

NATIONS OF IMMIGRANTS: AUSTRALIA, THE UNITED STATES, AND INTERNATIONAL MIGRATION

by Gary P Freeman and James Jupp (eds), Melbourne, 1993, Oxford University Press, 264pp, \$18.94, ISBN 0 18 55 3483 2

This interesting study of immigration issues in Australia and the United States was jointly sponsored by the Australian Bureau of Immigration Research, and the University of Texas' Center for Australian Studies. It is the first analysis of American — Australian immigration policies and practices, intended to "broaden ... understanding of one of the major social forces of modern times and to illuminate its impact on two comparable democracies which share many values, institutions and practices" (pix).

Comparative immigration studies are rare. The choice of the United States — Australian vantage point is a useful one. The two countries have a long association on immigration matters. In the past both countries co-operated to enact explicit, racist legislation excluding Asian immigrants and jointly resisted Japan's diplomatic efforts to secure some modification of their exclusionary policies. Presently both countries operate elaborate, off-shore visa programs. They are classic "gateway" or "front-end grant" systems. Australian and American immigration regulations are of similar size and incomprehensibility. Public debates in the two countries echo similar concerns about border control, family reunion and the facilitation of skilled, business and visitor entrants. Immigration policy-making between the two countries has the appearance of management by mirrors. Border control problems in the United States have prompted Australia to enact rigorous exclusions for unauthorised arrivals. Australian politicians justify our border detention policies for unvisaied boat arrivals by reference to "flawed, liberal" entry policies operating in the United States, which are said to invite the migrant smuggling trades. Australia models and reflects for the United States, examples of "managed, coherent immigration and settlement policies", particularly the migrant program mix of skilled and family entrants.

There also are points of contrast in the immigration systems of the two countries. Freeman and Jupp in their apt and illuminating introduction, observe that the United States attracted diverse immigrants. Its settled frontier "provided ... symbolic support for the idea that immigration was necessary to populate the continent and for the notion that it could serve as a safety valve against social tensions in the crowded eastern urban centers" (p11). In Australia, by contrast the predominantly British settlers did not "so much occupy their land as surround it", tenaciously clinging to coastline settlements. The perceived "emptiness" of Australia made "immigration more palatable to Australians than it would otherwise have been" (p12) but the harsh frontier promoted working class solidarity and organised labour campaigned against immigration, particularly against so-called "unfree" Asian labourers.

Various immigration commentators have noted Australia's immigration "control" focus. Freeman and Jupp observe that the role of the State in immigration matters "has been far more longstanding, extensive and decisive in Australia than in the United States" (p19). Australia has the "better designed

policy-making structure to regulate and control immigration" and a favourable geopolitical situation for immigration control (p20). On the other hand, they observe, "public scrutiny and interest in immigration policy decisions are more intense in Australia and may constrain the flexibility of its policy makers more than their counterparts in the USA" (p20).

The book is divided into four sections dealing with the policy and politics of immigration control, with immigration and the economy, immigrant settlement and multi-cultural policies. The section of most interest to lawyers is that dealing with immigration control and accordingly, in this review, I have focussed on the essays in this section, namely:

- R Birrell, "Problems of Immigration Control in Liberal Democracies: The Australian Experience";
- F D Bean and M Fix, "The Significance of Recent Immigration Policy Reforms in the United States";
- M J Miller, "Never Ending Story: The U S Debate Over Illegal Immigration"; and
- G P Freeman and K Betts, "The Politics of Interests in Immigration Policy Making in Australia and the United States.

These essays might have been subtitled: "Can immigration be controlled?" The answers given by the American and Australian writers appear to provide a further point of contrast between the two systems.

The American essays explore the impact of the *Immigration Reform and Control Act 1986* and the *Immigration Act 1990*. The former introduced various after-entry controls to supplement relatively ineffective border checks against undocumented immigrants. Employers could be sanctioned for hiring undocumented workers. The Systematic Alien Verification for Entitlements (SAVE) program required all States systematically to verify that non-citizens were eligible for welfare benefits. At the same time, illegal aliens residing in the United States from 1 January 1982 and certain "special agriculture workers" were permitted to regularise their status. In the 1990 Act, as a further disincentive to illegal immigration, the legal migration programme was expanded. It was termed "closing the back door while keeping the front door open" (p54).

The writers in this text generally concur that the legislation did not meet the objective of controlling illegal immigration. Bean and Fix suggest that the reduced flows of Mexican illegals workers in the year following the 1986 enactment:

may have owed less to the deterrent effects of sanctions than to generalized patterns of anxiety and rumour, especially in Mexico, about what the effects of the law might be. Once it was learned that the legislation was not going to lead to draconian outcomes (such as undocumented being thrown in jail), the process of undocumented labour migration resumed unabated (p47).

Another study, alluded to in the text, suggested that the 1986 Act may have increased undocumented entry by women and children from the south "perhaps in anticipation of more lenient policies toward family members and future amnesties" (p54). The changing migration pattern presaged a more worrying trend for migration managers. Such entrants looked set to undertake

longer periods of undocumented residence than seasonal, male illegal entrants and could be more dependent upon public benefits.

In appraising the legislation, the writers generally agreed that the 1986 regularisation campaign was successful. It allowed some three million illegal aliens to be located and legalised. However few additional claims were made for the legislation. Miller noted that certain observers took comfort from the fact that the legislature had committed itself to controlled immigration. Even so, the volume and pattern of immigration seemed unlikely to change. Immigration policy is evaluated as performing a political, rather than a societal function. It is there to allay community anxieties about their changing societies — to “create a symbol and perception of commitment to controlling membership within the society” (p54).

The Australian writers, Birrell and Betts, begin from the assumption that immigration can be controlled and that immigration management makes a real impact on the economy and society. Their thesis essentially posits that the Immigration Department's efforts to manage migration are undermined by an unhappy alliance of craven politicians, “altruistic” intellectuals and the latter's natural allies, the judiciary. Birrell referring in particular to Einfeld J, notes that “[j]udges tended to reflect the prevailing changes in Australian elite attitudes towards immigration issues in which the would-be migrant was seen as a victim of Australians' alleged prejudices and DILGEA's bureaucratic insensitivity” (p28).

The Birrell premise concerning managed migration is a simple one. He cites the “sovereignty principle” — a 1978 version — that “it is fundamental to national sovereignty that the Australian Government should determine who would be admitted to Australia” (p24), and notes that immigration department officials and ministers “have made the running” on immigration control issues. In his view, the Courts circumvented the offshore control system by opening up avenues for permanent entry from within Australia. Birrell cites various examples. The Courts “redefined the terms” of the pre-1989 compassionate and humanitarian residence category, opening it up to unexpected numbers of applicants. Similarly, the High Court decision on the refugee case, *Chan Yee Kin v MIEA* (1989) 87 ALR 412; 169 CLR 379 is said to have “opened the way for a whole class of appellants, such as about 40,000 Peoples' Republic of China students in Australia, to claim membership of a social category — Chinese students — some of whose members had been persecuted at the Tiananmen Square affair” (p31). The Federal Court case of *Dhillon v MILGEA* (1989) 86 ALR 651 (and *MILGEA v Dhillon* Full Federal Court, No WAG 26 of 1989, 8th May 1990, unreported.) also is said to challenge Departmental policy, such that a marriage or de facto immigration claim could be rejected only where both parties to the relationship were duplicitous and contrived the marriage for immigration purposes. According to Birrell “this sharply reduces DILGEA's capacity to police contrived immigration marriages” (p32).

Whatever the merits of Birrell's thesis, his argument is marred by his misunderstandings concerning the meaning and substance of the cases cited and the general constraints of judicial review. Thus, he criticises the High Court in *Chan*, because “none of the five High Court judges reporting on the case made any serious attempt to evaluate what Chan's position was likely to be should he have returned in 1989” (p29). In fact the High Court made much of

the Full Court's error that Chan would be unlikely to encounter persecution if returned in 1989 because of the "substantial changes in the political situation in China" since his departure. The High Court noted that there "was simply no material before the Federal Court which entitled it to conclude or assume that the regime in China was different from that in power when Mr Chan escaped in 1974" (*Chan Yee Kin* at 419 per Mason CJ). Birrell's complaint is that the High Court did not fall into the same review error as the Court below. The *Dhillon* judgment, which canvassed the decision-maker's refusal in the particular case, is cited by Birrell as a proposition about all immigration — marriage cases. Again this misreads the case. The Court was concerned with the decision-maker's reasons, particularly his finding that the *Dhillon* marriage had been contrived to enable Mr *Dhillon* to migrate to Australia. The Court noted that the evidence before the decision-maker belied this finding as the wife held an anticipation that theirs would be a workable relationship. On the Birrell concern — the general issue of contrived immigration marriages, Lee J noted:

If the decision-maker was of the view that the marriage was contrived or a sham, that conclusion should have been stated. It is obvious that it is not in Australia's interests to grant a permit to a participant in such a contrivance and thereby advance the purpose of the sham. Of course the decision-maker may move beyond that to ground the refusal of the grant of the permit on a finding that the marriage is one in name only or will shortly cease with no prospect of resumption, but in this case he has not done so. If a decision-maker is uncertain about the true nature of a marriage relationship and bases the decision to decline to grant an entry permit on mere speculation or suspicion, such a decision may be shown to be arbitrary in that it has not been based on material tending logically to show the existence or non-existence of facts relevant to the issue to be determined (at 666).

The editors of the book self-consciously disavow searching for orthodoxy on any of these immigration management questions. The issues are raised, not resolved. The book engenders the feeling that the field of immigration control is best reserved for optimists. Certainly, immigration legislators and administrators, whether Australian or American, profess a committed faith in the efficacy of their movement data bases, their visa systems, passenger cards and carrier sanctions. Yet, in both countries, for those who take heart when bureaucratic structures are subverted or by-passed by "ingenious" entrants, their immigration systems provide an eternal source of faith.

The book provides an excellent case study on the rhetoric and practice of immigration management. The unresolved question for other Australian studies concerns the expectations we have of our immigration managers. Can immigration be controlled or have we demonised the legal system to explain the shortcomings of a system which must always fail in the face of longstanding, well established travel and migration pressures?

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