant classifications is the equivalent to the Australian sponsored employment temporary visa scheme as is the skilled worker scheme; typical H-1B workers are the equivalent to the employment sponsored visa and the H-2A, agricultural worker and H-2B non-agricultural worker are equivalent. There is not a senior executive scheme in the US system however; senior executives may fall under the H category or L category in the US scheme. In the Australian system, employees and business partners can immigrate on a permanent basis if they meet certain experiential and skill requirements, which is also true in the US system, skilled workers must have at least two years of experience to emigrate, but if they have at least that requirement, the US system will them to immigrate simply because there is no US worker available to fill that particular job. Perhaps the biggest divergence between the US non-immigrant and the Australian temporary and student categories is that in Australia, the spouses are allowed to work at least part time, whereas in the US,
spouses cannot, except for spouse of J-1 exchange visitors, are not allowed to work.419

Conclusion

There are many similarities not only between the US and Australia in general, but in their immigration law, immigration policies and fears associated with immigration.420 Businesses need immigrants and their skills and are making great efforts to liberalise immigration policies so they can obtain their needed labor: and yet the former ‘immigrant’ populations of the respective countries fear competition and that the new immigrants will drain public assistance funds. However, the fears are just that - ‘fear’. The boat people do occasionally come and there are those in need, but the general rule is that both nations and their economies require immigrants or there will be far greater negative impact, at least economically, than if some of the fears of immigration turned out to be true. Further, refugees from other countries often have a true humanitarian need and their negative consequences on society should at least be quantified scientifically before legislation and fear react harshly. The US situation as a border nation is more complex, but the effects should still be quantified and dealt with without punishing all immigrants. Australia has grossly over reacted to a sudden influx of refugees, who most likely had real life and death concerns, before even processing them or determining the consequences.

Regarding business immigration, an employer will not go through the trouble to hire a ‘foreigner’ if there is a qualified Australian or American worker. It is much easier, cheaper and more patriotic to hire an American or Australian worker. If a business is hampered by a lack of labor, then certainly we will all pay the price.421 We are also rejecting

419 See text accompanying above n 313.
420 Jeannette Money notes that some authors believe globalisation and the nature of western societies and economies prevents cessation of immigration by allowing migratory flows which are increasing as she states:

Many authors attribute this disparity—between the apparent desires of the society and the continued growing presence of immigrants—to the role of human rights norms. According to this line of reasoning, basic human rights associated with family reunification, asylum and protection against deportation, prevent states from responding to domestic political pressures to reduce immigration.

Money, above n 213, 498.

421 For an analysis and discussion of immigrant labor in the US and patterns of employment and unemployment, see Barry R Chiswick, Yinon Cohen and Tzippi Zach, ‘The Labor Market Status of Immigrants: Effects of the Unemployment
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the opportunities and values displayed in our origins and forgetting
that immigrants are seeking to make numerous contributions that
benefit their new. They are fighting for a new and better life and ea-
ger to contribute to society. They also represent intimate new links to
other countries. Their host society will benefit much form such op-
portunities brought by its new constituents. If a country could have so
many citizens with such intimate links to so many countries; they
everyone will benefit from such opportunities.423 If new immigrant com-
puter professionals take jobs from US or Australian citizens, then
perhaps the old immigrant population should emphasise computer
science or engineering and be qualified to take such jobs. Immigra-
tion should be valued as a resource, not a threat. Australia and the US
thrive for having such resources in their historical beginnings and do
direct best to maintain this resource with a sense of reality.

It could be that in discussing the restraints of immigration law and
the effects of immigration, Australia and the US are ignoring the im-
provement of their societies that naturally results from having the
best and brightest around the world make the US and Australia their
new homes; it could even be viewed as an excellent opportunity for
social engineering or planning. Thousands or millions of people
around the world, who possess a high level of skills and education to
offer the societies, have the desire to immigrate to both countries.
They must also manage to pass character and moral tests and have
the ability and resources to make it through complex immigration
structures.

There were a few things that I was not aware of when I was that four
year old little boy taking off in the Qantas jumbo jet from the airport
in the small town of Springfield, Missouri to Sydney, Australia. I was
not aware that my chosen profession would be based on the same
principle. That principle is one of assisting people to immigrate to
the US to begin new homes in a new land in the very same way I had
begun my new home in Australia. Also, little did I know, that I was
leaving one immigrant nation for another, that both countries were

Rate at Arrival and Duration of Residence' (1997) 50 Industrial and Labor Relations
Review 289.

422 See, eg, Christopher W Rudolph, 'Globalization, Sovereignty, and Migration: A
Affairs 325.

423 For a discussion on the economic perspective of immigration, see Howard F
Chang, 'Liberalized Immigration as Free Trade: Economic Welfare and the
1147.
made up of immigrants, needed immigrants, yet, often feared immigrants: and they did not want to admit it.