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# THE IMMIGRATION KIT
# (10TH EDITION 2022)

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Although the *Australian Constitution* of 1901 is a sparce document, the Founders provided to the new Federal Parliament many heads of power for dealing with immigrants. These included the specific powers for immigration and emigration (s51(xxvii)); the influx of criminals (s51(xxviii)); naturalization and aliens (s51(xix); external affairs (s51(xxix)) and the relations of the Commonwealth with the Islands of the Pacific (s51(xxx)). Given the broad and ample principles for the interpretation of the *Constitution* adopted by the High Court of Australia, especially after the *Engineers Case* of 1921, and the gaps and defects inherited from colonial times, it was natural that these powers were assigned to the federal polity and expressed in ample and multiple terms.

One factor that engaged the High Court from the very start of the Commonwealth was the common conviction that Australia should enforce a "White Australia Policy". Enacting such a law was one of the first priorities of the first Federal Parliament in 1901. Already, in the 1890s, it had been a hot issue for debate and negotiations between the Imperial power of the United Kingdom and the Australian supplicants seeking as high a degree of

* Justice of the High Court of Australia (1996-2009); Patron of Refugee Advice and Casework Service (2018-).

independent national governance as they could secure from the British authorities. One of the issues that exercised British politicians from the start was that they, and their Crown, governed a huge part of the earth's territory and had allegiance from millions of different races. Within limits, after the loss of the American colonies, they were prepared to grant self-government to the 'white dominions'. But they always had to be very conscious that most of their empire, comprising "British subjects", were of "non-white" ethnicity. A very small proportion of them in Australia were Australian Aboriginals who scarcely received any special recognition from the settlers or their representatives. Possibly with this in mind, no specific power was afforded to the Federal Parliament to make laws with respect to "citizens or citizenship". Nationality status throughout the Empire was that of allegiance to the British Crown.

Even in the 1960s, when I received my first passport, it declared that I was a "British subject". Since that time, the federal laws on citizenship have galloped ahead. They now mingle with the other laws with respect to "non-citizens". The result has been a huge array of federal law-making in the past 50 years to deal explicitly with citizenship. In 1996, when I moved from my office as President of the New South Wales Court of Appeal to the High Court of Australia, one of the features of my new responsibilities that surprised me was the large number of cases that dealt with immigrants and immigration. The High Court spent a significant part of its time dealing with these cases. There were even more of them by the year I concluded my service as a Justice in 2009.

Quite apart from the large number of appeals and applications for constitutional writs heard by a Full Court of the High Court, there were many procedural hearings before single Justices. In those days there were also many relevant applications for special leave to appeal against various migration decisions. At first, these in were commonly heard not “on the papers”, as today, but orally before two or three Justices. Often, for default of legal representation, these cases were heard with oral submissions, limited in time to 20 minutes. Those submissions were presented by unrepresented people whose first language was not English and whose command of the applicable laws, as those gathered in this book, was limited and often misdirected. The Justices often had to search unaided for appealable or jurisdictional error in the case. These formulae afforded the applicant the keys to the kingdom of a Full High Court hearing. Because I myself was always uncertain about the exact ambit of jurisdictional error, I could hardly blame the litigants for finding the concept impenetrably elusive. To try to clarify the law on these fields of law this kit was developed. This is the 10th edition of the kit. I am proud to endorse it.

The chief merits of the Kit assembled in these pages are in my view:

* It provides a clear, user-friendly step by step guide on how the Australian immigration law and administrative system operate;
* Whilst not a substitute for legal advice, the Kit affords an accessible resource for individual legal and political engagement;
* Its content was commissioned from a team of experienced lawyers. The editor and lead author is Ali Mojtahedi, principal solicitor at Immigration Advice and Rights Centre (IARC), which has also raised

the funds to afford free and confidential advice and representation to vulnerable immigrants;

- The content of the Kit is comprehensive and accurate to the time of publication;
- It includes necessary references to federal enactments. It provides details of the personal powers afforded to the Minister of Immigration, including to grant or cancel a visa on “character” grounds;
- It includes explanations of the specific laws and regulations governing registered relationships; sponsored parents; the Skilling Australians Levy; the Regional Sponsored Migration Scheme; the Priority Migration Skilled Occupation List; in-country Special Humanitarian Visas and Revised Citizenship Procedural Instructions; and
- It contains 23 chapters addressed to the huge range of laws and policies that may afford a foundation, in law and policy, for unfavourable determinations, commentary and law reform.

Chapter 13 of this book, by Kerry Murphy on Refugee and Humanitarian Visas deals with a subset of laws and policies that made up the bulk (but by no means all) of the immigration cases that found their way to the High Court of Australia. All migration decisions and the struggles to secure appropriate visas, are important to those affected and their families and dependants. However, the laws and practices affecting persons claiming refugee status are often the most gruelling and upsetting of the decisions reviewed in this book. They present Australia’s national response to its obligations under the *Refugees Convention and Protocol*.

Although not expressly incorporated into Australia law, the terms the text, context and purposes of the Convention can influence the interpretation of local laws, directions, advice and policy. This was where many of the High Court cases were fought out. Judges, tribunal members, politicians and officials would endeavour to read the law so as to fulfil our international obligations. However, as the High Court's unanimous decision in *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 2019 CLR 365 illustrates, and this book demonstrates, decision-makers in all branches of government are obliged to apply the law. They are not free to follow their hearts. Yet this book shows the need, wherever possible, to apply the laws on refugees and other would-be immigrant without ignoring universal human rights, a sense of justice and compassion, so long as it is sustained by law.

A book as comprehensive as this is a tribute to the fine minds that have assembled it and who explore the sometimes dense forest of this branch of the law. They will always remember that immigration law is not only detailed and complex. It is also constantly in a state of change. Sometimes, as with the recent special provisions for visas for Afghani or Ukrainian refugees, change will follow unexpected global events. Sometimes, they will respond to political and social pressures. Often, they will arise from nothing more than a creative invention of new actors, addressing the field of immigration law afresh. This is the final note of caution that must be mentioned.

There will be an 11th edition and later editions of this work. No text can provide the eternal explanation of migration law. It is constantly being re-written and we can surely predict that recent pressures will continue to arise

to call forth future editions that will help us in Australia to define who we are as a people, and who we will allow to become part of our Commonwealth.

Sydney,
18 March 2022

Michael Kirby