Framed by Legal Rationalism:
Refugees and the Howard Government’s Selective Use of
Legal Rationality,

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Being a refugee means taking refuge in a country other than one’s own. Many people are affected by the upheavals of refugee flight. In 1999 alone, the United Nations assisted approximately 17 million such people world-wide to live in another country or to return home.\(^1\) Australia was not immune from the upheavals of such massive global population movement. Some, however, made their way to Australia without first consulting with the relevant authorities. They arrived unannounced and by boat. Between 1999 and 2003, about ten thousand people arrived in Australia in such manner.\(^2\) Of these, the majority were refugees: The cited report shows that Australian authorities conferred refugee status to 7,339 of the 10,289 arrivals during this time-frame. It is likely that the actual number of refugees among this group was even higher because 2,085 people were in immigration detention, with at least some refugee determinations still in progress when the Department of Immigration and Multicultural Affairs published these figures. Whilst their claims for fleeing persecution thus were justified in most instances, the Howard government generally perceived uninvited refugees as a problem to the orderly process that regulated refugee intakes. This perception translated into a lack of enthusiasm and a hesitation to attend to a documented need among uninvited refugees who came to Australia.


\(^2\) Department of Immigration and Multicultural Affairs, (2003, 12 September) *Fact Sheet 74a. Boat Arrival Details*. For the method of how the number of refugees and detainees was calculated from the total number of arrivals, see Appendix A.
Such perception is not new, and successive governments have been reluctant to accept uninvited refugees who arrived from the 1970s onwards.\(^3\) What is however remarkable is the observation that the Howard government frequently sought to justify its refugee policies to the electorate in terms of legal necessities. Such justification seems to state the obvious, because all individuals within Australia’s jurisdiction, including government officials, have to obey the law or risk adverse consequences. In contrast to other citizens, however, government officials also have official duties. These duties include the delivery of public policies, which at times means that the law has to change as public policies change. So the Howard government’s recourse to the rules and procedures or the law as a policy justification seemed intriguing. From this apparent anomaly emerged the idea to ask several questions that led to the research for this thesis. The initial questions were: Why the frequent recourse to the law? What purpose does this serve when there already exists a close relationship between law and public policy? These questions are not answered in this thesis, but served as a catalyst to generate other ideas that gradually translated into a researchable proposition.

For reasons that will be discussed later, the central claim of this thesis is that the Howard government variously made recourse to the law to justify its refugee policies between 1999 and 2003, but the pattern of recourse took on a very particular form – that is, legal rationality was in effect colonised by an ideologically charged practice and discourse of legal rationalism. If substantiated, such a claim has significant implications for the legitimate exercise of state power in a system that requires a clear separation of political and juridical powers. Firstly, there is the potential for misuse of power if one system dominates the other. Secondly, there may be consequences for a system of democracy, public accountability, and the authority that the electorate

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confers to their elected representatives. All these implications will be discussed throughout this thesis.

The suggestion that the Howard government has made recourse to the law as a legitimising tool means that the government made claims to the law as the source of authority, either at symbolic or at concrete level, to justify a course of action. That is, the authoritative claim derives from what is commonly understood by legal rationality: the rules and procedures of the law and their institutionalisation within the structure of the state. However, it will be argued in this thesis that the Howard government’s recourse to legal rationality had a rhetorical edge, with the effect that the recourse was not to legal rationality per se, but to something else. This “something else” in this thesis is called “legal rationalism”, an ideological concept that will be elaborated throughout this thesis. Legal rationalism, it will be argued, tends to place overriding emphasis on the rules and procedures of the law without necessarily having concerns for consistency or continuity. In this way, legal rationalism emerges as an ideological projection that manifests itself in two forms. In its first form, legal rationalism manifests itself as the “misuse”, or selective use, of legal rationality that is carried as an ideological projection that often masks other rationales. In its second form of the ideological projection, legal rationalism manifests itself in the fetishism of legal rationality as an end in itself. There are more positive ways of conceptualising legal rationalism – that is, as simply the ideology associated with legal-rational practices. However, in this thesis it is used in the more critical sense. It is argued in this thesis that, although the Howard government did not fetishise legal rationality, it did misuse it as a legitimising device that did not consistently accord with its other practices.

To investigate the claim of this thesis, the analysis traces how the Howard government responded to refugees who arrived by boat between 1999 and 2003. The analysis focuses predominantly on how the members of the Howard government justified their refugee policies both in their own words, and in
their legislative policy outcomes. It focuses on the Minister for Immigration and Multicultural Affairs, the Prime Minister, and to a lesser extent, the Minister for Foreign Affairs and Trade and the Minister for Defence, as it attempts to understand public pronouncements in the context of events and practices at that time. The context of this analysis is around four broad parameters that the Howard government identified as the cornerstone of its refugee policies: border protection, law-and-order, humanitarian concern, and orderly process.

The motivation for researching the topic and writing this thesis came from events that were of greater personal significance than observing politicians’ statements about refugee policies. During the year 2000, I practiced nursing as a Registered Nurse for twelve weeks at the Woomera detention centre in South Australia. So it was with the benefits of personal contemplation about an era that still shapes Australia’s current political debates that this PhD began, just weeks before the Howard government decommissioned the Woomera detention centre in April 2003. This thesis, however, is not about personal anecdotes or introspection, even if both dimensions stimulated an academic interest in the complex puzzle of government rhetoric about refugee policy and law which eventually led to a focus on government accountability as a central theme in this thesis.

The major consideration for this thesis is that, if the ideology of legal rationalism influenced the refugee policies of the Howard government between 1999 and 2003, does such influence translate into a concrete social reality that can be discerned from clearly identifiable practices? If so, how dominant was the influence of legal rationalism? And in the first instance, can it be verified that the initial observation (the observation that the Howard government justified its refugee policies in terms of legal necessities) was repeated consistently throughout the timeframe of the case studies? If so, were these justifications restricted to face-to-face practices with refugees, or was there a
more prevailing process that also affected institutional practices? From these initial considerations emerged the research question: how, and to what extent, did the Howard government resort to legal rationalism when justifying its refugee policies to the electorate between 1999 and 2003? The answer will come first, from mapping a pattern of policy justifications in the case studies and, second, from asking where, if indeed there is such a pattern, the parts of this pattern are located in the institutions where public policy is formulated and contested.

The logic for answering the research question draws on the work on case study methodology that Robert Yin discusses in two books. The choice of method had to address the question that, if legal rationalism can be identified, does it occur as an isolated epiphenomenon at the level of government rhetoric, or does it affect other social practices? A “multiple-case study” design with cross-case analysis was chosen, as discussed by Yin. This method incorporates the logic of a non-parametric analysis of variance that seeks to demonstrate an interaction effect between cells. The relevance of this method for the argument in this thesis is discussed in the Introduction to the Themes section, and schematically presented in Table 2.

Pertinent to research are considerations of validity and reliability. To adapt Yin’s work to this thesis, the purpose of building construct validity into the design is that one can be reasonably certain that the method measures core aspects of legal rationalism and nothing else. Yin suggests that validity can be established by way of triangulation. Triangulation provides “multiple measures of the same phenomenon” from different data sources. In this thesis, these

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5 Yin, Case Study Research. Design and Methods, p. 109.
6 Yin, Applications of Case Study Research, p. 35.
7 Ibid., p 99.
multiple sources consist of documents from many sources, to account for different perspectives in the analysis. Yin lists types of sources that may be used for such purpose: parliamentary speeches, survey data, press releases, special reports, relevant court cases, newspaper clippings, transcripts from radio and television broadcasts.\(^8\) The sole criterion for including one of these listed sources is that the information assists with an analysis of how a member of the Howard government justified an aspect of its refugee policies. In addition to identifying these comments, I shall take into account the suggestion by MacDonald that documents should be examined for factual errors, hidden agendas, what the information does not state and what is over-emphasised.\(^9\)

Returning to Yin’s work, a few words about reliability. The wording of the research question seeks to answer the “how” and “what” of legal rationalism. Yin’s case study methodology suggests that an appropriate answer to “how” and “what” questions depends on “operational links needing to be traced over time, rather than mere frequencies or incidence”.\(^10\) It will be suggested throughout this thesis that the strategy of tracing relevant events over time assists in constructing a repeated pattern of legal rationalism. This identified pattern extends from the on-the-ground policy practices in the case studies to the institutional practices in Section 2 — Themes.

This thesis is divided into two main sections, Section 1 — Case studies and Section 2 — Themes, each with its own synopsis and conclusion. Each section analyses different layers of policy justification, as it observes the workings of government. Within each section, the analysis occurs at the level of government behaviour and is concerned with how the government justified its own policies. Therefore, omitted are challenges to these justifications from other sources, such as input from individuals or lobby groups, unless these

contributions were reflected in the language of the government’s policy justifications.

The thesis proper begins with Chapter 1 — *Background*, an exploration of the refugee issue and how the Howard government responded to this issue. From these responses by the Howard government emerge some unanswered questions, and Chapter 1 — *Background* finishes with the rationale for the research question. Three case studies in Part 1 seek to analyse three defining moments of the Howard government’s refugee policies: the arrival of the *Tampa* and its aftermath, the policy of mandatory detention, and the detention of children. The conclusion to Section 1 — that the Howard government did resort to legal rationalism when justifying its refugee policies to the electorate – leads to answering the second part of the research question: how, and to what extent, did this occur?

In the *Themes* section, the argument is still about the dominance of legal rationalism in refugee policy, but the presentation of the argument changes. There is a departure from the chronological approach and detailed analysis of the case studies, toward an identification of institutional factors and power relationships. All three chapters of Section 2 — *Themes* are about government accountability and the role of political process in the exercise of power within the institutions of the bureaucracy, the law, and the public as the legitimate source of government authority and power. There also emerges the theme of colonisation, and it will be argued that there are instances where legal rationalism has replaced, or colonised, legal rationality. Chapter 8 — *Conclusion* reflects on how legal rationalism has manifested itself as a systemic force that permeates different layers of social practices, and speculates on the influence of legal rationalism beyond refugee policy. This is followed by a *Postscript* to highlight that the ideology of legal rationalism did not disappear in 2003.
Introduction

Before concluding this Introduction, some definitions are in order. Firstly, there is the term “refugee”. Within the meaning of this thesis, refugees are individuals who arrived, or intended to arrive, in Australia, and intended to claim refugee status from Australia. Most arrived uninvited between 1999 and 2003, usually by boat and without valid travel documents. As will become clear, the Howard government disputes that they are refugees until government officials have confirmed their refugee status. In this thesis, however, they are called “refugees” because they identify themselves as refugees. Article 1 of the Convention Relating to the Status of Refugees, to which Australia is a signatory, strongly ties self-identification to the definition of “refugee”, with a clear indication that people become refugees when they have left their home state.\(^{11}\)

Another term is the title of the government department that administers refugee policies. Throughout my PhD candidature, this department has had several titles: Department of Immigration and Multicultural Affairs, Department of Immigration and Multicultural and Indigenous Affairs, and then back to the Department of Immigration and Multicultural Affairs. The last name change occurred on 30 January 2007, to Department of Immigration and Citizenship (DIAC), with the appointment of Kevin Andrews as the new Minister.\(^ {12}\) For clarity and uniformity, and because one name applied throughout most of the timeframe for the case studies, the department will be referred to in this thesis as the “Department of Immigration and Multicultural Affairs”, or “DIMA”.

Obviously, the title of a Minister is accompanied by the name of the relevant department. For the reasons stated in the previous paragraph, the Minister responsible for refugee policy is referred to as the Minister for Immigration and Multicultural Affairs, or in short, the “Immigration Minister”.

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Officially, the Howard government refers to immigration detention centres as “Immigration Reception and Processing Centres”. However, the term “detention centre” is more commonly used in the media and in official reports. Therefore, the term “detention centre” is used in this thesis.

It will also be noted that some cited references do not specify page numbers. The reason is that, generally, these were references that were downloaded in html format. In such cases, the URL is included in the bibliography.
Chapter 1

Political and Theoretical Background
This thesis analyses the policy responses of the Howard government to refugees between 1999 and 2003. During this time, the government progressively changed its policy, first from offering permanent asylum to temporary asylum; second, by intensifying the policy of mandatory detention that previous Labor governments had followed; third, by building, staffing and financing detention centres overseas whilst effectively retaining jurisdiction; and third, by putting into place a set of legal and bureaucratic measures that have made it increasingly difficult for refugees to claim protection from Australia.

This chapter discusses the background to these events. It holds that the Howard government’s policy on refugees was driven by legal rationalism, under the cover of legal rationality; both terms will be discussed at length later in this chapter. The first part of this chapter outlines the political issues surrounding refugee policies and the Howard government’s policy responses to these issues.
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Policy responses to refugees

Australia is a party to both the UN Convention and 1967 Protocol. The last of these documents, the Optional Protocol, was signed in December 1973. In both documents, Australia committed itself to a formal rights based approach to refugees. According to the Convention Relating to the Status of Refugees, a refugee is a person who,

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

The Convention Relating to the Status of Refugees sets out the rights that member states have agreed to make available to refugees, but excludes from refugee protection those individuals who have committed serious crimes, including war crimes and crimes against humanity. The Convention Relating to the Status of Refugees situates Australia in an international law context of individual claims and state obligations that become realised through national legislation within each member state. There is considerable variation in how states apply the Convention Relating to the Status of Refugees within their jurisdictions, to allow for economic differences between signatory states. Compliance with the instrument is not legally enforceable, but often depends on the United Nations

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1 For both instruments, see
4 Ibid., (cited) Article 1 B (6) F.
5 Ibid., (cited) Article 36.
6 Ibid., (cited) Preamble and Articles 20, 23, 24.4.
or the international community resorting to moral persuasion or diplomatic pressure on states which attempt to evade their obligations.  

In accordance with this scope for national legislation, uninvited refugees in Australia have been treated differently from refugees who were selected from camps overseas. Mandatory detention was introduced in 1989, seven years before the Howard government came to power. The government frequently stated that it did not change existing policy, but acted in accordance with obligations under international law, whilst at the same time protecting Australia’s national interests. Like the previous governments, the Howard government played on negative stereotypes of refugees by connecting the law with refugee boats. According to political commentator Mungo MacCallum, the Howard government used the power of language to remove the word “refugee” from its official vocabulary and used words such as *asylum seekers*, *queue jumpers*, and *unlawful*. This connected the issue of refugee flight and refugee protection with legal issues, as if law breaking was an innate trait of refugees. Such vocabulary also detracts from the stipulation of the *Convention Relating to the Status of Refugees* that criminals do not qualify for refugee status, as previously stated.

Refugee boats were not a new phenomenon. In this paragraph, I will draw on Don McMaster’s comprehensive overview of the recent history of refugees who came to Australia by boat. Accordingly, the boats that began to arrive in 1999 marked the beginning of a new wave of refugees, one of several waves that brought in the boats: the Vietnamese between 1975 and 1979; the Cambodians came ten years later between 1989 and 1994; shortly afterwards,

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the Chinese from 1994\textsuperscript{12} until March 1995.\textsuperscript{13} Whilst the Howard government continued with the overall policy framework of mandatory detention and border protection, it also introduced significant changes before the latest wave. In May 1996, two months after coming to office, the Howard government continued with the changes commenced by previous governments. Eventually, as will be seen later, these changes resulted in Australia turning away all refugees who arrived by boat. In March 1996, immigration intakes were cut by almost 10 per cent to just over 100,000, and preference was given to people who had special employment skills.\textsuperscript{14} Immigration Minster Philip Ruddock proposed a new structure that would bring the benefits of reduced costs and counter the delays of the court system, whilst at the same time strengthening “bureaucratic authority” and increasing ministerial control over the application process.\textsuperscript{15} The Howard government also restricted the intake of refugees who arrived “without prior application”, and thereby departed from the previous practice of taking in refugees “on the basis of need rather than on the basis of numbers available”.\textsuperscript{16} Three years later, the ‘Humanitarian’ entry category, which includes refugees, was capped at twelve thousand per year, of which four thousand was for refugees and another two thousand for refugee applications made after people arrived in Australia.\textsuperscript{17}

One can infer from the changes cited in the previous paragraph a strong commitment by the Howard government to reduce the intakes of onshore refugees. Another significant change occurred in October 1999, one month before the first boat of the new wave arrived. The Howard government introduced a policy of temporary protection only and scrapped family reunion from the program. Immigration Minster Philip Ruddock justified these changes in the following terms:

\begin{itemize}
  \item \textsuperscript{12} \textit{Ibid.}, p. 89.
  \item \textsuperscript{13} \textit{Ibid.}, p. 93.
  \item \textsuperscript{14} \textit{Ibid.}, p. 61.
  \item \textsuperscript{15} \textit{Ibid.}, p. 97.
  \item \textsuperscript{16} \textit{Ibid.}, p. 62.
  \item \textsuperscript{17} \textit{Ibid.}, p. 63.
\end{itemize}
Why do I argue that the temporary entry arrangements are likely, over time, to have some impact? It is because most of the people who are arriving in Australia unlawfully by boat, undertaking what I acknowledge can be a hazardous journey, are essentially unaccompanied males. They are leaving behind spouses and children in the expectation that within our Refugee and Humanitarian Program, they obtain a permanent residence outcome.\textsuperscript{18}

Some commentators described the significance of these changes as a way to maintain national security at the border and second, at maintaining an orderly assessment process that would lead to the exclusion of some refugees. Political journalist Paul Kelly wrote that the boats “represented a potential challenge to Australia’s border security” that governments could not ignore.\textsuperscript{19} Other commentators suggested that governments need to regulate refugee entry as a way of preserving cultural identity, whilst opening the borders to some, and closing it to others.\textsuperscript{20} Some writers objected to the mode of arrival, and argued for a reduction of intakes from this source, on the basis that intakes from the Middle East were likely to disturb social harmony.\textsuperscript{21} Others argued for restriction on the basis of social, economic and cultural considerations.\textsuperscript{22}

The Department of Immigration and Multicultural Affairs linked the refugee boats as people-smuggling operations and announced in December 1999 significant changes to its refugee policies.\textsuperscript{23} In the cited media release, the government planned for an increased naval presence at sea, and foreshadowed greater co-operation of the Australian Federal Police with law enforcement

\textsuperscript{22} Russell Blackford, "Racism and Refugees," \textit{Quadrant} April (2002).
\textsuperscript{23} Department of Immigration and Multicultural Affairs. (1999, 1 December). \textit{Immigration Minister Takes Anti-People Smuggling Campaign to WA} (Media Release, number 99r99169).
agencies abroad to launch “disruption operations” to prevent the boats from coming to Australia. Immigration Minister Ruddock announced an “information campaign” in “high risk countries”, which included China and Iraq, where refugees were most likely to come from. The cited media release continues that the intention of such campaign was to send “a clear message that people thinking about undertaking such a trip will fail, will be ruined financially and could even die undertaking such a hazardous journey”. This “information” included claims that parts of Australia were infested with snakes and crocodiles, and that women may end up as prostitutes.

The new policy directives created political pressures. Far from preventing families from coming to Australia, more families arrived by boat with their children. An inquiry by the Human Rights and Equal Opportunity Commission notes an increase in the number of arrivals in mid-1999 onwards, many of whom were children. The changing policy directive of removing family reunion from the onshore refugee program was followed by an even larger number of refugee families who arrived together by boat. Robert Manne suggests that the scrapping of family reunion, rather than preventing families from arriving in Australia, actually encouraged this. However, it is unlikely that the policy change fully explains the emerging trend, because the changes occurred a few months before the legislative changes in November 1999. Nevertheless, the accelerating trend was maintained until 2002, as evidenced by the number of children placed into immigration detention. Accordingly, the number of children in immigration who arrived by boat and without visa amounted to 748 in 1999-2000; 1,616 in 2000-01; 1,440 in 2001-02; and declined to 180 in 2002-03. Regardless of the reason, the resulting prolonged detention of families, especially of children, was criticised on moral and

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humanitarian grounds, as were the conditions of detention. The topic is so complex, that one case study is devoted in thesis to discussing the mandatory detention of children.

The new policy directive was expensive. In addition to its previously authorised 2001–02 budget, the government asked the Senate to approve additional funding of $214.54 million to the Department for Immigration and Multicultural Affairs.\textsuperscript{27} The report just cited reveals that of this money, over $192 million was requested for “additional funding to address unauthorised arrivals”. In September 2003, the \textit{Herald Sun} newspaper was critical of the escalating costs.\textsuperscript{28} The article cited in the previous sentence calculated that the costs of mandatory detention, which included transporting refugees on naval vessels to detention centres, amounted to $627 per person per day at the Christmas Island detention centre, and $415 at the Baxter detention centre. The cited article compared this with a cost of $161.40 to house a prisoner in a high-security jail. The \textit{Herald Sun} reported in April 2004 that the immigration detention costs per individual had increased by 150 per cent between November 2002 and April 2004.\textsuperscript{29} Despite this increased need, evidenced by the increase in refugee flow, Australia’s total refugee intake between 2000 and 2001 remained more or less constant at around 12,000 per annum.\textsuperscript{30} However, it took about two years before a change occurred in the number of onshore refugee arrivals. Between 1999-2000 and 2000-2001, just over 4,100 individuals arrived by boat per year.\textsuperscript{31} In the following year, the numbers reduced dramatically. Between 2001-2002, there was a 70 per cent reduction of arrivals, and in the following year, “only one unauthorised arrival reached Australian


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territory by boat”.32 The cited source quoted Immigration Minister Philip Ruddock’s announcement that this reduction in the numbers of arrivals was due to success of the new policy. Such a claim, however, is debatable. Philip Ruddock told Parliament in August 2001 that the measures of his government to “search and detain vessels … have not been as effective as we would have liked”.33 In the speech cited in the last sentence, the Minister also said that 10,000 people have already arrived, another “900 intended to come this week”, and quoted an ABC report that “as many as 5,000 people are in Indonesia”, and added that “there are people further upstream”. Political commentator Robert Manne adds that the policy of military deployment after August 2001 led to a reduction in the number of refugee arrivals:

By August 2001, it was clear that mandatory detention and temporary protection had failed. During 2002, however, it gradually became obvious that the successor measures – plausible threats of military repulsion and Pacific Island incarceration – actually worked. When the aftermath of Operation Relex had been mounted and the Pacific Solution put in place, not one asylum seeker boat arrived.34

Internationally, the new policy generated attention. The American organisation, US Committee for Refugees and Immigrants, which observes global trends in refugee issues and published the changing numbers of onshore refugees cited in the previous paragraph, was critical of the Howard government.35 The cited report argued that the allocation of resources by the Howard government to pursue its exclusionary policy indicated a trend that surpassed previous policy in Australia and abroad, and that Australia may indeed be the first “Western” nation to put such broad and significant legal effort behind the rhetoric of discouraging the “spontaneous” arrival of asylum seekers in favour of a more

orderly, predictable, discretionary, and political system of selecting refugees for resettlement from overseas. The United Nations High Commissioner for Refugees, however, took a different view.36

Accordingly, the Howard government’s strategies were not a new policy, but the implementation of restricted measures among several industrialised nations to keep refugees out, in order to control “irregular migration”.37 The cited report contextualised these strategies as a general trend, as matters of sovereignty claims and control measures over entry into Australia.38

Whilst the debate was going on, the Howard government stated the objectives of its refugee policies. For now, I wish to define these objectives. From the detailed discussion of the case studies, it will be noted that the Howard government claimed that it conducted a refugee policy that met its international obligations to refugees, whilst at the same time maintaining Australia’s national interests. There were four parts to this policy. First, there were border protection and sovereignty considerations, which meant protecting the borders from ‘unwanted’ persons who arrived without visas and travel documents. Secondly, there was mandatory detention, which meant detention in immigration detention centres until the identity and refugee claims were verified and health and security checks were conducted. Third, the policy consisted of orderly and lawful assessment procedures. Fourth, the policy was intended to be humane, so that the procedures aimed to address what was necessary, without causing unnecessary distress to refugees. In its media and parliamentary statements, the Howard government committed itself to these four broad policy parameters, and one may assume on this basis that border protection, mandatory detention, law-and-order process, and a humanitarian approach formed the essential elements for its refugee polices. I will return to

these parameters in the next section when I outline the analysis of the case studies.

Mandatory detention and the exclusion of refugees had its critics. Some commentators argued that the Howard government has adapted national Australian law to lessen Australia’s commitments under the human rights treaties of the United Nations.\textsuperscript{39} Other legal critics argued that the Howard government, through removing the scope of decision-making from the courts, has bypassed the court system.\textsuperscript{40} Some reports provided eye-witness evidence that conditions inside detention centres damaged peoples’ health.\textsuperscript{41} Formal investigations confirmed abuse of refugee applicants in immigration detention and mismanagement of these centres.\textsuperscript{42} Several political commentators suggested that the government politicised the refugee issue and over-stated the need for a legal approach to maintain order.\textsuperscript{43} The Howard government countered its critics by increasingly framing onshore refugees in terms of national security; less so in terms of refugee needs. For instance, the


\textsuperscript{40} Julian Burnside, "Authoritarianism the Name of Freedom. How Our Detention Camps Breach the Most Basic Human Rights," \textit{Arena Magazine} 56, no. Dec 2001-Jan 2002 (2001);


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political and theoretical background

Immigration Minister declared in mid-November 1999 on the 7.30 Report: “If it was a national emergency two weeks ago, it’s just gone up ten points on the Richter scale”.44

Several inconsistencies made questionable the government’s policy justifications in terms of border protection and orderly process. Until the late 1990s, the greatest number of onshore refugee visas were issued to those who arrived with a valid visa, and subsequently lodged their onshore refugee application.45 One may infer from the report cited above that the people who arrived on a visa before lodging their onshore refugee application also disrupted the orderly process and took up resources. Furthermore, issuing a larger number of visas to the group who arrived on a visa raises the question if this was not a greater source of disruption than the disruption generated by boat arrivals, who received a lesser number of refugee visas. Viewed from this perspective, the Howard government’s reasons remain unclear for directing political attention and increased resources to thwart the arrival of refugees without visas. There also remains the issue of how framing refugees as law-breakers contributes to an approach based on law-and-order. From these anomalies, two questions emerge that will be asked throughout the thesis. How did the government go about maintaining to the electorate that its justifications of the changing refugee policy were plausible? To what extent did the Howard government promote an orderly process?

Policy as an instrument of framing

Public policy has an important role in the affairs of a state, and the business of the state is conducted through the process of public policy. The Prime Minister bears ultimate responsibility for the formulation and delivery of public policy, and appoints ministers to be in charge of policy portfolios. So important are policies that Ministers are expected to resign if there is maladministration. Bridgeman and Davis convey a sense of how policy flows through the structure of governance and becomes “the outcome of ideas, interests and ideologies that impels our political system”. Accordingly, policy flows from the level of government and is translated into rules and procedures that are carried out in accordance with the Minister’s decisions. Policy is then administered through the public sector, which may have special legal discretion or special resources that are needed to deliver this policy. Many of these policies become expressed in statute law, so that there is an inescapable link between law and public policy. Thus, refugee policy and any changes to relevant legislation and policy practices can be attributed directly to the directives determined by the Howard government, issued though the Immigration Minister.

Given the structure of public policy, one may even perceive that policy is instrumental in implementing the values and visions of the government in power. Given the importance of public policy, it is not surprising that

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49 Ibid., p. 136.
governments seek to justify their public policies to their electorate and debate policies in parliament and in the media. As in any debate, the extent to which ideas and visions are realised often depends on how an issue is presented, or framed. According to Béland, framing is not about the policy itself, but about attempts to change our understanding of an issue by putting it into an acceptable ideological context.\textsuperscript{51} Considered in this way, framing has the potential to take public perception of refugee policy in a fundamentally different direction, provided the public accepts this new way of framing.

What, then, is framing? William Gamson gives a two-fold description of how framing is used in the social sciences.\textsuperscript{52} Gamson’s working description of framing resonates with the two-layered approach that is used throughout this thesis as it places the Howard government’s justifications for its refugee policies in the case studies, and the emerging institutional themes in Section 2 — Themes in the context of framing. This thesis does not engage with Gamson’s work other than to acknowledge that his two-fold description of a frame has been used in planning the broad structure of this thesis.

The first part to Gamson’s work on social framing cited in the previous paragraph is the metaphor of a picture frame, a frame that includes and highlights some areas and excludes others. Second, a frame can be thought of as a supportive structure, which lends form and shape to underlying ideas and concepts, but is no longer visible once the structure is complete.\textsuperscript{53} These aspects of framing are a useful metaphor for analysing the political processes by which the Howard government attempted to bring about public acceptance for its refugee policies. The metaphor of the superficial frame, which will come to the fore in the case-studies, gives insight into the slant given to issues in public debate, where matters are either considered important or

\textsuperscript{53} Ibid.
inconsequential. One example of framing is how the Howard government re-interpreted the meaning of article 31.1 of the Convention Relating to the Status of Refugees. In its re-framed form, article 31.1 retained the stipulation that refugees are not to be penalised even if they enter a country illegally. What was new is the re-framing of the arrival of refugees without travel documents into an issue of border protection, national sovereignty, international crimes syndicates, and compliance with orderly process. The frame, as Béland noted in the citation above, is not about the policy but about how the issue is to be understood.

Gamson’s second meaning of framing is more difficult to analyse, because it is a frame that supports the structure and hence may not be visible. However, as will become clearer in Section 2 — Themes, the framing metaphor does give insights into what holds together the working of government and what makes social practices durable. Oliver and Johnston take this idea of framing further and argue that analysts need to distinguish between framing and ideology. Oliver and Johnston describe the frame as the mental construct that selects these issues, where framing is the process that gives meaning to issues. Ideology, on the other hand, is a political concept that refers to the ideas and norms, and is related to how to best achieve a particular vision of society. Framing thus gives meaning to an issue, while “ideology focuses attention on the whole content of beliefs … and on the way the ideas are related to each other”. Oliver and Johnston make the point that it is not frames, but ideologies, which have a value system. Accordingly, frames only select the conceptual issues. Ignoring this difference and focusing on the frame, the authors argue, leads us to ignore the political influences, and treats this merely as a difference of opinion.

Extrapolating from Oliver and Johnson’s work, one gets a sense that the frame itself becomes the way in which the Howard government presented the refugee

issue through a political vision of refugees that was accepted by the public. Though one may add that the selection of these framing topics depends on a system of underlying values derived from an ideology that guides what is included in the frame. Ideology in this sense would emerge in this thesis as an unstated overlay that guides the major assumptions and practices of refugee policies between 1999 and 2003. McMaster illustrates the difference between stated and unstated objectives when discussing Australian refugee policy, which is officially non-discriminatory. However, McMaster cites examples where, under the auspice of free speech, public discussion of refugee policy occurred in a discriminating context. Such practices actually led to policy practices of discrimination against targeted groups.

In this sense, discrimination may still occur from the unstated slant that is being promoted in public discourse, which in turn also slants social norms and practices in a particular direction. The role of values and ideology in the refugee policies of the Howard government is only a tangential concern within this thesis, which, nevertheless, emerges as a strong contributing factor to policy and institutional practices, as will be argued in Chapter 7 — Formation of the Public Voice and Chapter 8 — Conclusion. Bearing in mind that there may be differences between stated and unstated justifications, there emerges the consideration as to whether there is a deeper meaning to the Howard government’s constant framing that its refugee policies are legally defensible. I will return to this point shortly when I discuss the difference between legal rationality and legal rationalism. For now, I just wish to state the possibility that giving legal reasons may mask other ideologically charged practices and rationales by which the Coalition government is conducting its refugee policies.

56 Ibid., pp. 153-55.
57 Ibid., p. 190.
Eagleton suggests that the role of ideology as a guide for framing is difficult to identify.\(^5^8\) In the text just cited, Eagleton reasons that, although there is a lack of “invariable characteristics” to ideology, ideology nevertheless exerts its effects through the institutions of the state in an objective manner through an impersonal political process that is not subjective. However, Eagleton continues, Habermas adds to the discussion that ideology is a “non-subjective” component can be observed. Ideology becomes evident through “emancipatory critique … which brings these institutional constraints into awareness”\(^5^9\). To gain an understanding of how the influence of ideology may become evident in this thesis, if at all, the thesis will not ignore the possibility that an ideology may be inferred from the framing practices and political process behind the politicised representations of refugee issues, even if the policies can be defended in terms of legal necessity. Even the assumption that policy ought to be delivered in legally rational manner is derived from the taken-for-granted assumption that the law definitively settles disputes and thus gives certainty to social practices.

According to Habermas, the paradigm of the social sciences is not grounded in observation, but in dialogue.\(^6^0\) Through dialogue, Habermas continues, society achieves intersubjective understanding because “the understanding of meanings” relies on language, not on the measurements themselves. The task of critical theory, Habermas writes, is to ask “what lies behind the consensus, presented as a fact that supports the dominant tradition at the time, and does so with a view to the relations of power surreptitiously incorporated in the symbolic structures of the systems of speech and action”\(^6^1\). In these embedded meanings, one can find ideology in how the language delivers an issue for discourse. This guides a major orientation to conducting the case studies,

\(^5^9\) Ibid., p. 132.
\(^6^1\) Ibid., p. 12.
which examines rhetoric as a way of distorting and hiding issues and their unstated assumptions.

Examining the discourse requires an analysis of processes, rather than observations of factual events, and uncovers the deeper motives behind social action. Critical theory, especially from a Habermasian perspective, directs us to discover meaning within social dialogue, and to identify an intersubjective understanding, which is a product of society; not of individual but mutual understanding. This intersubjective understanding holds the key to rationality within a given society. It is at the level of mutual understanding, where analysis of discourse becomes an analytical tool to identify interference with communication.

How may the analysis of this thesis reveal an ideology behind the justifications for refugee policy? Whilst some language analysis is required, this thesis is not primarily about analysing texts, but then looks beyond the texts and infers an ideology from the policy justifications and the political process behind these justifications. As will be argued shortly, much of this process can be traced back to a skewed definition of legal rationality that is traced throughout the case studies and finds its way into institutional practices. It is through these distorted communications, as Habermas argues, that ideological purposes that drive an issue, become masked. This assumption that there are distortions becomes arguable from an exploration of two layers of the dialogue between the Howard government and the electorate. This will be seen from the practices that accompany the language claims in the case studies, and assume even greater significance in the Themes, where the meaning of these language claims is reflected in an intersubjective understanding of a social construct that

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continues as a political force within the institutions of the state, and sets the rational basis for institutional practices.

Whilst much of this thesis uses transcripts of court and government statements about the law, this analysis is not about the law, but about how the Howard government has manipulated the law in order to justify its policies. This distinction is important, because the influence of critical theory has led to its own developments in legal circles. By deconstructing and mapping the limitations of other legal theory, critical theory has led to a critique of legal theory itself. These developments have led to questioning the rationality of legal theory. However, this thesis does not attempt to examine these claims as truth or false propositions within jurisprudence, or whether the laws that are being discussed reflect legal rationality, normative consensus, or justice. The analysis presented in this thesis assumes that the recourse to legal rationality by the Howard government is prone to ideological distortion, and seeks to point out these distortions.

Similarly, the word *legitimating* needs to be differentiated from its use in the legal sense. For instance, when the Howard government fulfils the requirements to pass new legislation, which include passage by majority vote through both the House of Representatives and the Senate, and subsequently secures Royal Assent for the legislation the resulting legal statute is legitimate. It is thus “lawful” and legally binding, and does not require further *legitimating*, unless the High Court repeals the law. Habermas, by contrast, views *legitimating* as a process by which people delegate power to the government and accept the workings of government as legitimate. Whilst the law itself “requires purely legal behaviour”, Habermas argues that the body of citizens does not

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In the Habermasian sense, the authoritative base for the law rests on the legitimacy that autonomous citizens confer by giving “generally and motivated rational assent” through communicating such “assent” in a democratic process. It is in the Habermasian sense that the word *legitimating* will be used in this thesis.

From the clarification in the previous paragraph, one can now see the potential of the power of rhetoric in the justification of public policy by governments: legitimating government policy occurs in discourse, the public sphere, where rhetoric not only systematically hides ideological distortions in language, but also affects the structure and workings of legal rationality. This generates the possibility for legal rationality to become colonised by an ideology. In this thesis, this ideology is called *legal rationalism*, and is depicted as undermining the imperatives that have become legitimated as normative aspects of legal rationality.

If legitimating refugee policy involves a process of justification through the use of language by the Howard government, then how does the analysis of these justifications identify the systematic distortions that derive from ideological bias? Forester suggests that the Habermas’ assumption of systematic distortion in the communication process “opens up a rich set of practical influences to investigate.” According to Forester, Habermas proposes “three processes of social reproduction”: cultural reproduction through elaboration of views, social integration through norms and rules, and socialisation, which leads to the development of, or alterations in, social identity. By drawing on the insights of Habermas cited in this paragraph, Forester argues that there are two aspects

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67 Ibid.
69 Ibid., p. 115.
to such social reproduction of language analysis. Firstly, analysis occurs at the level of language that does, however, not rely on the meaning of words alone: Social reproduction occurs, and leads to loyalty when claims become anchored into institutionalised practices. Forester’s second point in the argument cited above is that political analysis thus necessarily incorporates knowledge of the issue, of how consent was obtained, and of the changing perception of an identity that occurs as the result of social reproduction.

Forester’s work thus provides a rationale for going beyond the case-studies and asking if there are components in social structure that relate directly to the Howard government’s presentations and framing practices. Adding such insight to the discussion so far, one expects that public discourse about the framing of refugee policies generates knowledge about institutional practices. From this perspective, one may expect that governments not only participate in public discourse but also seek to control the discussion. Forester’s emphasis on cultural, social, and institutional dimensions cited in the previous paragraph thus broadens the discussion of this thesis and introduces the potential for drawing clear connections between on-the-ground policy practices and the broader practices within the institutions of the state.

**Arguing legal rationalism**

Before continuing to develop the background to this analysis, it is important to discuss three theoretical concepts that Habermas discusses in the second volume of his book, *The Theory of Communicative Action*.71 These three concepts are the *lifeworld*, the *system* and *colonisation*. Habermas identifies two parts of

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70 Ibid., pp. 116-9.
Chapter 1
Political and Theoretical Background

society, the system and the lifeworld. The lifeworld is the place of social and cultural communication and reproduction, where social actors “develop, confirm and renew their membership in social groups and their own identities”, a place of “integration and socialisation” . In other words, the lifeworld is the seat where social norms are developed and contested. Habermas gives an example of system and function differentiation as the social formation with “economic and bureaucratic spheres ... in which social relations are regulated only by money and power”. Accordingly, specialised parts operate independently, with their own logic dictated by economic requirements. Another example is the “authority of office” in modern states, where hierarchical stratification is determined by the state, rather than kinship lines.

Habermas continues that the system does not operate independently of the lifeworld. Instead, the system’s mechanisms need to be “anchored in the lifeworld” and become “institutionalised”, where they become “consolidated and objectified into norm-free structures”. In the cited work, Habermas argues that colonisation may occur at the junction where the mechanics of the system intersect with the lifeworld. Accordingly, a process may develop at such intersection whereby the system colonises the lifeworld and displaces the normative characteristics of the lifeworld with its own functional and rational requirements. As the gap between the rationality of the system and the normativity of the lifeworld increases, the rationality of the system becomes increasingly specialised and dominates the lifeworld until the system gains “more and more independence from normative contexts” and separates from the lifeworld. At this point of separation, Habermas argues, rationalism replaces, or colonises, rationality: the system separates (“uncouples”) from the

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72 Ibid., p. 151.
73 Ibid., p. 139.
74 Ibid., p. 154.
75 Ibid., p. 167.
76 Ibid., p. 154.
77 Ibid., p. 155.
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life-world not because of its complexity, but because system logic and rationalisation result in a disregard for “normative contexts”, as the system increasingly “instrumentalises” the life-world in accordance with “system imperatives”. The problem arises when system rationality becomes such a dominant force that it replaces the capacity of the life-world to contest social norms. When these conditions occur, according to Habermas, the life-world becomes unstable, or “challenged”, by this separation and becomes increasingly “objectified” as it “uncouples” from the life-world.

Habermas points out that uncoupling does not mean the end of the life-world, but the system exerts its changes in a life-world that has now become rationalised to extremes. It is “structurally differentiated”, permeated by “functional specification” where “specialised tasks of cultural transmission, social integration and child rearing are dealt with professionally”, where previously informal relationships are permeated by the rationality of the system. System rationality thus expresses itself in the life-world with a colonising effect, when it moves beyond the rationality of its own discipline. As rationality is being colonised, it becomes a rationality where “modern natural science, jurisprudence with specialised training and autonomous art break down the quasi naturalness of ecclesiastic traditions”. Eventually there may be a point where colonisation begins and replaces rationality with rationalisation:

In the end, systemic mechanisms suppress forms of social integration … where the symbolic reproduction of the life-world is at stake. In these areas, the mediatization of the life-world assumes the form of a colonisation.

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78 Ibid.
79 Ibid., p., 173.
80 Ibid., p., 146.
81 Ibid., p., 147.
82 Ibid., p., 196.
Habermas uses the system/lifeworld metaphor to describe a change in society where norms operate according to mechanistic system logic. Once uncoupling has occurred, system logic operates for its own sake, without consideration for the norms themselves, or for the values that are expressed through these norms. Colonisation represents an extreme form, where the system logic replaces the logic of the lifeworld. Habermas views rationalisation, in the context of uncoupling the system from the lifeworld, as a systemic process that results in pathology; not in historical inevitability. This distinction does not make rationalisation inevitable, but leaves open a direction into the “development of the cognitive as well as the expressive and normative domain, which could have allowed for the development of new subsystems.”

From the discussion in this and the previous section it becomes apparent that Habermas acknowledges the power of public discourse as a means for citizens to define the extent of both system logic and legitimation of state power. Casual observations of the Howard government’s refugee policies raise the question of whether or not there has been a process of colonisation that is consistent with the Habermas metaphor of colonisation. As noted in the last section, there was debate about the changing emphasis in refugee policies. This change came about through a re-framing of the policies from refugee protection to greater emphasis on the protection of state borders. The thesis therefore asks whether colonisation, or a displacement of rationalities, has occurred. This will be explored in Section 2 — Themes. Is legal rationalism a systemic process, or is it a surface phenomenon, perhaps a rhetorical gesture that does not exert in a significant way a systemic effect throughout the institutions of public policy? This thesis, therefore, endeavours to generate insight into the contestability of normativity, by arguing that there were key points where rationality was distorted and channelled the direction of rationalism. Especially in Section 1 — Case studies, there is speculation on how

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84 Ibid., p. 53.
the rationality/rationalism course may have altered, had the Howard government pursued a different course of action.

To Habermas, discourse analysis is the method of identifying this bias. Central to Habermas’ discourse theory is the “proceduralist view”, a concept he derived from combining aspects of the philosophical assumptions of the Republican and Democratic political parties in America. According to Habermas, the legitimation of state power as a combination of informal, as well as formal structural processes: rather than being underpinned by rationality, official decisions instead are a matter of “practical reason” which comes about by way of public discourse within society. Discourse thus, according to Habermas, consists of clusters of “communication processes that unfold in the institutionalised deliberations of parliamentary bodies … and in the informal networks of the public sphere”, such as the media and political interest groups. Critical Theory focuses on the social control aspect of legal rationality. Habermas argues that the state enforces its decisions “with the legitimating force of a legislative procedure that claims to be rational”.

Habermas’ discourse theory thus critiques of the dual function of the state, where the state has the authority to either persuade, or to force, its citizens to submit to the rules and regulations of the law.

It is now time to return to the earlier point: the claim that legal rationality has a systemic bias toward ideological distortion. Should there be such bias, and could it lead to, or perhaps mask, a policy rationale that is of benefit to the Howard government? If legal rationality is the issue, then what is rationality? According to Habermas, democratic decision-making is not solely a matter of “compromises between competing interests”, nor the deliberation of “an ethical discourse of self-understanding”, but the integrated combination of

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86 Ibid., p. 248.
87 Ibid., p. 255.
both elements that brings about “an ideal procedure for deliberation and decision-making”.

For the purposes of this thesis, Habermas’ argument means that, as rationality is a social process that is the outcome of agreement during discourse, then legitimation places governments into a systemic process of exercising power that requires ongoing affirmation from the electorate. But how does this assumption sit with the rationality of a legal system that is structured to work relatively independent of government? The legal system receives ongoing input from government, as new legislation is written to conduct the business of governing through public policy and at the same time, government is mandated to operate within the limits of the law. As will be discussed in Chapter 6 — Politicisation of the Law, legislation does reflect the purpose of the legislator, in this case parliament, but these statutes must be situated within the legally rational code and the process of the law.

One may conceptualise the rationality of the law as a system of rules and procedures which form part of the institutions of government. Together, these three components of rules, procedures and institutions give the law its rational character, with clearly identifiable features, predictable procedures and outcomes that exist regardless of which party is in office. The discussion earlier acknowledged that the use of rationalism can mean different things in everyday usage. It should be possible that, where rationality and rationalism are separated for analytical purposes, they have the potential to unmask a communicative bias toward an ideological use of the rationality of the law. Within this distinction, rationality is the use of the law within its rational framework of rules, procedures, and institutions, whilst rationalism is the use of these for purposes that cannot be found within the rationality constructs of the law.

\[88\] Ibid., p. 246.
Legal rationality is only one of four aspects of the Howard government’s stated parameters for refugee policy. The broad discussion on refugee policy in the first part of this chapter suggests that the government may have placed excessive emphasis on the legal rules and procedures, when justifying the policy to the electorate. This thesis tests this suggestion. One would also expect from a legally-rational oriented policy that all parts of the policy — sovereignty, border protection, law-and-order and humanitarian outcomes — are applied more or less equally. Legal rationalism is defined as the process in which overriding emphasis is placed on the rules, procedures and rational instrumentality of the law. Rhetoric aimed at persuading an audience about the merits of the law does not constitute legal rationalism in itself, because the use of language does not necessarily influence the way in which the law operates. However, as will become apparent throughout this thesis, the rhetoric about the role of the law in refugee policy was, in the case of the Howard government, accompanied by a political process that drove institutional changes which significantly slanted the operation of the law into the direction of the political ideology of that government.

The suggestion that the Howard government excessively pointed to the rules and procedures of the law as policy justifications, emerged from the research question. This question is: how, and to what extent, did the Howard government resort to legal rationalism when it justified its refugee policies to the electorate? If the answer suggests that the resort to legal rationalism was excessive, then this raises questions about the potential for political influence and power over the workings of the institutions of the state.

The three case studies that we are about to enter follow, more or less, the chronological developments of events that shaped refugee policy, and this analysis is structured around how the Howard government framed and popularised these events. When following these events throughout the case studies, I will ask the question: did legal rationalism feature significantly as a
policy justification? The case studies conclude that legal rationalism was the

dominant justification for the refugee polices, for the following reasons. First,
legal rationalism emerged as a dominant pattern among other policy
justifications. Second, the Howard government justified these policies to the
public during media interviews and in parliamentary speeches in a way that
framed refugee policies within the context of government ideology. Case Study
1 — *Showdown at Sea: The Tampa* analyses how some policies were justified as
the legal necessity to prevent refugees from arriving; externally through police,
military and customs operations and internally through restrictions on refugee
determination and settlement. Case Study 2 — *Detention in the Desert: Woomera*
analyses how the government justified the practical delivery and enforcement
of the policy of mandatory detention as the requirement of orderly process.
Case Study 2 — *Children in Detention* analyses the government’s justifications for
the effects of the policy of mandatory detention on children.

From the description of the pattern of legal rationalism in these case studies
emerge its three features: policy justifications predominantly as claims to legal
rules and procedures, inconsistent application of these legal rules and
procedures in practice, and systemically distorted information that assists the
plausibility of these justificatory claims. I will argue that these features of legal
rationalism, whilst inconsistent with the Howard government’s stated policy
objectives, nevertheless form an integral part of government strategies for
achieving these objectives.
Introduction to Section 1 — Case Studies
The goal of the case studies is to answer the research question of how, and to what extent, if at all, the Howard government justified its refugee policies to the electorate by resorting to legal rationalism. For reasons set out in the case studies, this section argues that the government justified many of its decisions in refugee policy as legal necessities, while effectively making rhetorical recourse to legal rationality. Such rhetorical recourse to the law may be conceptualised as legal rationalism. This section endeavours to answer two questions: first, did such rhetorical manipulation for ideological purposes occur? Second, if legal rationalism did feature in the decision-making about refugee policies of the Howard government, was legal rationalism used occasionally, or was there an ongoing and systemic process that was integral to the delivery of refugee policy?

Each case study begins with a story that illustrates how the Howard government justified its policy approaches. This is followed by an overview of how the Howard government justified its policy approaches as the case progressed chronologically. As has been pointed out, the government identified the policy goals of its refugee policies between 1999 and 2001 as sovereignty, legal-rational, orderly process, and humanitarian concerns, and frequently justified the policies within those parameters. In the three chapters
of this section, these four justifications make up the pool of possible policy justifications for the refugee policies that are examined in the case studies.

This analysis tests for legal rationalism in two ways. First, it asked whether the Howard government used legal rationality as the dominant policy justification for its refugee policies between 1999 and 2003. A justification was deemed to be legally rational when a member of the Howard government justified the policy by pointing to the rules, procedures, or institutionalisation of the law. “Members of the Howard government” in this context are senior government ministers who made public statements that gave reasons for decisions and practices under refugee policy.

It should be noted from the outset that the analysis failed to establish a dominance of legally rational inferences among the justifications for refugee policy in all cases. The Howard government used legal-rational justifications approximately equally with justifications that pointed to the sovereignty, orderly process, and humanitarian policy goals. At this point, these observations should have led to the conclusion that legal rationality was not always the dominant justification and that therefore, the Howard government did not overwhelmingly use legal rationalism to support its refugee policies.

Such a simple conclusion, however, sat uneasily with another observation that was not anticipated before the analysis commenced. Policy practices abounded that were incongruent with the government’s justificatory language claims. For example, there were instances where a language claim was humanitarian, but such claim became questionable when accompanied by practices that were inconsistent with what could be expected from humanitarian language claims. Such inconsistency suggested that the prime concern was not humanitarian outcomes. Another layer was introduced to the analysis. Instead of analysing for statements of how members of the Howard government justified the
refugee policies, the policy practices were also analysed. The revised analysis is shown in Table 1.

Table 1. Assessing Legal Rationalism as Language Claims and Practices.

<table>
<thead>
<tr>
<th>Legal Rationalism</th>
<th>Cases</th>
<th>Language Claims</th>
<th>Practices</th>
<th>Legal Rationality</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Tampa</td>
<td>• Sovereignty Issues • Legal Rationality • Orderly Process • Humanitarian Outcomes</td>
<td>Congruent or Incongruent</td>
<td>Dominant or Not Dominant</td>
</tr>
<tr>
<td></td>
<td>Woomera</td>
<td>• Sovereignty Issues • Legal Rationality • Orderly Process • Humanitarian Outcomes</td>
<td>Congruent or Incongruent</td>
<td>Dominant or Not Dominant</td>
</tr>
<tr>
<td></td>
<td>Children</td>
<td>• Sovereignty Issues • Legal Rationality • Orderly Process • Humanitarian Outcomes</td>
<td>Congruent or Incongruent</td>
<td>Dominant or Not Dominant</td>
</tr>
</tbody>
</table>

Let us go back a step. Table 1 predicts four possible outcomes. First, legal-rational language claims predominate as policy justifications, as suggested by the research question. Such dominance would indicate an overbearing recourse to the rules and procedures of legal rationality, and thus would be indicative of legal rationalism. A second outcome could be that the language claims consist of a mixture of several response types. Third, another of the four language claims predominates. Such a conclusion would refute the claim of the thesis. Fourth, no justification predominates, and the government justified its policies equally among all four policy parameters, as it claimed to. The fourth possibility would answer the research question by decisively refuting the claim of this thesis. Outcomes two and four would indicate a random distribution of policy justifications, and also refute the claim of the thesis. However, as I have begun to suggest, there may be the scope for the fourth outcome to be further interrogated in terms of practices that go beyond language claims.
Introduction to Section 1
Case Studies

The four language claims in Table 1 serve as ideal types that will guide the analysis of the case studies. The notion of ideal types is derived from sociologist Max Weber, who constructed them as a methodological tool to enable researchers to observe social behaviour against an ideal model that encapsulated the essence of such behaviour. Rather than existing in real life, the ideal type is an exaggeration for heuristic purposes: a “one-sided accentuation” based on the “pure elements” of an analytical construct. In this thesis, the ideal descriptions will be used as a classificatory tool that helps map a pattern of the four possible policy justifications, based on ordinary usage of the words. For instance, a humanitarian ideal type shows mercy, benevolence, and compassion. One would not expect somebody operating from this ideal type to advocate torture or to administer corporal punishment. A sovereignty ideal type is primarily concerned with government, about a state making its own decisions within its territorial borders, and with having the power to regulate who crosses these borders. A legal-rational ideal type subscribes to the ideology of authoritatively settling disputes through the legal system, where pre-defined rules and procedures operate through the institutions of the state. Such an ideal type opposes martial law, or individuals fighting out their disputes in the streets. The orderly process ideal type presents a sense of unity, predictability and certainty, and carries out tasks methodically, in accordance with pre-defined rules.

The visual presentation of the analysis in Table 1 may imply, incorrectly, that the case studies arrive at a frequency distribution of the policy justifications. Instead, these four policy justifications will be analysed for the intensity of their rhetorical value. This idea comes from Michael Billig’s methodology in his book, Arguing and Thinking. Billig’s focus is on the effects of rhetoric, not on conversational detail. Billig does not mean empty rhetoric constructed for

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entertainment purposes. His is a rhetoric that produces what Habermas refers to as “communicative rationality [as] the necessary condition of a free and rational society”. It is a rhetoric that leads to clearly identifiable material consequences. Rhetoric, as discussed in Chapter 1 — *Theoretical and Political Background* in relation to Habermas, hides a distortion and generates new meaning through intersubjective understanding in the taken-for-granted assumptions that lead to public acceptance of government policies. The aim, as Billig puts it, is not to examine detail but “to play with the text” in order to get to the punchline.

It [Billig’s method to identify rhetoric] does not analyze the precise words, in order to examine the text’s rhetorical stake, as the story leads up to the triumphant punchline. Instead, the chapter re-tells the tale, in its own words, in order to make its own point.

The punchline in these three case studies consists of identifying legal rationalism in its various empirical presentations, derived from the public discourse of the government’s justificatory language claims. As the analysis progressed, it became obvious that this discourse did not follow the categories set out in Table 1, but instead was more flexible than Table 1 suggests. Some of the *ideal types* overlapped, especially when the government framed some events as requiring a balanced approach that met the objectives of a legal-rational, orderly process and sovereignty-oriented policy that was also humane. These mixed *ideal type* language claims created some ambiguity over how to categorise the justifications, and made this analysis less certain than if the Howard government had only ever used one *ideal type* at any given time. The reason for mentioning this now is not to build a “disclaimer” into this thesis, but rather to build greater confidence into the analysis by going beyond the government’s language claims and accessing additional material from academic

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6 *Ibid.* In the cited example, Billig uses text from the Talmud to argue that his method of analysing for rhetoric is more likely to get to meaning than the method of discourse analysis. Such discussion, however, goes beyond the scope of this thesis.
publications to assist with the interpretation of these language claims. Other information that helped interpret the language claims and policy practices of refugee policy often did not become known until after the case studies were initially drafted. This information came from official investigations that were made public after the events of the case studies had occurred. Additional information came from the Howard government’s subsequent policy justifications. Whilst this inadvertently stretched the timeframe of the case studies, such retrospectivity was necessary to argue the claim of this thesis with greater confidence than would have been otherwise possible.
Chapter 2

Showdown at Sea — The Tampa
On 23 August 2001, the Indonesian fishing vessel *Palapa* became distressed at high sea, about 160 km north of Christmas Island. Its 433 passengers survived the ordeal, and were rescued by the crew of the Norwegian freighter ship *Tampa* two days later. The *Tampa* sailed toward Merak in Indonesia, with the intention that the rescued passengers should disembark there. The survivors had boarded the *Palapa* for the purpose of claiming refugee protection from Australia, and had paid an exaggerated fee to people smugglers to bring them to Australia. Intent on arriving in Australia, the rescued survivors forced the *Tampa* crew to turn the ship around and sail toward the Australian outpost of Christmas Island. At this point, a standoff between the Australian and Norwegian governments began to emerge. The Australian government denied the *Tampa* entry into Australian waters, but after a five-day standoff over where the rescued passengers should disembark, *Tampa* captain Arne Rinnan ordered the ship into Australian waters near Christmas Island. In response, forty-four Australian soldiers boarded the ship on the morning of 29 August 2001. On 3 September 2001, the Australian navy took the passengers from the *Tampa* to *HMAS Manoora*, and from there to a detention centre in Nauru. Among the rescued *Tampa* passengers were four *Palapa* crew. Australian Federal Police

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1 Except where otherwise indicated, the summary of the events in this and in the following paragraph were taken from chapters 1 and 2 of David Marr and Marian Wilkinson, *Dark Victory* (Sydney: Allen & Unwin, 2003).
arrested these four individuals, charged them with the offence of people smuggling and took them to the Christmas Island police station.\(^2\)

After arrival of the *Tampa*, refugee policy changed in three major ways. First, the Howard government significantly changed its policy of mandatory detention. Passengers from refugee boats would no longer mandatorily be taken to detention centres to have their refugee claims assessed. Under new legislation, the boats could instead be turned around. Second, the Howard government established refugee detention centres abroad; in Nauru and on Manus Island in Papua New Guinea. Third, islands in areas where refugee boats were most likely to arrive, were “excised” from Australian territory to prevent people from lodging refugee applications under the Australian legal system. The Howard government passed the legislation for the policy changes on the evening of 29 Aug 2001, about twelve hours after Australian soldiers boarded the *Tampa*. One month later, the *Border Protection Act* received assent and was backdated to 27 August 2001.\(^3\) Effectively, the *Act* took effect one day before *Tampa* Captain Arne Rinnan sent the first emergency signal that asked for assistance from Australia.

This chapter analyses the events that surrounded what has become known as the “*Tampa* crisis”, an incident that illustrates in practical ways the difference between legal rationality and legal rationalism. Throughout this analysis, the question will be asked: how did the Howard government justify these policy changes to the electorate? The analysis concludes that, although the Howard government justified these changes as necessary to preserve Australia’s sovereignty, legal rationalism was the dominant mode of justification. It will be argued throughout this chapter that the support for this conclusion comes from observations of inconsistencies between language claims and practices in refugee policy by senior members of the Howard government.


Chapter 2
Showdown at Sea – Tampa

New framing of an old issue

The Convention Relating to the Status of Refugees sets out the rules on how member states ought to protect people who have left their home country on the basis of a realistic fear of death or persecution, when they seek to engage the protection of member states to the Convention Relating to the Status of Refugees. Article 36 of this Convention leaves the discretion of how to implement these principles of refugee rights to the signatory states. This stipulation gives much scope on how refugee protection is to be realised within the national borders of that state. Within this discretionary scope to implement refugee rights within Australia’s jurisdiction, the Howard government established two categories of refugees. As the refugees of interest to this thesis began to arrive at the end of 1999, Immigration Minister Philip Ruddock described the government’s policy of treating refugees differently, depending on whether they arrived in “authorised” or “unauthorised” manner. The changes consisted of the issuing a Temporary Protection Visa that was valid for three years, the scrapping of family reunion, and combining the onshore and offshore refugee intake numbers. In the paper just cited, the Minister justified the changes in terms of restricted resources. Otherwise, Philip Ruddock argued, the “unauthorised arrivals” would take up resources that were set aside for the “authorised” arrivals.

Journalist Peter Mares, known for his pro-refugee advocacy stance, concurred that the Minister’s logic based on resources and numbers was essentially

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unanswerable. In a personal interview with Peter Mares, the Minister argued that, unless Australia was prepared to take all of the 22,000,000 refugees, there would always be a cap on intake numbers and costs. The Howard government capped these resources at a total intake of 12,000 people, including both onshore and offshore refugees. Mares continues that this capped intake included not only refugees, but also people who entered Australia for other humanitarian reasons.

Although the practical reasons in terms of lack of resources were compelling, there appeared also an underlying political implication for restricting resources. According to Frank Brennan, the link between onshore and offshore places to seek a maximum outcome for “refugees in greatest need” was “a moral calculus completely of the government’s own construction”. Brennan continues that, under the terms of the three-year Temporary Protection Visa, refugees took “the places of the offshore refugees who would be granted permanent residence”. In this reference just cited, Brennan’s argument was based on the presumption that, because the claim for refugee protection had to be reconsidered after three years, there already was a cap on the number of successful refugee claims, and hence intakes. The Howard government worked from the opposite presumption. Regardless of the resources that were actually available, the argument that a limit had to be placed on such resources justified a policy that uncoupled onshore refugees (who also fitted the definition of “refugee” under the Convention Relating to the Status of Refugees) from their offshore counterparts.

After the arrival of the *Tampa*, Philip Ruddock published a paper in the online discussion forum Online Opinion. In the online publication just cited, the
Minister justified the legal and policy changes by appealing to the goals of maintaining Australia’s sovereignty and combating international crime, and sharpened the dividing line for onshore and offshore refugees. The paper contained two broad changes to refugee law and policies, which will be discussed later in this chapter: the implementation of the *Pacific Solution* and changes to the *Border Protection Act*. Philip Ruddock continued with an outline of three distinct policy measures that impacted on the processing of refugee claims, according to where the boat first came in contact with Australian authorities. If such contact occurred at sea, officials had the discretion to turn the boat around, taking into account safety considerations such as weather conditions or seaworthiness of the vessel. If the boat arrived “in an excised shore place”, Ruddock continued, Australia would finance the operation of taking the passengers to a “declared place”. At the “declared place”, refugee protection claims would be conducted under the rules of the United Nations High Commissioner for Refugees, instead of under the more generous system of the Australian legal system. Third, if the boat entered “Australian territorial waters”, refugee claims would be assessed “under the coverage of Australia’s protection obligations”.

In the paper, cited earlier, the Minister suggested two motives for the policy changes by the Howard government: First, these measures would send “the strongest possible message to smugglers and their clients” whilst, second, also observe Australia’s “international obligations” toward refugees. The same paper also outlined three arguments why a national legally rational framework, that offered fewer rights to refugees than under the previous policies, did not put Australia in breach of international law. First, a return to Indonesia did not constitute refoulement, because on return to Indonesia, passengers had access to Australian funded refugee assessment by officers of the International Organisation of Migration. Second, Australia retained the discretion to

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9 Ibid.
10 Article 33.1 of the *Convention Relating to the Status of Refugees* defines refoulement as “no contracting state shall expel or return … a refugee to the frontiers or territories of a state
conduct refugee assessments abroad, because “there is nothing in the Convention that directs where those procedures take place”. Third, Philip Ruddock argued, the assessment under the rules of the United Nations High Commissioner for Refugees, whilst different from the Australian assessment, was “adequate”. As will be seen in this chapter, these arguments by Philip Ruddock in favour of the post-Tampa refugee policies outlined a new legally rational framework that, for practical purposes, depended on the ability of the Howard government to physically prevent refugees from arriving in areas where they could lodge refugee applications under the Australian legal system.

At the time of the arrival of the Tampa, neither the policy nor the legislation that applied at that time, had been written. Marr and Wilkinson wrote that when Captain Rinnan ordered the Tampa into Australian waters, he expected that the survivors would disembark at Christmas Island. Instead, the Australian government threatened to arrest and charge Rinnan with people-smuggling. The international awards that Rinnan later won for his handling of the Tampa issue contrasted sharply with the Howard government’s view that Rinnan had engaged in criminal activity and threatened Australian sovereignty. Rinnan won several international awards, including the title Officer of the Norwegian Order of Merit and Shipmaster of the Year from Lloyds of London. The United Nations High Commissioner for Refugees honoured Rinnan with the Nansen Award, a distinguished recognition for “great personal courage and a unique degree of commitment to refugee protection”, in the face of the “risk of substantial delays and a large financial loss” to his employer.

The way in which the Howard government framed the arrival of the Tampa gives a sense of the power of rhetoric to define material reality. As Arie Brand

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where his life or freedom would be threatened …” The avoidance of refoulement by member states is the strongest purpose behind the Refugee Convention.
11 Marr and Wilkinson, Dark Victory, p. 292.
12 Ibid.
puts it, in his discussion on Habermas’ work in the *Theory of Communicative Action*: truth and falsity all depend “on the basis of a definition of the situation” that seems reasonable and is agreed to. Brand argues that Habermas views public discussion as a matter of “raising claims” among participants, mediated through the use of language that establishes a rationality basis for assessing these claims. According to this view, the rhetoric of the Howard government was not a matter of truth or falsity, but of downplaying some events and highlighting others in order to arrive at a version that was acceptable to the electorate. The pertinent question to the present analysis is: to what extent did the rhetoric reflect the stated policy goals?

Entry without permission

This section analyses how the Howard government framed the *Tampa* as a threat to Australian sovereignty, and how the logic of this framing became the basis in law and policy to deny entry to refugee boats in future.

After the *Tampa* interrupted its voyage to Singapore and picked up the *Palapa* survivors and sailed toward Indonesia, the *Tampa* itself became the site of an emergency, as the rescued *Palapa* survivors put the crew under duress and demanded that the *Tampa* set course for Australia. The Australian government responded by framing this change of course as a threat to the sovereignty to Australia. Prime Minister Howard refused permission for the *Tampa* to enter Australian waters, and argued that the *Tampa* had nothing to do with Australia. He told Parliament that this was “a matter to be resolved between the government of Indonesia and the government of Norway”. Yet in some

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15 Ibid., p. 20.
ways, Australia was already involved, because the intention of the Palapa passengers to enter Australia had become linked with the safety of the Tampa crew. A Senate Inquiry learned later that, although the duress exerted by the rescued passengers did not endanger the lives of the Tampa crew, at the time of the event, Australian Search and Rescue personnel suspected a hijack and feared for the safety of the Tampa crew.\textsuperscript{17} In arguing from a sovereignty perspective, John Howard’s claim that this had nothing to do with Australia dismissed the safety issue for the Tampa crew, as it was understood at the time, and also ignored the underlying refugee issues behind these events.

Those six days between the 23 August 2001, when the Palapa first became distressed in the Indian Ocean, and 29 August, when soldiers boarded the Tampa, set the scene for the framing of the Tampa’s movements as a national emergency. A Senate Inquiry learned later that Australian surveillance aircraft initially spotted the sinking Palapa, and that Australian Search and Rescue subsequently asked other ships in the area to pick up the Palapa survivors.\textsuperscript{18} According to an expert on international protocol, the rescue by the Tampa should have been the end of Australian involvement, because once the passengers were safe, they should have been taken to Indonesia.\textsuperscript{19} But it was not the end of the matter. Marr and Wilkinson describe how on board the Tampa, which was designed to carry cargo rather than passengers, the situation worsened as overcrowding with approximately 450 people led to medical and sanitary problems that rendered the ship unseaworthy.\textsuperscript{20} The effects of dehydration, dysentery and food poisoning in an overcrowded environment began to take hold, further complicated by lack of adequate number of toilets. These circumstances also provoked psychological problems and concerns for


\textsuperscript{18} Ibid., Statement by Mark Bonser, Rear Admiral, Director General, Coastwatch. 22 May 2002, p. 1,642.

\textsuperscript{19} Ibid., Statement by Clive Davidson, Chief Executive Officer, Australian Maritime Safety Authority. 1 May 2002, p. 1,375.

\textsuperscript{20} The summary of the situation on board the Tampa comes from the description by Marr and Wilkinson, Dark Victory, pp. 68-72, 68, 123.
physical safety as passengers threatened suicide and other forms of self harm. Captain Rinnan sent several distress calls that Australian authorities did not answer, before ordering the *Tampa* to enter Australian waters.

One day after Australian navy personnel boarded the ship, the Prime Minister framed this event as a threat to sovereignty brought about by the actions of the *Tampa* passengers:

> After picking them up—I stress, at the direction of the Indonesian search and rescue authorities—the *MV Tampa* then proceeded towards the Indonesian port of Merak where the ship had been granted approval—I repeat: the ship had been granted approval—to dock and for the group to disembark. However, under a form of duress, with some people threatening to jump overboard, the master turned the ship around and headed for Christmas Island … The current situation is that the *Tampa* is still lying within Australian territorial waters. It is our view that it should return to international waters.21

John Howard here equated state sovereignty with territorial borders, and any crossing of borders as a violation of sovereignty. Sovereignty notions that linked the development of the modern nation-state with state borders developed in the 1800s, concurrently with notions of “national interests”, and nationalism as an ideology.22 The ideology of nationalism was expressed as “great nation advance and consolidation”, which closely related to territorial national borders that required protection.23 Developments in the late twentieth and early twenty-first centuries witnessed a “lowering” of borders driven by economic factors, with a concurrent magnification of “identity politics” that linked a human element of meaning and fate to these borders.24 In the context of the arrival of the *Tampa*, the Prime Minister linked the ideology of

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23 Ibid.
24 Ibid., p. 12.
nationalism as a form of identity with territorial borders and framed both as the safeguarding of Australia’s national interests by the military.

Based on the ideology that borders required “protection” in the absence of war, rather than rules and procedures that regulate permission to cross them, the Howard government justified military intervention. This intervention consisted of two broad strategies: first, to deal with the Tampa and its rescued passengers and second, to formulate a policy on the assumption that all refugee boats threatened Australian interests, and hence required military involvement. First, a few words about how the second strategy that began with Operation Relex relates to this thesis on legal rationalism. Operation Relex transferred the usual functions of peacetime border surveillance from Customs to the Defence Department.25 At the time of its inception, the military operation was politically sensitive and under direct control of the Executive. Defence Minister Peter Reith personally set the “rules of engagement” for Operation Relex, with approval from the Prime Minister, as the Australian Defence Force practiced “a much more aggressive border control policy”.26 Usual media practices were restricted.27 The framing of refugee boats as a threat to Australia’s sovereignty not only provided a rationale for separating onshore from offshore refugees, as discussed earlier. Such framing also provided the legislative basis for treating refugees as illegal border crossers, as is discussed in Chapter 6 — Politicisation of the Law.

As one commentator observes, the government’s military response was necessary when the Tampa disobeyed instructions not to enter Australian waters, but the Tampa was also a catalyst for changes to refugee policy.28 Here, the military presence not only visually displayed strength to keep outsiders out.

26 Brennan, Tampering with Asylum. A Universal Human Problem, p. 60.
27 Marr and Wilkinson, Dark Victory, pp. 134-35.
The military also became engaged in practices that uncoupled the refugees in the boats from refugee policy. This uncoupling, even if performed under the auspice of national sovereignty, required a new set of legal rules that changed how the Australian government interpreted its duty to protect refugees in accordance with the Convention Relating to the Status of Refugees. Such policy extension, if politically motivated, has the potential to feed into legal rationalism. The framing of refugee applicants as a threat to sovereignty introduced the element of legal rationalism, because it would mean recourse to re-interpretative legislation for the purpose of denying entry to refugees under international law.

The first strategy, the military involvement, began on 29 August 2001, when Australian soldiers boarded the Tampa. This strategy began to wind down about two weeks later, with the transportation of Tampa passengers to a detention centre in Nauru. When Australian soldiers boarded the Tampa, a Bill to authorise this move was rushed through Parliament later that day. These legal changes led to significant amendments to the Migration Act and to the Border Protection Act. The legalities of such changes based on the new perception, however, was far from resolved. Prime Minister John Howard indicated this when he told Parliament: “It is an unusual situation, but it does require a very quick comprehensive and unambiguous response from the representatives of the Australian people”.29 The Prime Minister said in the speech cited in the previous sentence that the Attorney General had already advised him that Parliament’s actions in relation to the Tampa were legal. This raises the speculation as to whether there was doubt about the other purpose of urgently re-writing the Border Protection Act, the purpose to the effect that refugee boats were equally considered a threat to national sovereignty.

It is acknowledged here that an understanding of the military involvement and changes to Australian legislation cannot be limited to an analysis of government rhetoric. On the contrary, the *Tampa* issue raised many legal arguments over international refugee and maritime law, over the constitutional powers of the executive to act when national borders are perceived to be under threat, and over the “right” of individuals to cross state borders to seek asylum.\(^\text{30}\) Nevertheless, it is arguable that the new legislation served as a pretext to keep future refugee boats out. This points to legal rationalism, where legal rationality facilitated an ideology behind the refugee policy. The difference between the legislative intent of parliament and utilising the law for an ideological purpose, and how this difference impinges on the interpretation of legislation in court judgements, will be discussed as an institutional issue in Chapter 6 — *Politicisation of the Law*. For now, I wish to infer from the Prime Minister’s urgent request for unambiguous legislation, at a time when he said that ordering soldiers to board the *Tampa* did not present a legal ambiguity, the possibility that the *Border Protection Act* was aimed at another purpose. Immigration Minister Ruddock alluded to this when framing refugee issues as sovereignty issues:

> Obviously, there will be circumstances in which vessels enter our territorial sea for unlawful purposes, and in such situations the law of the sea enables us to deal with such unauthorised entry. But the Bill is designed to put these matters beyond doubt as a matter of domestic law.\(^\text{31}\)

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\(^\text{30}\) Such discussion goes beyond the scope of this thesis. For an exploration of the complexities of different legal constructions presented by various legal sources, of the ambiguities inherent in the legislation that was relevant to the arguments, and the political context that provoked these arguments, see: Mary Crock, “In the Wake of the *Tampa*: Conflicting Visions of International Refugee Law In The Management of Refugee Flows,” *Pacific Rim Journal of Law and Policy*, (2003) 12: pp 49-95.

Saunders, Cheryl, Michael Taggart (eds), *The Tampa Issue*. (Riverwood, NSW: Lawbook Co, 2002).

The “certainty” that the Minister alluded to consisted of unambiguous language in the Border Protection Act that sought to remove the practices of refugee policy from the ambit of court decisions. Whilst clear and unambiguous legislation is desirable, one can observe a tendency toward ideological bias if the legislation is directed at achieving a political goal. This connection with the ideology of the Howard government became evident when clarity in legislation ensured that Australia, despite having signed the Convention Relating to the Status of Refugees, did not have a legal obligation toward them, as long as Parliament framed them as a threat to Australian sovereignty.

**Tampa and a humanitarian policy**

This section explores how the Howard government justified the changes to refugee policy by arguing that these changes were necessary to deliver a humane policy. It should be noted that these arguments occurred concurrently with the earlier justifications by the Howard government, but have been separated here, for the purpose of analytical clarity.

It should be noted here that in the material discussed in all three case studies, the humanitarian policy justifications emerged as the least persuasive. In Case Study 1 — *Showdown at Sea: The Tampa*, language claims about humanitarian aid were generally tied to the purpose of ensuring that the *Tampa* left Australian waters, or by pointing out that rendering of humanitarian assistance was to Australia’s detriment. This rhetoric about placing conditions on humanitarian assistance, or denying that such need exists in the first place, relates to what Michael Billig calls *categorisation* and *particularisation.* By drawing on observations from the field of psychology, Billig describes categorisation and particularisation as two opposing forces in human thought. Accordingly, the

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mind sorts incoming information (a stimulus) into categories (categorisation), but also attends to the unique features of the information (particularisation). Particularisation creates a “special case” that opposes “routine categorisation” and gives scope for stretching the category, due to the unique features of the special case. Billig argues the ability to conceptualise of information in accordance with this model bestows to humans the ability to construct arguments:

Moreover, humans, through their use of language, possess that most important capability which makes rhetoric possible: the ability to negate. It is not just that we have different categories which we can apply to things; but we can argue the merits of categorising one way rather than another. One category can be placed in opposition to other potential categories. This opposition of categories might then be a matter for justification and criticism.33

If, as Billig argues, rhetoric is a matter of juggling categories, then one appreciates that the framing of an event leads to justifications of how the matter was dealt with. Such was the case when Immigration Minister Ruddock framed refugee flight as a quest for opportunities that negated the surrounding humanitarian issues. He told Parliament: “we have created an environment where as many as 2,500 people are sitting in Indonesia believing that it is more attractive to get to Australia.”34 Two days later, the Prime Minister framed this matter from a different perspective, when he categorised humanitarian refugee policy as a competition of interests between Australia’s national interests and the interests of individuals. Refusing permission to the Tampa became a matter of “balance against the undoubted right of this country to decide who comes here and in what circumstances.”35 Such categorisation, whilst adding rhetorical punch to public debate, omitted other factual information. As James Jupp

33 Ibid., p. 165.
noted, Australian governments have decided who entered the country ever since the Immigration Restriction Act was proclaimed in 1901.\textsuperscript{36}

Framing a humanitarian response to the \textit{Tampa} as a question of “balance” also assisted the Howard government to tip the balance in favour of its own political interests in the federal election of November 2001. During the politicised debate over how refugees ought to arrive in Australia, the phrase “we decide who comes into this country and the circumstances in which they come” became a major election slogan that was sent on postcards to voters in marginal seats just a few days before polling day.\textsuperscript{37} As Peter Mares observed: “The federal government’s response to the \textit{Tampa} may have been questionable policy, but it was certainly good politics.”\textsuperscript{38}

The Howard government translated the “compromise” rhetoric between the competing interests of Australia and those of the \textit{Tampa} refugees into a conditional form of humanitarian assistance. John Howard restricted humanitarian assistance to physical assistance, in the form of “food, water, medical supplies and safety equipment to enable the \textit{Tampa} to leave with its recently acquired passengers”.\textsuperscript{39} In another speech to Parliament on the following day, John Howard stretched the particulars of the case, so that a need for humanitarian assistance also necessitated a need for military involvement. Despite the unseaworthiness of the \textit{Tampa} and the unsanitary conditions on the overcrowded vessel, the Prime Minister indicated that previous requests for urgent medical assistance were exaggerated, which further strengthened the justification for military involvement:


\textsuperscript{38} Mares, \textit{Borderline: Australia’s Response to Refugees and Asylum Seekers in the Wake of the Tampa}, p. 133.

The government was left with no alternative but to instruct the Chief of the Australian Defence Force to arrange for Defence personnel to board and secure the vessel ... we have subsequently been advised by the ship's captain, in contradiction of earlier advice given, that the reason he decided to enter Australian territorial waters was that the spokesman for the survivors of the Indonesian vessel had indicated that they would begin jumping overboard if medical assistance was not provided quickly ... nobody — and I repeat: nobody — has presented as being in need of urgent medical assistance as would require the removal to the Australian mainland or to Christmas Island … The SAS personnel on the vessel have put it to the captain that the appropriate thing would be for the captain to return to international waters.40

The framing of a need for military involvement also signified a major policy shift. As John Howard framed resorting to the military as repelling a sovereignty threat, it was also clear that “compassion for genuine refugees” was to occur through framing them within the context of border control.41 Yet there were “genuine” refugees on the Tampa, a possibility that the Prime Minister ignored when the rhetoric also excluded the need for compassion. Within this perceived hierarchy of competing claims, assistance was restricted to minimal levels. Foreign Minister Alexander Downer argued for “an outcome” that addressed “any humanitarian needs of the rescued passengers”, yet also framed this as a matter of observing “our immigration laws and our sovereign rights” - a context that meant there was no obligation “to accept the rescued persons into Australian territory”.42 According to the rhetoric, the Howard government was taking measures to protect Australia from becoming a victim. On board the Tampa, the soldiers incurred the nickname “the humanitarian assistance workers”.43

41 Ibid.
43 Marr and Wilkinson, Dark Victory, p. 103.
Chapter 2
Showdown at Sea – Tampa

The justifications for the government’s response can be evinced by reference to actions that achieved three overlapping policy goals: narrowly qualified humanitarian assistance, sovereignty and legal considerations. However, some “justifications” were so circumstantial, they barely deserve mention. For instance, Immigration Minister Philip Ruddock told Parliament that it was physically impossible to let the *Tampa* in, because this would destroy the moorings at Christmas Island.⁴⁴ The issue was about refugees entering Australia, not about finding a harbour capable of accommodating large ocean liners. When it later suited the government, passengers were transferred on to naval boats in deep water, as they were taken to Nauru. Similar rhetoric became evident when Philip Ruddock deflected from Australia’s restricted humanitarian assistance by accusing the Norwegian government of lacking compassion:

One could be forgiven for thinking that the matter that is driving those who want to see a resolution of these issues by forcing these survivors on Australia in these circumstances has more to do with commercial profit and getting the vessel back on the line than it has to do with the circumstances of the individuals involved … There have been no offers from those who own the ship to bring humanitarian assistance to bear, and yet they use agents around the world, they ply their trade around the world and gain commercial advantage from that … I do not know whether the Norwegian government was complicit in it or not, but certainly the captain was determined to bring the vessel into our territorial waters.⁴⁵

In reality, the shipping company had already provided humanitarian assistance by rescuing the survivors, and continued to incur financial losses until the *Tampa* was able to resume course. Here, Philip Ruddock’s rhetoric turned the argument around and implied how humanitarian the Australian policies were, which in turn served as a justification for restricting assistance to the *Tampa*.

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However, it is suggested here that the government’s humanitarian assistance lacked generosity.
Chapter 2
Showdown at Sea – Tampa

Morphing borders, morphing policies

As will be seen throughout the case studies, orderly process as a policy goal in refugee policy was as much about regulation as it was about regulating in order to exclude. In this speech, Immigration Minister Philip Ruddock encapsulated how the ideology of orderly process also contained the hidden meaning of skewing such process toward a differentially orderly process for at least some refugees:

Australia does accept its international obligations and does so honourably. It exercises them conscientiously, but it does not accept that our refugee and humanitarian program will be managed by people smugglers.46

Yet the new policy direction contained in this announcement did precisely what Ruddock denied. The new Border Protection Act and resulting changes to the processing of refugee applications were directed at controlling people smuggling operations. At the same time, the legislation to effect this change had to introduce a new category of criminal: the “people smuggler”. A more detailed discussion of this legislation will commence shortly. For now, I only wish to highlight the impact of these changes on the institutions of the state. The link with orderly process and international crime syndicates was rhetorical: irrespective of their mode of arrival, most applicants were refugees. If such a link was not rhetorical, the legislation may have resulted in charging refugees in relation to this crime, perhaps with aiding and abetting the criminal activity of people smuggling or being an accessory to a crime. I do not advocate such measures, but merely wish to point out that the link between an orderly

process in refugee policy and international crime syndicates was about formulating a new deterrent policy, under the auspice of orderly process.

The new legal changes, aimed at reducing “the continuing influx of unauthorised arrivals to this country”, were framed as assisting orderly process. Yet achieving this ideologically motivated goal relied on feeding the revised notion of an orderly process through the institutions of the state. In the speech quoted at the beginning of this paragraph, Philip Ruddock said that “the second major challenge” to an effective operation of the Migration Act was “the increasingly broad interpretations given by the courts to Australia’s protection obligations”. Therefore, the Minister continued, his proposed changes would give “clear legislative guidance” to curtail such “generous interpretations” by the judiciary. In a process of orderly exclusion, the new changes were specifically aimed at curtailing the interpretative powers of the courts. The Immigration Minister argued that, “because the law has already been determined”, passed by parliament and applied by the Refugee Review Tribunal, there was no need to go to the courts. Yet the Minister himself, as will be noted in Chapter 6 — Politicisation of the Law, frequently litigated against court decisions that he did not approve of:

I am the most litigious minister of the Commonwealth, with over 2,000 cases currently before the courts. Why would you not want to put in doubt the possibility of legal actions that would prevent the exercise of these powers? It is not just a question of putting it beyond doubt in terms of its legality; it is a question of putting it beyond doubt in terms of the possibility to argue that there may be a case for doubt. (Italics added).

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48 Ibid.
49 Ibid., p. 30,236.
One may view the legal and policy changes since the *Tampa* as a development of how the Howard government established a legal structure that removed judicial influence from the delivery of refugee policy. To a large extent, this was achieved through an overbearing appeal to the rules, a feature that was characteristic of legal rationalism where rules featured as ends in themselves. Fetishising the rules, justified by an appeal to orderly process, led to concrete outcomes in terms of political power and structural changes. The strategies by which this was achieved will be discussed in Chapter 6 — *Politicisation of the Law*. But first, more discussion is needed on the case studies to illustrate the Howard government’s preferences of how the rules ought to be interpreted.

The perception that orderly process of refugee policy was under threat was further augmented when in December 2001, the mere sighting of a boat prompted the Howard government to write more legislation designed to prevent refugees from reaching Australia. At that time, the government “temporarily excised” four islands near Carnarvon “as a precaution after the sightings of a boat sailing toward the mainland on the weekend” was suspected of “possibly carrying illegal entrants”.51 Here, one gets a sense of legislation being directed specifically against refugees, as well as being suitable for assisting a politicised campaign against refugees. The passing of legislation for such political and ideological purposes is part of the pattern of legal rationalism.

The end of mandatory detention

The new *Border Protection Act* retrospectively legalised all actions taken by the government in relation to the *Tampa*, and other refugee boats that arrived since.\(^{52}\) Under this legislation, officers became authorised to search people and boats in national and international waters without a warrant, to detain people in their boats or on military vessels, to forcibly return persons to their vessel, or to take individuals to Australia or elsewhere. Schedule one of the *Migration Act* transferred the oversight from Customs to the military, and authorised customs officials to use similar powers as defence personnel.

David Marr and Miriam Wilkinson viewed the government’s recourse to the military as a political opportunity before the pending election.\(^{53}\) Accordingly, some members of the Howard government argued from early 2001 that the navy should be utilised to send back the boats. However, when the *Tampa* approached in August, John Howard was still undecided about this option. At that time, Indonesia had already rejected a plan for Australia to finance a detention centre in Indonesia to prevent boats from travelling to Australia. Additional pressure, Marr and Wilkinson suggest, came from the already overfilled detention centres inside Australia. Furthermore, there had been escapes from the Villawood detention centre and another boat with 340 passengers had arrived at Christmas Island.

The Howard government framed the passing of the new legislation as “a strong message to people smugglers and their clients that Australia is not a soft touch and that the government will continue to demonstrate leadership in

\(^{52}\) Amendment of the Customs Act, 1901. Border Protection (Validation and Enforcement of Powers) Act.

\(^{53}\) Marr and Wilkinson, *Dark Victory*, pp. 46-47.
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protecting our borders”. 54 Marr and Wilkinson suggest that the 
Tampa presented itself as “an opportunity for Howard to show Canberra was in control”. 55 As the 
Tampa was sailing toward Australia, the Prime Minister told listeners of Melbourne’s 3AW radio station:

Many of them are frightened to go back to those countries and we are faced with this awful dilemma of on the one hand trying to behave like a humanitarian decent country, on the other hand making certain that we don’t just become an easy touch for illegal immigrants … You see the only alternative strategy I hear is really the strategy of using our armed forces to stop the people coming and turning them back. Now for a humanitarian country that is not an option. 56

But this is in effect what happened. Three days later, the Howard government rushed the Border Protection Bill through Parliament; legislation that authorised the armed forces to turn the boats around. However, the passengers were not sent “to those countries” that the Prime Minister referred to in the radio broadcast quoted above. Instead, as will be seen shortly, refugees were forced back to Indonesia, or taken into newly established detention centres to Nauru and New Guinea. At face value, John Howard’s statement was about a humanitarian policy. There was no mention of the law or of sovereignty. Yet, the Prime Minister also outlined the legitimacy of two competing claims that served as justification for the change in refugee policy: by contrasting a strong commitment to humanitarian values with the outcome of being perceived as an “easy touch”, John Howard also left open the possibility that some qualifications may be imposed on a humanitarian policy. Three days later, the Prime Minister directed soldiers to “take whatever action was necessary to stop the 
Tampa from moving into or further into Australian territorial waters. 57 The new policy retained minimalist humanitarian elements in that “obviously

55 Marr and Wilkinson, Dark Victory, p. 47.
56 John Howard on Radio 3AW, cited in Ibid.
vessels will not be sent back to the high seas in circumstances where that would endanger people’s lives.” It was also clear that the goal to repel all threats to Australian sovereignty, no matter how slight, dominated the humanitarian goals.

Then, the policy shift occurred, with the Prime Minister linking the *Tampa* with refugee boats. This is a good example of legal rationalism. John Howard said that the purpose of the new legislation was to ensure that in future, boats did not have the authority to enter Australian waters. As the words imply, “unauthorised vessels” never had such authority. But now, the law identified refugee boats as a threat to sovereignty, without alluding to the possibility that these may be refugee boats, as John Howard continued in his speech to Parliament quoted earlier in this paragraph: “There is no doubt that the integrity of the borders of Australia has been under increasing threat from the rising flood of unauthorised arrivals.” Under the terms of the *Pacific Solution*, as the new policy known became known, defence personnel turned around refugees at sea or took them to detention centres abroad. Whilst this policy was officially about intercepting illegal border crossers, it was written in a political context of turning refugees away:

> The [previous] Border Protection Act gave the government powers to intercept vessels in international waters and it gave officers power to board, search and detain vessels where they suspected that people smuggling is involved, and we have been doing this - we have been using these powers. But they have not been as effective as we would have liked.

These initial decisions of where passengers from the intercepted boats would go, which significantly impacted on the processing of refugee claims, were not

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made by refugee assessment personnel, but by naval and customs personnel. The new legislation resulted in mandatory sentencing with mandatory non-parole periods for people smugglers. But the law went beyond utilising the armed forces to keep refugee boats away, and also impacted on the legal system. The new legislation also granted a qualified immunity to “the Commonwealth, or a Commonwealth officer, or any other person who acted on behalf of the Commonwealth”, whilst acting under the provisions of this legislation. The wording of the legislation made it clear that prosecution of individuals for breaches of criminal or civil law could occur solely at the discretion of Parliament. This established the potential for the ideology of legal rationalism to determine how the law would be applied in the politicised context of refugee boats. This legislation, which introduced a privative clause under section 157 of the *Border Protection Act*, had significant repercussions for the structure of the state and will be discussed again in Chapter 5 — *Bureaucratic Process and Ministerial Power*.

Officers were authorised to board or detain a boat at high sea, or to disable the vessel, and to use “reasonable force” for this purpose. Under its new powers, the *Border Protection Act* stipulated that “any restraint on the liberty” resulting from such detention was not unlawful, and the legality of detention of individuals affected by the laws could not be challenged in court. Although those taken to detention centres were deprived of their liberty, the Howard government carefully avoids the word “arrest”. This is another example of legal rationalism, where rhetoric minimises the impact of the policies on individuals. It also raises the question of how much damage individuals can suffer as the consequence of the legitimate and routine exercise of state power. These questions will be revisited when discussing how the courts contemplated the relationship between the law and the psychiatric damage sustained whilst in

62 Ibid., Schedule 7 (1).
63 Migration Act 1958 No 157 (2001 as Amended) 1958, Section 245.
64 Ibid., Section 245D (8A).
immigration detention by then six-year old Shayan Badraie, the teenagers Alumdar and Muntazar Bakhtiyari, Mr Behrooz, and two men identified only as “S” and “M”.

As refugee policy became fused with defence policy, military and customs officers decided at sea whether to take a person to “the migration zone” or to “a place outside Australia.” The detention of refugees thus no longer was mandatory but discretionary. Customs officials and military personnel exercised such discretion, without a legal requirement that such officers had formal qualifications in refugee assessment procedures. Section 245 (18) (a) of the Migration Act confers such powers to “any person in command or a member of the crew”. Section 245FB (1) legitimates the use of force to detain a person on an Australian ship and to subsequently return the detained person to their vessel. The Prime Minister justified the new powers and the bypassing of the court system in the absence of a physical threat as a matter of Australian sovereignty:

> The protection of our sovereignty, including Australia’s sovereignty to determine who shall enter Australia, is a matter for the Australian government and its Parliament. Consequently, sections 4, 8 and 9 ensure that a direction given under section 4, and actions taken as a consequence of that direction, will not be eligible to be challenged in any court in Australia. In particular, the Bill confirms that the person on board the vessel will not be able to seek to delay the removal from the territorial sea under the Migration Act.66

Through the end of the mandatory detention of refugees, the ideology of legal rationalism manifested itself in two ways. First, the law supported the government’s ideological agenda that refugees should be kept out of Australia. Through the denial of entry of onshore refugees to Australia meant that offshore refugees were considered almost exclusively as the only legitimate refugee source. Second, the legislation served government ideology by

65 Ibid., Section 245D (8B).
enhancing the power of Parliament within existing state structures. The discussion in this section identified how the Howard government set the legal groundwork that allowed for later manipulation of these rules through language claims and policy practices.

**Detention of refugees abroad**

The detention of refugees abroad under the *Pacific Solution* meant that onshore applicants could apply for refugee entitlements from Australia. The Prime Minister justified this step by framing refugee boats as giving rise to a national emergency, and claimed that the previous system had disadvantaged Australia:

> Something has to be done internationally to ensure that people who seek to be treated as refugees are commonly, fairly and equitably assessed, and that is not happening now ... what is happening with people smuggling is that the principle of fairness is being grossly violated. We hope that, by the action we have taken in relation to the Tampa, we have not only upheld the principles of international law and acted in Australia’s national interests but also sent a message of our concern to the rest of the world, the international community, regarding the situation that has developed.\(^6^7\)

One outcome of the *Pacific Solution* was a refugee assessment system with fewer rules and processes to ensure fairness toward refugees. The Immigration Minister supported the Prime Minister’s claim to add that Australia was being treated unfairly by other countries. Philip Ruddock, when responding to international criticisms that Australia had closed its borders to refugees, said that “lamentably”, the international community ignored Australia’s concerns.\(^6^8\)

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Here, the Prime Minister and the Immigration Minister implied that Australia, rather than refugees, deserved considerations of fairness. It is a theme on state power that will be discussed in the next section.

The link between people smugglers and refugee boats was unarguable, because people smugglers steered refugee boats to Australia. Political and economic analyst in Southeast Asian affairs Greg Clancy supports the government’s view that onshore refugees are essentially people smuggling operations. In the article just cited, Clancy views the onshore refugee matter as a clash of interests between the aspirations of people smugglers and their paying customers with Australia’s national interests, and implies that the Howard had to stop the boats. Accordingly, the ever increasing number of boats during 2001 meant that “at some point the Australian government would be forced to act”. In this context, Clancy claimed that any electoral gain arising from this was irrelevant, because “the government had acted in the interests of the community at large.”

The notion that the Howard government’s response to refugee boats was inevitable, or that people smugglers prompted such action, was only part of the story. Other evidence suggests that, by closing “legitimate” channels of entry to refugees, western nations actually encouraged the international people smuggling trade. Frank Brennan observed in his book, *Tampering with Asylum*, that Europe had already practiced the framing of refugee policy as an anti-people smuggling policy for almost a decade. Accordingly, Germany developed a model during 1992 and 1993, which “has since been replicated by many first-world countries.” This model, as Brennan explained in his comparative analysis of refugee policies in western countries, maintained a refugee protection program, but excluded those people who had travelled

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70 Ibid., p. 104.
71 Ibid., p. 108.
through countries where they would previously have been safe. Through several legislative changes, the European Union effectively closed its border in 1995 to citizens “of countries affected by civil war and unrest”. One may view this development as the criminalisation of refugee flight:

The success of first-world governments in closing the legal routes gave rise to the phenomenon of people smugglers who for a fee will engage in criminal behaviour in order to deliver the asylum seeker to a country with a transparent asylum process.73

When linking this international development to the Australian context, Brennan observes that around 1999 and 2000, as the political situation in Iraq and Afghanistan deteriorated, “people smugglers were offering cheaper deals to Australia than to Europe”.74 This observation makes Australia an accidental, rather than a carefully chosen, destination by onshore refugees, and suggests that claims that the passengers are wealthy people may be exaggerated. Arguments that view onshore refugees from the people smuggling perspective tend to play down the refugee component. One example is how Robert Illingworth, Assistant Secretary of the Onshore Protection Branch of the Department of Immigration and Multicultural Affairs, interprets the increase in the number of onshore refugees: “…between July 1999 and April 2001, 7,484 people arrive[d] unauthorised in Australia by boat”, and among those, “there has been an increase in the percentages of these arrivals who presented protection claims”.75 The problem intensifies, according to Illingworth, “when smuggled people also seek refugee status”, because this limits the sovereign right to decide who can enter and stay.”76 In support of the argument of the government’s framing of refugees as a people smuggling issue, Illingworth concludes that the “single most serious threat to the continued viability of the international protection system” arises through the combination of “illegal

73 Ibid., p 76.
74 Ibid., p. 106.
76 Ibid., p. 97.
entry” with the choice of “country of protection and [the achievement of] a simultaneous migration outcome.”

These arguments about people smugglers and the impact on state resources ignored the increasing international need for refugee protection, which may have generated the refugee flight in the first place. Instead, the Howard government increasingly directed its framing of the refugee issue in terms of Australia’s national interests and responded by isolating these refugees from Australia’s legal obligations toward refugees. Measures to refine the legal framework for that purpose were in place well before the *Tampa* arrived. It was a matter of extending existing legislation and existing policies to support the Howard government’s ideology of framing refugees in public discourse.

Such measures were under consideration one year before the *Tampa* arrived. Foreign Minister Alexander Downer mentioned this plan during the *Tampa* issue. Accordingly, the Minister sought to combine refugee policy with “the broader issue of people smuggling” through a regional arrangement with Indonesia, the International Organisation of Migration and the United Nations High Commissioner for Refugees since April 2000. However, it was not until the post-*Tampa* legislation that a national legal framework primarily considered the new refugee policy as an anti-people smuggling operation. This framing of refugee issues as criminality issues was characteristic of legal rationalism, because it allowed the Howard government to justify the ideology behind refugee policy as a legal necessity to protect Australian interests. The rhetorical recourse to the law disguised that refugee policies had become people smuggler policies, and thereby uncoupled the legal statutes from their original purpose of protecting refugees.

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77 Ibid.
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One outcome of these legislative changes was the *Pacific Solution*. Peter Mares summarises the fast-forwarding of the events of setting up detention centres abroad:

By Saturday, 1 September, it looked as if the government’s impulsive decision to block the *Tampa* might backfire. Its draft legislation had been defeated, Indonesia’s president was refusing to even take a phone call from John Howard and Australia’s actions had provoked a storm of international criticism. SAS commandos were on board the *Tampa* but the ship was going nowhere and remained inside the 12-mile exclusion zone around Christmas Island … Urgent cables had been sent to the heads of Australian diplomatic missions around the region, instructing them to sound out their host governments about the possibility of warehousing asylum seekers on Australia’s behalf. Diplomats were given to understand that they had an open checkbook to get results … In the end, it was near-bankrupt Nauru that agreed to help.79

The other developments were also highlighted in Peter Mares’ research.80 On 3 September, the refugee applicants left the *Tampa* and boarded the naval vessel *HMAS Manoora*. The government deployed naval vessels and aircraft to patrol the “north-western approaches” to Australia. On 9 September, Defence Minister Peter Reith struck an agreement with Nauruan President Rene Harris that the *Tampa* passengers, and other people who were picked up by the naval patrols, would be held on Nauru for a maximum of six months. This contract was re-negotiated in December 2001 and extended to keep asylum seekers in Nauru “as long as reasonably necessary”. Subsequent information revealed that this agreement was re-negotiated again in 2004, at the cost of $22.5 million.81

Peter Mares’ research gives insights into the huge expenses of these arrangements to Australia.82 The deployment of the naval troops at Christmas

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Island to deal with the cost $3 million per day. Coast surveillance costs “were estimated at $20 million per week”. Initial aid money to Nauru, in return for agreeing to host the refugee applicants, amounted to $20 million. This was followed by “promises of $10 million in development assistance” in December 2001, “in return for agreeing to detain an additional 400 asylum seekers”. Mares continues that in October 2001, the Howard government negotiated with Papua New Guinea a detention centre on Manus Island to host 200 asylum seekers, initially for six months. Information from the Department of Immigration and Multicultural Affairs reveals that in January 2002 alone, the government sent an additional one hundred and eighty people from the Christmas Island detention centre to Manus Island and Nauru.

Most of the money was directed at keeping refugees out, rather than toward assisting refugees. In what Mares calls a “glaring imbalance”, the Howard government spent between 2000 and 2001 a total of $572 million on matters pertaining to “unauthorised boat arrivals”. Of this, the $11 million spent on “funding migration agents to provide application assistance” contrasted sharply with the government’s “core grant” of $14 million dollars during this period.

John Howard announced that New Zealand accepted 150 of the 433 Tampa passengers. For the remaining 302 who went to Nauru, the new refugee policy had dire consequences. Under the new assessment rules, the refugee applications were successful in only 79 cases. This contrasted sharply with results when assessments were conducted in Australia, where most boat passengers in the past had passed the refugee tests, either immediately or as the result of legal appeals. For those 79 refugees who went to Nauru in September

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83 Ibid., p. 130.
85 Mares, Borderline: Australia's Response to Refugees and Asylum Seekers in the Wake of the Tampa, pp. 236-37.
2001, freedom was a long way off. In July 2003, Australia accepted 26 people from this group, almost one year after confirmation of their refugee status. Freedom came only at the insistence of the Nauruan authorities, which prompted Philip Ruddock to say: “the only reason this is occurring is because we have an agreement with Nauru that refugees do not remain there.”

The Minister’s comment cited in the previous sentence testifies to the selective commitment of the Howard government to international obligations that was indicative of legal rationalism. Some refugees could come to Australia, as long the agreement with Nauru meant that the vast majority could not. Had Australian refugee policy been humanitarian, instead of a legal manoeuvre enforced by the military, the government would have accepted the Tampa refugees earlier. The cited comment also contradicted Philip Ruddock’s justificatory claim in August 2001, when he said that people spent a long time in detention because they used their right of appeal, and that removing appeals rights from the legal process would lead to a shorter time in detention, and hence greater certainty. There is even a hint at the suggestion that under the new legal rules, refugees may remain in detention unless external pressures prompted their release.

After the politicisation of the Tampa subsided, the Howard government justified its refugee policies less in terms of sovereignty issues and more as attempts to stop people smugglers. One year after the Tampa, Immigration Minister Philip Ruddock stated in a media release that the Pacific Solution thwarted the criminal activities of people smugglers and also resulted in a humanitarian outcome for the asylum seekers without exhausting Australia’s resources. Accordingly, the Minister announced that no boat has arrived for one year, and that “most importantly, the new measures have stopped people

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risking their lives in dangerous journeys organised by unscrupulous people smugglers”, with the additional benefit “to ensure that the asylum system protects those at greatest risk and is not abused by those seeking migration outcomes”.

Philip Ruddock, in his new role as Attorney-General, justified the success of the “Pacific Strategy” as humanitarian policy:

Overall, these strategies save lives – because they reduce the likelihood of people putting themselves in the hands of unscrupulous people smugglers and risking dangerous journeys in overcrowded boats. They also save space – by allowing us to keep offshore places for those unseen refugees in parts of the world, such as Africa, who are in need of resettlement but are not in a position to use people smugglers to get to Australia.91

Similarly, Philip Ruddock’s successor Amanda Vanstone committed to the strategy to delay the acceptance of bona fide refugees from Nauru to Australia, when announcing one year later, in 2004, that Tampa refugees continued to arrive “in dribs and drabs”:

We only have to look at the success of offshore processing, realise that once the people smugglers can’t guarantee to get their sorry cargo to Australia, they lose business. It’s been the most effective way of shutting down the dreadful business of people smuggling.92

The explanation failed to note the fact that onshore refugees were also refugees, and that the Howard government reneged on protecting these refugees. The Pacific Solution went beyond establishing government control over an orderly process. It consisted of relieving Australia of obligations to refugees

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in a legally rational manner, and of detaining them without the expectation that they would be released quickly once their refugee status was confirmed. Apart from the knowledge that they were not welcome by the Howard government, onshore refugees did not know in which country they would eventually live. The emerging aim of the refugee policy of the *Pacific Solution* was to devise strategies to exclude refugees. Philip Ruddock hinted at this when he responded to a Senate committee report that recommended closing all detention centres abroad, because they led to problems with accountability and Australia’s international image. Ruddock then told reporters that the *Pacific Solution* “hasn’t failed, it’s worked and it’s worked exceedingly well” because it had stopped the “large number of unauthorised border arrivals” in Australia, and because “it’s saved Australia hundreds of millions of dollars.”

**Tampa aftermath**

The *Border Protection Act*, as discussed in the previous section, authorised the interception of vessels and passengers, to physically prevent their arrival in Australia. To recap, amendments to the *Migration Act* removed Australia’s obligations to offer protection to refugees from these intercepted boats. As part of the excision laws, Christmas Island and Cocos Island were deemed not to be part of Australia for migration purposes under section 46 of the *Migration Act*. This legislation was later extended to include other islands. Section 46 of the *Migration Act* also introduced the new category of “off-shore person”, which meant that uninvited refugees from the boats would never be eligible to claim refugee protection from Australia. The legislation left intact the refugee rights under Australian law for people whose boats travelled undetected through to the excised migration zone, and arrived in areas that were not excised.

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94 *Migration Act 1958 No 157 (2001 as Amended).*
This section analyses how the Howard government utilised these legal changes in the delivery of refugee policy. As will be seen shortly, the Howard government did not apply these new legal rules consistently, but did apply them in situations that favoured the ideological position of its refugee policy. It will be argued that these policy practices were consistent with legal rationalism: a misuse of the law for ideological, rather than legal purposes.

Before elaborating on the previous two paragraphs, a few words about the significance of the legislation. Frank Brennan pointed out the differences between the Australian system and the system of the United Nations High Commissioner for Refugees (UNHCR).\textsuperscript{95} Accordingly, under the rules of the UNHCR, a case officer decided on the outcome of the refugee application, and another case officer could review this decision. Under Australian rules, there was a much more elaborate system of appeals through the courts. Germov and Motta note that the United Nations High Commissioner for Refugees expressed concern over the “denial of the right to apply for Protection Visas and the forced removal of asylum seekers to other countries”.\textsuperscript{96}

Rather than refining the legal rules toward achieving fairness, as the Howard government claimed, the new legislation aimed at preventing refugees from entering Australian soil, because that prevented them from accessing Australia’s legal rules. Marr and Wilkinson note that the United States had already enacted a similar model when they stopped refugees from reaching American soil.\textsuperscript{97} Accordingly, during the 1980s and 1990s, when “thousands of people fled Haiti … the United States scooped them out of the sea and took them to be processed at its military base in Guantanamo Bay.” Marr and Wilkinson continue that, although these people had arrived at the “beaches of

\textsuperscript{95} Brennan, \textit{Tampering with Asylum. A Universal Human Problem}, p. 147.
\textsuperscript{97} Marr and Wilkinson, \textit{Dark Victory}, p. 106.
Florida”, they were literally prevented from “setting foot on land” for the purpose of accessing American refugee laws.

The above example hints at how the excision legislation of the Australian Migration Act was about a legalistic interpretation of migration law that gave rise to the claim that refugees did not arrive in Australia. Operation Relex, which operated at full capacity between September and December 2001, played an important part. Navy and helicopter patrols surveyed international waters, and this military intervention was scaled down at the end of the year, a few weeks after John Howard won the November 2001 elections. During Operation Relex, the Navy intercepted almost fourteen boats with 1,800 passengers.

Harapanindah, or Siev 5, was the first boat to be turned back to Indonesia after Operation Relex began. The circumstances of the return by the navy had the hallmarks of minimal humanitarian assistance: just enough assistance to turn the boat around toward Indonesia and enough force to prevent it from arriving in Australia. Marr and Wilkinson describe the human face of the pre-election policy, as the naval ship Warramunga intercepted the Harapanindah near Ashmore Reef:

Its [Harapanindah] engine had failed two days out from Lombok. Food ran low. Water was rationed. Mechanics among the passengers got the engine going again. In the eight days at sea, the people suffered all the usual afflictions: sea sickness, diarrhoea, scabies. A baby died in the heat. Another was born whom the mother would name Ashmorey.

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100 Marr and Wilkinson, Dark Victory, p. 216.
For five days, the navy gave food and medical assistance. Then, the Prime Minister approved that the boat be sent back.\textsuperscript{101} The *Harapanindah* was escorted back to Indonesian waters, equipped with “food and water, new fire extinguisher and charts”, and enough fuel to make it back to Indonesia.\textsuperscript{102} The Prime Minister “claimed the first success” under the new policy and told reporters that “the return to Indonesian waters … was due to the tougher laws.”\textsuperscript{103} One can infer from the statement just cited the goals of the new refugee policy that was executed by Australian soldiers: to turn around refugee boats, accompanied by careful monitoring to prevent loss of life.

This strategy of giving minimal humanitarian aid for the purpose of fulfilling the objectives that were justified by an overbearingly legalised approach, continued well beyond the timeframe of the *Tampa*. Almost five years later, in May 2006, a family travelled by boat from Papua New Guinea to the nearby Australian island of Saibai. The Afghan family was taken to “a secret location” in Brisbane and kept away from “legal and community contact” whilst the nine-year old son underwent hospital treatment.\textsuperscript{104} Approximately one month after their arrival, immigration officials returned the family to Papua New Guinea because the island had been excised from the migration zone and the family were therefore “not entitled to have their claims heard in Australia”.\textsuperscript{105} In this game of legalistic interpretations, the family was prevented from invoking Australian refugee legislation, although having physically entered the mainland.

Whilst *Operation Relex* operated at maximum capacity until the end of 2001, two boats attracted the most media attention. Neither arrived in Australia. The first boat was the *Oblong*, which was sighted by a navy ship on 6 October 2001.\textsuperscript{106}

\begin{flushleft}
\textsuperscript{101} Ibid., pp. 216-17.
\textsuperscript{102} Ibid., p. 220.
\textsuperscript{104} Sasha Shtargot, “Nauru Detention Fear for Afghan Asylum Seekers,” *Age*, 2 June 2006.
\textsuperscript{106} Marr and Wilkinson, *Dark Victory*, p. 181.
\end{flushleft}
To avoid repetition, the events pertaining to the Oblong, which later became known as the children overboard affair, will be discussed in Chapter 7 — Formation of the Public Voice. The next boat sank on 19 October 2001 in the Indian Ocean, leaving behind only forty-six survivors\(^ {107}\). The boat was allocated only a number, and became known as Siev X\(^ {108}\).

News of the Harapanindah and children overboard had barely subsided when the Siev X sank. Already, there were comments that the government’s refugee policies may well lead to such an outcome, as critics questioned the legal and the moral basis of these new policies. David Marr for instance, when commenting on the outcome of the Tampa case, called the new refugee policy “a policy of expulsion”.\(^ {109}\) The Sydney Morning Herald called the passing of the new Border Protection Act “an unconstitutional, inhumane piece of legislative rubbish which potentially allows asylum seekers to die”.\(^ {110}\) Perhaps the most scathing criticism came from former Human Rights Commissioner Chris Sidoti, when he told a conference: “Australia is becoming a nation of thugs, betrayed by its political leader through an inhumane and absurd policy”.\(^ {111}\)

Against this political backdrop, the Siev X sank one month before the November 2001 federal election. An article in the Sydney Morning Herald speculated that the Howard government now used a different approach to its refugee policies, when reporting that John Howard felt “saddened for that terrible human tragedy”.\(^ {112}\) The article just cited also reported that Philip Ruddock, whilst stating that 90 percent of the passengers were looking for “family reunion outcomes”, and drawing attention to the fact that they had not

\(^ {107}\) Ibid., p. 229.
\(^ {108}\) Brennan, Tampering with Asylum. A Universal Human Problem, p. 64.
applied for refugee protection in Indonesia where they were safe, also announced that the Howard government would accept survivors with “family linkages” to Australia. This concession to 
Siev X survivors was a temporary exception to refugee policies that did not amount to a policy change to, or an acknowledgment that the \textit{Siev X} was a refugee boat. In effect, Philip Ruddock framed this as a legal and criminal matter when he responded to criticisms that many of the dead were women and children related to men who had already been granted refugee status in Australia:

\begin{quote}
I'm not going to be made to feel guilty about people who put themselves in the hands of smugglers and who pay large amounts of money knowing that they're going to break our law.\textsuperscript{113}
\end{quote}

The law that the Immigration Minister referred to came from a national Australian perspective that was self-confirming. Cecelia Bailliet pointed out the tension between international law, which Australia was also obliged to uphold, and the dangerous precedent that has been set by the \textit{Tampa} under national law.\textsuperscript{114} In this article just cited, Bailliet argued that breaches of the \textit{International Convention on Maritime Search and Rescue}, of the \textit{International Convention for the Safety of Life at Sea}, and of the \textit{Convention Relating to the Status of Refugees}, as well as breaches of long established international norms by Australia, may have set a precedent whereby ships in future ignore distress signals at sea because it is too inconvenient to render assistance.

The government’s power to make temporary exemption to the policy and to suspend applying the legislation behind the policy was a humane gesture to the affected individuals. However, it also reveals the power of Parliament as an institution of the state. The remainder of this case study cites a few examples of how this exercise of power was applied to other refugee boats. There

\textsuperscript{113} Australian Associated Press [AAP Newswire]. (2001, 26 October). \textit{I Won’t Feel Guilty: Ruddock.}

emerges a picture of applying legislation in politically expedient manner. At times, the rules were applied strictly and consistently to keep refugee boats away, but temporarily suspended when the same rules did not achieve the political ideology behind this legislation. The mechanistic recourse to a rule-driven policy, so characteristic of Legal Rationalism Form 1, turned into Legal Rationalism Form 2 – a misuse of legal rationality – when the rules did not fit with the political imperatives of the Howard government.

In July 2003, a boat with 53 refugees slipped past the naval blockade and arrived three kilometres from the Port Hedland coast. They arrived with personal identification papers. The captain, an Australian citizen who attempted to bring members of his extended family from Vietnam to Australia, was charged with people smuggling and later received the minimum mandatory sentence of five years. When the boat arrived, officials were unable to determine initially if the boat had arrived within the designated migration zone. Whilst these investigations were in progress, Immigration Minister Philip Ruddock said:

If they are within the migration zone, then the more complex, time-consuming and expensive arrangements will be engaged, in which people will be able to appeal decisions to the Refugee Review Tribunal and probably to the courts if they wish. It would be disappointing but that would be the outcome.

After authorities determined that the boat had made it into the migration zone, the government’s practices became inconsistent with its policy. Consistent practice would have been to mandatorily detain these people in an immigration detention centre on the Australian mainland. However, Legal Rationalism Form 2 would override the practical application of the existing rules, and would treat these refugees even more harshly than could be expected from

these rules. The Age reported that, although the nearest detention centre in Port Hedland was only several kilometres away, the Minister ordered that people be taken to the isolated detention centre at Christmas Island, 1,800 kilometres away. The article just cited also reported that the re-location to an isolated area created greater difficulty for the passengers to stay in contact with relatives and lawyers in Australia. The report continues with a statement by Philip Ruddock that they would not be taken to Port Hedland, “in order to make it abundantly clear that people are not reaching the Australian mainland”.

At this point, the story takes a twist. It appeared from the developments cited in the previous paragraph that the Minister now contradicted his earlier statement that the refugee applications would be processed under Australian rules. Such was my impression when writing an earlier draft of this chapter: under Legal Rationalism Form 2, refugees would never get in, no matter what the legally-rational constructed rules said. This interpretation was strengthened when the Prime Minister supported Philip Ruddock’s orders:

We have a very clear policy and that is that people who seek to come to the country illegally will not be allowed to come to the mainland.118

It appeared, incorrectly, from the comments by Philip Ruddock and John Howard that, because the refugee applicants did not come to Australia, their applications would not be processed under Australian law. However, sending the refugees to Christmas Island was an expensive political manoeuvre that did not stop the legal process. It was revealed one month later that it cost $2,326,170 to re-open the mothballed Christmas Island detention centre and to detain those 53 people for 70 days.119
Getting back to the twist in the story, my initially incorrect interpretation of these events suggests an even greater level of complexity to legal rationalism than anticipated: it comes from the rhetoric that preventing these refugees from getting to the mainland meant preventing them from accessing Australian refugee law. They did access Australian refugee law whilst detained on Christmas Island.

Regardless of my interpretation, the Howard government’s response to the Vietnamese refugee boat is still an example of legal rationalism, because it is an example of a mismatch between language claims and policy practices as set out in the introduction to this section. However, I did not anticipate a mismatch in the direction in which the Howard government implied that it did not follow existing legislation, but actually did so in practice. Yet one may infer that such instance of legal rationalism was politically useful for the government, because it assisted in convincing the electorate that no uninvited refugee would get into Australia. Indeed, the earlier quoted comments by Philip Ruddock and John Howard about getting into Australia, contrary to their political pitch, only referred to the venue of detention rather than what is generally meant by entering the country.

These practical difficulties to analytically separating legal rationalism from legal rationality and from political process also generate insight into the complexities of legal rationalism. First, the apparent flexibility by which the Howard government resorted to legal rationalism raises the question of what is behind the recourse of the Howard government to legal rationalism. Such flexibility tentatively supports the claim by Jürgen Habermas that politicians frame their public policies in a way that gains favour from the electorate. A second complexity arises from the extent to which the policy practices that were justified by legal rationalism have modified institutional practices. There are other examples in this thesis where the Howard government quietly followed the legal rules, or fixed problems with the policy, but presented arguments in
public discourse that suggested otherwise. The institutional requirement for governments to obey the law gives rise to a third complexity that will be noted throughout this thesis. It is argued that there were instances where the Howard government actively prevented situations from occurring, where following the legal rules would have led to changes in refugee policy that were incompatible with the political arguments that justified these policies. Legal rationalism, it is argued especially in Chapter 6 — *Politicisation of the Law* and in Chapter 8 — *Conclusion*, helped overcome this tension between policy justifications and legal requirements.

A final example in this case study illustrates how government rhetoric brings out the three claims outlined in the previous paragraph: the tendency to portray policy practices in politically advantageous manner, the political impact of policy practices on institutional practices, and the fine balance between rhetoric and enacting the law. Senator Amanda Vanstone, who became Immigration Minister in October 2003, continued with the legal rationalist strategy, as is argued in this instance. A newspaper reported on 5 November 2003 that fourteen Kurdish men arrived at Melville Island, that they were not allowed to disembark and that the navy vessel *HMAS Geelong* towed the boat to a secret location.120 Hours after the boat arrived, new legislation was to excise an additional 3,000 islands from the migration zone, including Melville Island.121 The newspaper article just cited also reported that the government backdated the legislation to take effect from midnight of that day. Amanda Vanstone framed the arrival of the boat as intent to break Australian law, backed by evidence that damaged identification papers were found on the boat: "That is a typical indicator ... of people associated with people smuggling that identity documents are destroyed".122 Despite this indicator, the Defence and the Immigration Ministers denied that the men applied for refugee status, and

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even if they had applied, such application would be irrelevant because they did 
not arrive in Australia. The comments by the ministers were correct in the 
technical-legal sense, and then only because the legislation was backdated. 
Here, the distinction between legal rationalism and legal rationality becomes 
(stark. The Howard government, by simultaneously manipulating the law and 
appealing to it as an authority, had entered the realm of legal rationalism.

Further developments of how the case assisted the legal rationalist strategy may 
be inferred from the current affairs programme Lateline. The program revealed 
that after their return to Indonesia, the men told reporters that they told 
Australian authorities they were refugees. Lateline also reported that lawyers 
in Darwin lodged an application to allow the men to apply for refugee status 
under Australian law. However, when the case was heard in court on 9 
November 2003, the boat had been towed to Indonesian waters, and was 
therefore outside the jurisdiction of Australian courts. Amanda Vanstone then 
conceded on Lateline in the broadcast cited above that “some people said 
something about human rights and mentioned a refugee” but insisted that this 
did not amount to a valid refugee claim.

One can see clearly how the legal rationalism was enhanced by the secrecy 
surrounding the issue, which allowed the Howard government to implement 
only that part of the legislation that suited an ideological purpose. That is, the 
law was applied, and specifically written, for the purpose of turning the refugee 
boat around. Whilst it may be legally rational for governments to write and 
retrospectively apply legislation, such practices in this case were specifically 
aimed at preventing refugees from exercising their rights.

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123 Tim Johnston and Sophie Morris, "We Said We Were Refugees: Kurds," Australian, 11 
November 2003.
Refugees Requested Asylum. Reporter: Dana Robertson.
One can also note the *categorisation* and *particularisation* strategies described by Michael Billig. After the refugees were excluded from the “refugee” category, the Howard government focussed exclusively on the categories of illegal entry, people smuggling and violation of Australian law and sovereignty. This becomes clear from Immigration Minister Vanstone’s media release after the fourteen Kurds left Indonesia. Published in mid-January 2004, the Media Release stated that “all men had voluntarily returned home” after the United Nations High Commissioner for Refugees turned down the applications of those six men who lodged applications. The Minister called these events “a slap in the face to people smugglers:”

The message to people smugglers is simple – dropping your customers on our doorstep does not get entry into Australia … Our best interests are served by processing people outside of Australia and away from our legal system, which provides potential for significant delay and abuse.

Notable in Senator Vanstone’s statement cited above is the question as to whose rights are addressed in refugee issues: the rights of the state that individuals ask for protection or the rights of the person asking for protection? The cited statement also refers to the institution of the law as a potential problem to the Howard government’s delivery of refugee policy. Other examples will be noted in the case studies, where the government continues to suggest that the law may stand in the way of good governance, at least of the governance of those framed as outsiders. One may predict at this point that strong inputs are required throughout the various layers of governance and the legal system, if indeed legal rationalism colonises legal rationality.

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127 Ibid.
Conclusion

This analysis had two goals: first, to establish if any of the four parameters, which the Howard government identified as goals to its refugee policies, predominated. A second goal was to investigate if there was a mismatch between policy justifications and policy practices by the Howard government.

Two policy justifications, humanitarian and orderly process, were least convincing. Humanitarian policy goals were constantly undermined by the over-arching goal of keeping refugees out of Australia. Whilst there was no shortage of offers of humanitarian assistance, such assistance was offered for a highly restricted purpose. Measures that addressed security needs did little to address human security needs, but focused on security needs of the state. The other policy parameter, orderly process, became a euphemism for bringing the process under greater government control and restricting the influence of the courts. Such policy justifications under the auspice of orderly process generally had in common preventing refugees from accessing a system of dwindling benefits and rights.

Policy justifications in terms of legal rationality and national sovereignty were almost equally strong. It is held here that legal rationality justifications predominated. The reason for such suggestion is that the sovereignty justifications often occurred together with recourse to the law in order to strengthen the framework that preserves national sovereignty. Such argument, however, cannot be made strongly because most changes to public policy do occur concomitantly with legal changes. Therefore, the evidence from this case study cautiously suggests that legal rationality may have predominated among the justifications. More evidence is required from the other case studies before
suggesting with confidence that the Howard government made overbearing recourse to the rules and procedures of the law.

The strongest evidence for legal rationalism in this case study comes from the painstaking and overbearing adherence to the rules, as if the rules had an existence of their own. Even stronger evidence came the selective manner in which the Howard government applied these rules. Strongest adherence to the rules under refugee policies was observed in situations that aided the ideology of excluding refugees. These rules became so refined that it excluded some refugees to access the benefits of refugee policy. In general, the rhetoric of the Howard government in public discourse consisted of comments that framed refugee policy as protecting Australia’s borders and sovereignty, in part by combating international crime. This may have indirectly contributed to electoral gain, because it can be safely assumed that the electorate approved of such policy.
Chapter 3:

Detention in the Desert — Woomera
This case study investigates how the Howard government justified its policy of mandatory detention, by focussing on Woomera, without disregarding developments at other detention centres in Australia. Figure 1 shows the detention centres within Australian jurisdiction. The Woomera detention centre was located in outback South Australia, about 180 kilometres north of Port Augusta and five kilometres north-west of the township of Woomera. It housed refugee applicants between November 1999 and April 2003, and has since remained in readiness to become operational again, if required by the government. Located amid the salt lakes of the almost treeless gibber desert and small stones polished by the relentless action of the sun and the wind, it was also subject to temperature extremes from freezing point on a cold winter’s night to 50 degrees centigrade in summer. During less than its three years of operation, the Woomera detention centre gained notoriety as the symbolic expression of the harsh policy of mandatory detention.
The history of the township of Woomera was as imposing as its natural landscape. A website outlining the history of Woomera states that since its inception in 1947 as a town for conducting rocket launching experiments and other defence projects, Woomera has always had a close link with government polices. The cited site also states that during the 1960s, more than 6,000 people lived in Woomera, consisting of defence personnel and their families. However, defence priorities changed. The Advertiser newspaper reported that it was estimated in November 1999, that only about 500 people would remain in

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1 Human Rights and Equal Opportunity Commission. “Figure 8.1: Location of Australia's Immigration Detention Centres.” [Map]. Copied map from above source. Approximate location of Manus Island was added later and is not part of the downloaded graphic.

Woomera. The cited newspaper article also reported that at that time, the government announced that it would refurbish the disused army barracks at Woomera west and establish a new immigration detention centre there. Even prior to this announcement, refugees were no strangers to the area. Seven months earlier, some Kosovars, who had survived massacres in the former Yugoslavia, found temporary refuge there. The Kosovars lived in an open centre, and Immigration Minister Ruddock said that he did not intend to “imprison people”. However, the uninvited refugees from the Middle East were treated less generously as they were locked behind razor fences and prevented from escaping by guards in khaki-brown uniforms.

Unlike the Kosovar refugees, the Howard government did not frame the new refugees in November 1999 as people in need, but as rich people who demanded resources they were not entitled to. When announcing that a four-and-a-half metre tall fence would surround the Woomera detention centre, Philip Ruddock told the press that these people had come to Australia unlawfully and stolen “places that would otherwise be available to the most vulnerable”. Security measures tightened, and the Woomera detention centre continued to enlarge, as the Howard government implemented a new phase of the policy of mandatory detention. In 2003, the Department of Immigration and Multicultural Affairs informed that the outer perimeter of the detention centre was extended with several surrounds of new fences and a “sterile area” between them. The cited source also stated that the Woomera centre was being refurbished to accommodate up to 3,500 people.

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4 Miles Kemp, "Woomera and Hampstead Bases to Take 750 in Refugee Airlift," Advertiser, 10 April 1999.
The purpose of this chapter is to investigate the mandatory detention aspect of the refugee policies of the Howard government. By using Woomera as one example, I argue that the Howard government enhanced the existing legal framework that already supported the policy of mandatory detention of refugees, whilst at the same time criminalising their detention. It will be suggested in this chapter that the success of these developments depended on mandatory detention operating in secrecy, especially during the early stages of the Howard government’s changes to refugee policy. Such secrecy, it is suggested, consisted partly of secrecy surrounding conditions inside detention, and was partly due to an information process that made information almost inaccessible. It is argued that justifications by the Howard government, based on the ideology of legal rationalism, significantly contributed to this process.

Public policy on detention

This section outlines the policy of mandatory detention, and discusses the structural arrangements between the Department of Immigration and Multicultural Affairs and the private contractor. It was not until the release of a Performance Audit by the Auditor-General in 2004, after Woomera had closed, that information became known about this contract.7 The Howard government began the first few years of privatisation in relative secrecy away from public scrutiny. The available information sheds light on the overall pattern of legal rationalism, in the sense that the contract enabled the Howard government to maintain such secrecy.

First, a few words about the history of privatisation of immigration detention services, and the nature of the services. Australasian Correctional Services

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Chapter 3
Detention in the Desert – Woomera

(ACS) won the contract for the sole provision of immigration detention services in November 1997. In August 2003, Global Solutions Limited, then known as Group4 Falck, won the contract. These contracts were between the Department of Immigration and Multicultural Affairs and private service providers. Australasian Correctional Services, after obtaining the first contract in 1997, contracted Australasian Correctional Management to provide the actual services. Under the terms of the 1997 contract, the new contractor would provide “a complete service” that consisted of “detention services, catering, health and education services, transport services, or whatever”. Australasian Correctional Management had a duty of care to provide these services in accordance with the Immigration Detention Standards, but the overall responsibility for detention services rested with the Department of Immigration and Multicultural Affairs. Australasian Correctional Services won the contract from among seventeen tenders “to deliver services that meet Immigration Detention Standards”.

The government’s choice of successive contractors gave a clue that security, rather than humanitarian considerations, would continue to dominate the detention of refugees. Before privatisation, the contractor was Australian Protective Services. This national security organisation worked closely with the Australian Federal Police. The core business of Australasian Correctional Management and Global Solutions Limited was prisons. Had the government...

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9 Global Solutions Limited, GSL (Australia) Pty Ltd. Contracts & Services [Website].
14 Joint Standing Committee on Foreign Affairs Defence and Trade, A Report on Visits to Immigration Detention Centres. (Chapter 3: Administration of Detention Centres).
15 Australian Protective Service Amendment Act 2003.
intended to focus mainly on humanitarian needs, it would instead have chosen companies experienced in delivering services to families, with a core staff of social workers and teachers. The requirements of the service provider were set out in the Immigration Detention Standards.\textsuperscript{16} Parts of these Standards were labelled “commercial in confidence”, and were not legally enforceable.\textsuperscript{17} The absence of clearly identified legal obligations in the Immigration Detention Standards, and the withholding of parts of the Standards, provided an early cue that the Howard government may place barriers to public scrutiny and holding the government accountable in a public forum.

Government secrecy about its new policy was noted and criticised on different fronts. Justice Selway, when presiding over a case in the Federal Court, described this “absence of a statutory regime” about non-enforceable conditions of detention as “a legislative legal vacuum” that was “potentially unfair both to those involved in the conduct of detention centres and to the detainees”.\textsuperscript{18} The Auditor-General later criticised the performance points as stated in the contract between the Department of Immigration and Multicultural Affairs and Australasian Correctional Management, as “vague”.\textsuperscript{19} The Human Rights Commissioner, when reporting on a visit to a detention centre, criticised the Detention Standards as an ineffective monitoring tool, and added: “they fall short of minimum human rights standards in some areas, including compliance measures”.\textsuperscript{20} This perception of secrecy affected a hearing conducted by the Senate Legal and Constitutional Legislation Committee.\textsuperscript{21} A committee member at that hearing asked for greater public

\textsuperscript{18} “Secretary, Department of Immigration and Multicultural and Indigenous Affairs V Mastipour [2004] FCAFC 93.
transparency. Deputy Secretary of the Department of Immigration and Multicultural and Indigenous Affairs:

You come here and say, ‘What about the contracts’, and, ‘This contract is going to do this’ but we never see the contract. This is a bit unfair because you have given me a pro forma and invited me to look at it, which I do not intend to do because this has all got to come out in public.22

It is noted throughout the thesis that the Howard government’s “secrecy” did not remove the contract from existing accountability structures. Instead, it is be argued, such secrecy created practical inconveniences to investigators who had a statutory duty to investigate aspects of government accountability. This secrecy was systemic throughout the Howard government’s refugee policies, and continued under Senator Amanda Vanstone, who replaced Philip Ruddock as Immigration Minister in 2003. For instance, in September 2003 the magazine *Business Review Weekly* reported that “a serious contractual breach” over how Australasian Correctional Management’s (ACM), “handling of an escape” had resulted in a default notice being issued by the Department of Immigration and Multicultural Affairs (DIMA) to the company.23 The cited article criticised the government for withholding “secrecy surrounding the default notice” and suggested that that the lack of transparency may have DIMA and ACM “become complicit in hiding unpleasant truths under the guise of commercial-in-confidence”. Minister Vanstone later defended the withholding of information on the basis that the government would not release information that “may have the capacity to damage the reputation of a contractor in the market if details … are made available publicly”.24

22 Ibid., p. 191.
It is reasonable to assume that information that damaged the reputation of Australasian Correctional Management in the context of providing immigration detention services would also damage the reputation of the Howard government, because the government bore overall responsibility for the delivery of the policy of mandatory detention. The next few paragraphs discuss the role of the delay in the auditing of detention centres, which spanned the Ruddock and Vanstone ministries from 1998 until 2005. Here, the Howard government did not avoid its statutory obligations to submit its policies to public auditing, but through the delay of several audits, also delayed the release of information into public discourse by about five years. The strategy resulted in building into the contract a level of secrecy between the government and the private operator. Whilst not removing the accountability structure, it nevertheless manipulated the rules within this structure. Rather than overt secrecy, the strategy was less direct in that it delayed release of information, as illustrated by the example of two performance audits.

The two delayed reports were two parts of the Management of Detention Centre Contracts by the National Audit Office.\(^{25}\) The first audit of a policy that began in 1998 was not released until 2003. It is expected practice that such reports are released annually. Paragraph 4.24 in chapter 4 of Part A gives the reasons for the delay. It states that between September 1998 and early 2000, the government and the contractor “contemplated refining and adjusting the performance measures”. The cited report continues that these performance adjustments did not occur but that instead, the Department of Immigration and Multicultural Affairs negotiated with Australasian Correctional Management any changes “outside the detention agreements”. Consequently, the auditor reports, that instead of annual reports, the first audit covered “a six-year period from 1998 to 2004”. Due to the delay, the auditing was a

massive task. With the release of the first report in 2004, the Australian National Audit Office announced “a second performance audit of the management of the detention centre contracts”. Chapter 8 of the audit report adds that the government changed section 37(2) of the Auditor-General’s Act 1997 prior to the release of part A, with the consequence that sections of part A were excluded from public release.

The publicly available information in Part A contained a clue as to how information about detention services remained hidden not only from the public, but also from the Howard government. This clue was in the communication structure between the Department of Immigration and Multicultural Affairs (DIMA) and Australasian Correctional Management (ACM). There were two official routes of communication: monthly reports from the onsite DIMA business manager at each detention centre, and second, from incident reports from ACM to DIMA. The audit found that the monthly reports by the DIMA manager were so inefficient and inconsistent that they may be disregarded as an effective source of information: These reports often arrived late, and the content generally was about major incidents at a detention centre, instead of the required comprehensive assessment of the quality of contract delivery. Such omission of official information occurred systematically, because, as previously stated, each detention centre had its own on site government official.

With the information from detention centres by managers of the Department of Immigration and Multicultural Affairs taken out of the information process, only one major channel of official communication remained: incident reports that the contractor Australasian Correctional Management sent to DIMA. According to the Flood Report (an investigation into detention services that

27 Ibid., paragraph 8.
28 Ibid., chapter 5, paragraphs 5.24 and 5.25.
will be discussed in the next section) an “incident” was an “occurrence which threatens or disrupts security and good order, or the health, safety or welfare of the detainees”. Furthermore, “incidents” ranged from a death of a staff member or a detainee to medical emergencies, and included a staff member being approached by the media, theft within the detention centre, or even the “transfer of a detainee to another facility”.

In addition to being a major reporting tool about events in detention centres, incident reports were also a tool by which the government issued financial penalties to the service provider. If adverse incidents occurred, the company was liable to incur financial penalties. If DIMA suspected a breach, it would appoint consultants to investigate the reported incidents, “in particular, escapes, riots and other serious disturbances, where it considered that ACM might have breached its duty of care”. But where the company failed to report incidents, and the Department of Immigration and Multicultural Affairs found out “through other sources”, it considered the non-reporting as a breach, and hence a potential reason for imposing penalties. Despite the importance of the incident reports, there were considerable difficulties in retrieving information from these reports, as shown in the following example. In one court case, the significance of which will be discussed in Chapter 6 — *Politicisation of the Law*, the High Court was asked to issue a summons for documents from Woomera, in order to assess conditions of detention. The court heard:

> Between 1 December 1999 and 18 November 2001 … it would be necessary to examine more than 3,000 files, more than 1,500 electronic documents and about 6,000 incident reports. About 745 hours had already been spent by at least 47 officers

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31 Ibid., chapter 5, paragraph 5.37.

in identifying and locating files and it was estimated that completion of the process would be likely to take more than a further 1,000 hours.33

Justice Kirby conceded that the request for these summonses was “oppressively wide” and may possibly constitute an “abuse of process”.34 The court denied the request for the information. However, the cited comments highlighted the issue about the cumbersome process for retrieval of information from an ineffective retrieval system. Part A of the audit informs that Australasian Correctional Management did not start its electronic Incident Tracking Database until March 2001.35 This involved manually entering all data into the system, and summarising the data twice before they were incorporated into the database.36

Although there were shortcomings in the official information process between 1998 and 2003, the Department of Immigration and Multicultural Affairs did access information about the delivery of the detention contract. However, the information sought by DIMA was highly selective. Chapter 5 of Part A of the national audit report describes an information system that did inform the Department of Immigration and Multicultural Affairs about negative information of the policy.37 Accordingly, DIMA was using electronic information “to mark incident reports that were not provided in the required timeframe”; to establish if the government could issue financial penalties against the company. DIMA’s selectivity of information also included other areas. The audit, previously cited, notes that the Department of Immigration and Multicultural Affairs was mainly interested in “exception reporting”: a management tool that gives enough flexibility to the service provider to focus

33 Ibid., paragraph 178.
34 Ibid., paragraph 179.
36 Ibid.
37 Ibid., chapter 5, paragraph 5.46.
on the key performance areas.\textsuperscript{38} The cited report explains that exception reporting consists of the collecting of essentially negative information that narrowly focuses on the trouble spots, with an apparent disinterest in more “neutral” information that may have led to a broader system of assessing and monitoring the operator’s performance:

Exception reporting carries certain risks; for example, that on-going substandard performance in a critical area of service delivery, such as health care, will not be recognised until it results in a specific trigger event.\textsuperscript{39}

This suggests that the information system ensured that the Howard government officially did not become aware of problems with the policy unless incidents reached crisis proportions. Other, less dramatic, information became “lost” in the system and thus did not feature in higher levels of decision-making about the policy. Audit A for instance reports that there was “a system of case management [that] also complemented exception reporting, by focussing on individual detainees and their treatment within a centre”.\textsuperscript{40} However, there was no formal requirement to review complaints lodged by detainees.\textsuperscript{41} Central to the information system between Australasian Correctional Management and the Department of Immigration and Multicultural Affairs was thus a systemic mechanism that prevented vital information on policy delivery from reaching the Howard government. This feature, established under the rules of legal-rational process, had the potential to manipulate information.

From the discussion it becomes evident that there was a systemic flaw to the information process. That is, as long as information did not reach the section of the process that focussed on financial penalties, the Howard government could reasonably argue that the operator successfully delivered the policy of

\textsuperscript{38} Ibid., chapter 5, paragraph 5.33.
\textsuperscript{39} Ibid., chapter 5, paragraph 5.34.
\textsuperscript{40} Ibid., chapter 5, paragraph 5.35.
\textsuperscript{41} Ibid., chapter 5, paragraph 5.38.
mandatory detention in accordance with the contract. One can see how information that may have suggested otherwise was excluded from the routine workings of this process: not by overtly falsifying information, but by systemically excluding it. This ability to selectively use information and to control the release of information into the public domain, suggests that the Howard government had considerable scope to present the policy to the electorate in a good light.

An Ombudsman’s report as early as 1999, the first after the privatisation of detention services began in 1998, suggested problems with the information process, and attributed these to dishonesty by the Department of Immigration Affairs (DIMA) and Australasian Correctional Management. For instance, the Ombudsman reported that, despite DIMA’s obligation to ensure “prompt investigation” of allegations of assault on detainees, the Department “had taken little action to investigate the complaint and subsequently provided incorrect information and unjustified assurances to my office”. A 2001 Ombudsman’s report also identified systemic problems and ongoing dishonesty by Australasian Correctional Management, and recommended that DIMA should find another service provider. In 2003, the Ombudsman reported two further inconsistencies. The cited report mentions one incident at the Woomera detention centre that contained a “misleading account of the actual event”, and another report of a “violent incident” at a different detention centre revealed “inconsistent reporting”.

From the discussion in this section emerges the picture of a systemically flawed information process, by which the Howard government obtained information on how Australasian Correctional Management delivered the policy of mandatory detention between 1998 and 2001. Two major problems were identified: the flow of information from the detention centres into the system,

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and the practical difficulties of retrieving information from that system. The next section discusses how this structured absence of information took an unanticipated twist when the Howard government had to justify the conditions of mandatory detention to the electorate: ironically, the system that focussed on carefully selected official information generated a flow of unofficial information that raised questions about government accountability.

**Managing the policy**

All information from inside the detention centres was controlled through the contract between the Department of Immigration and Multicultural Affairs and Australasian Correctional Management. Neither company management nor its employees were authorised to “engage in any public comment or debate” without written permission from DIMA. This agreement was governed by the official secrets provision of Section 79 of the *Crimes Act* 1914.45 In addition, the contract also stipulated that the contractor agreed “to indemnify the Commonwealth in respect of any loss, liability or expense” arising from this secrecy agreement.46 Despite such legislation, “thousands of official reports” that were written between 2001 and 2004 were published on the website of the current affairs program *Four Corners*.47 How did the Howard government deal with information about its policy of mandatory detention that came from unofficial channels? Did the government’s way of handling unofficial information contribute to legal rationalism? This section suggests that there was a reluctance to accept unofficial information, coupled with an unwillingness to act on it.

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47 *Four Corners* [ABC Television Broadcast]. (2003, 3 December). *ACM's Incident Reports.*
Chapter 3

Detention in the Desert — Woomera

Reporting and accountability

On 13 November 2000, *The Australian* newspaper reported that child sex abuse was “rampant” at the Woomera detention centre, and that the manager of Australasian Correctional Management at that centre prevented an investigation into child rape allegations in April 2000.\(^{48}\) Two days later, the same newspaper reported that a child was raped by his father, sold to other detainees in exchange for cigarettes, and that this matter was not reported “to an external agency”.\(^{49}\) In the following week, there were more allegations. Some claimed interference with medical files at Woomera.\(^{50}\) Others spoke of child abuse at the Port Hedland and Villawood detention centres.\(^{51}\) Immigration Minister Philip Ruddock initially dismissed these allegations as lacking evidence and as “hearsay”.\(^{52}\) Two days later, Philip Ruddock ordered another investigation and stated that the South Australian government child protection agency Family and Youth Services had re-opened a child abuse case at Woomera.\(^{53}\) The cited media release also stated that the government-initiated investigation would report on “the processes in place for dealing with and following up allegations and instances of child abuse and the manner in which these processes were followed in the past year”. After re-opening the case, the inquiry found the child abuse allegations were not substantiated.\(^{54}\) However, the government-initiated inquiry found that management of Australasian Correctional Management at the Woomera detention centre had covered up


\(49\) Mathew Spencer, "Woomera Officer Tells of Boy Raped and Sold for Cigarettes," *Australian*, 15 November 2000.


\(52\) Terry Plane, "Ruddock Dismisses Sex Abuse ‘Hearsay’," *Australian*, 22 November 2000.


the allegations of child abuse, and concluded that there should have been investigation eight months earlier, when these allegations were initially raised.\textsuperscript{55}

The information from the media reports cited in the last paragraph did not come from the official information channels that the Howard government controlled, but instead became available when former employees of Australasian Correctional Management spoke with the media. As will be seen shortly, the subsequent discussions pointed to shortcomings with the policy delivery, and a reluctance by the Howard government to address these issues. Public discourse about these matters will be discussed in detail, because the media interest allows for detailed examination of how the Howard government justified the detention policy to the electorate. These justifications also provide a practical example of how the setting up of the information structure from the detention centres to the Howard government, which was discussed in the previous section, impacted on government accountability. As will be argued in this section, the systemic problems with the policy delivery were not addressed, evidenced by an administrative structure that continued to allow other problems to emerge. This section also draws attention to a pattern of Legal Rationalism Form 1; an unusual pre-occupation with rules and procedures, that emerged when unfavourable and unofficial information emerged about government policy.

The suppression of the investigation of the suspicion of child abuse at the Woomera detention centre arose when nursing staff formed the suspicion that a child had been sexually abused. Philip Flood, who was appointed by the Immigration Minister to lead the inquiry which became later known as the “Flood Inquiry”, found that neither police nor Family and Youth Services were called when the allegations were made.\textsuperscript{56} The cited report added that the manager of the Woomera detention centre personally suppressed an

\textsuperscript{56} Ibid.
investigation that should have occurred: “the processes set down in legislation and the administrative requirements of DIMA and of ACM instructions were not followed”. Whilst drawing attention to local management, Flood was less explicit in drawing attention to systemic flaws.

It remained unclear initially when the child abuse allegations of April 2000 were first reported to an outside agency, and when they were first investigated. It appears that, if the re-opening of the case in November 2000 is included, there were three separate investigations. Philip Ruddock told Parliament in November that an investigation had “commenced as early as April”. The Minister also said that he was personally notified by a letter in October, and that his staff advised him that the matter had already been dealt with. However, it appears that the investigation that took place in April had not fully dealt with the matter. Flood later reported that no forensic evidence was collected in April, that police investigated in April and again in July, and that Family and Youth Services (FAYS) investigated in September. The re-opening of the case by FAYS in November 2000, according to the government, was prompted by an incident report that had previously been withheld from investigators. A serious flaw of the information process that relied almost entirely on incident reports from the private contractor, began to emerge when Philip Ruddock told Parliament:

Departmental officers found it [the incident report] last Friday week on the file in Woomera, and it was on the Monday following that it was brought to the attention of the South Australian department … For that reason I initiated the inquiry in relation to procedures because, to my way of thinking, it is a serious matter if a document that might be relevant to an inquiry that had already been undertaken by Family and Youth Services was not available to them at the time. I do not know in whose hands

it was. It may have been in the department’s, it may have been in the hands of the contractors. But they are the matters that I believe are appropriate for Mr Flood to examine in his investigation.60

In the investigation into the flaw in the information process, Philip Flood identified two separate cover-ups by local management of Australasian Correctional Management at the Woomera detention centre.61 The first occurred when child abuse was first initially suspected on 13 April and the second, when “documentation relevant to these inquiries” was not made available to the investigators in September. Philip Ruddock’s framing of the information process that prevailed at both times, inferred here from the Minister’s comments on these matters in November and December 2000, revealed a rhetorical recourse to the law that was characteristic of legal rationalism. As will be seen shortly, such recourse consisted of rebuffing the allegations predominantly in terms of legal rationality. It will also be seen shortly that, whilst such rhetorical recourse to legal obligations about the policy was in progress, the Howard government rectified behind the scenes aspects of the policy that it was publicly defending.

It would seem that, where the official information system had failed, “unofficial” information contributed to the process of government accountability, as the chronological developments suggest. The first media report of child abuse allegations was published on 13 November.62 Family and Youth Services re-opened the case on 16 November, and received on 20 November an incident report “which described the alleged events on 13 March 2000”.63 In the information cited in the previous sentence, Flood avoided mentioning if this document contained references to child sexual abuse. On both 21 and 22 November, Minister Ruddock implied that the abuse

62 Spencer, “Child Sex Abuse Alleged at Woomera.”
allegations were fabricated, without mentioning the re-opening of the case.\textsuperscript{64} It seems that the information in the official records, which the Minister used to rebut the unofficial reports, was less than trustworthy. Philip Flood wrote later: “the files at Woomera left a lot to be desired and betrayed evidence of sloppy and careless procedures and of possible interference”.\textsuperscript{65} One may also infer from the discussion in this paragraph that the investigations that began in November 2000 occurred as the result of media allegations, because it is unlikely that the official files contained relevant information that would have prompted a re-opening of the case.

Whilst the abuse case was under investigation, questions emerged about the information process itself. Suspicions arose that it was in the interests of Australasian Correctional Management not to report adverse events because this carried the risk of financial penalties.\textsuperscript{66} The publication of Part A of the audit report, which may have given credence to these suspicions, was almost three years away.\textsuperscript{67} Philip Ruddock justified the policy of mandatory detention by a mixture of moral-legal and humanitarian concerns. The Minister told Parliament that the child abuse allegations were damaging to detainees.\textsuperscript{68} In another response, the Minister questioned the integrity of the unofficial information sources:

\begin{quote}
One or two specific instances relating to specific individuals ought not to be used as a basis for generalised charges and claims which reflect upon the generality of the people who have been detained. Nor do I think it is reasonable for people who have a view about detention policy and who are seeking to unwind it to unnecessarily and inappropriately reflect upon the integrity and professionalism of officers of the Department of Immigration and Multicultural Affairs or those people with whom we
\end{quote}

\textsuperscript{64} Lateline [ABC Television Broadcast]. (2000, 21 November). Abuse Allegations; Plane, "Ruddock Dismisses Sex Abuse ‘Hearsay’.",
\textsuperscript{66} Mathew Spencer, "Clauses Gag Rape Report: Church," \textit{Australian}, 17 November 2000.
\textsuperscript{67} Australian National Audit Office. (2004). \textit{Department of Immigration and Multicultural and Indigenous Affairs, Management of the Detention Centre Contracts — Part A}.
contract. There is clearly a good deal of innuendo and unsubstantiated allegations about the detention centres and this seems to have a wider purpose.\textsuperscript{69}

As the time of the Minister’s rebuttals, the media reported even more allegations. The media sources, who identified themselves as registered nurses who had previously worked at the Woomera detention centre, spoke of another instance of child abuse, of the disappearance of another incident report from a medical file, and claimed that illegal storage and dispensing of prescription drugs had occurred at Woomera.\textsuperscript{70} Philip Ruddock questioned the credibility of the nurses by pointing to the law. The Minister told Parliament he was “concerned that people who under state law have a moral and legal responsibility to report these matters seem to be pressing these buttons now”.\textsuperscript{71} This was another example of legal rationalism, where Ruddock quoted legislation, without mentioning the systemic hindrances to the transmission of information between the government and the contractor. One week later, another parliamentary speech suggested how one might infer some difficulties for information to pass through the official system, without at least some degree of political control: the Minister exempted detention staff from the confidentiality clause of their working contracts, for the purpose of giving evidence to the Flood Inquiry.\textsuperscript{72} In the speech cited in the previous sentence, the Minister said that some community organisations had orchestrated “quite a malicious campaign” against government policy. It is possible that Philip Ruddock’s offer further prevented, rather than encouraged, information from getting into the official communication system. Four days after the Minister announced the exemption to the confidentiality clause for detention staff, \textit{The


Australian newspaper reported that some nurses rejected the Flood Inquiry as a “whitewash” and said they would not give evidence, despite the government’s offer of assistance of $10,000 toward legal and travel expenses.\(^7\)

Despite publicly defending its policies, the Howard government made significant changes after the Flood Inquiry. The Immigration Detention Standards were re-written, and the revised information system incorporated information from a source that was previously excluded from the process.\(^7\)

According to Schedule 3 of the new regulations cited in the previous sentence, the government no longer relied solely on the contractor for information, but included information from detained refugee applicants in the official process. Schedule 3 also specified that the Immigration Detention Standards must be prominently displayed in detention centres, and that detainees have the right to directly “complain without hindrance or fear of reprisal” to official agencies about conditions inside detention centres: to the Department of Immigration and Multicultural Affairs, the Human Rights Commissioner, the Ombudsman, police, and to child protection agencies.

Other significant changes occurred. When announcing the Flood Inquiry to Parliament, the Immigration Minister said that he would implement the major recommendations of the report, including a revision of child protection policy, a review of training procedures for detention staff, and a revision of the performance clauses in the detention contract with Australasian Correctional Management.\(^7\) In the cited speech, Philip Ruddock also announced the setting up of an independent Immigration Detention Advisory Group that would have “unfettered access to all detention centres”. In the speech cited above, the Minister rejected “claims that a ‘veil of secrecy’ surrounds immigration detention” as “simply not true”. This analysis does not support the Minister’s

\(^7\) Department of Immigration and Multicultural Affairs. Immigration Detention Contract 2003, schedule 3; 8.1.1, paragraph 3-57.
claim about an absence of secrecy. As suggested in the previous section, the structure of the contract between the government and the service provider was conducive to secrecy. The analysis of the events that followed the publication of child abuse allegations at the Woomera detention centre suggested that overcoming official secrecy depended on individuals working outside the official information process. Even then, transparency came about only after considerable pressure on the government through the media. Whilst the structure of the information process by itself is not indicative of legal rationalism, the manner in which the Howard government utilised the structure to control official information may contribute to legal rationalism.

Changes to what end?

Did the Howard government effectively address the policy problems in its mandatory detention regime that were discussed in the last section? The answer is a hesitant and qualified “yes”. As will be argued in this section, the systemic changes that caused the problems remained largely unaddressed, hidden behind an approach that had the appearance of legal-rational process. After the Howard government committed itself to implement the key recommendations of the Flood Inquiry, problems remained with investigating criminal allegations inside detention centres.

Although the Howard government had taken steps to restore the reporting mechanism, such measures were not necessarily effective. The Senate heard that on 20 January 2001, an officer of Australasian Correctional Management allegedly assaulted a detainee.76 Police were called after a delay of almost two weeks, and only after the detainee reported the allegation to the on site business manager of the Department of Immigration and Multicultural Affairs.

Charges were laid six days later.\footnote{Ibid., p. 197.} Within days of the Flood Inquiry being tabled in Parliament, a Senate Committee report connected the delay of an investigation into the assault allegations cited above with the suppression of the sexual abuse allegations at the Woomera detention centre less than one year earlier:

… with the allegations about Woomera and the length of time that was taken to investigate those allegations and the amount of information that came through after the event. It bothers me that the lessons from the experiences at Woomera have not been put into practice as yet.\footnote{Ibid., p. 198.}

One may infer from the above quote that changes to the information system had not overcome the systemic barriers within the reporting process. Although the rules had been changed, such changes did not translate to appropriate policy practices, evidenced by a two week delay in calling police to investigate an alleged assault.

Even when information found its way into the system, such information was not immune from the ideological slant toward legal rationalism. This can be seen in the following example from the work of lawyer and Jesuit priest Frank Brennan with detained refugee applicants.\footnote{Frank Brennan, Tampering with Asylum. A Universal Human Problem (St. Lucia, Qsl: University of Queensland Press, 2003) pp. 101-02.} Brennan wrote that he had seen an injured child with bruises at the Woomera detention centre, and that he knew of reports by Australasian Correctional Management that tear gas had been used on children at that centre. Brennan continues that he informed the Department of Immigration and Multicultural Affairs in April 2002, that the Department refuted Brennan’s report “within hours” on the basis that there was no record of this but subsequently investigated the matter after a delay of “more than three months”.\footnote{Ibid., p. 102.} Here was another example where DIMA publicly denied a problem in the delivery of the policy, but acted on information behind
the scenes. This example also questions Philip Ruddock’s assurance to Parliament, discussed earlier, that the policy was not conducted in secrecy.81

Brennan’s account cited above is a good example of Legal Rationalism Form 1, where cumbersome policy practices lead to a selective use of legal rationalism. Brennan wrote that he informed the Human Rights and Equal Opportunity Commission of how the child’s mother described to Brennan a conversation with a senior officer of Australian Federal Police (AFP):

> it was not the responsibility of Federal Police because they would come only for damage to property. He said Child Service would not come because their responsibility is child abuse and relationships between children and parents … He told me that the doctor and ACM had not made any report of my son’s injuries to Children’s Services.82

Implicit in the above quote is a suggestion that a systemic flaw remained within the reporting mechanism: if no report was forthcoming from the detention centre, it was as if the matter had not occurred. Brennan continued that the detention guard, who hit the woman’s son, wore a mask at the time of the alleged assault. Almost one year after the incident, in February 2003, Immigration Minister Philip Ruddock advised the woman that the matter had been referred to Australian Federal Police, who found “insufficient evidence” because the “alleged offender” could not be identified.83 Whilst it may be difficult for police investigations to occur without appropriate evidence, Brennan’s example cited above raises two points. First, there seems to be a unique relationship of policy practices with legal rationality; one where the rules created systematic barriers to identifying issues within detention centres. Second, a legal-rational approach would have addressed the mechanistic means

82 Cited in Brennan, Tampering with Asylum. A Universal Human Problem, p. 103.
83 Ibid.
of circumventing legal rationality and led to an investigation, even if the masked offender could not be identified by the victim or by eye-witnesses.

Brennan’s work highlighted another problem where the rules and procedures prevented efficient policy practices, even when the reporting mechanism remained intact.\(^4\) Accordingly, two men allegedly sexually assaulted and injured a woman, who was detained at the Curtin detention centre in 2003. Federal and state police in Western Australia were notified. Australian Federal Police advised that it did not investigate because this was a matter for the state police, and state police advised that this was a matter for the Australian Federal Police because the detention centre “was maintained on Commonwealth land”. Brennan wrote that one year later, Immigration Minister Ruddock wrote to him that the government “continues to work actively to develop formal arrangements” between state and federal police in South Australia, Western Australia and New South Wales. However, the skewed approach to applying legal rules in the example cited above did not mean that changing the rules to encourage greater transparency led to concomitant policy practices.

It is arguable from the discussion in this section that the existing protocols created barriers to some investigations, due to the location on Commonwealth land. An extension of this argument would be the statement that some crimes committed in international airport lounges could not be investigated, because the relevant law enforcement agency which usually investigates this type of crime does not have jurisdiction in this area. Yet, as will be seen especially in the next chapter, arguments pertaining to jurisdiction restricted the clinical practice of child protection personnel. In other areas, as will be seen in the section on the criminalisation of detention, the Howard government committed itself to change legislation to allow for effective prosecution by police within detention centres. Investigations, however, were not always performed uniformly.

\(^{84}\) Ibid., pp. 104-05.
From these investigative practices emerged a pattern of selective use of legal rationality that had the potential to conceal negative aspects of the policy, but informed on negative aspects about detainees. This observation sits comfortably with the Habermasian suggestion that governments put their policies in a good light. The observation also suggests a dimension to legal rationalism that is neither Form 1 nor Form 2. That is, investigations into crimes allegedly committed by refugees inside immigration detention centres may be consistent with good legal-rational practice, were it not for the selective aspect of investigations being conducted, depending on who the suspect may be. The “selective” investigations are, strictly speaking, not an example of Legal Rationalism Form 1, because such selectivity precludes any fetishising of the rules per se. Neither is this an example of Legal Rationalism Form 2, because there is no pretence of recourse to legal rationality when employees are the most likely suspects. In such cases, legal rationality may not even be set in motion at all, unless “unofficial” information is powerful enough to generate legal-rational practices.

**Criminalisation of detention**

This section discusses the information about policy practices that the government did not treat secretly. It is argued that information about disturbances from within detention centres served to consolidate the legal rationality rhetoric of the Howard government in areas where administrative detention under immigration law interfaced with Australia’s criminal justice system. It is intuitive to suggest that reports of regularly occurring allegations of assaults on women and children in detention centres would not look good for the Howard government. But what if the government could turn the argument around and argue that the actions of the refugee applicants justified
the threat frame, and that it was necessary to counter this perceived threat with a strong law-and-order response? In addition, what if the Howard government framed the detention of refugee applicants in remote desert locations as necessary components of humanitarian and legal-rational policies? To answer these questions, it is necessary to investigate the government’s policy justifications during a phase of mandatory detention when the emphasis was not on the safety to the detained refugee applicants, but on the safety of the Australian community.

As will be seen shortly, part of the Howard government’s justifications of the policy of mandatory detention were about a need for an orderly and legal processing of refugee claims. Without admitting that mandatory detention between 1999 and 2003 was part of refugee policy, the government frequently framed such detention as a humane screening process. Instead, the Minister dissociated mandatory detention from refugee policy and framed it as migration policy:

> All unauthorised arrivals, whether protection visa applicants or not, are required by law to be detained until they are either removed from Australia, or granted a visa … However, detainees are only released when they have satisfied all relevant criteria for the grant of a visa.

About one year later:

> Let me affirm that we do have a policy of detention for people who arrive in Australia unlawfully and clandestinely, to ensure that they are available for processing and for removal. It is a policy to achieve that public interest outcome. It is not

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punitive. It is humane. We do not detain refugees. We do, however, detain people, some of whom make asylum claims.87

One may infer from the Immigration Minister’s statements above that the policy was humane, delivered in lawful and orderly manner, whilst at the same maintaining Australian sovereignty. Other information, however, suggests a mismatch between the Minister’s language claims and actual policy practices.

In mid-March 2001, about two weeks after the Flood Inquiry and the Ombudsman’s report (both previously cited) were critical of conditions inside immigration detention centres, Immigration Minister Ruddock gave permission for a Defence and Joint Standing Committee on Foreign Affairs “to visit and assess human rights conditions at Australia’s immigration detention centres”.88 This committee recommended a time limit of no more than fourteen weeks for detention, and also reported “a number of concerns about the human rights conditions of detainees in the centres”.89 On the current affairs program Lateline, Philip Ruddock rejected this recommendation as “quite impractical” and not “substantially and properly researched”.90 During this interview, the Minister played down his earlier comments in Parliament that some committee members, who reported their findings as distressing, were “naive, lacking in life’s experience”.91 However, Philip Ruddock said that “one loses a sense of proportion”, because the amenities in Australian detention centres were better than those that existed in refugee camps in other parts of the world.92 This suggests that a humanitarian outcome to mandatory detention was not a top priority for the Howard government.

88 Joint Standing Committee on Foreign Affairs, Defence and Trade. Completed Inquiry: Visits to Immigration Detention Centres, chapter 1, paragraph 1.1.
89 Ibid., list of recommendations, recommendation 14; chapter 8; conclusions, paragraph 8.5.
91 Ibid.
92 Ibid.
On the same day when Philip Ruddock made this comparison on *Lateline*, Prime Minister John Howard made another comparison, when he responded to the committee’s report on the ABC radio broadcast *PM*. In this interview, the Prime Minister gave a qualified assurance of a humanitarian policy. John Howard conceded that detention centres were “very confronting”, but added that detention was necessary to humanely prevent “would-be illegal immigrants” from coming to Australia.\(^{93}\) John Howard elaborated:

> It is a very difficult problem, and I admire enormously the work that Philip Ruddock is doing to balance compassion. I mean we’re not sort of sending people back to their deaths. That’s the reason why we detain them.\(^ {94}\)

In the two media interviews on *Lateline* and on *PM* as cited above, the comments by the Prime Minister and by the Immigration Minister depict mandatory detention as a humane policy. One may infer that it was not the policy that was humane, but rather the contrasting framing options presented by the Howard government; options that compared detention in Australia with being sent to certain death, or a comparison of conditions in refugee camps overseas. However, the recommendation by the Defence and Joint Standing Committee on Foreign Affairs to limit immigration detention to fourteen weeks was based on its findings in detention centres in Australia. In this respect, John Howard’s and Philip Ruddock’s “humanitarian” justifications for a policy of mandatory detention are rhetorical.

Still reflecting on Philip Ruddock’s two comments cited above, there is also something incongruous about the policy practice of detaining refugee applicants and the Minister’s language claim that detention occurs for humanely processing these applications. Whilst the government may have

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\(^{94}\) Ibid.
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processed the applications in an orderly and humane manner, it did little that assisted refugees to engage with this process. Indeed, this legal-rational processing of applications, coupled with an unwillingness of government officials to assist people realise their refugee rights contributed to the criminalisation of the process. This may be inferred from a newspaper report on comments by Philip Ruddock, when the Minister spoke about a riot at the Curtin detention centre. Accordingly, the Sydney Morning Herald reported that the riot began when 57 people, who arrived in March, were told in June that they “would be sent home without being given a chance to apply to stay in the country”. The article reported that Philip Ruddock said that “they were screened out of the process on the basis that they made no claims”, and that officials “don’t tell people what they have got to tell us to get into the process”.

The context of the newspaper article cited above makes it clear that Philip Ruddock justified the government decision not to advise refugee applicants of their legal rights or on how to maximise the success of their application. Such is government policy under the special provisions of “separation detention”, as outlined in the Flood Inquiry. Accordingly, the policy specifies that new arrivals are initially prevented from having contact with other detained refugees and not allowed phone calls within Australia, until after they have lodged their application. Flood continues that they receive legal advice and contact with the Ombudsman, Human Rights Commissioner and the Red Cross, but only on request. Conversely, people who do not make such requests do not receive the assistance. It can be seen from the policy provisions of “separation detention” that, ironically, successful entry to the orderly refugee processing scheme is maximised by some deviousness and prior coaching by “unofficial” means, where persons who articulate their own interests and have some knowledge of

96 Flood. Report of Inquiry into Immigration Detention Procedures, paragraphs 2.8 to 2.10, p. 4.
the Australian legal system would benefit most. The rioting 57 people at Curtin mentioned earlier did not come into this category.

Riots and breakouts, regardless of what motivated them, prompted further law-and-order justifications from the Howard government. This will be seen shortly, when addressing the criminalisation of detention. As disturbances inside immigration detention centres became more frequent, the Howard government wrote new legislation to address issues that arose specifically from the detention of refugees. Almost concurrently, other legislation imposed penalties for members of the Australian community who assisted with riots and escapes.

Unrest began within six months after the Woomera detention centre opened in November 1999, and lasted for most of the lifespan of the facility. In May 2000, the *Sydney Morning Herald* reported unconfirmed rumours of hunger strikes, mental health concerns, and violent incidents. In the following month, about 500 detained refugee applicants pushed down the fences and walked five kilometres to the township of Woomera, where they remained for three days before returning to the detention centre. The first releases from Woomera occurred about one month later, in July 2000. Philip Ruddock told Parliament that the breakout occurred because people “were misinformed by people smugglers about the length of time they would spend in detention”.

The June breakout was relatively peaceful. Things changed during the August riots. Thirteen guards were injured, and a water cannon and tear gas were used to prevent escapes. Philip Ruddock told Parliament:

> On Saturday, … detainees stoned buildings and were throwing rocks and implements at the staff. One canister of tear gas was used to quell the crowd … This morning at

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5.45 South Australian time this same group deliberately set fire to a number of buildings. They have caused very extensive damage. The internal security fence has been pushed over and a perimeter fence has been breached in a couple of places. The detainees have used the fence posts to construct weapons. As a result, tear gas and the on-site fire tender were used to push those people back from the fence to enable some repairs to be made on a temporary basis.\textsuperscript{100}

The venue designated for orderly processing of administrative matters had become a place of violence. The Minister’s denial that there were refugees inside, and the actions of detainees themselves, may have strengthened the government’s claim that mandatory detention was necessary to safeguard Australia’s borders and citizens. Philip Ruddock later characterised the ongoing riots as objections to lawful detention, expressed in ways “ranging from non-compliance with a request to more serious incidents such as assaults, wilful damage and breakouts”.\textsuperscript{101} This framing of events held the key to the criminalisation of mandatory detention; not from the perspective of refugee policy, but from the perspective advanced by the Howard government. It was a perspective that legally separated the detention of onshore refugee applicants from refugee policy. Strictly speaking, applications were processed under the auspices of refugee policy. However, the emerging criminalisation of detention had a different function. It assisted the Howard government’s language claims that framed refugees as criminals and as people intent on breaking Australian law. Government policy, by contrast, was depicted as the bulwark that protected the civilian population at the borders, and again when the perceived intruders were inside the state. When Philip Ruddock defended the legality of mandatory detention in August 2000, he also announced special legal provisions for riots and violence within detention centres.


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The government will be looking at any further action that it can take to ensure that those people who have been involved in rioting, civil disorder and destruction of property are dealt with in accordance with the law and, if the law is inadequate, that the law is addressed.102

The Minister also told Parliament that Australian Federal Police, Australian Protective Services and South Australian state police were involved.103 This suggested that Australian legal provisions already addressed violence within detention centres. Such seemed to be the case when the Minister announced on the following day that ten detainees had been taken into police custody, and that the use of the water canon and tear-gas as “entirely appropriate and necessary, given that some 30 officers received injuries”104 However, existing legislation operated regardless of the venue of violence and the identity of the perpetrators. Philip Ruddock’s parliamentary speech cited above announced specific legislation based on the political framing of refugees as law-breakers inside immigration detention centres.

Philip Ruddock’s statements cited previously do not indicate that there were barriers to police jurisdictions that may have influenced investigations and prosecutions in relation to the August riots at Woomera. This contrasts with the discussion earlier in this chapter, where the effects of police protocols created barriers to investigating alleged crimes in which detainees were the victims. Philip Ruddock did not announce that the pending legislation would address such issues, or that victims of violence inside detention centres were entitled to special compensation, as one may expect from a policy that endeavoured to detain refugees safely and humanely. However, Philip Ruddock’s comments did feed into a public perception of detained refugees as criminals.

103 Ibid.
In December 2000, as some former detention staff publicly denounced conditions inside Woomera, and as the Flood Inquiry and the re-opened child abuse case were still in progress, life inside detention centres was far from peaceful. Already, Woomera had witnessed the June breakout and the August riots. A new phase of immigration detention had begun, with intermittent media reports of escalating violent disturbances that continued for the next two years. In early December, the newspaper *The Advertiser* published a photograph of homemade weapons that detainees had used against detention staff.\(^{105}\) These developments were increasingly at odds with language claims that mandatory detention was necessary for the orderly processing of illegal entrants to Australia.

As happened during the investigation of child abuse allegations discussed previously, the Howard government was the only official information source about events in detention centres. Pro-refugee advocate and Migration Agent Marion Le suggested this much when offering a perspective of events that differed markedly from that of the Howard government.\(^{106}\) The article reported that, according to information from the government, the riot at Curtin was sparked because 57 detainees were told they would be sent back. The same media source contained a statement by Marion Le which questioned why 100, who also participated in the riot, would risk their own refugee claims unless there were other issues that the government did not mention.

In November 2001, during “the sixth major incident at the isolated detention centre in 17 months”, there were six escapes as detainees set buildings on fire, causing damage of $140,000.\(^{107}\) The Howard government continued to focus its information on the violent aspects of the disturbances, without given an


equally detailed account of the causes of the ongoing disturbances. The Department of Immigration and Multicultural Affairs, which on other occasions was reluctant to discuss events within detention centres, released photographs of fire damage sustained during a riot in December 2001. These photographs could be accessed from a link at the cited media release, and remained on the departmental website at the time of writing the final draft of this thesis; more than five years later.

The public depiction of events in detention centres during the criminalisation of detention depended on the source of information. The government’s comments about linking refugee policy with mandatory detention were generally in the context of generating a negative refugee stereotype, as the following media report suggests. Philip Ruddock, when commenting about another riot at Woomera in March 2002, said that participating in the riot might jeopardise a “protection claim”, because “Australia is under no obligation to give protection to people who commit serious criminal offences”. Woomera increasingly resembled a prison, instead of a detention centre for the processing of refugee claims. More weapons were discovered at Woomera in July 2002 “during a routine search of detainee accommodation”. In the same media release, the Department of Immigration and Multicultural Affairs refuted as “wildly inaccurate” media reports that detainees sustained injuries during an incident.

In contrast to official information from the government, unofficial information, when it reached official channels, suggested that the government downplayed suggestions of heavy-handed practices by detention guards. Independent Member of Parliament Andrew Theophanous raised in

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Parliament “unofficial” information that was not passed through the “official” channels made available by the Howard government, but was relayed directly to Theophanous during a visit to the Port Hedland detention centre in June 2001. In the cited speech, Theophanous told Parliament that detainees at Port Hedland had taken possession of a metal baton, which they considered “proof … of continuing ill treatment at the centre”. Andrew Theophanous continued that, when he previously told Immigration Minister Philip Ruddock of this, the Minister “dismissed the hidden baton story”. In his response during the parliamentary debate, Philip Ruddock implied that the object was not an aluminium baton, without actually denying that it was an aluminium baton: Philip Ruddock said that the baton was “aluminium coated … by a form of plastic rubber”; a “standard issue” baton, the type that was “used from time to time”.

When Philip Ruddock refrained from admitting that detention guards used aluminium batons on refugees, the Minister employed the circumstantial manipulation of words that was so characteristic of legal rationalism. Accordingly, the Minister in the speech cited in the previous paragraph left open the possibility that a baton made of aluminium was not an “aluminium baton” if it was coated by plastic. The Minister continued by stating that “substantive issues” should be referred to the Human Rights and Equal Opportunity Commission for “full and complete investigation”, and that the Ombudsman, Human Rights Commissioner and United Nations High Commissioner for Refugees “are able to visit if they have had an invitation from detainees”. This advice directed information to the official channels; a process where information is published long after the event, and after prior consultation with the government. The official process thus assisted the

113 Ibid.
Howard government to favourably present unchallenged its own version of events to the electorate at a time when the issues were of political salience.

Official information from the Ombudsman and the Human Rights Commissioner, whilst not directly corroborating the unofficial information published by media sources, suggested that some unofficial claims were not implausible. One woman at the Curtin detention centre told an investigator that she sustained several hits from a baton during a riot, and that her husband, who intervened, was subsequently gaol. This is in addition to the baton incident at Port Hedland that Theophanous referred to, as previously discussed. Another report of the Human Rights and Equal Opportunity Commission cited a separate report, where the authors were informed that during 2003, some children reported that they “saw their parents being hit with batons by officers”. Similarly, the Ombudsman reported “tensions between different ethnic groups” inside detention centres which escalated to “fights, assaults and threats to kill”, as well as alleged assaults on children. The cited report continued that “women who do not have a partner” and “unattached children”, those without families, were at greater risk of “indecent assaults and threats” than any other group. Philip Flood wrote that “a small proportion of detention officers” intimidated and verbally abused detainees.

The criminalisation of detention within the timeframe of this case study (between 1999 and 2003) began when Philip Ruddock announced after the August 2000 riots that special legislation would be introduced, as discussed previously. Several months later, especially in April 2001, the Howard government renewed these announcements. The new legislative measures

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117 Ibid., pp. 19-20.
consisted of strip-searching of detainees, “including children as young as ten”, and an increase in gaol terms for convicted escapees from immigration detention from two to five years. These announcements also provided a clue that the criminalisation of detention would somehow include Australians. The Australian newspaper reported that the new legislation would include powers to “screen or search the possessions of visitors” to detention centres. The cited article also mentioned “a series of riots and mass breakouts from detention centres across the country”, during the last 12 months. Another newspaper article reported one riot at Curtin, which resulted in injuries to detention guards and $250,000 property damage, and another riot at Port Hedland in the previous week. Fourteen people escaped from the Villawood detention centre in April 2000, after they obtained bolt cutters that were used for construction work at that centre.

One may conclude from this discussion on riots and breakouts that the government’s announced legislative changes constituted the criminalisation of mandatory detention. Harsher legislative measures, in response to disturbances, are not an example of legal rationalism. These measures, however, do help answer the question posed at the beginning of this thesis: How, and to what extent, did the Howard government engage in legal rationalism when justifying its refugee polices to the electorate? The announcements of the pending legislation formed part of a pattern where the Howard government justified its refugee policies to the electorate by making recourse to the law. Where the judiciary imposed sentences under the increased penalties of the new legislation, such sentencing may have led indirectly to an adverse outcome of the refugee application.

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122 This point may be argued from the consideration that an increase of the maximum penalty from two to five years for participation of disturbances within detention centres may have led to the passing of increased prison terms by the judiciary. Article 33.2 of the
Chapter 3

Detention in the Desert – Woomera

The criminalisation of mandatory detention came full circle when announcements by Philip Ruddock heralded a new category of criminal: those members of the Australian community who assisted with escapes from detention centres. The examples cited in this paragraph form another part of a pattern, where the government has justified the policy to the electorate by recourse to the law. Philip Ruddock announced that those Australians who assisted in a breakout from the Woomera detention centre, would be charged with "conspiracy to defeat Commonwealth law"; an offence that carried a maximum sentence of ten years imprisonment. The cited article also reported that, although the new legislation had been passed, police instead charged those who assisted with the escapes “with a lesser offence” that carried a maximum penalty of four years. This suggests a difference between government rhetoric and actual law enforcement practices. However, the justification of the policy in terms of maximum sentencing provisions continued. In response to another breakout of 35 people from Woomera with outside help, the Minister said people risked up to ten years jail, and the “failed asylum seekers face up to five years in jail for their escape”.

The suggestion that Philip Ruddock’s comments were not only about the legislation, but also about justifying the policy, comes from a comment about a breakout from Woomera at Easter 2002. Then, the Minister said that those who assisted with escapes were not sympathisers, but people with criminal intent. Acting Immigration Minister Daryl Williams continued this line of

Convention Relating to the Status of Refugees for instance specifies that a person, may be "a danger to the security of the country" if convicted of a serious crime. This, in turn may have serious consequences for the refugee determination process if a judge imposed a prison term for an offence committed during a disturbance in a detention centre. The possible relationship between sentencing and refugee determination, however, was not pursued in this thesis.

125 Philip Ruddock said that this was a “deliberate, organised breakout by people who have been in contact with detainees: Terry Plane et al., "Woomera Breakout Exposes Security," Australian, 29 June 2002; Philip Ruddock spoke of people who had taken "the law into their
Chapter 3
Detention in the Desert — Woomera

argument, when, in January 2003, he called on refugee support groups to “condemn violence”, instead of “tacitly endorsing the actions of detainees”. 126 The acting Minister spoke of a “co-ordinated national campaign” of three days of rioting at Baxter, Villawood, Woomera and Port Hedland, that resulted in $3 million property damage. 127 One can see here a rudimentary attempt by the government to separate refugee support groups into “lawful” and “unlawful” categories. Despite wide publicity of potential legal repercussions for Australians, there was another breakout from Woomera in February 2003, with outside help. 128 Philip Ruddock continued this separation of refugee support groups, when he accused “some organisation and their advocates” of “saying it was appropriate for detention officers to be beaten by unknown assailants who had deliberately camouflaged their identities”. 129 In a general comment about the hunger strikes, riots and breakouts that occurred from Woomera, Philip Ruddock said that the government was “anxious” to close the facility. 130 Woomera was mothballed on 17 April 2003, and was replaced by the high-security facility of Baxter, about two-hundred kilometres south of Woomera.

In its defence of the policy of mandatory detention, the Howard government engaged with the public in many forums, including non-mainstream publications. The Sydney Morning Herald for instance reported an exchange of words with the Minister and the Australian Catholic Social Justice Council. 131 In the exchange, the Minister wrote to the editor of the magazine of the religious organisation in response to an article that people inside detention centres might have been abused. The cited Sydney Morning Herald article

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127 David Eccles and Daniel Clarke, “Mission to Destroy; Revealed: The Plot to Burn Woomera,” Advertiser, 1 January 2003.
continued that the Minister rebuffed concerns over “the use of sedatives, solitary confinement and threats of jail”, and concerns over “health, food and education conditions”. Philip Ruddock wrote that that “conditions in detention centres are better than in many Australian homes”, and that detainees had destroyed computers and the library at Woomera in the previous year. Similarly, Philip Ruddock wrote to the editor, after the industrial publication *Australian Nursing Journal* called for “a more humane approach” to immigration detention.132 In his response, the Minister stated that “detention should be humane”, and that the article contained “some factual errors and omissions”.133

The Howard government criminalised mandatory detention in two ways; through criminal convictions that occurred under specific legislation and imperatives of the policy, which included Australians who assisted with riots and escapes. Both approaches consisted of policy justifications by making recourse to the law. However, the recourse to the law in this section was not as direct as in the justifications about the conditions of detention noted earlier in this chapter.

### Conclusion

Whilst there was no sustained overbearing justification about legal rules, except for those instances that assisted the criminalisation process, such an approach did not remain uniform throughout other aspects of policy delivery that were discussed in this chapter. Instead, the pattern of legal rationalism manifested itself in the legal-rational contract between Australasian Correctional Management and the Department of Immigration and Multicultural Affairs. Then, legal rationalism was noted when the government did not address those

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features of the law that permitted a skewed outcome of process when such outcome was not disadvantageous to the government. For instance, the investigations of occurrences that put refugee applicants in a bad light, rather than the policy, indicated a selective application of expected legal-rational practices. It has been argued that in those instances, the systemic arrangements of the flow and retrieval of information sustained these skewed outcomes under the auspice of legally rational and orderly process. This process put the publicly accessible information about government performance and accountability under greater government control. Whilst this did not lead to a suppression of information, there was a delay in the release of information - either directly because the government could influence the timing of release, or indirectly because some information was very cumbersome to retrieve. Such power to delay the release of information occurred at a time when refugee policy entered a new phase with the privatisation of mandatory detention.

The findings of this analysis from the legal-rational arrangements of the policy practices and the detention contracts suggested that much of the Howard government’s recourse to legal rationality at times was rhetorical, instead of leading to sustained practices. However, the emerging pattern of legal rationalism is not displayed neatly and evenly throughout this analysis. Nevertheless, it is suggested here that the policy practices and detention contracts generated two layers of contradictions that made up the core parts of the two forms of legal rationalism. The most prevalent form of legal rationalism was its manifestation of Legal Rationalism Form 1; the selective use and abuse of legal rationality. This became notable in some instances where the policy practices suggested that allegations of abuse inside detention centres were carried out selectively. Investigations tended to occur more readily when detainees were the alleged perpetrators. The opposite occurred when detainees were alleged victims, with some investigations stalling over matters pertaining to jurisdiction of law enforcement agencies. In this respect, this analysis
supports the hypothesis that the Howard government resorted to legal rationalism.

The picture was less clear with the manifestation of Legal Rationalism Form 2 – the fetishism of legal rationality as an end in itself. Whilst this did occur when the government justified its policy at the time of the riots, this was less so with regard to adverse allegations about conditions within detention centres. With regard to justifying the policy of mandatory detention, the Howard government made a stronger appeal to the law-and-order stereotype than to a legal-rational approach. It may be argued, though not persuasively from the material analysed in this chapter, that the Howard government made recourse to the law when attempting to discredit people who raised these allegations. Such recourse to the law, however, was not the Howard government’s dominant recourse to justifying the policy, and occurred only after two separate investigations were already in progress.

Any electoral approval that could be attributed to the policies would be in the sense that the electorate disapproved of onshore refugees, and also of disturbances within detention centres. This proposition, however, was not tested in this analysis. This suggestion could be tested, perhaps through an analysis of opinion polls or media content of responses by the public to the governments policy justifications. Future research could also analyse how, or if, the information from non-government sources affected public discourse and how this resonated with the electorate. Similarly, the role of non-government organisations and their networks could be analysed for generating electoral support, or otherwise, for the policy of mandatory detention.
Chapter 4

A Special Case — Children in Detention
Six-year old Shayan Badraie was detained at the Woomera, and later at the Villawood immigration detention centres. The world may have never known his fate, had it not been for the hidden camera that refugee supporters smuggled into Villawood. Inside immigration detention, Shayan was known as *LEE 67*, the sixty-seventh person to step off a refugee boat that immigration officials had codenamed *LEE*. Footage from the hidden camera at Villawood was shown on national television. The current affairs program *Four Corners* depicted a listless child who had stopped eating, drinking and speaking, slumped over his father’s shoulder.¹ In the following year, the program *7.30 Report* stated that during a cycle of nine admissions for “rehydration and drip feeding” to the Westmead Children’s Hospital in Sydney, Shayan recovered, but became ill again when he returned to the detention centre.² On both television broadcasts cited above, Immigration Minister Philip Ruddock denied that Shayan’s exposure to life inside immigration detention had brought on his illness. However, in June 2006, after spending $1.5 million on legal costs during a compensation case for damages sustained during two years of


immigration detention, the Howard government paid to Shayan an out-of-court settlement of $400,000.³

Although the official position of the Howard government was that immigration detention was for administrative reasons, evidence emerged that children suffered under this policy. The evidence suggested that the length of stay in detention contributed significantly to this damage: The Human Rights and Equal Opportunity Commission reported that the average length of stay in detention continued to increase from 1999.⁴ According to the cited report, the average stay per child was almost eighteen months by the end of 2003, with the longest stay of almost five-and-a-half years for one child. The report also mentioned that, in the first half of 2002, there were 760 major incidents across all detention centres.⁵ Of these, sixteen incidents consisted of allegations of assault that involved children, and there were 25 reports of incidents where children were involved in self-harm.

The challenge for the Howard government was to reconcile its policy of mandatory detention with information that the detention environment was detrimental to the well-being of children. Moreover, such policy justifications to the electorate also needed to include language claims and policy practices that the detention of children was not only a legal requirement and imperative to Australia’s security interests, but also humane, as specified by the policy objectives. This case study concludes that, although legal rationalism was the dominant justification for the policy of the mandatory detention of children, legal rationalism manifested itself differently from how it presented itself in the previous two case studies, and was often less discernible.

³ Jewel Topsfield, “Immigration Spent $1.5m Fighting Boy’s Stress Suit,” Age, 1 June 2006.
⁵ Ibid., section 8.3.1, p. 299.
Policy framework

This chapter analyses how the government justified the mandatory detention of refugee children between 1999 and 2003.

First, a summary of the legislation. The law does not differentiate between adults and children. The Migration Act specifies that persons, who arrived without authority, are detained until the person goes to another country, or receives a visa to enter Australia. There is no minimum age for detention, with the consequence that newborn children are also detained if the mother is a detainee when she gives birth. Although children had been mandatorily detained since 1992, it was not until August 2001 that a child protection policy was formulated for all detention centres. Section 183 of the Migration Act states that the courts to not have the power to release people detained under immigration legislation; only the government can do this. However, the Migration Act gave several choices to the government about how and where children could be detained. As will be seen in the “Buffer” section, the Howard government did not pursue these choices until after questions were raised about the safety of detained children in late 2001 and early 2002.

The Migration Act also stipulates that children who arrived alone, the “unaccompanied minors”, have a special protective status. In such events, the Immigration Minister is the legal guardian of “non-citizen children”. Section 5 of the Migration Act defines such children as less than eighteen years old, who do not have a parent, or other relative over twenty-one years old, to care for.

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6 Migration Act 1958 No 157 (2001 as Amended), Section 196.
8 Migration Act 1958 No 157 (2001 as Amended), Section 183.
9 Immigration (Guardianship of Children) Act 1946. Act No. 45 of 1946 as Amended, Section 6.
them. Furthermore, the Minister may delegate this duty of care for the children “to any officer or authority of the Commonwealth or any State or Territory”.

Although the Migration Act did not specify this, the policy required that the private contractor of detention services treated children differently from adults. The 1998 Immigration Detention Standards recognised “individual care needs” among sections of the detainee population, with an obligation to identify such individuals and provide programs “to enhance their quality of life and care”.10 Section 9 of these Standards identified children as a group with special needs, and the contractor was obliged to “take account of the needs of [the] particular age and gender” of unaccompanied children.11 The contractor was also contracted to attend to the “special needs of babies and young children”.12 For older children and for children who had a parent or other adult to care for them, the contract did not stipulate special responsibilities. There was, however, a general requirement that obliged the contractor to provide “social and educational programs appropriate to the child's age and abilities”.13 The assumption was that parents had the overall responsibility “for the safety and care of their child(ren)”.14

After the allegations were raised that children inside detention centres may become victims of abuse and neglect, which were discussed in Case Study 3 — Detention in the Desert: Woomera, the Howard government clarified the duties of the contractor in relation to the policy framework. The 2003 Immigration Detention Contract identified children of all age groups, where the “minors, in particular unaccompanied minors”, were individuals who required “special care needs”.15 The assumption of the 1998 Standards that parents retained

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10 Department of Immigration and Multicultural Affairs, Immigration Detention Agreement 1998, Section 9.1.
11 Ibid., section 9.21.
12 Ibid., section 9.31.
13 Ibid., section 9.4.1.
14 Ibid., section 9.4.2.
15 Department of Immigration and Multicultural Affairs, Immigration Detention Contract 2003, section 2.2.2.1.
responsibility “for the health and welfare of their children” were also found in the 2003 Standards.\textsuperscript{16} However, the 2003 agreement placed specific onus on the operator to provide for the “safety, care, welfare and well-being” of the children “effectively and appropriately in accordance with” their personal circumstances within the legal and policy provisions.\textsuperscript{17}

As discussed in Case Study 2 — \textit{A special case: Children in Detention}, shortly after the arrival of the boats in late 1999, Immigration Minister Philip Ruddock described two policy outlines, depending on whether such arrival was “lawful” or “unlawful”.\textsuperscript{18} However, the Howard government did not use such justification for the detention of children, perhaps because children could not reasonably be held accountable for the circumstances of their arrival to Australia. Instead, the government justified the detention of children by arguing that it was better to detain the children than to split the family by releasing only the children. Before discussing this justification, first I wish to discuss how the government’s claim of maintaining family unity through mandatory detention sat with the policy decision to scrap family reunion for refugees on Temporary Protection Visas. In the paper cited at the beginning of the paragraph, Philip Ruddock based this decision on the logic of arithmetic.\textsuperscript{19}

Accordingly, there were 23 million refugees in the world, and Australia had committed itself to a “12,000 place annual humanitarian resettlement program to assist international efforts to address the plight of refugees and others in need”. The recent “unauthorised boat arrivals”, the Minister reasoned, threatened this intake goal. More that 1,600 people had already arrived between July and December 1999, and another 10,000 were on their way at that time. Most were “young males”, who on average, after being accepted as refugees, would bring three additional persons through the family reunion program, which was part of Australia’s refugee policies. By offering only temporary

\textsuperscript{16} Ibid., Section 2.2.3.2.2.
\textsuperscript{17} Ibid., section 2.2.3.2.1.
\textsuperscript{19} Ibid.
A Special Case – Children in Detention

protection to refugees from the “unauthorised” source for the first thirty months and making permanent protection conditional upon re-application, the Minister argued that Australia would be a less attractive destination and would therefore be able to offer the designated 12,000 places to “those in most need”. The Minister wrote that refugees were not the problem, but their mode of arrival, and that his policies would respond to this in an orderly and humanitarian manner.

Treating refugees differently depending on whether they arrive lawfully or unlawfully does not mean that we are penalising unauthorised arrivals. What it does mean is that we are being more generous in cases where people play by the rules of the international protection arrangements and where they comply with Australia's laws.20

It is now time to return to this case study and relate the Minister’s arguments, which were essentially about orderly processing and restricting access to resources, to the detention of children. To begin, the Minister maintained that the Howard government did not separate refugee families.

Separation from family members in these circumstances results from the decision of individuals to travel across the world and enter Australia unlawfully. It is not a decision of the Australian Government.21

Nevertheless, the government’s decision to treat these refugees less generously than other refugees did impact on children in three major ways. First, it changed the demographics of the refugee population from mainly single men to families. From this perspective, it was plausible that the detention of children was partly caused by the government’s policy decision, which provided an incentive for parents not to leave their children behind. Second, justifications based on the legal rationality of the detention of children suggested that the Howard government had a policy of vicarious liability,

20 Ibid.
which flowed on from the actions of the parents to the children. Third, the argument that detention served the interests of children because they ought to remain with their parents did not address or justify the detention of children who arrived without families. Nevertheless, the government maintained that detention was a parental choice, and offered financial incentives for people to forego their rights to appeal refugee decisions and to leave Australia:

Parents and their children are free to leave immigration detention at any time by leaving Australia. The government continues to work with people in detention and the governments of their home countries to facilitate the return of all unlawful non-citizens. Where a person does not have the funds to arrange travel to their homeland, the government will assist. Many people in detention who have been found not to satisfy the requirements for a Protection Visa choose to pursue several avenues of appeal. As a consequence, the period of immigration detention for them and their children may be extended. There are a number of other factors that can contribute to extended detention periods for children. These include difficulty in establishing identity, litigation, difficulty in obtaining travel documentation and non-cooperation by their parents.22

The statement cited above may be seen as part of a humanitarian policy to release families. However, the government’s offer also contained a potentially coercive element, at least for those applicants who believed that their appeals would eventually confirm their refugee claims. For those families, the choices consisted of taking their chances with freedom and returning to a country where persecution may be a realistic possibility, or to remain detained for a long time. Although the Migration Act underpinned the policy of the mandatory detention of children, one can assume from the website of the Department of Immigration and Multicultural Affairs there was intent by the Howard government to direct legal-rational process toward an assumption of illegal entry to Australia. Yet such assumption was premature, at least in cases where the legal-rational process of the refugee application was pending. In a skew to

22 Department of Immigration and Multicultural Affairs. (Undated). Women and Children in Immigration Detention [Website].
legal rationality, those parents who did not accept the government offer and continued to explore legal options for accessing their refugee rights for themselves and their children, were framed by the Howard government as responsible for the deprivation of liberty of their children.

Such policy framework, whilst derived from legal statutes and their interpretations in refugee applications and a range of legal-rational appeals, predisposed the process toward an outcome that suited the political objectives of the Howard government. This process was fine-tuned through the stipulation of the 1998 and 2003 Immigration Detention Contracts, as previously cited, in that it gave scope to parental discretion in the legal-rational sense. It was also a process that was geared to take legal rationality in the direction of legal rationalism through the nature of its framing assumptions.

**Service delivery of the contract**

In its attempts to justify its refugee policies, the Howard government came under pressure from the electorate to justify especially the mandatory detention of children. The *National Inquiry into Children in Immigration Detention* of the Human Rights and Equal Opportunity Commission received “more than 300 submissions” from community organisations and individuals that raised concerns about health, educational, social, psychological, and legal issues. Mental health clinicians reported that the uncertainties of detention, coupled with prolonged deprivation of liberty in an already traumatised population, provoked psychiatric disturbances that became worse as the length of immigration detention increased. There were allegations of involuntary

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Chapter 4
A Special Case — Children in Detention

chemical restraint within detention centres. A United Nations inquiry reported that conditions within detention centres were prison-like, where previous trauma suffered by children could easily be exacerbated. The cited report recommended that the Australian government review the “mandatory, automatic and indeterminate character of detention” and “the lack of sufficient judicial review of the detention”. These reports were published at the time of riots, hunger strikes and breakouts that were discussed in Chapter 3 — Detention in the Desert: Woomera. Moira Rainer’s 2001 Murdoch Lecture gave an insight into the effects of detention on children, as she called for the incorporation of a human rights based model into Australian legislation that legally protected detained child asylum applicants, instead of leaving child protection issues to political process:

What is life like, for children in immigration detention? It means being under constant video surveillance, being addressed by your number, not your name … There may be no medical facilities for mentally ill children, no paediatricians, and interminable queues, boredom and regimentation. Child detainees live behind razor wire, surrounded by uniforms, identification badges, roll calls and searches. Their food is prepared by strangers, not by parents, queued for and eaten on schedule or not at all.

The Howard government did not deny that unhealthy and traumatised children lived inside immigration detention centres. One government website listed these observations as issues of concern and pointed out that a range of social, medical and education services were available for detained children. However,

27 Ibid.
Philip Ruddock disagreed with the conclusion that, as a consequence of these findings, the policy of mandatory detention required modification, or that the policy contributed to the children’s dilemma:

The fact is that we know that there are children, for a variety of reasons, who have exhibited all sorts of problems but what we can’t say is that they’re associated with detention and not with prior experiences that they may have had in life.30

A humane policy may have erred on the side of caution and released the children, regardless of whether they had become traumatised before or after their arrival in Australia. However, the Howard government’s strategy not to collect systematised information from detention centres made it difficult to identify a longitudinal link between health issues and detention, or whether children became traumatised after witnessing disturbances in detention centres. Steve Davis, First Assistant Secretary of the government’s Unauthorised Arrivals and Detention Division, told a Senate Estimates meeting in 2004 that there was “no system wide research to point to” that may have shed light on disturbances within detention centres, but that issues were assessed instead on a case-by-case basis.31 Despite the lack of systematic information, the Minister attributed at least some blame to parents for not dealing effectively with the immediacy of the situations posed by adverse events:

… responsible parents removed their children away from that environment and away from witnessing those sorts of events when they occurred and I think even in a detention environment, parents have particular responsibilities in relation to what their children see and what they’re exposed to.32

Some children actively participated in these disturbances. The Minster implied that some parents forced or encouraged their children to participate, and may

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even have prevented the children from eating by stitching their lips together. In the cited newspaper article, Philip Ruddock warned that children may be taken away from their parents, pending an investigation by the Department of Human Services. If parents neglected their children, the evidence did not suggest this: the Human Rights Commissioner reported that not one child was taken away from his or her parents between January and April 2002.

The Minister did, however, authorise that those children over whom he was the legal guardian be moved to safety. In January 2002, the Department of Human Services removed nine unaccompanied children from Woomera after they collectively announced their intention to suicide. Philip Ruddock said at the time: "I am determined to protect these children from further harm". By the end of April 2002, all seventeen unaccompanied children who resided at Woomera had been transferred to home-based-detention. However, the Minister appeared less willing to remove children for their protection, when the parents, and not the Minister, were the legal guardians. This may indicate a legal-rational approach by the Minister to fulfil his statutory duties as a guardian toward unaccompanied children. Such speculation seems not unreasonable when one contrasts the removal of unaccompanied children with an earlier event in January 2002. At that time, several children were hospitalised as the result of various forms of self-harm, such as participating in a hunger strike, or poisoning themselves with detergent. When justifying why the children were not released from Woomera, Philip Ruddock said that it was not government policy to release the children and split families, unless child

experts advised him to do this. It may have been humanitarian under these circumstances to release the children with their parents. Such release, had it occurred for those reasons, still could have been legally rational, because the Minister retained the right to release individuals from detention in special circumstances. The Minister’s preferred option not to release the parents was also legal-rational, because the Minister was not obliged to release children. Such legal-rational approach, however, is indicative of the second manifestation of legal rationalism, which is characterised by an overbearing and technical approach to the law.

The child protection authorities responsible for the care and protection of children at Woomera were from Family and Youth Services in the Department of Human Services (DHS) in South Australia. Their work inside the detention centre on Commonwealth land was guided by a Memorandum of Understanding between the Department of Immigration and Multicultural Affairs and the Department of Human Services. This cited Memorandum set out the “mutual obligations” between both parties “in relation to the notifications of possible child abuse or neglect and child welfare issues pertaining to children in immigration detention in South Australia”. However, the relevant department managers did not “actively” consult with state welfare authorities until January 2002, when unaccompanied children threatened mass suicide. This suggests that consulting with child experts may have been a political, rather than humanitarian, response.

39 Ibid.
41 Ibid., paragraph 1.
Although mandatory detention has been law since 1989, the agreement cited above came about only after the Flood Inquiry recommended it in 2001.\textsuperscript{43} When making the recommendation, Flood anticipated a potential clash of the Memorandum with the Commonwealth legislation – that is, Flood anticipated a situation where a recommendation by “child welfare authorities” to remove a child from detention may be inconsistent with the Migration Act. However, Flood advised that such clash may be avoided if the child was moved to another detention centre, or to another venue “which DIMA can declare to be a place of detention”, or if the government issued a Bridging Visa and released the child.\textsuperscript{44} Thus, a legal framework was already in place that could be activated at the Minister’s discretion, whereby the Howard government could have released the children without a recommendation from child protection authorities. The Minister’s requirement for a recommendation from child protection authorities before ordering the release of a child might have indicated that, whilst a legalistic approach would be used to detain children, such approach could change for humanitarian reasons. Paradoxically, the requirement for a recommendation for the release of children was actually used as a legal-rational justification to detain them.

I will shortly elaborate on the previous sentence. First, to the Memorandum of Understanding. In practice, the Memorandum made the child protection practices of Family and Youth Services dependent on government permission. Detained children and parents would only be offered skills and awareness training to parents and children upon request from the Department of Immigration and Multicultural Affairs.\textsuperscript{45} This stipulation sets the theme for the purpose of the Memorandum, an agreement that dealt with instances where parents, not


\textsuperscript{44} \textit{Ibid.}, paragraph 6.15, p. 25.

\textsuperscript{45} Author Unknown. "Memorandum of Understanding (MOU) between the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) and the South Australian Department of Human Services (DHS) Relating to Child Protection Notifications and Child Welfare Issues Pertaining to Children in Immigration Detention in South Australia," paragraph 12.2.
conditions of detention, were responsible for child abuse or neglect. Investigations of child protection issues occurred only on express invitation, and the manager of the child protection service was required to “liaise” with the Director of Detention Operations of the Department of Immigration and Multicultural Affairs. The investigating authorities were required to “confirm the investigation plan” before commencing an investigation, to notify DIMA in writing of the identity of the child, and to negotiate an appropriate time in advance. The investigation itself was conducted “according to DHS standard procedures”, but the Department of Immigration and Multicultural Affairs had discretion on how to proceed afterward.

According to these terms cited above, the Memorandum did not compromise the independence of an investigation. The stipulations did, however, set up a process of political control that made other components of the investigative cycle, such as initiation, timing, follow-up and enforceability of recommendations, dependent on government permission. Contrary to his public statements, therefore, the Immigration Minister was less likely to act on recommendations by child experts than on the basis that officials from his Department became convinced of the merits of these recommendations. Viewed from this perspective, the Memorandum of Understanding assisted the government’s objectives to pursue its legal-rational approach for the mandatory detention of children, whilst also allowing for a humanitarian approach under strictly controlled conditions.

One example, broadcast on Channel Nine’s television program Sunday, illustrated this mixture of a legalistic and qualified humanitarian policy practice. The Minister said that one particular child remained in detention, because “the

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46 Ibid., paragraph 7.7.
47 Ibid.
48 Ibid., paragraph 8.1.
49 Ibid., paragraph 8.5.
report was not to release the child separately from the mother". 50 Philip Ruddock added: “if the relevant authority recommends the child be released into the community, that will happen”. 51 When the reporter pointed out that the authorities recommended the release of the whole family, so that separating the family would not be an issue, the Minister admitted to not following expert advice, and justified his decision in terms of migration law.

They will only be released if there is a lawful basis upon which that can happen … the law makes it very clear, Commonwealth law, the Migration Act, as to when people will be released into the community. 52

The lawful basis for release of the child in this instance would have been to release the child on the basis of the expert recommendation, as was current policy. The Minister’s assurances that the Howard government did not to detain children against expert advice thus emerged as political rhetoric, but with a twist: although the release of the child was recommended, the Minister would have recourse to other legislation that prevented such release. Here, the Minister interpreted the recommendation not to separate the child from the mother as justification to detain both, and to ignore the advice to release the whole family. The above example of a rhetorical skew to legal rationality was not restricted to an isolated incident, but pointed to a systemic process. Findings by the Human Rights and Equal Opportunity Commission cite other examples where the government did not release all families where Family and Youth Services recommended such removal. 53 The care and protection of children inside immigration detention centres, therefore, depended on how the legal rules coincided with political expediency.

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51 Ibid.
52 Ibid.
At stake for the Howard government was the proposition that children suffered damage as the direct result of their detention, and that government policy caused this harm and neglect. Through the restricted terms of the *Memorandum of Understanding*, the Howard government created the impression in public that child experts tacitly approved of the detention of children. From the perspective of the child experts, things were different. However, these experts did not communicate their view publicly at the time when the safety of children was at stake. At that time, the relevant authorities asked for submissions from the community in relation to “recent events” in child protection matters, which included matters pertaining to the detention of children.  

This concern was contained in an official Department of Human Services report based on these submissions. By the time the report was released, the *Memorandum of Understanding* had been operating for about eighteen months.

In the report cited above, the Department of Human Services reported that most of these submissions identified aspects of the policy of mandatory detention, rather than the actions of individuals inside detention centres, as the main contributing factor toward abuse and neglect of detained children. The key recommendation (to “release of all children and their families”, because detention was “so devastating to the wellbeing and development of children … [that] the State Government has a responsibility to take a strong position on this issue”) was published eighteen months after the intervention was recommended. The report also identified a conflict between the jurisdictions of state and federal law, and acknowledged that the *Memorandum of Understanding* curtailed the child protection mandate of the state based Department of Human Services. The report argued that children in immigration detention

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56 Ibid., paragraph 22.7-11.
57 Ibid., paragraph 22.11.
58 Ibid., paragraph 22.14.
“should not be denied their rights to protection merely because their parents or family have brought them to Australia to seek asylum”, and that the state government, not the federal government, had “a specific legislative mandate and administrative structure” to “ensure the proper protection of children”.59

The Department of Human Services reported that, within the legal constraints of this Memorandum of Understanding, child experts had to avoid a clash with migration law and to avoid recommending that a child be released, “even if such release were mandatory to the protection of the child”.60 Accordingly, this posed the child protection agency with a “limited choice between inappropriate options” and placed it at potential risk of litigation, because of the legal requirements to “accommodate the policy of the Federal Government” whilst at the same time having a statutory duty to protect children.61 This requirement created what child protection experts Chris Goddard and Max Liddell called a “double bind communication” that effectively silenced the child experts.62 According to another comment, this political requirement generated practical difficulties for child experts, who were “unable to control the structures”, and either excluded themselves or were being excluded “from effective political and professional engagement with asylum issues”, constrained by a legal arrangement with the government that transcended their usual professional and statutory roles.63

Unlike the Woomera child abuse allegations that were communicated through unofficial channels, as was discussed in Case Study 3 — Detention in the Desert: Woomera, the recommendations of the child experts discussed above remained within the official channels. As the only source of information, the Howard

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59 Ibid., paragraph 22.15.
60 Ibid., paragraph 22.14.
61 Ibid.
government used the official communication process between the Department of Human Services and the Department of Immigration and Multicultural Affairs to justify the mandatory detention of children in terms of legal and humanitarian necessities. Such justifications, however, relied on a requirement for immigration law to dominate professional-clinical practices. For now, I wish just to state that this is an example where migration law uncoupled the child protection work from its own legal-rational principles. This example of colonising will be visited again in Section 2 — Themes.

The Howard government, however, framed the matter differently when justifying the policy. In a media release, Philip Ruddock hailed the Memorandum of Understanding as “the first of many such agreements” that demonstrated “the Government’s continuing commitment to providing a safe, supportive environment for children in detention” that “built on the cooperative and collaborative relationships” between the federal government and state welfare agencies. In practice, as Frank Brennan points out, this agreement took more than three years to finalise, and there was still no Memorandum of Understanding in Western Australia at the time of the media release cited above. It remains unclear whether, in time, the Department of Human Services adapted to its political requirements, or whether the Howard government had restored the clinical independence of child protection experts. A 2004 report by the South Australian child protection agency stopped short of the strong language of the report discussed previously, and instead, endeavoured to build strong partnerships with the federal government, and to “remove barriers to information exchange (such as misconceptions about legal constraints)”.

The cited report did not address how the fundamental issues that were raised by the 2003 report may have been resolved.

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Chapter 4
A Special Case – Children in Detention

Buffers to the policy

Over time, it became overwhelmingly clear that detention centres were not safe for children. During the first half of 2002, the Department of Human Services investigated 92 cases of child abuse at Woomera alone, and referred nine of these to police.67 The Howard government made special arrangements to move some children from detention centres and to detain these children in the community. These arrangements consisted, firstly, of community-based detention, where children lived with foster families, and secondly, of the Residential Housing Projects, which consisted of homes, where children lived with some members of their family. In this section, these detention arrangements are called “buffers”, because it will be argues that their purpose was to buffer the impact of the policy of mandatory detention on children. According to the law, “immigration detention” was not restricted to detention centres, but could take place almost anywhere, “in another place approved by the Minister in writing”.68 An Ombudsman’s report and the Flood Inquiry recommended in early 2001 that the government should exercise this legislative option.69 The Howard government first utilised this option during the riots in August 2001 by establishing a Residential Housing Project in Woomera, and began community-based detention in February 2002, when the Minister “declared several homes in Adelaide to be places of detention for unaccompanied children in foster care”.70 Another option, rarely used by the Howard government, for releasing children under migration law in the absence

of confirmation of refugee status, was to issue a Bridging Visa. Between 1999 and 2002, the government released only “one unaccompanied child, one mother and her two children (leaving the father in detention) and one whole family” under this legislative provision. Contrary to what government rhetoric implied, most children remained in some form of detention.

Home-based detention

At the time of escalating riots inside detention centres between 2000 and 2001, the Department of Immigration and Multicultural Affairs announced “innovative approaches to provide appropriate alternatives to long term residence in an immigration detention centre”. These changes consisted of a Residential Housing Project, which will be discussed shortly, “foster care arrangements with child welfare authorities, and community-based placements for people with special needs”. In reality, these arrangements did not constitute release, but widened the definition of detention: it was an alternative form of detention. Community-based detention invoked special provisions of the Migration Act, where anybody could detain an immigration detainee, provided the detainee was “held by, or on behalf of, an officer”. For this purpose, “several houses and schools in Adelaide were declared as alternative places of detention”. The cited report continues that under this program, “several foster carers and school principals were directed to accompany and restrain detainee children”, and had to ensure that the children “remained in declared places or in the presence of directed persons”. Home-based detention

71 Ibid., paragraph 6.3, p. 142.
72 Department of Immigration and Multicultural Affairs, Women and Children in Immigration Detention.
73 Ibid.
75 Migration Act 1958 No 157 (2001 as Amended), Section 5, Interpretation (1) (b), “immigration detention”.
occurred only in South Australia, and the government did not actively explore the release of whole families, although the Department of Human Services had recommended this.77

Home-based detention occurred under narrowly defined and carefully monitored conditions in response to children suffering abuse during the disturbances. These interventions, however, were short-lived rhetoric expressed at a time when it was beneficial to the Howard government to convince the electorate that its policy to detain children was humane. The Human Rights and Equal Opportunity Commission observed that the Howard government excluded from this scheme relatives who were prepared to take their families into home-based detention.78 Instead, the government’s plan was to place children into the care of community agencies:

I made the decision some time ago as Minister that if a state welfare authority recommended that for the best interests of a child in detention they should be released from detention and cared for by state welfare authorities, I would accede to that course of action. It has not been a course recommended to me by any state welfare authority in Australia where detention facilities are placed.79

As was seen in the previous section, the Howard government did not necessarily release on the recommendation of child experts. It is held here that home-based detention also occurred in a context where the government justified its policies by making recourse to the law, with the effect that the legalities that underpinned these policies were presented in a highly politicised context. The politicisation of the home-based detention of two children, Alumdar and Muntazar Bakhtiyari, illustrates this. There were several court cases, and the institutional issues that these cases raised are discussed in Chapter 6 — *Politicisation of the Law*. Here, I wish to comment on the political

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77 Ibid., pp. 156-59.
78 Ibid., p. 159.
furore surrounding the detention of these boys. The issue was that there were serious health concerns, and legal steps were taken to compel the Howard government to release the boys from the Woomera detention centre. After the Family Court had ordered in June 2003 that the children be released, the Howard government framed this court ruling in terms of national security: Philip Ruddock said that the judgement “undermines all of our border protection arrangements”, and that people were “using, in effect, the legal system to continue to remain here as long as they can”. 80 For the Bakhtiyari family, the euphemism of “staying here as long as they can” amounted to about four years of immigration detention. Treasurer Peter Costello acknowledged the dilemma of detaining children, but attributed this to the choice of the boys’ parents to appeal refugee decisions. The Treasurer said:

nobody likes to see a child in detention, nobody … If they didn’t appeal then the family could be reunited back in their homeland but these appeals can go on and on and on. 81

Implicit in the statement cited above was the humanitarian consideration of family unity, but also the dominance of the legislative framework over humanitarian justifications. The government’s decision to appeal the court ruling seemed incongruous with Philip Ruddock’s statement that “he would heed advice from any competent authority that said children in detention should be separated from their parents to live in the community”. 82 However, the cited statement confirms the argument advanced in the previous section that the Howard government was willing to release children only in conditions over which it had full control. Another difference is that the recommendations by child experts were not enforceable, but the orders of the Family Court were definitive. There was also the unanswered question that, if two children could be released because they had become traumatised, how many others could be

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released? Similarly, given that the same legislation determined the detention of adults and of children, could adults be released under similar circumstances? These questions, whilst not answered here, give an insight that much was at stake for the Howard government.

The Howard government, which, as previously noted, was critical of those refugees who appealed unfavourable refugee decisions, lodged two appeals aimed at reversing the decision to release the Bakhtiyari boys. First, an appeal had been lodged in the High Court that challenged the constitutionality of the decision by the Family Court. An appeal was also lodged against the decision of the Family Court. As it happened, the hearing in the Family Court came before the hearing in the High Court, and the full bench of the Family Court upheld the original decision to release the children. Philip Ruddock again politicised the issue when he described the court decision as “unfortunate” and “pre-emptive”, because the matter of jurisdiction was still awaiting determination by the High Court.83 Prime Minister John Howard even went one step further with his political rhetoric and censured the judges and the court process:

One’s not supposed to impute the integrity of judges in relation to these matters, but they seem to have a desire to be involved in dealing with these matters, and dealing with them quickly because they say people are in detention. But you know, we have many people who are convicted of offences who are sent to jail who sometimes have to wait until the courts are ready to deal with appeals, and that can sometimes go for years. When you have them being heard within days... many Australians would like to think that they could get their matters dealt with by the Family Court in the time frame that these matters seem to be dealt with.84

However, the individuals most affected by the court decisions were not convicted criminals, but refugee children. The selective applications of the

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legal rules by Senator Amanda Vanstone, who had meanwhile replaced Philip Ruddock as Immigration Minister, brings out the political edge of the institutional tension between Parliament and the courts when Alumdar’s and Muntazar’s story took yet another twist. The boys lived in a house in Adelaide and were supported by the Catholic welfare agency Centacare. In April 2004, an injunction was in progress that aimed at preventing the Howard government from detaining the children once again. Before the Federal Court made a determination, Immigration Minister Amanda Vanstone declared the house in Adelaide, where the children lived at that time, “a place of detention”. This step legally put the children into community-based detention. The judge publicly criticised this move by the government, and Minister Vanstone apologised to the Federal Court.

At this point, home based detention, which began as a “buffer” between children and the harsh effects of refugee policy, ended in confrontation. Centacare withdrew from the agreement to provide community-based detention. Centacare rejected as “untenable” the Howard government’s plan: for practical purposes, this plan would have turned Centacare’s home-based services into quasi detention facilities, with carers effectively acting as detention guards who strictly observed and supervised the children for 24 hours per day. In part, Centacare’s decision to withdraw from the plan was also related to the government’s refusal to allocate additional resources for housing the children in the community.

At almost the same time that Senator Vanstone apologised to the Federal Court, the court quashed the injunction and the Howard government was authorised to detain the children. The Minister then ordered that the boys
remain in community-based detention. The Prime Minister welcomed this decision, but also expressed reservations about de porting the children:

> Just because that decision has come down and it's a very good decision, it clearly validates the whole detention system that is operating in this county, that doesn't mean we have to send the children back to where they came from. We want to be compassionate.

However, the children were removed from Australia. Eight months later, a few days before Christmas in 2004, the Howard government exercised its legal right to detain the Bakhtiyari family in a detention centre. Within the fortnight, in the early morning hours of 30 December, the family was deported to Pakistan.

The discussion in this chapter so far suggests that, whilst the Howard government did release some children from detention, it may not have approved of such release, but did so when there were political merits in such decision. Despite the rhetoric of compassion and a humanitarian policy that was informed by expert recommendations, the practices suggested that the government pursued a legally rational agenda of sole discretion, with a preferred option of placing children into detention centres, the harshest of all legally available forms of immigration detention.

The political rhetoric between the courts and the Howard government illustrates both forms of legal rationalism. The narrow scope for placing children in home-based detention is an example of Legal Rationalism Form 1, with a special skew of how legislation was translated into policy practices. This

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may be inferred from the documented process of the government’s resistance to releasing the children from the detention centres proper. Legal Rationalism Form 2, the deference to legal rules that hides an underlying ideology, also took a special twist. Senator Vanstone’s hasty decision to detain Alumdar and Muntazar before the ruling in the Federal Court, as noted above, and by John Howard’s and Philip Ruddock’s politicisation of the court determinations, are examples of Legal Rationalism Form 2.

However, the above examples differ from other examples of Legal Rationalism Form 2 that are mentioned in this thesis, in that the deference was not to the legal system, but to how the legal system may assist in promoting an ideology that has nothing to do with legal rationality. If one accepts this argument, then it seems reasonable to look beyond a fetishism of legal rationality as an end in itself, and to take the more critical approach that was suggested in the Introduction to this thesis. The more critical approach left open the possibility of whether or not the law itself may serve as a conspicuous icon that justified the refugee policies of the Howard government in a way that was acceptable to the electorate.

Residential Housing Projects

Running concurrently with community based detention was the Residential Housing Project, where some people were detained in cluster homes, instead of detention centres. The project began in Woomera in August 2001, and was extended in the following year to accommodate more families.93 Later, similar Housing Projects began in Port Hedland, Port Augusta, Perth and Sydney.94 To the public, the Howard government presented Residential Housing Projects as

living in the community. Detention under this project was open to some
women and children if a male family member remained in the detention centre,
to diminish the possibility of escape. When Philip Flood recommended the
Residential Housing Projects, he also conceded that some families may not
embrace this option, because it meant “leaving male family members
behind”.95 This prediction proved to be correct. Immigration Minister Philip
Ruddock said there were not many volunteers because families did not want to
be separated.96 In October 2002, the Human Rights and Equal Opportunity
Commission gave the government a temporary exemption from complying
with the Sex Discrimination Act 1984, and extended this exemption in September
2003, to “protect the Department from complaints that there was
discrimination against men by excluding them from participation”.97 However,
the cited report also communicated concerns about the separation of families.
As has been noted throughout this chapter, one main justification for the
Howard government’s justification to detain children was the argument that
releasing the children amounted to the splitting of families. Philip Ruddock
also maintained this stance as Attorney-General, when he said that the release
of children would counter government policy:

… if children were released, families had to be released with them, and thereby abort
the mandatory detention arrangements.98

This confirmed that the earlier references to the government’s willingness to
release children on expert advice was rhetorical, and not readily followed in
practice. Legal rationalism was the dominant process involved. The
government was less willing to explore the possibility of removing the whole
family from detention. During the period of the inquiry by the Human Rights
and Equal Opportunity Commission, from its announcement at the end of

96 Lateline [ABC Television Broadcast]. Labor Rethinks Detention Stance.
Children in Immigration Detention, p. 149.
2001 until the findings were collated in mid-2003, only one whole family was released under the provision of a Bridging Visa.99 “Only two whole families were transferred to home-based detention between 1999 and 2003”.100 This suggests that the Minister’s chief concern to move children from detention was not primarily humanitarian, because he was at any time able, if he chose, to exercise his personal discretion and release all individuals from detention. Instead, Philip Ruddock’s public statements suggested that he was mainly concerned with following the rules and the legislation which his policy had shaped, but was less willing to provide effective remedies to ease the effects of detention on children.

When the Residential Housing Project was heralded as a “trial of alternative detention arrangements” in March 2002, those who were there the longest were not allowed out.101 In time, the restrictions of detention impacted adversely on detainees, prompted by the “deprivation of liberty and autonomy”.102 In time, the government dropped the pretence that the Residential Housing Project amounted to release from detention. Immigration Minister Amanda Vanstone identified the Port Augusta Project in a 2003 media release as “family-style accommodation in a community setting”, but added: “detention for people who have entered this country illegally is an unfortunate but necessary part of our system”.103 Later, when opening the facility in Port Augusta, the Minister justified the detention of children by framing it as safeguarding against criminal activity. The Minister’s choice to speak of families, instead of “people who bring a couple of kids with them”, also identified as rhetoric the detention of children for purposes of maintaining family unity:

100 Ibid., p. 153.
101 Ibid., p. 145.
102 Ibid., p. 161.
Chapter 4
A Special Case – Children in Detention

No one likes to see children in detention but equally no one wants to send a flag to
these criminals that prey on vulnerable people that if they can just bring a couple of
kids with them that the criminals would be more successful in their people smuggling
ventures, to come in through the back door rather than through our organised
program.¹⁰⁴

Statements by successive Immigration Ministers also revealed the rhetorical
superficiality of the government’s arguments about legal rationality, because
first, the detention of children for purposes of deterring people smugglers was
outside what can be expected from legal rationality. Second, after the riots and
disturbances in detention centres settled, such justifications replaced the earlier
justifications that the government was willing to release children on expert
advice. In April 2004, the Human Rights and Equal Opportunity Commission
released the major findings of its National Inquiry into Children in Immigration
Detention, including that children inside immigration detention centres were “at
high risk of serious mental harm”¹⁰⁵. Therefore, one major recommendation
was that children should be released within four weeks.¹⁰⁶ Third, at about the
time of the release of the cited report, the government launched its Australia
says YES to refugees school education campaign to correct “a politically biased
account of our refugee policy”.¹⁰⁷ Immigration Minister Vanstone defended the
mandatory detention of children by pointing to statute law, international law,
and legal precedent, and that the release of children would send a “dangerous
message to people smugglers”.¹⁰⁸

What I think we should be focussing on is the success of the Government’s strong
border policies in deterring people smugglers, so that children aren’t put on these
appalling boats and smuggled from country to country.¹⁰⁹

Children in Immigration Detention, major finding 2, p. 850.
¹⁰⁶ Ibid., recommendation 1, p. 856.
¹⁰⁷ Amanda Vanstone. (2004, 21 April). Kids Need to Know That Australia Does Say Yes to
Refugees (Media Release, number VPS63.04.
¹⁰⁹ Ibid.
In a way, the Minister blamed people smugglers for the legal-rational framework in Australia that led to mandatory detention. However, legal rationality provided other choices, but the government’s preferred choice was to release the children when it became politically difficult to justify their detention. It was also arguable that, as the Howard government fine-tuned the legal-rational arrangements, it could have changed these to favour the release of children, especially as evidence about the harmful effects of the policy kept mounting.

However, the publication of the Human Rights and Equal Opportunity Commission’s 2004 report signified a more lenient form of detention. In July 2004, Prime Minister John Howard announced that most children had been released from detention centres, and indicated his willingness to release even more children, as long as it was “consistent with the maintenance of a strong policy and consistent with deterring people from resuming the illegal boat trade”.110 Immigration Minister Vanstone said that there was “only one child … in a mainland detention centre”, and that eleven children were in the Christmas Island, and nineteen in the Nauru detention centres.111 About one year later, the Minister announced that all children had been released from detention and moved into Residential Housing Projects in the community, but did not indicate how many children were detained offshore at that time.112

Less was known about the fate of children in detention centres abroad. In Nauru, which also housed detained children, there was no arrangement with child protection services comparable to that in Australia. However, some information was available from other experts. Dr Marten Dormaar, psychiatrist in charge at Nauru, resigned over his untenable position of providing services

112 Amanda Vanstone. (2005, 29 July). All Families with Children out of Detention (Media Release, number 98.05).
in a situation where the government prevented effective remedies. He said that after the Howard government ignored his reports, he resigned from his position and subsequently made videotapes from Nauru available to the ABC. Dormaar claimed that there were “unprecedented rates of mental illness among young asylum seekers” in Nauru. The Immigration Minister dismissed the psychiatrist’s diagnosis, and said they “are disappointed that they have not achieved their original objective”, and “disappointed people may at times be depressed”. This further indicated that the Howard government was reluctant to accept professional advice, unless such advice was proffered under carefully controlled conditions.

Detention under the Residential Housing Projects became the Howard government’s major buffer to community pressure, allowing the government to fine-tune its policy of child refugee applicants. It allowed the Howard government to logically argue that it adhered to the legal rationality of mandatory detention. However, there is also the suggestion that the Howard government was sensitive to community attitudes about the detention of children. Whilst this may have been politically advantageous, the Residential Housing Projects did not address the needs of children who were also detained under this policy in offshore detention centres.

Conclusion

In this case study, the Howard government’s justifications emerged as a mixed pattern of legal rationality, humanitarian outcomes, and border protection policy goals. Recourse to the policy goal of border protection occurred to some extent, and orderly processing almost never featured as a justification in

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this case study. Variations to the observed justificatory patterns usually occurred in response to events that attracted media attention about the mandatory detention of children, including claims that some children had suffered mental health problems as the result of their detention. At those times, the government justified the detention of children on the basis that their parents had broken the law, that releasing the children may encourage criminals to break the law in future, and because the family unit needed to stay intact. Concurrently with these language claims there emerged a significant change in policy practices, where some children were detained in community settings.

It was argued throughout this analysis that these changes could usually be explained by an obvious, though at times an underlying, recourse to legal rationality. This made legal rationality the dominant justification, along with projections of humanitarian outcomes. The inconsistency, and partial or selective application, of these principles suggests that legal rationalism, an ideology of legal rationality, dominated the other three policy ideal types. There was some mismatch between language claims and policy practices, when the Howard government did not move all children and families from detention, as advised by child experts. Here, legal rationalism manifested itself as an extreme form of legal rationality that dominated the work of child experts, and which the Howard government has built into the justificatory framework. The result was refusals by the government to release children where the experts recommended removing the whole family from a detention centre. The government justified the detention of families in such instances, because child experts did not specifically recommend that the children should be separated from their families and removed from detention centres. The legalistic agreements that subsumed the work of child experts clearly undermined the government’s justification that detention was in the best interests of the children because it kept the family together.
Buffers were politicised as release from detention, but effectively served as a legal-rational framework that avoided releasing the children. These buffers thus justified the detention of children, most likely because detention inside homes was more humanitarian than the detention centres. These policy practices could not however be entirely explained by a legal rationality or by a humanitarian *ideal type*, because the Howard government activated the legally rational framework and the humanitarian policy practices only when the policy came under public scrutiny. It should not be discounted that when media interest developed about the mandatory detention of children, especially from late 2000 onwards, the policy had been operating for more than ten years. Then, the legal-rational justifications dominated the humanitarian justifications. This suggestion was further supported by the fact that unaccompanied children, over whom the Immigration Minister was the legal guardian, benefited from these arrangements, but hardly any children who had families. It was a political move of limited humanitarian benefit at a time of human need and public scrutiny.

It would be simplistic to conclude with this observation, because the Howard government continued with the Residential Housing Project after media attention had dissipated. The framing of this form of detention as living in the community with great amenities, as depicted on the Minister’s website, suggested a political motive, a superordinate goal that may transcend the stated policy goals of the four *ideal types*. The legal-rational arrangement also ensured the political control over the process, and may explain why the Howard government was critical when the courts ordered moving some children from a detention centre into community foster care. It may also explain the demise of community-based detention through Centacare, when the government was unable to exert the same control as over other forms of detention.

These new policy practices could be turned on or off by political process, carefully controlled to maintain a system of mandatory detention of children.
that was less likely to gain media scrutiny than the policy practices prior to 2002. On the other hand, the changes may have reflected a commitment by the Howard government to deliver a policy that gave greater consideration to the humanitarian *ideal type* than was previously the case. The absence of similar arrangements for offshore detention centres leads to the conclusion that a political motive of putting the policy into a good light may have been the real justification that overlaid considerations of both legal rationality and humanitarian outcomes. Legal rationality (reduced to legal rationalism) may have been simply ‘useful’ instrumentality. Indirectly, these overlaying political motives may have contributed to political gain for the Howard government. This suggestion, however, was not tested in this analysis.
Conclusion to Section 1 — Case Studies
The Howard government justified its refugee policies along four parameters: sovereignty issues, legal-rational process, orderly process, and humanitarian outcomes. From the three case studies in this section emerged a pattern that identified the legal-rational justifications as unevenly dominant among all four justifications. The uneven elevation of legal rationality to dominate the other three policy justifications led to contradictions between the problems that presented themselves to the Howard government, and the way in which it endeavoured to solve them. Where legal rationality was not a sufficient solution to achieve political objectives, the Howard government filled the gaps between verbal policy justifications and on-the-ground practices with other rhetoric. The result was a skew of the rules and procedures of legal rationality, until politically desired goals were achieved. This skew was more consistent with how the Howard government had framed refugee issues, than with legal rationality. Here are some examples.

Right from the beginning of the case studies in 1999, the dominance of legal-rational policy justifications of the Howard government set up a rhetorical, rather than actual, relationship between refugee policy and legal rationality: Refugees were framed as law breakers, even though they had not committed a crime. Consistent with this framing, the international concept of ‘refugee protection’ within Australia’s national legislative framework was uncoupled
from uninvited refugee applicants. The latter was treated primarily as illegal arrivals. Where recourse to legal rationality no longer overcame the contradictions between the policy practices and justificatory language claims, the Howard government used justifications outside of legal rationality, or skewed the rules into another direction until they defied what could be expected from good legally rational practice. This amounted to complaints that invariably led to a conclusion that there should be no investigation. Child experts were hired for the purpose of advising on how to minimise child abuse and neglect, but any advice that was incongruent with the goal of detaining child-refugee applicants was largely ignored. Legal rules were tightly skewed or temporarily disbanded until the resulting practices were consistent with the political goal of keeping refugee boats away from Australia. Unofficial information that contradicted government-controlled information from official channels was disputed, regardless of its truth value. Legal rationality as government rhetoric was coercive some of the time, well practiced when it suited political expediency, and circumvented when it did not. This rhetoric did not bring about consistent and predictable policy practices consistent with any of the four policy goals, but at times generated arbitrariness.

The rhetoric, however, was useful to the Howard government because it placed responsibility for adverse policy outcomes on to legal rationality, whilst legitimating the goals of an ideology that were driving the use of legal rationalism. The Howard government did not state what these other goals might have been – that is of course, other than keeping Australia free of the burden of too many refugees. From the postulates of critical theory, however, one may predict that these goals were related to electoral gain. References to electoral gain were discussed mainly in relation the *Tampa* and the pending 2001 federal election. This issue will be taken up again in chapter 7, where the discussion suggests that it was primarily not a matter of electoral gain, but of framing refugees within a nationalist agenda.
Introduction to Section 2 — Themes
In the case studies, Weber’s *ideal type* model was used to analyse the language claims and behaviours of the Howard government against government defined parameters of “good practice” in refugee policy. This section looks beyond language claims and practices, and investigates the institutional framework that conferred legitimacy and authority to these language claims and practices. The analysis of the three chapters in this section is about how legal rationalism is located within the three institutions of the state: the bureaucracy, law, and public discourse.

How should such analysis be conducted, and is there a basis for extrapolating the legal rationalism argument of the case studies to a process of legal rationalism that informs institutional practices? To begin, it is useful to state why it is now time to depart from Max Weber’s methodology. Weber’s *ideal type* as a heuristic representation of reality was methodologically appropriate for the concrete analysis of the case studies. Much of Weber’s work is taken up with the rational construction of law and bureaucracy, and observation of the *ideal type* and the likelihood of obeying public directives, which may be viewed as an instrumental way of achieving the overall goal of policy legitimation.¹ However,

it has been suggested that Weber’s conceptualisation of the individual choices of actors has “a strong element of relativism” that relies on recourse to individual psychology. Such concern would be less suitable for an exploration of the structural complexities of legitimation. Moreover, the methodological depth of the *ideal type* for an institutional analysis of modern state bureaucracy has also been contested, and it may better fit a hierarchical rule based on military culture, instead of the more complex structure of modern societies.

Without agreeing or disagreeing with the arguments stated in the last paragraph, and whilst recognising that social action is inescapably tied to the behaviour of individuals, I am suggesting that legal rationalism manifested itself as a process that provided a background to these behaviours. It may be more useful therefore to turn to Anthony Giddens’s theory of structuration, which embeds practices within the broader context of social structure in a time-space matrix. One can infer from this that analysing legitimation practices within social structure takes into account the chronological developments and also the social space that these developments occupy. The “space” is made up of the rules and resources within law, bureaucracy and discourse. Giddens states that this time-space organisation constitutes the properties of the system, and that these systemic properties enhance the probability for similar social action to occur in future. The practices themselves are governed by rules and resources, and Giddens calls these rules and resources “institutions”. Giddens argues that the system, which contains these institutions, consists of “reproduced relations between actors or collectives, organized as regular social practices”. Institutional analysis is a matter of “treating rules and resources as chronologically reproduced features of social systems”.

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5 Ibid, pp. 24-25.
The question as to whether legal rationalism exists as an institutional process thus builds on the analysis in the previous section, and relies less on a descriptive analysis of individual rules, legislation, or procedures. Instead, the next three chapters explore the significance of the reflexive changes to the rules and resources that made up the changing framework for the institutions, as the Howard government mapped out the parameters of normativity through its policies. The relationship between this section and the case-studies may be thought of as an interaction between these different social layers, as depicted in the following table.

**Table 2**: The interaction between institutional and policy practices, mediated by the process of legal rationalism.

<table>
<thead>
<tr>
<th>Legal Rationalism</th>
<th>Bureaucracy</th>
<th>Law</th>
<th>Discourse</th>
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<tbody>
<tr>
<td>Woomera</td>
<td></td>
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<tr>
<td>Tampa</td>
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<td>Children</td>
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</tbody>
</table>

The table conveys a potential for an interactive relationship every time there is activity in any one of these cells. For instance, an event on the *Tampa* may lead to structural modifications within the law or to restrictions of how the media informs the public. If such an event is framed in public discourse as an issue that exposes Australia’s vulnerabilities, instead of a refugee issue, such framing may also affect practices pertaining to child refugees and to detention practices.

The question that arises from the conceptualisation of such relationships is the following: does legal rationalism still play a part in the many possible ways in which such interaction may, at least conceptually, occur between practices and discourses represented by the cells in Table 2? In other words, does the process of legal rationalism demonstrate an effect at institutional level that would not be observable, had the Howard government not resorted to legal rationalism?
The previous section began by asking if the Howard government used the law as rhetoric when justifying refugee policies to the electorate. This section asks if there is evidence that such ideological use of the law is observable within the institutions of the state. Should this be the case, as will be argued in this section, then one would expect evidence that legal rationalism is seen not only in policy practices that flow down from the institutions. One would also expect legal rationalism to flow upwards from the policy practices and become legitimated at institutional level. One would also expect the process of legal rationalism to mediate changes within the layers of practice and structure within the institutions. Anthony Giddens expresses this interactive relationship between the reciprocal layers of interaction and change, when he explains the essence of his structuration theory:

The constitution of agents and structures are not two independently given sets of phenomena, a dualism, but represent a duality. According to the notion of the duality of structure, the structural properties of social systems are both medium and outcome of the practices they recursively organise.\(^7\)

In practice, one may expect some ripples from a process that adapts institutional change to the ideology of legal rationalism as a by-product of this process. Anthony Giddens argues that framing leads to contradictions within social structure, contradictions that identify “an opposition or disjunction between structural principles of a social system”, and that these structural separations pinpoint “mechanisms of domination”.\(^8\) In his structuration theory, Giddens assumes a structural contradiction because of the way the state is operating.\(^9\) Giddens argues that these contingencies hold the key to social

change: actors, if they are “are both able and motivated to act”, then these contradictions may manifest themselves as tensions.\textsuperscript{10}

This has relevance for planning the analysis of this section. If contradiction is systematic and occurs as the result of framing practices, as Giddens argues, one may anticipate that legal rationalism creates a tension. Therefore, it is reasonable to ask: does legal rationalism provoke such tension? Should this be the case, how does this tension manifest itself and how is it resolved at institutional level? When answering this question, this section is as much about dominance and power as it is about legal and bureaucratic processes. In order to strengthen the argument that these ripples can be explained by legal rationalism, there will be many instances when the methodology of the case studies will be revisited. The purpose of examining the language claims and practices of the refugee policies of the Howard government in an institutional context is to arrive at a concrete example of an institutional process.

\textsuperscript{10} Ibid., p. 199.
Chapter 5
Bureaucratic Process and Ministerial Power
The purpose of this chapter is to investigate how practices of legal rationalism became routinised into the administrative structure of refugee policy under the Howard government. It is time to ask if the government’s legitimation practices were only surface phenomena, or whether there were also structural concomitants that occupy the bureaucratic space and endure over time. The Howard government frequently claimed that it did not change anything in principle, but only fulfilled its legal obligations in relation to a system that was set up by previous Labor governments. This discussion will show that, although the current structure for refugee policy was set up in the early 1990s, the Howard government significantly altered the practices within this structure by introducing small structural changes with regard to accountability, transparency, and outside scrutiny that gave rise to significant institutionalised practices within the established structure.

Is there a connection between the social relations within the institutions of the state, where public policy is practiced, and with using the law as a rhetorical tool to conduct a public policy that serves the ideology of the government in power? The mere fact of asking this question suggests that such a relationship is anticipated, because it seems implausible that these changes to refugee policy would have occurred without changes at the level of the institutions. The
remainder of this chapter suggests that these changes, grounded in the solid bedrock of statute law, required significant shifts in the type of power that comes from holding a public office, and were implemented through the bureaucracy.

What then is bureaucracy? “Bureaucracy” can be defined as “a diffuse organisation that comprises the public service, magistrates, heads of tribunals and departments.” In this chapter, I shall extend this definition to include the outsourced private companies who conduct these public services on behalf of the government. This includes not only the company that runs detention centres and the companies who build the infrastructure, or the labour hire contract companies who provide staff for the service provider, but also the contractors who conduct migration advice services for the Department of Immigration and Multicultural Affairs. Also included in this definition are those bodies which have a statutory duty to oversee government policy, such as the Ombudsman, the Human Rights and Equal Opportunity Commission, and the Australian National Audit Office. Strictly speaking, they are not the bureaucracy but they are bureaucratic institutions that either enact government policy or act to ensure that the government and the bureaucracy act in an accountable and responsible manner. The reason for including these statutory bodies in this chapter is because their accountability functions are part of the full cycle of public policy, and their recommendations play a part in shaping public policy.

Before beginning the analysis of the structural factors, it is important to understand the noted significance of the Public Service. Bridgeman and Davis provide an outline of the structure of the Public Service. Accordingly, the Public Service is an important part of the state apparatus that carries out public

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policy, largely by controlling the outsourcing process, as it receives policy instructions from government. At the top of Public Service structure is the Secretary, who liaises directly with the responsible Minister. The portfolio of Immigration Minister is a senior position, which is part of Cabinet. Cabinet oversees the structural changes of Public Service departments, allocates budgets through its Expenditure Review Committee, and is responsible for legislation that is outside direct ministerial control. Cabinet, through its Expenditure Review Committee, controls this structure of policy administration through budgetary resources according to policy priorities. Ultimately, the Prime Minister has overall responsibility for the public policy, and appoints Ministers who oversee the implementation of policy by the Public Service or the private sector.

As was the case with previous chapters, this chapter will also focus on the role of government. However, consideration will be given to the power relationships of the bureaucratic departments that execute the administrative features of modern states under the control of an elected government, as identified by Gianfranco Poggi.³

**New practices in a slowly changing structure**

Changes to refugee assessments need to be seen in the larger context of changes to the Public Service that began in the 1970s. These changes developed as the result of ongoing deliberation by successive actors over two-and-a-half decades and only became legally enforceable with the enactment of the *Public Service Act 1999*.⁴ Sections 56 to 57 of the Act give insight into these changes. Accordingly, each department was subsequently headed by a Secretary

who directly advised and provided information to the Minister. Security of tenure disappeared and the Prime Minister appointed, or removed, the departmental Secretary. The outcome was greater control by government over the Public Service than had previously been the case.

Before commenting on refugee policy, I wish to discuss the restructuring of the Public Service from the 1980s onwards, because these broader changes shaped the structure for the administration of refugee policy under the Howard government. The literature suggests that these changes began with economic and political changes, and led to greater control over the Public Service by Parliament. These changes translated into greater political control. Howlett and Ramesh, for instance, argue that in 1995, approximately twenty years after the beginning of these changes, the Public Service was still in a position to meet its own preferences by steering politicians into policy decisions, by either providing or withholding crucial information. 5 However, Howlett and Ramesh suggest that although the federal Ministers have the statutory authority to appoint the heads of each Public Service department, the structure still preserves “a degree of autonomy from both the Executive and the legislature”. 6

Greater control of politicians over Public Service appointments was certainly the stated goal of the Hawke government. 7 Michael Keating suggests that these changes in control and mergers of departments may be viewed as a positive development in that it removed some factional interests and overlap in responsibilities, made departments more cost effective, and allowed for direct

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departmental representation to Cabinet through the Minister.\(^8\) Other writers were concerned about the potential impact that these changes may have on individual autonomy and the potential abuse of power by bureaucrats.\(^9\) The new structure was set up in a way that allowed for further structural changes to occur more quickly and easily, and led to greater scrutiny of government departments by Parliament and by statutory investigators.\(^10\)

There is debate over when these structural changes to the Public Service were completed, or even if they have been completed. Scott Prasser for instance argues that by 2003, the wave of the structural changes from the 1980s had stopped, that reform was off the agenda, and that independence of advice had become subsumed by political control and reluctance by public servants to advise government of unfavourable matters.\(^11\) Other writers argued that these changes brought the Public Service under direct Prime Ministerial control, and constrained Public Servants from giving unbiased or politically neutral advice on policy matters.\(^12\) There was also argument that the removal of safeguards against potential personal repercussions brought the Public Service under greater government control and may lead to the suppression of policy advice that did not conform to the Minister’s intentions.\(^13\) However, this position is contested, for instance by Patrick Weller who argues that the replacement of the Secretary when a new Minister takes over a Department may be viewed in the light of more personal, rather than political factors - not in the sense of

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\(^12\) Stewart, "Public Sector Management." pp. 77-78 and p. 83.

nepotism but in the sense of being able to work effectively with the person. 14 However, there seems to be a general agreement in the literature cited above that the Public Service changes resulted in greater control by government over the Public Service.

These larger changes within the broader Public Service accompanied two broad changes in refugee policy: ministerial delegation of duties within the bureaucracy and concomitant limitations on independent review of this process. This became apparent as early as 1989, which marks the beginning of the statutory delegation of duties for the processing of refugee applications. 15 Germov and Motta describe the new three-tier system of decision-making that became operational in 1990. 16 Accordingly, there was first, an initial (“primary”) decision that was, second, followed by a review of rejected applications. Third, there was a final review by the Immigration Minister to allow those individuals to stay in Australia who were not accepted as refugees, but who had compelling humanitarian reasons for leaving their country. This replaced the old system where the Minister personally decided on all refugee applications. Under the changes since 1990, the Minister retained the option of final discretion, including the discretion to overturn refugee decisions made within the system of delegated powers.

The process for review and appeal of unsuccessful refugee applications was also delegated to the bureaucracy, with the Minister exercising final control over the decisions. Germov and Motta continue that the Refugee Review Tribunal (RRT) was established in 1993 to deal with rejections at the primary stage “according to the requirements of substantial justice and the merits of the individual case”. 17 Under the current system, a delegate of the Minister, who is

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16 Ibid., p. 72.
17 Ibid., p. 74.
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an officer of the Department of Immigration and Multicultural Affairs, makes
the primary decision, which can be reviewed by the RRT.\textsuperscript{18} The legal authority
for ministerial intervention is in the \textit{Migration Act}. According to the legislation,
the Minister may exercise discretion and make a more favourable decision than
that made by the Migration Review Tribunal.\textsuperscript{19} Similar provisions exist for
decisions of the Administrative Appeals Tribunal.\textsuperscript{20} This decision cannot be
delegated must be exercised personally by the Minister, is not reviewable and
the Minister is not compelled to exercise such discretion or even to intervene.\textsuperscript{21}

There are potential problems with ministerial veto powers over a process that
is intended to be fair and independent. The non-compelling and non-
reviewable aspects, as Don McMaster points out, “could be used to adapt
migration law to their own political ends”.\textsuperscript{22} McMaster’s comments also give
insight into the close relationship between political process and legal,
bureaucratic and policy practices; a relationship that is explored in this chapter.

The second change to refugee policy curtailed the role of the courts in the
decisions of the determination process, through the establishment of quasi-
legal tribunals. Germov and Motta summarise these changes:\textsuperscript{23} The passing of
the \textit{Judicial Review Administrative Decisions) Act 1977}, which began operation on 1
October 1980, facilitated judicial review of refugee decisions in the newly
established Federal Court. Accordingly, decisions could be reviewed in the
Federal Court on the basis of error of law. In addition, as has been the case
since Federation in 1901 and guaranteed by the \textit{Constitution}, review on
constitutional grounds was also possible in the High Court. The merits of the
case could not be reviewed in the courts. In 1992, changes were introduces to
limit the reasons for judicial review in the Federal Court, but did not affect
review on constitutional grounds by the High Court. In 2001, changes to the

\begin{footnotes}
\item[18] Ibid., p. 83.
\item[19] \textit{Migration Act 1958} (No 157 (2001 as amended), 1958. Section 351
\item[20] Ibid., Section 391.
\item[22] Don McMaster, \textit{Asylum Seekers. Australia’s Response to Refugees} (Melbourne:
\item[23] Germov and Motta, \textit{Refugee Law in Australia}, pp. 84-85.
\end{footnotes}
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Migration Act further restricted review by the Federal Court and the High Court, prevented class or representative actions in the Federal Court and the High Court, and introduced the privative clause. The privative clause had such massive impact on the process that it will be discussed in the next section.

It becomes apparent from the above overview of the structural changes to the refugee determination process, and to the limitations to judicial review of this process, that these changes were put in place by Labor and Coalition governments over one-and-a-half decades. The task of this chapter is to analyse how, or if, the power shift assisted the development of legal rationalism.

Power within political structure

With these policy and legal changes in mind, it is now time to look at the whole of human agency in the changed power relationships within the institution of bureaucracy. To Giddens, agency becomes evident by the capacity to effect choice. To put it in Giddens’ words: “An agent ceases to be such if he or she ceases to make a difference”. It seems from the discussion in this chapter so far that the central agent for defining refugee policy and the guidelines for making decisions under this policy are members of the Howard government. It should be remembered, however, that public policy always occurs in a climate where stakeholders push the legitimacy of their own agendas, and government may search for common ground, or stall until consensus emerges, but eventually exercise leadership in this process.

Here are a few words about the power of agency in state structure. Examples of human agency on the part of government officials have been discussed in the case studies, where power was exercised to achieve policy outcomes that operate at the level of policy practices. There were examples of how agency resulted in exercises of military power, in the power to control information, or in the power to influence the work of professionals practicing in detention centres. Power, when it affects outcomes, is not expressed in this thesis as hierarchical – but as a diffusive layer that influences other practices. This power is communicated from the state structure to policy practices in several ways: first, through though professional and technical expertise, second, on the interpretation of the details of delegated legislation, regulations, bylaws, or ordinances. According to John Uhr, political analysis does not lose sight of the political context of these variables and also distinguishes between formal government powers and actual practices. Uhr continues that practices may change without an accompanying change in formal power, and one must not overlook the influence that informal practices may have on institutional performance.

However, there is also a more subtle form of power that assists the legitimation process identified by Habermas. It is a power that relies on legitimating public policy not by coercion, but by argumentation. This power links human agency with political process. Cerny views the political process in state structure as consisting of two key elements: inclusion and control. According to Cerny, both are controlled by the political executive, who control the “apparatuses of the state”, and which includes control through the means of budget allocations and appointments. Giddens, on the other hand, defines power as a neutral concept; nothing more than “the capacity to achieve

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27 Bridgman and Davis, Australian Policy Handbook, p. 73.
outcomes, “a force that changes as structures of domination keep changing.”

Neutrality thus means that power is all pervasive, perhaps at times unseen and not noticed. Yet, as Giddens observes, power is there and is integral to the outcome of social action: “There is no concept more elemental than that of power … Power is the means of getting things done and, as such, directly implied in human action”. In this thesis, the concept of power is used in the non-coercive and all-pervasive form, as described by Giddens, where power is not imposed, but a necessary concomitant of all government action.

Kerry Carrington’s discussion of ministerial interventions in refugee decisions is an example of the exercise of power within the structure of bureaucracy. The figures quoted by Carrington also give insight into the humanitarian impact of the changes to refugee policy after 1999. In the cited paper, Carrington argues that ministerial interventions, where the Immigration Minister has offset the harsh impact that legislation would otherwise have had on refugee applicants, have increased considerably since the Howard government took office in 1996. Such conclusion, however, may be misleading when the raw data are taken into account. In the cited article, Carrington compares ministerial intervention decisions of Labor Immigration Ministers between 1992 and 1996 with those of the Coalition Minister between 1997 and 2000. Figures quoted by Carrington reveal 303 positive decisions by a Labor minister after rejection by the Refugee Review Tribunal (RRT), and 1,562 positive decisions by a Coalition minister for the respective timeframes. However, a different picture emerges when one converts Carrington’s figures to percentages. Then, the rate of ministerial interventions remains similar: just under 3 per cent approval under a Labor, and about 3.1 percent under Coalition government. These percentages, however, are offset when one takes into account the sharp increase in negative RRT decisions under the Howard...

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31 Ibid., p. 283.
33 See Appendix C, Figure C1.
government, which Carrington also quotes. Then it becomes apparent that over 51,400 RRT applicants missed out under the Coalition government, compared with slightly less than 10,000 individuals under Labor.

The institutional power of the Immigration Minister can be inferred from the size and influence of the Department of Immigration and Multicultural Affairs (DIMA). The DIMA website reveals that this government department is responsible for the processes and practices of refugee determination, and controls all aspects of this process. Accordingly, primary refugee decisions are made by DIMA, and this function necessarily has a structural relationship with the appeals process. DIMA was established in 1945. The website also reveals that in September 2003, when this information was downloaded, DIMA employed about 3,680 people in Australia and overseas. In practice, many more people are involved in the operations of the Department because some services are outsourced through contracts. Other responsibilities include the monitoring of legitimate entry to and departure from Australia, detention of individuals and their removal and deportation from Australia, as well as the overall management of refugee claims and appeals. The Department has its own Corporate Division, a division for Litigation and Legal Services, and its own media division.

Through changing the structure of migration advice, the Howard government reduced the influence of the courts and enhanced its own influence over the process. One example is the establishment of the Migration Agents Registration Authority (MARA). In 1998, legislation prevented all people, including lawyers and barristers of the High Court, from giving migration advice unless they fulfilled MARA registration criteria. MARA is a statutory body that regulates the registration of Migration Agents and investigates

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complaints against them.\textsuperscript{35} There are hefty registration fees (initially $1,760, and $1,595 annually thereafter) and education requirements to maintain this registration.\textsuperscript{36} Whilst Migration Agents act independently, and MARA is an independent statutory body, the process is not immune from government control. DIMA contracts Migration Agents to give independent migration advice, generally through subcontractors.\textsuperscript{37} In a competitive market of tendering, the dependence on DIMA for employment in a relatively limited area, and bearing in mind the time, money and effort required to achieve and retain registration with MARA, one gets a sense that such process of refugee determination is not entirely independent of the wishes of the Howard government. It is highly unlikely that such “requirements”, should they exist, are ever spelled out as a requirement for maintaining employment, but are more likely conveyed as tacit knowledge through working culture among migration agents.

Whilst migration agents had the independence of their decision-making guaranteed by law, the scope for such decision-making became increasingly narrow. This occurred as the result of changes by the Howard government about how the decision-making rules were interpreted and implemented. Alex De Costa traces a process whereby after September 2001, the government took steps to decrease the number of positive outcomes in refugee determination decisions, and how these rejections led to an increasing number of court appeals.\textsuperscript{38} Da Costa cites the case of Mrs Sarrozola, which Immigration Minister Philip Ruddock used to convince Parliament of the merits of a narrowed interpretation of refugee claims. Accordingly, the Minister told Parliament that a drug dealer was assassinated in Columbia because he owed $40,000. The assassins subsequently alleged that the sister of the dead man, as

\begin{itemize}
  \item \textsuperscript{35} Department of Immigration and Multicultural Affairs. 2003, 19 August. \textit{Fact Sheet 100. Migration Agents Registration Authority.}
  \item \textsuperscript{36} Migration Institute of Australia. 2005. \textit{Migration Agents Registration Authority. [Website].}
  \item \textsuperscript{37} Department of Immigration and Multicultural Affairs, \textit{Fact Sheet 3.}
\end{itemize}
the only surviving relative, was responsible for payment and threatened to harm her children if she did not pay the debt. Mrs Sarrozola feared that she and her family would encounter persecution if they returned to Columbia and based her claim to refugee protection on belonging to a particular social group, her family. Additional complication came from the fact that the persecution was conducted by private individuals, who were not government officials. Da Costa, in the cited article above, describes the story of Mrs Khwar, where police in her home country turned a blind eye to the domestic violence to which she was repeatedly subjected. Mrs Khwar claimed persecution as the result of belonging to a social group, which essentially related to her being female and being born in Pakistan.

There was no doubt that both women were persecuted. Da Costa continues that in both cases, the High Court deliberated over whether such persecution satisfied the requirements of the *Convention Relating to the Status of Refugees*, and whether the Refugee Tribunal (RRT) had applied the correct legal test to assess refugee status. Da Costa considers the different decision-making criteria over refugee decisions as a source of the tension between judges and the Executive. Officials of the Department of Immigration and Multicultural Affairs and the RRT make refugee decisions based on their delegated duties as limited by parliament, which is narrower than the interpretative power of judges within the institution of law.

There is, however, another side to the debate, as presented by Justice Sackville.\(^{39}\) According to Justice Sackville, the tension between the judiciary and the Executive occurs for several reasons: first, from non-reviewable administrative decisions; second, from the highly publicised context about a large number of litigation cases over the last twenty years; third from the stipulation in the *Convention Relating to the Status of Refugees* that refugees may

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arrive in a host country “by whatever means”; and fourth, from the frequent passing of statute law by Parliament in response to judicial decisions. Justice Sackville argues that this cat-and-mouse game between the judiciary and Parliament has ushered in “the constitutionalisation of refugee law in Australia” and moved judicial review into a legal area (that of constitutional law), with is outside the legislative authority of the Executive.\textsuperscript{40}

In the article cited in the previous paragraph, Justice Sackville referred to a process that increasingly restricted the jurisdiction of the courts to decisions over whether or not matters pertaining to the refugee determination process had breached the Constitution. The conflict between the courts and Parliament also became notable during the post-\textit{Tampa} legislation, as was noted in Case Study 1 — \textit{Showdown at Sea: The Tampa}. Then, refugee policy became increasingly framed as immigration policy, with a focus on immigration intake rather than refugee protection, and was increasingly open to ministerial discretion.\textsuperscript{41} For the government, the bureaucratic process was easier to control than legal processes and agency of the legal system. It translated into institutional practices where the Minister could determine the process, appoint key agents, override all decisions, and issue directives. Against this structural background, and with fewer lawyers in the process, questions were raised about the integrity of the process. Carrington concedes that this discretion of process has invited criticisms.\textsuperscript{42} James Jupp suggests that the review system would have more credibility if it were conducted independently from DIMA, and transferred to the Attorney-General’s department.\textsuperscript{43}

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\textsuperscript{40} Ibid., p. 43-44.
\textsuperscript{41} Don McMaster, "Asylum-Seekers and the Insecurity of a Nation," \textit{Australian Journal of International Affairs} 56, no. 2 (2002).
\textsuperscript{42} Carrington, \textit{Ministerial Discretion in Migration Matters: Contemporary Policy Issues in Historical Context}.
Excluding the judiciary

The purpose of this section is to highlight the structural tension between the judiciary and Parliament, as refugee assessments were increasingly brought under the political control of the Howard government. It was noted in the introduction to this section that Giddens’ structuration theory predicts that tension occurs within state structure. According to Giddens, such tension occurs directly from the way the State is operating. 44 Structuration theory assumes that contradictions are systematically built into the structure of the state and exist as “fault lines” that are not necessarily problematic, but that do manifest themselves as tensions. 45

However, how does one detect the faultlines? Bevir, Rhodes and Weller argue that tensions within bureaucratic structure can be traced through “nodal points”, and that tension manifests itself through a “dilemma”. 46 They suggest that a dilemma may take the form of an event or a theoretical crisis that clashes with the belief system of political actors. Bevir, Rhodes, and Weller illustrate this nodal tension and its resolution through an example: the then-accepted constitutional meaning of the role of British Parliament in relation to public law clashed with the separation of powers doctrine under the Westminster system. The dilemma was resolved when a new interpretation downplayed the previously dominant interpretation of ministerial accountability, and instead highlighted the “emphasis on executive power and the role of the Executive as the guardian of the national interest”. In this example, the newly established doctrines moved in a different direction, but without clashing with the traditional belief system.

One clear node of tension consistently identified throughout this thesis is in the relationship between the Executive and the courts. The case studies gave concrete examples of the faultlines played out in policy practices. These faultlines, it is suggested here whilst drawing on the work cited in the previous paragraph, were overcome through framing practices that were consistent with the ideology of legal rationalism. It will be argued shortly that these dilemmas were resolved by changing to a structure that was dominated by a bureaucratic model of decision-making in the refugee determination process.

Structuring to exclude

First, we shall explore the transfer of decision-making from the courts to tribunals. The second step, the introduction of a legislative model that enhanced the process of preventing cases from getting to the courts, will be discussed in the next section. As the new system increasingly came under government control, basic legal principles that applied to citizens were removed from the refugee decision-making process that applied to refugee applicants.

Susan Kneebone describes a process where refugee application decisions eventually became administrative decisions under the Migration Act, “where the satisfaction of the Minister became the overriding consideration”.

To illustrate this, Kneebone cites two cases where the judges ruled not in favour of natural justice, but in favour of another legal principle, that of “administrative convenience”. According to Kneebone, this was achieved by taking into account the importance of “streamlining of administrative

48 Ibid., p. 367.
procedures” and the importance of “reducing economic costs to the government”. Kneebone comments on the significance of such changing principles.49 First, the courts applied a legal principle that “is based upon the concept of a closed community, which could be applied to exclude non-citizens”. Second, Kneebone observes that decisions which rule in favour of administrative convenience, however, came at the cost of “excluding some categories of non-citizens” from “the universal principles of natural justice”.

The cases that established the changing principles that Kneebone refers to, were heard in 1993 and 1994.50 The shift toward an administrative model with different rules thus was well in progress before the Howard government came to power in 1996. Mary Crock observes that by 1992, almost all migration decisions were removed from the courts, and access to the judicial overview of this administrative process became more and more limited.51 Mary Crock notes three major legislative changes to the Migration Act; in 1989, 1992, and 1994, followed by a gradual transfer of power from the courts to an administrative model.52 Crock suggests this administrative model became structurally narrow; resulting in the removal of the power of judges interpreting how the law applies and applying the law according to precedent. The bureaucratic decision-makers did not have these powers of interpretation. Their duty was instead to apply the law without resorting to precedent.

49 Ibid., p. 379.
Mary Crock argues that judicial oversight of administrative law matters strained the relationship with the parliaments “over the role of judicial review in the control of migration decision-making”. Crock wrote in 1993:

> It is difficult to underestimate the resentment that the courts appear to have engendered first in the bureaucracy, and then in parliament. Through their interpretation of the law, the courts were seen to be usurping the policy-making role of parliament, and threatening the very fabric of immigration control. Put in crude terms, the courts were seen to be letting in people that the government, acting through the bureaucracy, wanted to keep out.\(^5^3\)

If there were resentments, the structure was increasingly set up to resolve tension through a legal-bureaucratic approach by shifting the parameters for decision-making. Whilst the Howard government did not set up this structure, one gets a sense that this new structure was not antagonistic to the government’s framing practices of refugees that were observed in the case studies. Moreover, the structural changes from 1989 onwards gave greater control to the government. The question for this and for the next chapter is: did human agency under the Howard government utilise this structure to conduct institutional practices that were driven by the ideology of legal rationalism? If so, how did this occur?

Amendments to the *Migration Act* in 1989 gave rise to “one of the most highly regulated systems of public administration ever seen in Australia”.\(^5^4\) The policy of mandatory detention became law with the passing of the *Migration Amendment Act* in 1992. This resulted in measures to place into custody all refugee applicants who arrived after 19 November 1989, if they were not detained already.\(^5^5\) Six years later, after the Howard government had been in power for two years, Mary Crock observed:

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\(^5^4\) Crock, “A Legal Perspective on the Evolution of Mandatory Detention,” p. 27.

\(^5^5\) *Ibid.*, pp. 33-34.
The most striking feature of the present system when compared with the earlier regime is the extent to which discretions are confined. The government's policy is no longer exclusively in the form of guidelines, but has been reduced into law through the medium of subordinate legislation. The Act, together with the Regulations, set out exhaustively the steps that must be followed and the criteria that must be applied in order to make lawful migration decisions. Even the Minister's power to decide a case outside the rules set by the legislation is strictly confined.\textsuperscript{56}

The citation above suggests the Howard government established control through micro-legislation that micro-managed the parameters for decision-making. Another development, as was noted earlier, was structural changes that guaranteed the independence of the decision-makers by statute. However, the scope for such independence and for exercising discretion was limited by other statutes. Concurrent with these changes, other significant developments occurred. It became increasingly difficult for refugee applicants to access the court system, as will be discussed in Chapter 6 — \textit{Politicisation of the Law}. Other structural changes discussed later in this chapter consisted of limiting the powers of two statutory advocacy bodies: the Human Rights and Equal Opportunity Commission and the Ombudsman.

Within the changing structure of governance, the growth of tribunals reflected a growing trend to increase the power of administrative bodies and to bypass the courts system. This structural change reflects an international trend. Members of the \textit{Council of Australasian Tribunals} include sixty-one tribunals from Australia and New Zealand, including the Administrative Appeals Tribunal, Migration Review Tribunal, and the Refugee Review Tribunal.\textsuperscript{57} On its website, the \textit{Council of Australasian Tribunals} stated that tribunals have increasingly replaced courts in order to produce “a range of determinative functions” that “achieve justice in terms of individuals’ relationship with Government as well

\textsuperscript{56} Crock, \textit{Immigration and Refugee Law in Australia}, p. 42.
\textsuperscript{57} Council of Australasian Tribunals. (2002-2005). \textit{Register of Member of Tribunals} of COAT. [Website].
as each other”. Its objectives are to establish a national network and register of tribunals and its members, with agreed standards of practice, performance and behaviour, the training and support of its members, education and publications, close links to the tertiary education sector, and advice to government “on tribunal requirements”. Within this structure, potentially all decisions by government departments can be made by tribunals.

According to its website, the umbrella organisation for Australian tribunals is the Administrative Appeals Tribunal (AAT). It is a statutory body under the portfolio of the Attorney-General, and addresses refugee matters under Section 7 of the Migration Act. The AAT commenced operation in 1976 amid other changes to the Public Service structure that attempted to overcome the lengthy and costly way of arriving at decisions through the courts. Its role is “to provide independent merits review of administrative decisions”. Its members are public servants appointed by the Immigration Minster. The AAT hears appeals to refugee decisions that are not resolved by two lower bodies: the Refugee Review Tribunal and the Migration Review Tribunal.

Several tribunals were set up for the purpose of overseeing refugee determination decisions, with an emphasis on minimising government discretion. The Refugee Review Tribunal, formed in 1993, is the first avenue of appeal. “Its main function is to review decisions made by the Department of Immigration and Multicultural Affairs (DIMA) to refuse or cancel protection visas to non-citizens in Australia”. Included in this appeals structure is the Migration Review Tribunal, which deals with issuing and cancellation of visas. Although the Migration Review Tribunal and the Refugee Review Tribunal

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58 Ibid.
63 Refugee Review Tribunal, About the Tribunal. [Website].
operate independently, they are parts of DIMA “with staff employed under the Public Service Act 1999 which operate with some degree of independence ... but which are not separate APS agencies as defined in the Public Service Act”.64 Thus, Australian tribunals that address questions of refugee determination retain a strong structural link with the government.

Safeguards that initially guaranteed independence of the appeals bodies were gradually removed. In line with other Public Service changes, there was downgrading of status and salary, and the removal of tenure of AAT members. Since the Migration Reform Act 1992, courts could only arbitrate over errors of law, not on the merits of a case. Krause and Knott discuss some implications of these changes.65 They indicate that the Minister can override refugee decisions of the RRT and the MRT, and issue directives, and this has the potential to affect the independence of the process. Officials of the Refugee Review Tribunal are not required to hold a legal qualification. Krause and Knott argue in the citation above that this may “adversely affect the quality of the Tribunal’s decision-making”, complicated by the fact that legal error is not grounds for review. The authors claim that reviews are not independent of the Executive but form part of its structure. Moreover, this occurred in an environment where legislation led to an interpretation of statutes toward the removal of rights of asylum seekers, which moved the system toward government control.66

Administrative structures that resolve disputes and determinations in a cost-saving and time-efficient manner have their merits. However, when such structures are weighted against the likelihood of successful refugee applications through “relaxing” notions of fairness and process on the one hand, and greater government control on the other, a different picture emerges. The

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64 Commonwealth of Australia. (2005). Australian Public Service Agencies [Website, Adelaide Skilled Processing Centre].
66 Ibid.
emerging picture is one of structural concomitants that enable the pattern of legal rationalism that was arguably observed in the case studies. This structure may even explain the strategy of some refugee applicants to exhaust all avenues of appeal and explore legal loopholes; a strategy of which the government was critical.67

As part of legislative changes that were designed to prevent cases from reaching the tribunals, the government put up barriers that made it more difficult for applicants to file an appeal. Since July 1997, applicants had to lodge a $1,000 fee for appealing to the Refugee Review Tribunal. Applicants recovered their costs only if the appeal was successful. Since 2001, the barriers to filing appeals have been enhanced. A time limit was imposed that required detained applicants who to lodge an appeal within seven days, and present all material in English, translated by an accredited translator. This presented difficulties for applicants, especially in remote detention centres, where it was difficult to access lawyers and interpreters in a timely manner.

One can infer the potential for the development of nodes of tension, as described earlier by Bevier and Rhodes and Weller, not only within the structure of refugee decision-making, but also within the larger structure of the state. Some of this tension was observed in the case studies, where framing practices and policy practices were adapted to bring about policy goals that enhanced an exclusionary refugee policy. It is suggested here that such tension was partly overcome at the level of structure through changes toward a dominant administrative model, and through the potential for political control of decisions within this structure. This legal-bureaucratic structure allowed for power to flow through the statutes of the administrative model.

Once government control over the structure became almost complete, it was a matter of resolving structural tension through changing legislation; not in the politicised manner that reflected the language of framing practices described in the case studies, but through incremental changes over approximately three decades. These changes established a process of colonisation at system level, where bureaucratic power under political control gradually dominated the independent model of judicial decision-making. It should be noted in passing that this interpretation goes against the classic Habermasian conception of the system colonising the lifeworld. Here I am suggesting that a particular systemic understanding of law and politics colonised the systems world.

Exclusionary legislation

It is now time to address the second part of the structural change that contributed to creating an environment where institutional practices could occur that were not antagonistic to an ideology of legal rationalism. However, this discussion addresses the legislative changes that brought about the structural shift to an administrative model, and does not include the micro-legislation that guided the refugee decision-making per se.

Perhaps the most direct attempt by the Howard government to change the structure of oversight was through introducing the privative clause. The purpose of this legislation was designed to put actions of individuals, who carried out relevant government policies, beyond the reach of the courts, except with permission from Parliament. The application of this legislation went beyond the actions of officers in relation to refugee boats, as discussed in Case Study 1 — Showdown at Sea: The Tampa, but included the decision-makers who operated under the delegated powers of the Minister. The privative clause thus included the administrative decisions within the Department of
Immigration and Multicultural Affairs and the independent tribunals. Section 474 of the Migration Act stipulated that issues related to the Constitution remained under the jurisdiction of the High Court.68 This allowed only the constitutional matters that may arise from such decisions to be decided in the court, but kept issues pertaining to the refugee decisions within the tribunals and out of the courts.

The Migration Act specifies that only the Minister had the power to override the privative clause and authorise a case to get to court.69 Germov and Motta argue that this “means that the Minister has effectively reserved the right to declare which decisions will be judicially reviewable”.70 Legal commentators pointed out other anomalies. Although the privative clause was “final and conclusive”, the Migration Act identified areas of jurisdiction for the High Court and the Federal Court in relation to the privative clause.71 One may assume that the definitive wording of the privative clause and the conferring of a gatekeeping authority to the Minister by statute heralded the end to most court cases. In fact, the opposite came to pass. In the year after introduction of the privative clause, in 2002-03, there were “2131 applications for constitutional writs” filed in the High Court, most of which were about migration matters.72 The more restrictive and exclusive the rules became, the greater the incentive for refugee lawyers to challenge those areas that the rules had not specified as exclusion criteria.

68 Migration Act 1958 No 157 (2001 as amended), 1958. Section 474 (1) states: “A privative clause decision is (a) final and conclusive, and (b) must not be challenged, appealed against, reviewed, quashed, or called into question in any court, and (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account”.
69 Ibid.
70 Germov and Motta, Refugee Law in Australia, p. 708.
72 Creyke and McMillan, Control of Government Action. Text, Cases & Commentary, paragraph 2.2.20, p. 45.
Caron Beaton-Wells suggests that these challenges achieved the opposite of what the Howard government intended to achieve. According to Beaton-Wells, the government transferred the jurisdiction of most migration cases from the High Court to the Federal Court and provided eight additional Federal Court magistrates. In the cited article, Beaton-Wells argues that this began in 1993 and therefore reflects changes implemented by several federal governments to stop “clogging” the court system - “an acknowledgement by the government of the limits on its capacity to place substantive restrictions on judicial review”.

One clear node of tension that has been consistently identified throughout this thesis is in the relationship between the Executive and the courts. It is possible that to the Howard government, the privative clause seemed a reasonable way to remove this tension by legislating for situations that would keep the courts out of the process. The post-Tampa legislation was the third attempt by the Howard government to introduce the privative clause. Mary Crock notes a first attempt, where Immigration Minister Ruddock proposed a privative clause as early as 1997. Germov and Motta note a second attempt in 1999, three years before the Tampa, to resolve the tension. They note that the Minister framed refugee determination as “a threat to Australia’s national sovereignty and their [the government’s] ability to decide who enters and remains in Australia” as a “domestic concern, rather than as a requirement under Australia’s international obligations”. However, it is arguable that the arrival of the Tampa in August 2001 significantly contributed to the writing of statute law that resolved a structural tension - a tension in the legal-administrative system over the framing of refugees as a threat to sovereignty under domestic law that collided with the tension of framing refugees as bearers of rights to protection under international law. The Howard government’s third, and successful, attempt at

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74 Ibid.
75 Cited in Crock, Immigration and Refugee Law in Australia, p. 294.
76 Germov and Motta, Refugee Law in Australia, p. 721.
introducing the privative clause resolved the tension, because the requirement for approval by government over when and how the judiciary would address disputes had become part of the legal apparatus.

As Mary Crock observed in 1998, this tension, from a legal perspective, came from attempts to shut off curial inquiries into the legality of refugee decisions. Crock correctly predicted in 1998, three years before the passing of the privative clause, that such a clause would only be final on the factual nature of the inquiry, not on a matter of law. Administrators do not have the powers to interpret the law; only judges do. Making the privative clause part of domestic legislation, therefore, may be seen as an attempt by the Howard government to limit when instances of judicial interpretation may come about. Justice McHugh articulates some reasons for this tension. McHugh suggests that the Executive believes the courts often do not take into account a broad picture that confronts policymakers, and that courts are pedantic about procedures. However, Justice McHugh argues in the cited article for maintaining independence of decision-making, because members of an administrative tribunal “do not have the same security of tenure and independence of judges”. As Germov and Motta suggest, the prospect of judicial review leads to more careful decision-making at the level of the tribunals and thereby ensures a “consistency of approach concerning how the law is applied” that “cannot be achieved by administrative tribunals”.

Overcoming this tension by keeping cases out of the legal system and retaining them within the bureaucratic system of appeal tribunals illustrated a flow of power from one system to another. It also illustrated how one system displaced another system within state structure. Such displacement of one area, and replacement with another, may be conceptualised as colonisation, in the sense

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77 Crock, Immigration and Refugee Law in Australia, p. 294.
78 Michael McHugh, "Tensions between the Executive and the Judiciary" (paper presented at the Australian Bar Association Conference, Paris, 10 July 2002).
79 Germov and Motta, Refugee Law in Australia, p. 723.
that Habermas uses the word. In his colonisation thesis, Habermas argues that the rationality of a social system can become so mechanised that it displaces the considerations that underpin normativity. According to the theory, there comes a point where the rationality of a specialised system gains “more and more independence from normative contexts” of society, until this rationality becomes replaced with rationalism. At this point, the rationality of “system imperatives” replaces these normative contexts with the logic of the system. The problem arises, according to Habermas, when system logic overshadows the capacity for citizens to debate and contest what is normative in society, so that the “systemic mechanisms suppress forms of social integration”. The problem here is not rationality, but a “rationality” that, devoid of normativity, takes on an existence of its own and is valued for its own sake.

According to Habermas, the direction of colonisation moves from the system to the lifeworld, where the mechanised system replaces the values of the lifeworld. However, the findings of this thesis suggest that colonisation may occur within the system itself, where the bureaucratic system colonises part of the legal system, under the driving force of political process. A similar suggestion will be made in the next chapter, where it is argued that part of the legal system has “colonised” itself. In both instances, colonisation arguably arises from attempts to exercise government power through the structure of the state, without resorting to coercion. Instead, it was a matter of building a structure, and then introducing into this structure legislation that achieved the ideological goals of the Howard government. In this sense, ideology was driving both the legislation and the institutional practices. Whilst the discussion can reflect only on the Howard government, it is likely that this mechanism of colonisation is systemic to democratically elected governments, at least under

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81 Ibid., p. 155.
82 Ibid.
83 Ibid., p. 196.
certain conditions. Suggestions for this assumption come from the bipartisan attempts by Labor and Coalition governments since 1989 to colonise the legal system. This may reflect a systemic tension between governments and the judiciary in all Westminster democracies consequent to the rise of neo-Liberalism.

Normativity necessarily includes the relationship between government and citizens, because government writes the statutes that set the parameters for normative practices. The limiting factor on how governments exercise their power over their citizens is in the Constitution of the state. Mary Crock describes how the Constitution gives every citizen the right “to seek judicial review of the decision of federal officials”, thus ensuring the scope for judicial review over the action of government officials in the High Court. 84 This includes officers who deal with migration cases, and means that some migration cases will always be reviewable in the High Court. As discussed earlier, these cases deal with the legal, not with the substantive part of the decision. From this perspective, refugees may always be viewed as outsiders because they are not citizens. However, questions of citizenship are not paramount in this process, as suggested by Creyke and McMillan. 85 They write that the Constitution stipulates, and there is also precedent in common law, that the actions of “an officer of the Commonwealth” can be reviewed in the High Court. Not surprisingly, some authors did not discount the possibility that the Howard government’s statutory restriction through the privative clause may result in a constitutional challenge – a challenge that was likely to cause further antagonism between Parliament and the judiciary; an undesirable situation in a system of separation of powers for reasons of accountability. 86

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84 Crock, Immigration and Refugee Law in Australia, pp. 276-77.
85 Creyke and McMillan, Control of Government Action. Text, Cases & Commentary, paragraph 2.2.3, p. 40.
However, the tension discussed in the previous paragraph dissipated before it escalated to a constitutional challenge. Instead, the privative clause was rendered ineffective in a landmark case that determined how the privative clause should be applied.\footnote{Plaintiff S157/2002 v. Commonwealth of Australia HCA 2 (4 February 2003). (2003). See section on Questions and Answers 1 and 2.} One forerunner to this decision was the joint verdict on appeals in five court cases of the previous year, where the full bench of the Federal Court established that the privative case was not to be taken literally, but should be read in conjunction with the Hickman principle.\footnote{David Bennett, "Privative Clauses — Latest Developments" (paper presented at the Aial Forum, Canberra, 27 Aug 2002), Endnote 1. Bennett refers to the following case: NAAV v. MIMIA, NABE v. MIMIA, Raturnivrai v. MIMIA, Turcan v. MIMIA and Wang v. MIMIA (2002) FCAFC 228. (2002).} The Hickman principle, on which the decision was based, stipulates that administrative decisions are valid, provided such decisions:

- constituted a \textit{bona fide} attempt to exercise the power conferred on the decision-maker;
- related to the subject matter of the legislation;
- was within the power of the decision-maker; and
- did not breach an inviolable statutory constraint.\footnote{Germov and Motta, \textit{Refugee Law in Australia}, p. 725.}

The verdict of the case colloquially known as \textit{s157}, the case that neutralised the privative clause, limited judicial review to violation of the Hickman principle.\footnote{“Plaintiff S157/2002 v. Commonwealth of Australia HCA 2 (4 February 2003).} However, the courts also left open the right of judges to determine whether government officials acted within the principles set out in the citation above. Although there was no constitutional challenge, other tension persisted. Solicitor-General David Bennett, who usually represents the Howard government in court cases, suggested at a conference that this decision relaxed requirements for procedural fairness, but left open the door to future litigation on the basis of arguing “bad faith” on the part of the decision-maker.\footnote{Bennett, "Privative Clauses — Latest Developments," pp. 20-21.} The court ruled that jurisdictional errors could still be brought before the High Court.\footnote{Beaton-Wells, "Judicial Review of Migration Decisions: Life after S157."} However, in the process of arriving at this decision, the court widened the definition of jurisdiction of the privative clause to the point where this
clause became irrelevant for practical purposes.\textsuperscript{93} This verdict of \textit{s157} generated much anticipation. On the day before the finding, Parliament issued a press release that stated that “immigration litigation was at record levels”.\textsuperscript{94} Nevertheless, the declaration that the privative clause was invalid where an absence of procedural fairness could be established, opened once again the door to litigation in future.\textsuperscript{95}

In the judgement of \textit{s157}, one can clearly see the systemic tension, and systemic strategies to overcome such tension, when the judiciary limited parliamentary powers in legal matters. However, it is held that, whilst limiting the power of the Executive to control institutional practices, the judiciary did not limit institutional practices that could be linked with the political framing of refugees as outsiders. This is also suggested in the next chapter.

Thus, the tension over control between the Executive and the judiciary is far from settled. In its quest to keep refugee decisions from the ambit of the courts, the government explored a new angle. Since the end of 2001, lawyers may be personally responsible for the legal costs in cases that have little likelihood to succeed. The \textit{Tampa}-case, which will be discussed in Chapter 6 — \textit{Politicisation of the Law}, challenged the authority of the Howard government to refuse permission to let the \textit{Tampa} passengers into Australia. Lawyer Eric Vadarlis lost this case, and the Howard government applied to the court for a determination that Vadarlis personally be liable for all legal costs.\textsuperscript{96} The case about the legal costs received far less media publicity than the \textit{Tampa} case. Yet the following discussion suggests institutional practices that illustrate the central argument of this thesis – the argument that the Howard government made recourse to the law when it suited the government’s ideological purposes.

\textsuperscript{93} \textit{Ibid.},
Germov and Motta describe the legal reasoning in the case *Ruddock v Vadarlis*, cited above.\textsuperscript{97} According to Germov and Motta, the lawsuits that challenged the detention of the *Tampa* passengers were brought by lawyer Eric Vadarlis, and by the Victorian Council for Civil Liberties (VCCL). Both cases were so similar that the judges treated them as a single case. After Vadarlis lost his case, the VCCL withdrew its case. After the judgement of the Tampa case, the government sued lawyer Eric Vadarlis and the Victorian Council for Civil Liberties for costs.

Germov and Motta state that the government argued in court that the Tampa case should not have occurred.\textsuperscript{98} Accordingly, the government argued: “the proceedings were an interference with the executive power of the Commonwealth”. The government argued in court that the legal proceedings interfered with the government “exercising an aspect of executive power central to Australia’s sovereignty as a nation that was non-justiciable”.\textsuperscript{99} Most judges rejected this view, and “held that section 75(v) of the *Constitution* expressly provided for judicial review of executive power”:

> The litigation raised important and novel legal issues concerning the alleged deprivation of the liberty of the individual, the executive power of the Commonwealth, the operation of the Migration Act and Australia’s obligation under national law.\textsuperscript{100}

Despite such acknowledgement, the court ordered Vadarlis and the Victorian Council for Civil Liberties to pay costs. Germov and Motta write that the court held that such payment was “to compensate the successful party rather than to

\textsuperscript{97} Germov and Motta, *Refugee Law in Australia*, pp. 601-4.
\textsuperscript{98} Ibid., p. 604.
\textsuperscript{100} Ibid., pp. 604-05.
punish the losing party”\textsuperscript{101} Germov and Motta continue that the court order effectively meant that Vadarlis did not pay, for two reasons: first, the court ordered that each party should pay their own costs, and second, the court allowed Vadarlis to apply for a certificate that waived any fees arising from the case.\textsuperscript{102}

It is interesting to note that, whilst determining whether or not legal costs should be awarded against Vadarlis personally, similar considerations did not arise with regard to Immigration Minister Philip Ruddock. Whilst this undoubtedly caused personal discomfort to Eric Vadarlis, something else was at stake. This case was not only about recovery of costs. There was also the principle about making lawyers think carefully about filing for cases, given the potentially devastating personal consequences. Court cases that examined the actions of government officials in the delivery of policies did not match the political objectives of the Howard government. The Prime Minister and the Immigration Minister told Parliament on several occasions that the point of the post-	extit{Tampa} legislation was to clear up any legal doubt, and to bring government decisions about unauthorised boats beyond the reach of the courts in future.\textsuperscript{103} Since winning in \textit{Ruddock v Vadarlis}, the Howard government has passed legislation that disallows individuals or legal bodies in the community “from pursuing the litigation further”.\textsuperscript{104} However, existing legislation already allows for the awarding of costs, at judicial discretion.\textsuperscript{105}

Such discretion has been replaced by mandatory consideration. As part of “new reforms”, the government legislated away that discretion, so that lawyers

\textsuperscript{101} Germov and Motta, \textit{Refugee Law in Australia}, p. 604.
\textsuperscript{102} Germov and Motta, \textit{Refugee Law in Australia}, p. 601.
\textsuperscript{104} Germov and Motta, \textit{Refugee Law in Australia}, p. 604.
\textsuperscript{105} Ibid., p. 601.
must provide a document that the case has a reasonable chance of succeeding, and the courts must mandatorily consider whether to award costs against the lawyers.\textsuperscript{106} This is an example of a particular approach to the system colonising the system in general, where the access to the judiciary for purposes of arguing government accountability has been curtailed. It is also an example of the “needs” of the systemic use of legal rationalism colonising the “needs” of the system of legal rationality to ensure access to the courts.

The Howard government continues to pursue this avenue to dissuade lawyers from taking on refugee cases. In May 2004, then Attorney-General Philip Ruddock called again for lawyers to personally bear costs for “unmeritorious” cases.\textsuperscript{107} Philip Ruddock justified this as an initiative to prevent what he framed as “court shopping” and to prevent all refugee cases from getting to court. The move was based on the “Penfold Report”, a document that the Attorney-General refused to release.\textsuperscript{108}

This change in institutional practices must be seen against the systemic tension over ensuring government accountability, and the government’s powers to determine the direction of its own accountability. Bringing the bureaucracy under control of the Executive became an effective tool for the Howard government to influence how and in what circumstances Parliament is accountable for using its powers. The main benefit of the new institutionalised practices—cheap and timely access to justice—often seemed a euphemism for injustice, backed up by the government’s power to utilise the law for its ideological purposes and to manipulate the institutional structure to achieve this. The privative clause brought out a contradiction between the legal-rational imperative to deliver an acceptable level of government accountability, and the government’s strategy to curtail such process. In these developments, the

\textsuperscript{106} Beaton-Wells, “Judicial Review of Migration Decisions: Life after S157.”
\textsuperscript{108} Ibid.
Howard government maintained the structure for review and accountability, but raised the hurdles to accessing the process.

**Taming the watchdogs**

Government accountability forms part of the policy process. There are three statutory bodies for this purpose: the Ombudsman, the Human Rights and Equal Opportunity Commission (HREOC), and the Australian National Audit Office. All three bodies have statutory powers and obligations to check on the delivery of public policy and to investigate how government officials execute their duties. Investigators of all three statutory agencies are employed under the provisions of the *Public Service Act 1999*. These offices allow for inexpensive high-level investigations that result in decisions that are sound and reasonable, and which makes their findings authoritative. This section discusses examples of how legal rationalism was practiced until the legislation limited the effectiveness of the accountability that these statutory bodies were set up to deliver.

As a background to this discussion, each agency will be introduced. The Australian National Audit Office describes itself as “a specialist public sector practice providing a full range of audit services to the Parliament and Commonwealth public sector agencies and statutory bodies”. The Ombudsman investigates complaints about government policy and the actions of government officials. The cited legislation states that the actions of a Minister, or of a politician acting under Parliamentary privilege, are exempt from the jurisdiction of the Ombudsman. The Human Rights and Equal

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109 Commonwealth of Australia, *Australian Public Service Agencies*. [Website].
Opportunity Commission investigates and reports to the Minister on human rights concerns.\textsuperscript{113}

These three agencies do not release their reports directly to the public. The Auditor-General’s report is first tabled in both houses of Parliament.\textsuperscript{114} Similarly, the findings of HREOC and of the Ombudsman only become public when being tabled in Parliament.\textsuperscript{115} The Human Rights Commissioner, who conducts regular visits to all immigration detention centres, conducts the investigations without making public statements about these visits, “but will advise DIMIA [sic] in writing of any human rights’ issues, should that be necessary”.\textsuperscript{116} Similar arrangements exist for reports issued by the Ombudsman. During the investigations by the three bodies, there is a consultative process with the government, which allows the government to take remedial action before the final report is released. As a consequence, the reports by these agencies often state that the government has already acted on recommendations to improve policy delivery. These investigators tend to work quietly behind the scenes and focus on better outcomes, rather than confronting the government.

One may assume from the discussion in this section so far that the roles of the HREOC and the Ombudsman are relatively apolitical, due to requirement for a consultative process with government before the release of finings. However, there is some evidence that the interaction of the Howard government with the Ombudsman and the Human Rights and Equal Opportunity Commission show how the government resorted to legal rationalism in order to curtail the investigative force of both statutory bodies. The first clue comes from the language of the website of both agencies. Key words on the Human Rights and

\textsuperscript{115} Human Rights and Equal Opportunity Commission Act 1986. Section 46.
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Equal Opportunity Commission and Ombudsman sites are “investigate”, “advise”, “administer”, “educate”, “negotiate”, “persuade”, “resolve”. Information on the Ombudsman website stipulates that the Ombudsman neither issues directives nor makes legally binding decisions. The Ombudsman endeavours, according to the Website, to improve administrative practices by way of “negotiation and persuasion”, but may make formal recommendations to government. This reporting practice makes it all the more remarkable when open confrontations occur between the investigators.

Despite the need for diplomatic language and a consultative process, Ombudsman reports are not immune from criticism by the Howard government. For instance, although conceding that the Ombudsman’s Own Motion Investigation investigated seventy cases, Philip Ruddock said the report was “unbalanced” because the Ombudsman did not follow an appropriate consultation process. Not only does such comment ignore the substantive issues raised by the cited Ombudsman report. The Minister’s comment also ignores that legislation requires that the Ombudsman first, informs the relevant government department that an investigation is being conducted, and second, that the Minister receives a copy of the report. With such extensive process, it is difficult to follow Minister Ruddock’s comment on Lateline that the Ombudsman did not appropriately consult with Parliament. Similarly, in 2004, the Immigration Minister refused to accept the findings of the HREOC inquiry, A Last Resort?. Instead, the Howard government alleged unreliable methodology and historical irrelevance of the report to dispute the validity of

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119 Commonwealth of Australia, Ombudsman Act 1976. Sections 15(2) and 15(6)
As discussed in the case studies, both reports identified systemic and ongoing problems with the mandatory detention regime.

Such confrontations, however, occurred before the politicisation of refugee issues that were discussed in the case studies. Already, the Ombudsman has been restricted from giving “unsolicited advice” to people who were detained inside immigration detention centres. In August 1999, the Howard government curtailed the activities of the Human Rights and Equal Opportunity Commission. Fred Argy suggests that at that time, the government passed legislation that redefined and downgraded HREOC’s role to an advisory role with greater emphasis on educating individuals about human rights, rather than having a more forceful investigatory role. After these events that limited the power of official investigators, the Law Society warned that these changes removed the independence of HREOC. In the cited article, there was also the prediction that political interference may arise in cases where the government itself was party to the litigation, and may therefore be in a position to influence the outcome of such litigation.

Despite these structural cutbacks, the Human Rights and Equal Opportunity Commission had retained its powers to “make an order” over a human rights issue. In 2004, three months before the release of *A last Resort?*, HREOC invoked these powers to intervene in court matters. The report, it will be recalled from the case studies, made compelling findings about the suffering of


children in immigration detention. Although the Human Rights and Equal Opportunity Commission was compelled by legislation “to settle the matter by way of conciliation”, HREOC took the view that a conciliatory approach was “inappropriate” in this investigation, and formally reported the matter to the Attorney-General.\textsuperscript{126} Former Immigration Minister Philip Ruddock, who had ministerial responsibility when most of the findings of alleged human rights breaches occurred, had become federal Attorney-General. To his credit, Ruddock gave permission for HREOC to intervene.

HREOC lodged its request to the High Court to intervene in a case that was already before the court, in an attempt to secure the release of four children from immigration detention.\textsuperscript{127} HREOC submitted that the immigration detention of the four children under consideration in this case was punitive and therefore unconstitutional.\textsuperscript{128} HREOC also submitted that the impact of such detention on the children went beyond what was “reasonably necessary” and argued that the High Court should take into account the severely adverse effects of detention on these children.\textsuperscript{129} Therefore, HREOC argued in the submission cited above that the government should release these children. In the following week, HREOC announced that it had been granted permission to challenge the detention of children in the High Court.\textsuperscript{130}

But when the case was heard eight months later, all seven High Court judges unanimously dismissed the appeal by HREOC. Justice McHugh pointed out that Parliament had the authority to pass special laws for “aliens” and that the legislators did not intend immigration detention to be “punitive” and to punish


\textsuperscript{129} \textit{Ibid.}, paragraphs 7a, c, d.

the children. Had the court accepted the submission by the Human Rights and Equal Opportunity Commission that the detention of the four children went beyond what was “reasonably necessary” for administrative purposes, the courts may have had to consider the legality of detaining the children under such circumstances. However, the judges disagreed with this assertion and found that the legislative intention of immigration detention was “protective” of Australia, in that it was designed “to prevent unlawful non-citizens, including children, from entering the Australian community”, and not to punish them. The court also ruled that the effects of detention on these four children did not constrain Parliament from exercising this “alien power”.

Effectively, the ruling meant that the High Court disagreed with HREOC’s submission that the court should take into account the damaging effect of detention on the mental health of the children, when considering an order to effect their release. The example discussed in the previous paragraph gives a unique twist to the influence of legal rationalism in institutional practices. On the one hand, permission from the Attorney-General to the Human Rights and Equal Opportunity Commission set up a forum for the HREOC to argue its case directly in court without political interference in the High Court. The unanimous decision of the seven judges to reject the HREOC submission indicates that, no matter what the human rights issues pertaining to detention, such issues would be irrelevant because the stated purposes of the legislators did not convey such intent. The case is discussed again in the next chapter, in the context of an argument that this is an example of the dominance of migration law over other basis law. Here, I wish to highlight that the court decision is one example of the convergence of institutional practices with the political framing of legal rationalism.

131 Re Woolley; Ex Parte Applicants M276/2003 by Their Next Friend Gs [2004] HCA 49. (High Court of Australia, 2004), Justice McHugh, paragraphs 43 and 44.
132 Ibid., Justice McHugh, paragraph 115.
133 Ibid., Justice Gummow, paragraph 165.
These institutional practices also corroborate Poggi’s work of how governments achieve not only legal, but also public legitimation by working through a structure in Coalition democratic states. Poggi identifies that governments (the “ruling party”) exert control by prioritising and allocating resources, and set directives through the administrative and bureaucratic apparatuses charged with implementation. In the end, it is the structure that confirms policy and institutional practices, and this confers legitimation to the workings of governments. Poggi argues that the legitimating aspect of state structure is an expectation “made manifest through the institutionalisation of opposition that policy formation does not express the higher wisdom of an unchallengeable power.” Accordingly, there is considerable structural capacity to accommodate other views, which further confers strength and legitimacy to the formation of public policy. This suggests a large potential for human agency to achieve structural change and, once such has been achieved, the resulting practices become a powerful tool of legal and public legitimation.

Another example, which occurred after the timeframe of the case studies, needs to be included because the watered-down structure of accountability protected the Howard government from the political impact of adverse findings. As was the case with allegations of child abuse and neglect that were discussed in the case studies pertaining to Woomera and children in detention, two incidents of incorrect detention under migration legislation also were first aired by “non-official” sources. Another similarity was that the government continued to deny the allegations, until the “non-official” evidence and the accompanying media pressure persuaded the government to order a parliamentary investigation.

As 2004 drew to a close and the Howard government prepared to deport the Bakhtiyari family, the media reported allegations that an Australian woman was

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135 Ibid., p. 56.
inappropriately detained under immigration law. Within weeks, there were reports that the Department of Immigration and Multicultural Affairs had deported another woman, who was an Australian citizen. When the government called the Palmer Inquiry, it commissioned a non-public investigation and specified that the findings should not be made public, but later gave permission for publication. As has happened in the Flood Inquiry and the Ombudsman’s Own Motion Investigation in 2001, the political impact was offset by improvements that had already taken place before the findings were released.

The Palmer Report investigated the detention of Cornelia Rau, and also released initial findings into the deportation of Vivian Alvarez.\(^{136}\) Ms Rau had Permanent Resident Status, and Ms Alvarez was an Australian citizen. Therefore, visa requirements under immigration law did not apply to them. Mick Palmer identified a Kafkaesque Department of Immigration and Multicultural Affairs as the main culprit in both cases. Palmer found that “a clear ‘disconnect’ between policy development … and operational requirements” have “created an environment in which people are unwilling to accept ownership of matters beyond their immediate responsibility, regardless of the importance of the matter and the obvious need for continuity”.\(^{137}\) Furthermore, the report identified “a culture preoccupied with process and rule-driven operational practice”, “a strongly hierarchical, process-motivated, bureaucratic organisational structure” with “a high degree of vertical control”, consisting of “arrangements that constrain, rather than enable, effective management action”.\(^{138}\) After the blunder, the Howard government increased the investigative powers of the Ombudsman, but not those of the Human Rights and Equal Opportunity Commission. However, Ombudsman investigations are slow, and results often come to light after the concern for an

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issue has dissipated. Eighteen months after the Rau issue emerged, the completion of 248 cases of wrongful detention under immigration law was still awaiting completion.\footnote{Andra Jackson, "List of Wrongful Detention Cases Grows," \textit{Age}, 18 August 2006.}


\footnote{Andra Jackson, "List of Wrongful Detention Cases Grows," \textit{Age}, 18 August 2006.}
A “much better” colonisation?

This chapter would not be complete without discussing how the Howard government responded to some adverse findings that came from “official” channels. The Ombudsman identified ongoing problems with record-keeping and reporting to outside agencies in the 1998-1999 Annual Report, and the Department of Immigration and Multicultural Affairs agreed with the recommendations and promised to implement them.\textsuperscript{146} Later, the Ombudsman reported that DIMA had improved “both the general administration of programs and the handling of complaints”.\textsuperscript{147} In 2004, however, the Ombudsman Annual Report once again made recommendations for “appropriate record keeping” and “further training of detention officers”.\textsuperscript{148}

Emerging problems are often framed as indicators of a need for further training. A 1998 audit report stated that DIMA staff who worked in remote locations needed training, and DIMA agreed to provide this.\textsuperscript{149} Amid complaints that emerged from the detention centres during the timeframe of the case studies, recommendations were made that “all ACM staff working in detention centres should undergo cultural awareness training”.\textsuperscript{150} The cited report also recommended “comprehensive training in cultural awareness and guidance to deal with issues of racism, sexism and religious intolerance”.\textsuperscript{151}

\textsuperscript{150} Commonwealth Ombudsman. \textit{Report of an Own Motion Investigation into the Department of Immigration and Multicultural Affairs’ Immigration Detention Centres}, recommendation 9, p. 8.
There were also “delays in establishing and training staff in ACM policies”.\footnote{Ibid., paragraph 6.25, p. 27.} Whilst there is a need for initial and ongoing training in working situations, there also seems to be a pattern of pointing to “training” as a remedy that does not solve problems in the long-term. Recommendations for “training”, whilst not disputed here, may also reflect a “diplomatic” way of masking other issues.

There could be a difference within different areas of DIMA. The Australian National Audit Office analysed a stratified random sample of 209 completed applications for protection visas from a pool of 3,077 cases lodged between July 2002 and June 2003.\footnote{Australian National Audit Office. (2004). Management of the Processing of Asylum Seekers, paragraph 2.6, p. 30.} The sampling, which was conducted to assess the efficacy of the decision-making process, found an overall “high” standard, with 99 and 92 per cent efficacy for some assessment parameters.\footnote{Ibid., paragraph 6, p. 12.} Although there were “administrative shortcomings”, the report found that training needs of decision-makers for Protection Visas were met and well structured.\footnote{Ibid., paragraphs 9 and 10, p. 13.} Audit reports thus produced different findings in those areas of the Department of Immigration and Multicultural Affairs that deal with the detention of refugees. This finding contrasts with the training deficits repeatedly identified for staff of DIMA’s Compliance branch and those employed by the providers of detention services identified in the reports already discussed. Similarly, the finding that DIMA’s Refugee and Humanitarian (Onshore) Program has clearly identifiable targets to achieve, and a quality control program suggests a competent and efficient government department.\footnote{Ibid., paragraphs 13 and 14, p. 40.} The findings for the onshore “humanitarian” assessments contrasts with findings for the onshore refugee assessment process. For onshore refugee processing, the Ombudsman recommended that “DIMA ensure that the number and use of trained staff for processing detainee applications is adequate”.\footnote{Commonwealth Ombudsman. Report of an Own Motion Investigation into the Department of Immigration and Multicultural Affairs’ Immigration Detention Centres, recommendation 2, p. 5.}
However, it was a different matter when the Department of Immigration and Multicultural Affairs dealt with people, not their refugee applications. These events were repeatedly documented as involving less than efficient ways of handling refugees, as evidenced by findings of several Ombudsman reports, the Flood Inquiry and more recently, the Palmer Inquiry. All these reports have been discussed in this thesis. Rather than training needs, the findings may suggest a less than ideal working culture. This may be due to the repeated framing of refugees as illegals and threats to Australian sovereignty, an attribution directly encouraged by the dominance of a rule-driven culture of legal rationalism.

Under the rules of legal rationalism, policy shortcomings are framed as a requirement for training in policies, procedures, or multicultural matters. One consequence of this however, is that people responsible for the policy avoid taking full responsibility, and identification of systemic problems are also avoided by changing areas of jurisdiction or by identifying faults at the lower levels of the hierarchy. Under these rules, ministerial accountability can be avoided as long as no government minister or legislator states in public that the policies are specifically designed to harm people, and instead pays lip-service to a humanitarian policy. For example, during a media interview after the release of the Ombudsman report into the removal of Vivian Alvarez from Australia, Senator Vanstone did not accept that she was to blame. Nor did her predecessor Philip Ruddock, who was the Minister at the time of the detention of Ms Rau and Ms Alvarez. The Prime Minister said that Minister Vanstone should not take responsibility, because she was not in office at the time. He added:

> if somebody in a remote part of a department makes a mistake, to automatically say that because of that mistake the minister has to resign would mean that, to be quite frank, ministers would be resigning all the time through no personal failing of their
own. If the minister is personally responsible for a failing or clearly has directed a course of conduct which brings about the failing then that's another matter.158

Yet the findings of official investigators suggest ongoing and systematic policy blunders. This thesis claims that these blunders were in part encouraged by the rule-driven ideology and circumstantial reasoning that manipulated the legal rules. This occurred in conjunction with an ongoing unwillingness to accept information about the policy that the rules, presented in neutral language, were concealing. The systemic way of preventing negative information from entering official records through the selective reporting of “incidents” and “exception-reporting” discussed in Case Study 3 — *Detention in the Desert: Woomera* are but two examples. Under the policy practices of legal rationalism, good legal-rational reporting and processing of information was being colonised by the practices of delay and clandestine policy delivery.

Whilst the government did not accept that it was to blame, it did accept the findings of the Palmer Report. Immigration Minister Vanstone proposed to address the deficiencies in training and departmental culture by appointing several managers, and by replaced the secretary of the Department of Immigration and Multicultural Affairs. Many of the deficiencies would be addressed by training under the new leadership. Minister Vanstone’s media release announced in the light of poor training establishment of a College of Immigration Border Security and Compliance “for the training of DIMIA officers” that would generate several “much better” initiatives.159 The cited media release promised “much better training of DIMIA staff”, “much better health and well being for detainees”, “much better information management”, “much better quality assurance and decision-making”, and a “much better focus on clients” in future. In August 2006, the Howard government announced the appointment of former Police Commissioner Mick Palmer,  

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who also headed the investigation into the wrongful detention of Cornelia Rau, as the chair of the newly established College of Immigration. The professional background in law enforcement of the head of the new educational institution, together with the awarding of the detention contract to a company that is renowned for its world-wide expertise in managing prisons, suggests that the real focus may remain on the incarceration of people who have been framed as intruders. Detention as a primary commitment, however, is at odds with the images that come to mind when contemplating the “much better” focus on clients and detainee well-being that Immigration Minister Amanda Vanstone committed herself to during the adverse political publicity when the findings of the Palmer Report became known in July 2005.

DIMA indicated resistance to the findings of Part B of an audit that was discussed in Case Study 3 — Detention in the Desert: Woomera and implied that its services were so unique that outsiders may not fully understand the processes involved: there was the claim “that it is not possible to define these requirements in simplified ways, and that it was a misconception that services, standards and reporting can be simply and inflexibly stated”. However, assessments and reports by professionals who are not part of DIMA are crucial to maintaining accountability, and this includes accountability in a court of law. If outsiders are kept at bay, there is no challenge to prevailing ideas; only full exposure to the ideology of legal rationalism. So far, the cumbersome rules within a closed system have kept it that way. The audit report cited above reports that DIMA acknowledged that reports were needed about the efficiency of detention services. Yet when the efficacy of the contract was assessed, DIMA indicated difficulties in how to quantify some measurable

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162 Ibid., paragraph 47.
indicators to the auditor.\footnote{Ibid., paragraph 57.} It would seem that not the rules, but their manipulation toward political goals, was the culprit.

Based on the argument of this thesis that many of the problems arose from the skew of legal-rational rules for ideological and highly politicised purposes, it is unlikely that training will solve the problem. More training may be effective if it is accompanied by the appropriate use of legal rationality. Otherwise, the establishment of government-controlled training facilities is likely to build a bureaucracy that is more massive; one where a government minister has the power to override every decision. A more likely outcome is that, once the use of rules and regulations has been designated its proper place in the political process of exercising institutional power, training may be less of a problem than has been suggested. Training of personnel should be a matter of routine, not a standard recommendation of investigations that identify problems with the delivery of public policy.

Under the statutory requirements for investigators to use diplomatic language and to negotiate with government before releasing their findings, coupled with a requirement to make non-enforceable recommendations and a potential threat of budget cuts after releasing unfavourable findings, “training needs” remains a euphemism for a void that becomes evident when legal rationalism has colonised other areas of legal rationality. There is no suggestion here that ongoing investigations by the Auditor-General, the Human Rights Commissioner and the Ombudsman should be removed from the process. There is, however, a suggestion that such process should be free of political manipulation.
Conclusion

This chapter enhances the findings of the case studies by bringing out the institutional factors that operated behind the façade of conducting refugee policy in a legal-rational manner. The structural changes, however, enhanced the practice of legal rationalism and therefore support the argument that the Howard government used the law as an instrumental tool. The government achieved these changes by utilising changes to the larger structure of the Public Service, and then adapting the institutions to drive the political process that was behind refugee policy. The legislative changes and changed allocation of resources led to greater government control, which further enhanced this process.

Through the manipulation of legislation and the structure, the effectiveness of institutions for government accountability was weakened progressively, until almost all aspects of accountability for refugee policy were placed under effective control of one person: the Minister for Immigration and Multicultural Affairs. This retained the structure of clear accountability lines, but with restrictions on what could be reported and how and when this was to occur. It put the Howard government in a position to resist all inquiries, except those it approved of. This undermines meaningful participation in the public sphere, and thus further enhances legal rationalism, which, as argued in the case studies, relied on secrecy. Governments are expected to act politically and seek electoral approval to retain office at the next election. However, the danger of controlling legal rationality in a way that controls information about institutional practices according to their political saliency has set a dangerous precedent for democracy. There have been indications that this exercise of
legal rationalism was not absolute, but could be controlled by other legally rational processes.
Chapter 6

Politicisation of the Law
This chapter explores how the institution of the law addressed tensions over the Howard government’s control of the policy process that, arguably, could be linked to the government’s framing practices of refugee issues. The delivery of public policy and the implementation of social change may be perceived as a process where public officials’ exercise of power has been conferred upon them. To Poggi, power within state structure is expressed as legislation; a view borne out throughout this thesis. If one accepts this statement, then one may perceive of elected politicians as agents of change, who exercise power in a space where politics and the law cannot be separated. Moreover, government officials also write the law that govern their policies. For Poggi, since politicians write the law, the law is therefore politicised and has an ideological charge.¹ The relationship between government and the law is thus never neutral, but is an exercise of power that achieves political outcomes. In Poggi’s words,

increasingly the state comes to employ juridical instruments (from the constitutional charter to the statute to the administrative warning to the judicial sentence) in order to perform the most diverse political tasks. It is by means of law that the state

articulates its own organisation into organs, agencies, authorities … The state thus ‘speaks the law’ in almost all aspects of its functioning.2

If one extends Poggi’s view for a moment, then it is plausible that the rules and procedures that accompany changes to refugee policy in Australia also contain political bias. The exercise of power to achieve political goals by changing the law is therefore systemic to the structure of the state and does not constitute legal rationalism. Instead, it was argued that legal rationalism consists of a rhetorical recourse to legal rationality that masks an ideology behind these changes in two ways: First, legal rationalism consisted of a fetishised obedience to legal rules; an ideological representation that reduced the legal-rational constructs of the law to blind obedience to the rules. Second, it was argued that legal rationalism masked the exercise of political expediency, without necessarily revealing other, often unstated, purposes behind these rules. In this way, legal rationalism emerged as an ideology that drives the use and direction of legitimately conferred power, rather than the government’s use of such power per se.

This chapter addresses the political dimensions of the exercise of power through the law, and the scope of political process to manipulate such power. Based on the findings of a divergence of judicial practices with the ideology of legal rationalism, it will be argued that legal rationalism has become part of the institutional practices of legal system, and that legal rationality has become colonised by legal rationalism. The analytical descriptions of legal rationalism in this chapter are much more subtle than the clear connection between practices and legal rationalism that was argued in the case studies. Nevertheless, the analysis in this chapter points to an intrusion of legal rationalism from political framing practices into institutional practices.

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2 Ibid.
Chapter 6

Politicisation of the Law

The law, judiciary and parliament

This section introduces the relationship between the judiciary and parliament under the Westminster system: a type of government that originated in England and was subsequently incorporated into the Australian Constitution. Under the separation of powers doctrine of the Westminster system, institutional power is split between an elected parliament and a judiciary that is not elected and operates independently of parliament. As will be seen shortly, this structural relationship between the law and parliament has the potential to create a tension between both institutions. Such tension is distinct from any structural tension that may be generated by the framing practices of legal rationalism, should they exist. Nevertheless, the separation of powers doctrine is relevant to this analysis, because this doctrine shapes and defines the structure where public policy is practiced and where power is exercised.

Under the Westminster system, the separation of powers doctrine is designed to ensure that parliament works in accountable manner. This doctrine guards against a concentration of power in the hands of parliament, and against both parliament and the judiciary “working in tandem”. What, then, are the powers that this doctrine endeavours to separate? Political analyst Haigh Patapan identifies two locations of power that are in constant tension within the structure of the state: first, the judiciary guards against the possibility of parliament acting illegally. Tension comes about, according to Patapan, from the expectation that an elected parliament implements the will of the people without hindrance from the judiciary. Second, Patapan identifies a paradox in

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this structural relationship between both institutions: only when power is exercised, can it be separated. Patapan writes: “each independent branch needs to be powerful enough to protect itself from a takeover by other branches”, and that “independence is secured only by means of mutual checks”.6

In this system, parliament is known as the legislature, the bureaucracy as the Executive, and the legal system as the judicial powers. Spencer Zifcak explains that under Australia’s Constitution, there is no strict separation between the legislature and the executive, but there must be clear separation between the legislature and the judiciary.7 Thus, ministers are part of the legislature and of the executive. Zifcak concedes that, whilst the power of parliamentarians as law-makers does not extend to exercising judicial functions that may result in imprisonment, such functions are not clearly separated when it comes to non-citizens and asylum seekers. Here is a brief outline of the difference between these three powers:

Executive power is the power to administer the law. It may include, for instance, the initiation of law, the maintenance of order, and the promotion of social and economic welfare. It is characterised by the development of policy and the management of public organisations. Judicial power is the power to determine disputed questions of fact or law, in accordance with the law laid down by the parliament.8

Within this separate, rather than hierarchically superior, power structure the courts exercise their role of the judicial oversight of parliament: first, through judicial review in court cases. Second, the High Court has the authority to strike out parliamentary statutes that are constitutionally invalid.9 The overall responsibility for judicial oversight rests with the High Court; a court that ensures that governments act within the powers conferred upon them by the

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6 Ibid., p. 153.
8 Ibid., p. 5.
Australian Constitution and thereby guards against arbitrary use of powers by governments.10 Judicial review gives to courts the power to determine if government officials have acted within the limits of the legal authority of their office.11 For this purpose, section 75 of the Constitution specifies that courts can issue writs and declarations.12 These constitutional powers of the legal system thus give certainty to social practices that occur within the context of public policy, safeguarded by judicial review under the doctrine of the separation of powers.

Power is not static and the rules that determine its use change over time. One may, incorrectly, infer from the discussion on the separation of powers so far that a polemic, rather than a reciprocal, relationship exists between the law and parliament. The structural requirement to separate power does not necessarily imply a struggle for power. One can, however, anticipate that legal rationalism may provoke tensions when legislators barely disguise that the laws were written for political purposes, and will be implemented on a variable basis.

Examples in Australia, where legislators have written statute law for political purposes, are as old as the Australian legal system. Mary Crock illustrates this in a discussion on the white Australia policy.13 Crock’s work just cited gives an example of how the political decision to keep non-white migrants out of Australia became part of the statutes and institutional practices that were operational for the first fifty years of the Australian legal Federation. Accordingly, about five years prior to Federation, the English Privy Council denied royal assent on the *Coloured Racial Immigration Restriction Bill 1896*, because the proposed legislation was couched in overtly racist exclusionary language. Crock continues that, although the *Immigration Restriction Act 1901*

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11 Ibid., Paragraph 2.2.1, p. 39.
13 Ibid., pp. 13-20.
was also written for the purpose of preventing entry to Australia on the basis of race, this Act did not contain racist language. Legal exclusion from entering Australia was much more subtle: The *Immigration Restriction Act 1901* introduced the dictation test; a test that appeared objective, but was set up so that uneducated non-white people would fail. Failure to pass this test not only meant refusal to enter Australia. People who failed could also be deported; even if they had lived in Australia for several years. The dictation test was part of the legislation until the passing of the *Migration Act 1958*. Crock concludes this story with the observation that the High Court upheld the constitutionality of parliamentary legislation by interpreting the law in a way that allowed parliament to detain under the aliens power and the head of foreign affairs power conferred by the Constitution, which “ensured that the migration cases have been firmly isolated from debates about implied rights in the Constitution”.14

When applied to this thesis, the examples cited in the previous paragraph give insight into the legally conferred power that the Howard government had at its disposal to implement its framing practices with the assistance of the law. The above example also shows how non-racist language established the legal rules for institutional practices on the basis of race for almost six decades. This, I argue, is an example of legal rationalism: The neutral wording of the dictation test legitimated government practices that were firmly grounded in statute law, whilst masking the political ideology of racial exclusion that was driving the legislation. Leaving aside inferences about racism, one can see a similarity between the *Immigration Restriction Act 1901* and the contemporary refugee law of the *Migration Act 1958* with its amendments by the Howard government: both Acts, whilst purporting to regulate the rules for migration to Australia, were actually instruments of exclusion. The commonality of both statutes lies in masking exclusionary policies by raising the legal barriers to enter Australia.

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The *Migration Act* that excluded onshore refugees between 1999 and 2003 did not nullify the *Convention Relating to the Status of Refugees*. The case studies discussed a tension between the benefits of the refugee protection that flowed from the *Convention* and the barriers that the *Migration Act* posed to reaching those benefits. In his book, *The Postnational Constellation*, Jürgen Habermas identifies similar issues. Habermas identifies a tension “between the universal meaning of human rights and the local conditions of their realisation”. Habermas explains this tension through the close relationship of human rights with morality. Accordingly, human rights have a basis in law and in morality, but they only protect the individual if the person belongs to the legal community of the nation state.

Ari Brand’s discussion on the law adds another complexity to the debate: Brand writes that, although the law expresses a moral order, it operates in instrumental fashion, as a “morally neutral” construct that becomes oriented toward its own goals, so that there is a difference between law and morality. One may infer from Brand’s work just cited that the law itself has “agency”, rather than the law-makers. This complexity, when applied to the discussion in this chapter that parliamentarians write the law, suggests that members of the Howard government are themselves drawn into a process that has an autonomous logic. In this process, the law, though it does not operate autonomously of the law-makers, nevertheless has its own logic that is distinct from the logic and autonomy of the law-makers.

Without further exploring the relationship between law, morality and logic, one may infer from the previous two paragraphs that the law represents a codified expression of normative behaviour in society, and that normativity is channelled through the legal code. Hughes and Leane, in their discussion on

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Australian legal institutions, discuss how this close relationship between normativity and the law is expressed in determinations in court cases.\textsuperscript{17} Court cases are essentially arguments where two parties argue ("plead") their opposing claims and judges adjudicate over these disputes by applying existing law to the arguments. In this sense, Hughes and Leane continue, the judges interpret, or "determine", the will of parliament; a will that parliament has already expressed through the writing of the legal statutes. The power that is being separated in a Westminster democracy thus consists firstly, of writing the statutes, and secondly, of the power to definitively interpret what these statutes mean in practice.

From the preceding discussion of the legal system within the structure of the state, and from Giddens' prediction that framing practices create tensions within social structure, as noted in the introduction to this section, arises a consideration: if the framing practices of refugees by the Howard government generate structural tension, then evidence of such tension may be expected to surface in court cases where the delivery of refugee policy is contested. Legal rationalism, if it modifies institutional practices of the legal system, would be within this dividing line that separates the two powers that face each other in the court room: the framing practices that are evident in parliamentary legislation, and the interpretation of this legislation.

\textit{The frame becomes legal precedent}

The \textit{Immigration Restriction Act 1901} was repealed half a century ago. Racist policy practices have since become illegal and court practices and legislation have changed considerably since the Federation of Australia. Nevertheless, the way in which the judiciary has interpreted this racist legislation established

\textsuperscript{17} Hughes and Leane, \textit{Australian Legal Institutions. Principles, Structure and Organisation} pp. 38-41.
about one hundred years of legal precedent within the Australian legal code. It will be noted in this section that the way in which judges have interpreted immigration legislation has varied considerably. It will be argued that the legal rationalist framing of refugees by the Howard government has found its way into court decisions pertaining to refugee matters that occurred between 1999 and 2003. This is not to suggest that some judges have become legal rationalists themselves, but rather that their decisions have been swayed by the legal rationalism of the government.

There are broad indicators that a change has occurred in judicial thought. Mary Crock observed a trend in the 1970s, where the High Court interpreted immigration law along the principles of international instruments.\(^{18}\) By 2001, however, this trend had changed. When confirming the legal right of the Howard government to deny entry of the *Tampa* into Australian waters, the High Court upheld the “principle of strict territoriality”, rather than interpreting the matter of entry of the rescued people on the principles of a humanitarian instrument.\(^{19}\) In 2004, the High Court ruled in the *Behrooz* case that mandatory detention was for administrative purposes and that such detention was voluntary.\(^{20}\) In another decision, the High Court ruled that immigration detention was not indefinite but prolonged, because the duration of detention depended on how well individuals co-operated with authorities to leave Australia.\(^{21}\) Let us briefly return to Chapter 2 — *Showdown at Sea: The Tampa*, to the time when the *Tampa* was inside Australian waters and the destination of the rescued refugees on board the ship was still unclear. The reason for repeating material that was already quoted in this thesis is that the same material gives rise to different arguments that each chapter addresses. The current chapter broadens the discussion and analyses the tension itself.

\(^{18}\) Crock, *Immigration and Refugee Law in Australia*, p. 28.
and discusses some of the institutional mechanisms that have absorbed this tension. However, such broad consideration has one narrow purpose: to ask if this legal rationalism thesis still has merit when the hypothesis that the Howard government justified its refugee policies by making rhetorical recourse to the law is placed in another context. This context, as alluded to at the beginning of this chapter, is the space where the Judiciary and Parliament contest the boundaries of legitimate state power.

When both the Prime Minister and the Immigration Minister argued for passing of the *Border Protection Bill*, they indicated that the proposed legislation would transform institutional practices beyond the *Tampa*. John Howard said that, whilst the legality of the government’s actions with regard to the *Tampa* was not in doubt, the new legislation was necessary, because “the law is often an unpredictable thing”.

One day later, Philip Ruddock added that the legislation would not only clear up matters of legality, but also remove “the possibility to argue that there may be a case for doubt”. It is now time to discuss the uncertainty of the institutional practices to which the Prime Minister and the Immigration Minister referred. This uncertainty was about how the judiciary may apply the new legislation.

Academic lawyers Tania Penovic and Adiva Sifris discuss this changing trend in judicial decision-making in three articles that were published in a special edition of the *Alternative Law Journal*. Penovic’s and Sifris’ description of the chronology of this change is not inconsistent with the argument of this chapter that legal rationalism has directly contributed to changing institutional

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practices: the argument that the institution of law, in the politicised context of refugee policy, increasingly resembled the framing of refugees by the Howard government as illegal intruders and as a threat to Australian sovereignty.

Two cases discussed by Penovic and Sifris, known as Lam and Teoh, are not refugee cases. However, the cases give insight into the reasoning by the judiciary only five years before the Howard government introduced major changes to its refugee policies from 1999 onwards. Mr Teoh had committed an offence that incurred the penalty of removal from Australia. In April 1995, the High Court ruled that Mr Teoh was allowed to remain in Australia because his removal would not be in the best interest of his children. Sifris comments that the decision to allow Mr Teoh to remain in Australia came from Australia’s ratification of the Convention on the Rights of the Child in 1989, and that this ratification created “a ‘legitimate expectation’ that the convention would be taken into account in the decision-making process”. Eight years later, Sifris continues, “the High Court was critical of the ‘legitimate expectation’ approach in Teoh”.

Sifris cites the second case, the Lam case, where the court judgement differed markedly. Not unlike Mr Teoh, Mr Lam had also committed an offence that resulted in the cancellation of his Australian visa. Sifris writes that in 2003, eight years after Teoh, several judges were critical of Mr Lam’s application to the Department of Immigration and Multicultural Affairs that his children would be disadvantaged if Mr Lam were ordered to leave Australia. Justices Gleeson, McHugh and Gummow stated that although Mr Lam did not claim that the Teoh case had set a precedent for his (Lam’s) claim, Mr Lam’s

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27 Ibid., p. 219.
submission may imply such claim. Some judges were critical of Mr Lam’s submission, because the legislation that applied to the Lam and Teoh cases had changed. The joint judgement by Justices McHugh and Gummow indicate how legislation sets the boundaries of judicial power:

One consideration is that, under the Constitution (s 61), the task of the Executive is to execute and maintain statute law which confers discretionary powers upon the Executive. It is not for the judicial branch to add to or vary the content of those powers by taking a particular view of the conduct by the Executive of external affairs … Rather, it is for the judicial branch to declare and enforce the limits of the power conferred by statute upon administrative decision-makers, but not, by reference to the conduct of external affairs, to supplement the criteria for the exercise of that power.

Such is the status of legislation within state structure, even if legislation was written for narrow politicised purposes, as has been argued in the case studies. Creyke and McMillan describe how judges pronounce judgement on points of law: judges decide if and how legislation applies to a particular case, and also interpret what the legislation means in a particular case. Accordingly, parliament writes the law and the courts receive the authority of what they can decide from such legislation. For the discussion in this thesis, these legal matters raise the question of how judges determine on points of law where the law has been written for narrow political purposes. This takes the discussion into the area of judicial interpretation that, combined with the power to make definitive determinations, gives to judges considerable power to influence the workings of parliament through the institution of law.

As noted in the case studies, Australian statute law does not give a special status to uninvited refugees. This has always been the position of the Howard

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28 Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam [2003] HCA 6 (12 February 2003), (High Court of Australia, 2003), paragraph 7; Ibid., Justice Gleeson, paragraph 28; Justices McHugh and Gummow, paragraph 65.
29 Ibid., Justices McHugh and Gummow, paragraph 102.
30 Creyke and McMillan, Control of Government Action. Text, Cases & Commentary, paragraph 2.3.2, p. 56.
government, as indicated in this speech by Immigration Minister Philip Ruddock to Parliament:

Let me affirm that we do have a policy of detention for people who arrive in Australia unlawfully and clandestinely, to ensure that they are available for processing and for removal. It is a policy to achieve that public interest outcome. It is not punitive. It is humane. We do not detain refugees. We do, however, detain people, some of whom make asylum claims.  

The legislation the Minster refers to is the *Migration Act*. This legislation established a visa system, and refugees were increasingly viewed in relation to valid travel documents. The gradual change of institutional practices, where the power of oversight moved from the judiciary to the Immigration Minister, was discussed in Chapter 5 — *Bureaucratic Process and Ministerial Power*. Nick Poynder argues that this process depended on a ruling by the High Court that the Executive had powers to bring about this change. Accordingly, this occurred when the High Court ruled in the *Lim* case in 1992 that Parliament was authorised under the Constitution to detain people. Mary Crock notes the impact on refugees during this change, where the *Migration Act* prevailed over earlier UN treaties: the courts considered asylum seekers “a mere subset of unlawful non-citizens”, so that the lawfulness of administrative detention under a system of bureaucratic decision-making “neatly removes from consideration anything personal to a litigant”. Crock concludes her discussion by arguing for “a much more contextual approach to both the interpretation

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and application of the law in cases involving the detention of asylum seekers”.

Tania Penovic perceives a double layer of tension that was generated by the new institutional practices, and resolved in the Lim case: first, only the courts have the power to detain people. Penovic continues that in Lim, the High Court decided that mandatory detention did not infringe on the separation of powers, provided that Parliament did not “exercise judicial power”. Judicial power is exercised when judges impose a custodial sentence. Second, Penovic continues, detention under orders from Parliament may infringe on the separation of powers doctrine. This tension was resolved when the High Court ruled that Parliament could detain non-citizens under the “aliens power” under section 51 of the Constitution:

The detention must be reasonably capable of being seen as necessary for the purposes of removal or to enable a visa application to be made and considered. If detention was not limited to one of these alien power purposes, it would be punitive in character and violate the separation of powers.

One may infer from the above discussion of the papers by Poynder, Crock, and Penovic that the judiciary created a space in the legal system where Parliament conducted new institutional practices that refined the policy of mandatory detention. It is my assertion that legal rationalism later entered this space when the Howard government stretched the application of these rulings through legislative changes. First, these legislative changes directly affected refugees, as was discussed in the case studies. Second, and less publicised than the legislative changes to refugee policy, other changes limited government accountability, as was discussed in Chapter 5 — Bureaucratic Process and Ministerial Power. Through both sets of legislation there resulted, on the one

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37 Ibid.
hand, in greater powers for the Howard government to define the scope of its accountability, and second, through increasing parliamentary powers over people defined as “aliens”, a space was created within legal rationality for the ideology of legal rationalism to inform institutional practices.

For example, Penovic writes that when the Lim case was heard, there was a time limit of 273 days on detention and that the High Court accepted that this time limit would “result in expeditious removal from Australia”. Penovic writes that later, this time limit was removed. I do not suggest that the continuation of mandatory detention after the removal of the time limit was a misuse of legal rationality in the technical-legal sense. However, the court ruling that Parliament had the power to detain people without sentencing by the judiciary occurred in a specific context. When this context changed after removal of the time limit, there remained within the legal system a broader authority for Parliament to exercise its powers of mandatory detention. Within this broader authority created by the Lim case in 1992, the Howard government subsequently delivered a policy of mandatory detention that carried over to the case studies. At this point, I wish to allude to the possibility that within this space of increased government power, there was the potential for legal rationalism to dominate other institutional practices. Such would be an example of Legal Rationalism Form 2, where the exercise of government power through the law may mask other ideologies behind its refugee policies.

Such development, as seen in the following example, does not preclude the manifestation of Legal Rationalism Form 1: the idea of observing rules for their own sake, as long as such practice is consistent with other goals. Penovic comments on the different legal arguments that lawyers presented in the Woolley case about the power of Parliament to detain children: Counsel for

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39 *Ibid.*, p. 225. Another aspect of the Woolley case, how legal rationalism has stifled the powers of the Human Rights Commissioner, was already discussed in the *Bureaucracy* chapter.
the children argued that the detention of children was “unconstitutional in their indiscriminate application to children without accounting for their developmental needs and vulnerabilities”. Penovic contrasted this argument with an argument advanced by counsel for the government: “constitutionality must be determined by the legal structure of the detention regime and not by its consequence and effect on detainees”. The second argument is what Habermas would call the uncoupling of legal rules from the purposes they were intended to serve, a fetishised system of rules exercising for its own sake. I will return to this point in the next section, when elaborating on the fate of the Bakhtiyari family.

The argument presented so far suggests how a changing trend in court judgments allowed for legal rationalism to influence institutional practices. Court judgements, however, are informed by a legal code, and not by political rhetoric of the elected government. What then, are the legal factors that may account for this changed interpretation of the law by the judiciary? First, there was the framing of refugees as aliens under Australian law since Federation, as already discussed. However, these factors existed long before the Howard government came to office, and therefore do not fully explain a change in judicial reasoning when the Howard government, as is argued here, pursued an ideology of legal rationalism. Without implying a causal relationship, two changes to the broader principles of judicial reasoning may explain this new trend: the changing interpretation of the Convention Relating to the Status of Refugees as expressed by the “consular” and the “surrogate” views.

Germov and Motta describe two variations within the accepted view that protection of refugees under the Convention Relating to the Status of Refugees is a matter of agreements between states, rather than a statement of individual rights:40 On the one hand, there is the concept of “surrogacy” where, when

Chapter 6
Politicisation of the Law

states fail to protect their citizens from persecution, there is “a duty on the international community to offer surrogate protection to individuals who have been identified as fitting the definition of refugee on criteria set by the receiving state”. In the citation above, Germov and Motta explain that the second interpretation of the Convention Relating to the Status of Refugees, the “consular” view, is less generous than the surrogate view: “consular” protection, in contrast to “surrogate” protection, focuses on the rights of the state to exclude aliens, rather than on the obligation of the state to offer protection. “Consular” protection thus has a special focus on how persecution fits into the narrow definition in Australian law. One implication is that if an applicant has not met the Australian protection criteria, then “this could result in the expulsion, or refoulement of that individual to a territory where they may well face such persecution”. Germov and Motta add that such view has been accepted “by at least three judges of the High Court.”

One can see from the previous paragraph that in these new institutional practices, refugee determination was conceptualised as a right of the state to refuse permission of entry to foreigners. Also significant is that these new practices, which resulted in a dominance of immigration law over refugee rights, occurred at the height of refugee arrivals in Australia, and the Howard government’s politicisation of such events. It was the time when the Howard government pursued the language claims and framing practices of its legal rationalist agenda, as was argued in the case studies. The developments, cited in the next paragraph, support such claim.

Susan Kneebone argues that the state approach focuses “on the sovereign rights of states to enter into treaties and exclude aliens”. Elsewhere, Kneebone notes that this change among judges to view “the [Refugee]
Convention from the perspective of the rights of the receiving state, rather than from the need of individuals seeking protection or asylum”, whilst not held by all judges, marks a shift in judicial interpretations.44 As recently as 1998, “the claims of the applicants were accepted on the basis of an individual investigation into their claims of persecution”.45 Two years later, in the *Khawar* case, the judges accepted a persecution claim not primarily because the applicant demonstrated an acceptable claim to persecution, but because the state of the refugee applicant did not enforce existing legislation.46 Such judicial reasoning, Kneebone continues, conferred “a limitation upon the absolute right of member states to admit whom they choose”. Nevertheless, the goal posts had changed from accepting refugees because they were persecuted, toward an interpretation that the applicant needed to demonstrate a case where the home state had not taken appropriate measures to protect the applicant from persecution.

This change in judicial reasoning, and the judgement of the *Khawar* case, give credence to an observation stated earlier in this chapter: that the legal code has its own logic, which may differ from that of the law-makers. Whilst the Howard government may have welcomed the interpretation of the *Convention Relating to the Status of Refugees* from the perspective of the rights of the Australian state, the judicial interpretations of the legal code also generated an outcome less favoured by the government. Such reasoning may be inferred when Mrs Khwar won her refugee case on appeal. Thus, the institution of law absorbed some tension created by legal rationalism, when the court judgements became less incongruous with the rhetoric of the Howard government, as the legal code increasingly framed refugees as a threat to Australian sovereignty and as illegal border-crossers. Some tension between the judiciary and Parliament, however, remained. The *Khawar* case is but one example of how this tension remained in constant flux. Other examples will follow in this

44 Ibid., p. 302.
46 Ibid., p. 308.
chapter: Although the influence of legal rationalism could be observed in some judicial reasoning, such association was weak because the judges applied the logic of the legal code.

Whilst there may be the scope to appeal, governments eventually have to accept court determinations. Haigh Patapan writes that, because the judgements of the High Court affect the formation of public policy by governments, the High Court automatically assumes a political role. However, the court decisions that affected the formation of refugee policy had a special political flavour. Mary Crock and Ben Saul observe a unique feature in the emerging trend of decisions in migration cases. Crock and Saul argue that this trend was brought on by an increasingly restrictive legislation by the Howard government that left less and less room for interpretation by the judiciary. Accordingly, some judges, given the political climate, risk vilification or “retaliative legislation”. In what may appear as a competition between claim and counter-claim, the Howard government referred to some judges, who pronounced court judgements that the government disapproved of, as “activist judges”. Such derogatory comment, however, misses one point. Judges, whose determinations did not clash with the ideology of the Howard government, were not called derogatory names. Yet it is arguable that the judge who stretches the interpretation of statute law into the direction of an outcome desired by Parliament, may be just as “activist” as the judge whose interpretation pulls in the opposite direction. The reality was that, due to the politicised nature of the refugee issue, it became increasingly impossible for judges to pronounce “neutral” decisions, without some political reaction.

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48 Crock and Saul, Future Seekers, Refugees and the Law in Australia, p. 62.
49 Ibid.
The system colonises itself

In their discussion on the changing trend in judicial decision-making, Sifris and Penovic allude to an ambivalence that accompanied this development: in one case, the Family Court ruled that the children of the Bakhtiyari family had suffered damage as the result of their immigration detention and that, therefore, the government should release these children from immigration detention. The Howard government appealed against the order to release the children, but the full bench of the Family Court upheld the previous decision. One year later, in April 2004, the High Court ruled that, as “unlawful non-citizens”, children could lawfully be detained under the Migration Act. Justice Callinan declared that the Migration Act “was designed to deal with all matters, without exception, relating to unlawful non-citizens”.

The judgement by the High Court meant that the provisions of the Migration Act operated in immigration detention centres and, therefore, the Family Court did not have the jurisdiction to release the Bakhtiyari children. This judgement also raises two points when contemplating the argument in this chapter: the assertion that legal rationalism has modified institutional practices. First, is the judgement of the High Court, which stipulated that the legislation of the Migration Act applied to detained children, an example of legal rationalism? Perhaps, because the High Court ruling, which favoured an interpretation of immigration law over child protection law, was not incongruent with the government’s framing practices that identified refugees as outsiders. However, in the language of the legal code, an interpretation of the law to treat refugee

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51 Ibid., p. 219.
children differently from other children may express itself as a matter of jurisdiction.

Second, does legal rationality necessarily imply that the wordings of legal statutes are followed to the letter? Justice Richard Chisholm sat on the full bench when the Family Court ordered the release of the children. After retiring from the bench, Justice Chisholm wrote that if he could have released the children from detention, he would have done so. According to Justice Chisholm, evidence from health professionals in the court case showed that “the children demonstrated the effects of abuse and neglect”, and that the evidence also “identified the immigration centre environment as prima facie the source of the children’s abuse and neglect”. Therefore, Justice Chisholm reasoned, the Family Court assumed it had jurisdiction to release the children. When the High Court later overturned this decision, it meant that there were no legal provisions to release the children, except by discretion of Parliament.

Justice Chisholm’s paper cited above brings out the tension between judicial interpretation in accordance with rules and with principles. The legislation was clear, from section 196 of the Migration Act: courts do not have the authority to release anybody who has been detained under this law. On the other hand, there was also a principle that brought out a tension within the legal system: Children ought to be protected from harm, even if such harm occurs in the context of lawful delivery of public policy. The legal system accommodated the tension, firstly through implementing a rule-driven approach that was so characteristic of legal rationalism, and secondly through colonising, or displacing, one part of legal statute with another. With regard to the first point, one can see how the strict application of legal rules is an example of Legal Rationalism Form 2, the fetishising of rules without addressing the

53 Ibid., p. 42.
consequences or the principles behind these rules. In the strictly legal sense, one may argue that the High Court determined that Parliament is the relevant authority to deal with the welfare of children detained under immigration law. Such reasoning, however, starkly departs from the principle that children are protected by other jurisdictions.

I will return to the second point shortly. First, a few words about the role of legislation and principle in legal rationality to support the argument advanced at the end of the previous paragraph. One may infer from Abraham Kaplan’s exposition on the philosophy of law that legal rationality is greater than codification and resolution of disputes through the legal code. Although judgements are based on the rationality of the law, rationality goes beyond “acting so as to secure the values pursued” and “is not limited to a choice among means”. Instead, Kaplan argues, decisions should not be guided by means–ends relationships as the determining reason for the decision. Instead, Kaplan continues, the “rationality of a person or an institution lies in the whole of its working, in the style of its performance”. Viewed from this perspective, rational-legal decisions are not made entirely on the basis of the wording of statute law, but are also informed by the principles of precedent and interpretation. When combining these components, there may be scope for judicial decisions to depart from the concrete wording of legislation, yet remain consistent with the legal code. However, the issue is more complicated: Kaplan concludes the discussion cited at the beginning of this paragraph by adding that, unless legislators have written unambiguously worded legislation for a specific purpose, judges may exercise personal discretion and preferences when interpreting the legislation. Applied to this thesis, one can see how through the politicisation of refugee issues that were driving the increasingly concrete

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55 Ibid., p. 60.
56 Ibid., p. 62.
wording of immigration law, legal rationalism projected another ideology, one that was driving the political process as well as the legislation.

Putting legal statutes into the wider context of legal rationality does not remove the tension that exists within the institution of law — a tension that arises from the requirement that on the one hand, legal rules must be obeyed, while on the other, that legal rules may be applied with discretion. It is a tension that has been observed throughout this thesis. Sebastián Urbina addresses this tension as a central concern, almost as a dichotomy, that exists in jurisprudence.57 Accordingly, one view proposes that if laws are viewed as norms, one should not focus on “neutral procedures … but on both legal procedures and subjects who interpret and apply them to specific cases, in certain contexts, at a certain time”. Urbina outlines the other side to the debate: legal positivists reject the view that legal orders are more than “instruments”, but argue that strict adherence to these “legal orders” achieve the goals of predictably giving “intentionality, purpose, morality and self-interest” to social life.58 In arguing for a rights-based approach to the law, Urbina writes that judges should pronounce their court judgements beyond normative expectations and the wishes of the majority, because “individuals ought to be treated with equal concern”.59 Urbina concedes that the practical application of the philosophical principle proposed in the above citation has the potential to generate tension when judges, in exercising their discretion to interpret law, arrive at a decision that is contrary to the will of the legislators.

It is suggested here that legal rationalism absorbed some of the tension that arose from this ambiguity: through micro-legislation that achieved politically desired outcomes and influenced judicial interpretation, the Howard government removed some of this ambiguity and gave more certainty to

58 Ibid., p. 104.
59 Ibid., p. 233.
institutional practices. Such certainty, however, also points to a fundamental flaw within the legal system that the Howard government exploited when, under the auspice of the apparently “neutral” language of legal statutes, the government advanced the strong ideological intent of its framing practices – an intent that was not obvious from the wording of the statutes. Just as the courts in the early days of Federation assisted Parliament with the exclusion of non-white immigrants to Australia, so the court determinations based on the statutes of the post-Tampa legislation legitimated an exclusionary ideology behind the framing practices through the legal system. The framing of refugees as intruders, their deprivation of liberty under the auspice of immigration law, and the removal of legally enforceable measures designed to guarantee the safety of children inside immigration detention centres make this point. There comes to mind a not dissimilar development in the legitimate exercise of state power that was already discussed, one where the “neutral” language of legislation pertaining to the dictation test disguised a racist ideology until racism was no longer the preferred practice.

It is now time to return to the second point that emerged from the discussion on the tension between court determinations based on wording of statutes and principles behind these statutes. Such point relates to the High Court ruling that the Family Court did not have jurisdiction to release children from immigration detention to the Habermasian colonisation thesis. However, the fate of Alumdar and Muntazar Bakhtiyari as the result of the High Court determination adds a qualification on the colonisation thesis. To recap from Chapter 1 — Theoretical and Political Background, and drawing on the above citation: Habermas predicts that the system colonises, or displaces, the functional ability of the lifeworld as a normative construct, and thereby rationalises the lifeworld to extremes. However, the court ruling that the Migration Act prevails over other law in matters pertaining to immigration

detention centres, generates an observation that the Habermasian *colonisation thesis* does not predict: here, one part of the legal system dominates another and displaces, or colonises, part of itself. This observation adds another dimension to the *colonisation thesis*: Habermas may well have underestimated the power of politics to resolve tensions within the system, and the ability of political process to resolve a struggle for dominance and institutional power within the structure of the state, instead of spilling over to the lifeworld.

This insight warrants a closer look at the potential for colonisation of legal rationality by legal rationalism. Three articles by Spencer Zifcak, published three months apart in the e-journal NewMatilda.com, take us into this space where colonisation has occurred. In these cited articles, Zifcak does not use the word “colonisation” or mention Habermas. However, Zifcak’s discussion on the principles of judicial interpretation is not inconsistent with the claim that is advanced here. Zifcak discusses four cases that have already been mentioned in this thesis: the cases about the teenage children Alumdar and Muntazar Bakhtiyari, four children of a family from Afghanistan in the Woolley case, Mr Ahmed Al Kateb, and Mr Mahmed Behrooz. The reason for mentioning these cases again is to focus on one aspect that has not yet been discussed: how legal rationalism assisted in resolving the institutional tension about the separation of powers doctrine.

Zifcak’s three articles cited at the beginning of the previous paragraph have one common thread: in the four court cases that Zifcak discusses, the courts accepted that Parliament was authorised to detain people under section 196 of

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61 *Spencer Zifcak, "The Forgetting of Wisdom: The High Court and Mr Ahmed Al-Kateb." [e-Journal] NewMatilda (2004, 10 November).*

*Spencer Zifcak, "The Forgetting of Wisdom: Mr Behrooz Jumps the Razor Wire but the High Court Catches Him." [e-Journal] NewMatilda (2004, 10 November).*


the *Migration Act*. Zifcak notes another commonality: the judiciary, when interpreting the law in this way, did not interpret the law to determine whether or not the detention itself was punitive. As noted earlier, and Zifcak also makes this point, Parliament is authorised to detain non-citizens for administrative, but not for punitive, reasons. Zifcak’s point is that the courts had scope to interpret whether detention was punitive, but instead avoided this option and interpreted the cases on the technical aspects of the rules of migration law.

It is now time to elaborate how Zifcak arrives at the conclusions set out in the previous paragraph. In relation to the detention of children, Zifcak identifies a dilemma: whilst technically correct on points of law, their detention also was “a grave assault on their human rights [and] a significant infringement of Australia’s obligations under several international human rights conventions.”

In the case of Ahmed Behrooz, the High Court disallowed documents from Woomera, which may have shown that Behrooz’ detention was punitive. Zifcak argues in the previous citation that the courts ruled on technicalities of law and separated detention from the conditions under which it occurred, so that “once inside, the conditions to which this person is subjected, no matter how harsh or degrading, are irrelevant to the inquiry”. Zifcak continues that the assumption that Behrooz was detained “because he came to or remained in this country without permission” may have been punitive. Zifcak’s conclusion closely approximates the description of Legal Rationalism Form 2; an ideology where legal rules are fetishised and obeyed for their own sake:

>The majority perspective is informed by and infused with an adherence to technique. Being technical, it is also narrow and prone to abstraction. This abstraction, regrettably, can lead to the adoption of propositions that not only defy common sense but also, more perilously, deny our common humanity.

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63 Zifcak, “No Way Out: The High Court and Children in Detention.”
64 Zifcak, “The Forgetting of Wisdom: Mr Behrooz Jumps the Razor Wire but the High Court Catches Him.”
When ruling that Ahmed Al Kateb’s potentially lifelong detention was not punitive, the High Court also interpreted section 196 of the *Migration Act* literally, and did not make an interpretation “on the presumption of liberty”. Zifcak explains that this principle comes from a precedent that is based on “numerous prior judicial decisions that, in case of doubt, laws should not be interpreted in a way that is prejudicial to individual liberty”. Behind this principle is the assumption that the courts assume that the legislature does not “overthrow fundamental principles, infringe rights, or depart from the general system of law without expressing its intention with irresistible clarity”. Zifcak’s concern that the emerging principle behind judicial interpretation as a pre-occupation with rules is not inconsistent with the key argument of this chapter that the political framing of legal rationalism has become of part of institutional practices:

> The principal implications of the case, however, lie far deeper than this. The court has adopted a very literal, semantically founded interpretation of both statute and Constitution. This suggests a measure of deference to the will of the Executive that is likely to narrow significantly its role as guardian of individual rights and liberties and expand governmental power correspondingly.

What Zifcak calls in the above quote “deference to the will of the executive” also suggests resolution of the structural tension between the Howard government and the judiciary; a resolution where the judicial framing of refugees increasingly reflected the government’s political framing. The trend of the judiciary to interpret in favour of the concrete wording of the legislation that authorises parliament to mandatorily detain people, instead of exercising its discretionary powers to interpret in each case whether detention is punitive, takes us back to a type of judicial activism not acknowledged by the Howard government. This is an example of judicial activism alluded to earlier in this

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66 Zifcak, “The Forgetting of Wisdom: The High Court and Mr Ahmed Al-Kateb.”
67 Ibid.
68 Ibid.
chapter, where judges, whilst appearing to have limited discretion of interpretation due to the wording of legislation, actually stretch and accommodate the interpretation until the outcome barely disguises the ideology of legal rationalism.

**Pacific Solution on trial**

This section discusses two cases that may be seen as an additional example of colonisation within the legal system, and how the legal rationalist agenda of the Howard government resolved the tension that occurred in this process. The *Tampa* case and the *Nauru* case, as they became colloquially known, show how the legal system resolved the tension created by the micro-legislation that reflected the framing practices of refugees by the Howard government. Both cases take us back to the case studies. However, the cases are discussed here because of the institutional issues they raised. These institutional issues revolve around how the judiciary responded to the Howard government’s political exploitation of tensions that occurred as the result of the changes to refugee policy between 1999 and 2003.

At that time, the quandary for the Howard government was how to move the *Tampa* from Australian waters without taking the refugees. *The Australian* published a story that drew similarities between the *Tampa* and a historical event that later became known as *The Voyage of the Damned*. In 1939, the ocean liner *St Louis* carried 930 Jewish refugees, who had left Nazi Germany. The Cuban government refused permission for the ship to enter the port of Havana, and the Cuban president said that “the shipping line … should be taught a lesson about respect for Cuban law and sovereignty”. The cited

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newspaper article reported that the ship returned to Europe, and that most refugees later died in the Holocaust.

Unlike the *St Louis*, the *Tampa* did not turn around. Foreign Minister Downer indicated that the *Tampa* may be towed to international waters, but the Norwegians prepared a court injunction to prevent this, on the basis that the *Tampa* was unseaworthy.\(^{70}\) The Australian government did not follow through with this option of towing the *Tampa*, but instead send the navy in and moved the refugees to military ships. It was argued in the *Tampa* case study that the Howard government resolved the political pressures created by the arrival of the *Tampa* by resorting to framing refugees as intruders. Political framing, however, did not sway the attitudes of the judiciary, which decided arguments on the rule of law. Or did it?

On 31 August 2001, two cases were lodged in the Federal Court that “sought restraining orders preventing the Commonwealth and the MIMIA [Minister for Immigration, Multicultural and Indigenous Affairs] from removing the asylum seekers to the territorial sea”.\(^{71}\) A group of lawyers who acted pro bono for the refugees challenged the detention on board the *Tampa* and argued that these people should not be detained on the *Tampa*, but instead be detained on the mainland under section 196 of the *Migration Act*. Any other form of detention, they reasoned, would be illegal. In court, the government did not argue the legality of detention, but argued instead that the passengers were not detained at all: the Federal Court accepted the view “that the rescuees were not held in detention on the MV *Tampa* but that they were free to go wherever they wished other than to Australia”.\(^{72}\) The full bench agreed with this proposition.


\(^{71}\) Germov and Motta, *Refugee Law in Australia*, footnote 46, p. 46.

and ruled that “the rescues were not detained by the Commonwealth or their freedom restricted by anything that the Commonwealth did”.

Realistically, with the *Tampa* being unseaworthy and with the Indonesian government refusing permission for the refugees to enter, their ability to move elsewhere was severely curtailed. Although some of the *Tampa* refugees later went to New Zealand, several newspaper reports at the time indicated that no country had given permission to allow the *Tampa* to dock and leave its refugees there. Philip Lynch and Paula O’Brien argue that the *Tampa* judgment in its practical and political context indicates a narrow interpretation of what constituted lawfulness: the finding that the passengers were not detained on the *Tampa* was based on judicial reasoning of “abstracting each individual act of the Commonwealth from its context and consequences”. Such narrow interpretation, Lynch and O’Brien continue, was based on two key assumptions. First, the judges reasoned that the closure of the Christmas Island port to prevent the *Tampa* from docking there, occurred on the basis of lawful authority. Second, the judges accepted that “the presence of SAS troops on board the *MV Tampa* did not … constitute detention” and the negotiations with Nauru and New Zealand “provided the only practical exit from the situation”.

Lynch and O’Brien’s conclusion in the article cited previously is not inconsistent with the argument of this chapter that the legal system resolved the tension generated by legal rationalism through a process where the legal system colonised parts of itself. Lynch and O’Brien conclude that the Howard government created a context where it ensured “that none of the fundamental rights accorded to non-citizens under the *Migration Act 1958* (Cth) accrue to the

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73 *Minister for Immigration and Multicultural Affairs & ORS v. Eric Vadarlis*, V1007/01
asylum seekers”.76 One can see in the previous comment how immigration law colonised a more basic principle that was expressed in other legislation that conferred certain rights on individuals. From an institutional perspective, the Tampa judgement reflected to points significant to this chapter: first, the law kept out those who were framed in the political language of the Howard government as intruders. Second, the legal system replaced, or colonised, one set of judicial principles with another: the judiciary favoured an interpretation of the rights of the state, as was discussed in the previous section.

The following case came about from the way in which the Nauruan legal system rationalised the detention of refugees who were prevented by the Australian military from reaching Australia.77 The case in the High Court did not occur until 2005, but the background events take us back to September 2001. Then, the Howard government was in the process of establishing the Pacific Solution, which included the transfer of refugees to a detention camp in Nauru. It will become apparent from this example that institutional framing practices are much more enduring and powerful than political framing practices.

To reflect on the background, I will draw on the work of Marr and Wilkinson.78 Whilst the legality of the policy of mandatory detention in Australia was part of Australian legislation since 1989, such laws did not exist in Nauru. Moreover, the Nauruan Constitution stipulated that “no person shall be deprived of his liberty unless authorised by law”. Neither were there provisions in the Nauruan legislation that authorised detention under Australian law. Marr and Wilkinson argued that Australian lawyers resolved this legal dilemma for Nauru’s constitution through “brute force and tricky interpretation”.79 According to this interpretation, the refugee applicants were

76 Ibid., p. 215.
78 Cited in Marr and Wilkinson, Dark Victory, p. 163.
79 Ibid.
not detained at all. Instead, Nauruan authorities issued a “visitor’s visa”. This visa was issued “on condition that each person remained within the confines of the camp”. But if people left the detention camp without authorisation, they would breach their visa conditions and hence be in breach of Nauruan law.

On the Australian side, there was no doubt that transporting the *Tampa* passengers to Nauru was all about detention. Frank Brennan notes that the Australian Protective Services, a branch of the Australian Federal Police, co-operated with Nauruan police to keep “the asylum seekers inside these facilities”. Brennan also cites a document where the International Organisation of Migration, the agency that processed the refugee applications in Nauru for the *Tampa* passengers, saw its role to manage these places as detention centres “in coordination with the relevant agencies of the Australian government”. Although the refugees were sent by Australia’s defence forces to Nauru for the purpose of detention, their framing as visitors under Nauruan legislation suggested otherwise. In October 2006, five years after implementation of the *Pacific Solution*, a newspaper cynically reported a projected cost of $1.2 million per year for “a world record visa charge” to keep one refugee on Nauru. The cited article reported that the Nauruan Foreign Minister said that Nauru charged high fees “for humanitarian reasons”, in an attempt to put pressure on the Australian government to move this refugee from Nauru.

The foregoing example of the legality of detention in Nauru shows how the power of political rhetoric becomes magnified when such rhetoric is barely distinguishable from legal reasoning: Technically, there is a difference between the framing of refugees by the Howard government as outsiders and their framing by the Nauruan government as “visitors”. These semantics, however,

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81 Migration Legislation Amendment (Transitional Movement) Act 2002. Section 198D (3) (c); Cited in Ibid., p. 108.
do not obscure the reality of detention. Marr and Wilkinson predicted that this “curious message about law and lawfulness” worked, provided there was no legal challenge in an Australian court, and provided that Australian lawyers were denied entry to Nauru. Subsequent developments proved this prediction incorrect.

On 28 April 2004, a refugee claimed that his detention in Nauru as a condition of the visitor’s visa, was illegal. On the previous day, a newspaper reported that the Australian government paid for a Queens Counsel and for a barrister to defend Nauru against these charges. The cited report continues that the lawyers who were paid by the Australian government flew to Nauru. Other lawyers who intended to defend the refugee, were prevented from boarding the plane, because the Nauruan government had cancelled their visas at the last minute. In response, the lawyers who were left behind claimed “political interference” by the Australian government. On the following day, the online news service Nine MSN reported a twist to the proceedings: The Nauruan Justice Minister “ordered all Australian lawyers to leave”, including those financed by the Australian government, and ordered that Nauruan paralegal teams instead argue the case in court. Queens Counsel Julian Burnside, who intended to defend the refugee applicant in Nauru, told reporters:

The visas contain a condition requiring those people to remain locked up as long as they are on Nauru… They didn't want to be in Nauru, they didn't ask for visas and it is a very strange thing to have a visa foisted on you that requires you to go to jail.

Another newspaper report gives insight into further developments. The report indicated that the significance of the case was that if one refugee

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83 Marr and Wilkinson, *Dark Victory*, p. 163. Marr and Wilkinson explain that Nauru did not have lawyers, and its legal relationship with Australia stemmed from a post independence treaty that recognised Australian courts as the highest seat of appeal.


86 Ibid.

applicant was detained on Nauru illegally, so was everybody else. The Supreme Court of Nauru found that the asylum seekers were not held there illegally. Normally, this would have been the end of the matter. However, the Chief Justice of Nauru lodged a complaint to his government “over the cancellation of visas for four Melbourne refugee lawyers”. This complaint paved the way for the Australian lawyers who intended to represent the refugee in Nauru, to appeal the judgement of the Nauruan court in the High Court of Australia. One can infer, from the events just cited and from the events in the next paragraph, the power of rhetoric when rhetoric has become part of institutional practices.

In the case before the Australian High Court, Mr Ruhani claimed that his detention in Nauru under a visitor’s visa was illegal. In a majority decision, the High Court rejected Mr Ruhani’s appeal, which effectively meant that both the Nauruan and the Australian legal system had confirmed the legality of his detention. Chief Justice Gleeson acknowledged that Mr Ruhani had the right that this matter be heard in the High Court of Australia. However, Chief Justice Gleeson ruled that the High Court needed “to apply the law of Nauru in determining this controversy”, and added that “Nauruan law was given the force of federal [Australian] law”. The power of politics in legal rationality is further demonstrated by the outwardly passive conduct of the Howard government during Mr Ruhani’s case. Justice Kirby was critical of the Howard government’s conduct and said that in a case that had the potential to unwind the legal basis of the Pacific Solution, the government did not “seek to appear, to intervene or otherwise to provide oral or written submissions” to the High Court. Justice Kirby found this omission most irregular:

neither the Commonwealth nor the Attorney-General of the Commonwealth appeared, as would have been their right under federal law and normal practice. This left the defence of

89 Ibid., Chief Justice Gleeson, paragraph 58.
90 Ibid., Chief Justice Gleeson, paragraphs 65-66.
the validity of the Australian legislation to the appellant alone, acting through his lawyers. In my view … this presented a most unsatisfactory state of affairs… To leave the defence of that law, when under attack by a public officer of a foreign country having treaty arrangements with Australia, to another foreigner, detained in that country under arrangements with Australia … is unique. 91

It is possible that the Howard government refrained from arguing its position in the High Court because it relied on the power of its political framing that had found a way into Nauruan law. However, the controversy of the government’s conduct in the Ruhani case does not end there. Justice Kirby was critical that the government did not disclose to the High Court that it financed Nauru’s legal defence, and of the fact that “the circumstances of the costs and indemnity” were unknown “before press reports appeared”. 92 Justice Kirby’s criticism about the government’s non-disclosure of financing the lawyers was two-fold. First, it was up to the High Court to decide on costs, and the court would not award costs against the Commonwealth, which was a “non-party” in these proceedings. 93 Therefore, payment by the Australian government to the Australian lawyers begs the question of why the court case in Nauru was so important: the assumption that an Australian Court would be guided by the judgement by the Nauruan court seemed inevitable. Justice Kirby’s cited comment supports the speculation cited at the beginning of this paragraph that, once political framing becomes law, it has become part of normative assumptions that no longer require debate. Second, Justice Kirby stated that the government’s non-disclosure changed the perception of the High Court that “the Commonwealth and the respondent were at arm’s length”. 94 The second comment cited in the previous sentence takes us back to a lawyer’s comment about political interference stated earlier.

91 Ibid., Justice Kirby, paragraphs 222-23.
92 Ibid., Justice Kirby, paragraphs 228-29.
93 Ibid., Justice Kirby, paragraph 238.
94 Ibid., Justice Kirby, paragraph 228.
With the benefit of knowing the outcome of the court case, and taking Justice Kirby’s criticisms into account, one gets a sense of how a political process between the Australian and Nauruan governments almost pre-empted the determination in the case discussed above. All attest to the power of an exclusionary ideology that cannot be inferred from the statutes nor the judicial determinations. It is not surprising, therefore, that the Constitution formally separates the powers of Parliament and the judiciary. Despite such formal separation, the practical boundaries between both remain in constant flux and are subject to manipulation by political process.

**Conclusion**

This chapter explored structural power and dominance within the institution of law. It was argued that, when the system became stressed as a consequence of the political framing practices that informed the refugee policies of the Howard government between 1999 and 2003, legal rationalism influenced practices within the institution of law. An attempt was made to analyse whether or not the new institutional practices within the legal system resembled the government’s political framing practices that were in the case studies attributed to legal rationalism.

The analysis showed that the judiciary has modified the way in which it exercised its powers of interpretation, and that these changes were not incongruent with legal rationalism. These changes in turn informed judicial thinking in three main ways. First, though not necessarily in this order, there was a shift in judicial thinking from the rights of the refugee to the rights of the state. Second, as a flow-on from the first point, court judgements increasingly framed refugee issues as matters of unwelcome intruders, favoured a focus on the rights of the state. Both points suggest strongly that the ideological
projections behind legal rationalism have become part of institutional practices. In the introduction to this thesis, such development was called legal rationalism form one. Third, there was a shift from interpreting from principles behind legislation to narrow interpretation of statutes. All three markers indicate an insidious proliferation of politics as the emerging dominant pattern among institutional practices within state structure.

This does not mean the influence of legal rationalism on institutional practices came easy. Changing judicial practices were accompanied by legislative changes from Parliament in the form of micro-legislation, which almost predetermined judicial rulings and limited the discretion of judges to interpret these statutes in future court cases. Here, the system reinforces itself, as these changes, over time, become established precedent in the institution of law. One’s mind drifts to Anthony Giddens’ structuration theory, which predicts a reciprocal interaction between structure and actors, as the power of political framing practices shapes institutional practices.

Tracing legal rationalism from the Howard government’s political statements and policy practices from the case studies to the domain of institutional power within the legal system suggests a fundamental problem with the law. This problem derives directly from the structural tension between Parliament and the judiciary under the Westminster system of government in Australia. Whilst it may be necessary for this tension to exist in order to accommodate new social practices, this analysis has shown great potential for this space to become dominated by self-serving political interests. The requirement for the courts to interpret the rules in a pre-determined fashion led to some instances where, arguably, the political process that propelled legal rationalism influenced the outcome of court judgements in a system that required full court autonomy. In those instances, the statutes became isolated from the full autonomy of judicial interpretation, and promoted the semantics of legal rules to become the main consideration in judicial decision-making. If such
reasoning is accepted, then another point may be equally acceptable: if key practices of the legal system are susceptible to domination by legal rationalism, then the system needs activist judges who create a scope for human agency to contest the boundaries of power in the courtroom. Such contest, however, needs to be more transparent than it has been under the Howard government and come closer to the practice of public discourse that Habermas suggests.
In the three case studies, the analysis was about rules and the manipulation of the rules for political purposes. The previous two chapters extended the analysis and explored how in the institutions of law and bureaucracy these new rules legitimated such manipulation and gave authority to this ideological skew of legal rationalism. These two chapters discussed legitimacy in the legally rational sense, where legislation and public policy go hand in hand, and the legislation and policy practices are confirmed, or modified, under the influence of case law when disputes are settled in court. This chapter explores a different type of legitimation: legitimation of government policy that is derived from the electorate, the source of authority for governments within state structure.

To Habermas, the legitimation that this chapter explores is achieved through public deliberation and is an integral component to democracy. Habermas argues that at the base of legitimation is a cultural identity that forms the basis for the unity of a “collective identity” that exists at national level. Accordingly, this combination of state structure and the political activity of citizens are characteristic of the state. Habermas writes: “Only the symbolic construction of ‘a people’ makes the modern state into a nation-state”. Within Habermas’s

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theory, democracy becomes the “legitimation of political authority” not as citizens being ruled by government from above, but into citizens as bearers of “liberal and political civil rights” who confer such authority to the state. Public discourse thus becomes the space where citizens can influence their government, and it is logical that governments direct lots of energy toward that space.

Chronologically, the public legitimation discussed in this chapter occurred between 1999 and 2003, when the Howard government justified the policy changes that were discussed in the case studies. The significant direction for these policy changes, and public discourse about these changes, was thus distinct from the legitimation through the legal system: legislative changes occurred after key events prompted such legislation and the cases that interpreted the new legislation occurred even later. Public discourse about the events that the Howard government politicised to shape its refugee policies also occurred before official investigations were conducted; indeed such investigations often were prompted by such events. However, some information about how the Howard government delivered its refugee policies was released into the public domain between 1999 and 2003, such as the ongoing media publicity about the events themselves and reports by official investigators. It will be argued in this chapter that the public discussion approved of the Howard government’s changes to refugee policy. It may also be concluded that, because there was public knowledge of how the Howard government conducted its refugee policies, the public legitimated the new refugee policies and that the Howard government had no option but to represent the will of the people. Such conclusion, however would be too simplistic, because a recurring thread through the case studies and Chapter 5 — *Bureaucratic Process and Ministerial Power* was a systemic process that resulted in a delay of the release of information until after public discussion of the topic had subsided.
Chapter 7
Formation of the Public Voice

A thesis that argues that the Howard government resorted to legal rationalism to convince the public of its refugee policies would not be complete without asking if legal rationalism swayed public opinion, and what part the Howard government played in shaping public opinion through its legal rationalist agenda. This chapter, however, is not about how public opinion is generated or expressed, but about how the intensity of public opinion became a legitimating force for refugee policies between 1999 and 2003. Here, the question is: how did the Howard government frame its dialogue with the public to get public support for its refugee policies? From this chapter emerges a perception that public legitimacy was achieved by creating a perception of difference at cultural and psychological levels, and by creating a fear based response to this difference. It is argued that legal rationalism, whilst it did not specifically change public opinion, nevertheless provided an ideology that legitimated these changes that resulted in public approval of policies designed to dispel these perceived threats.

Thoughts of the public

It is difficult to know what “the public” is thinking. Jürgen Habermas conceptualises of public opinion as that which transpires in public discourse. Habermas writes that governments (“the state”) secure their external borders and exercise legitimate power within these borders. Such legitimacy comes partly from the law, and partly from the electorate. Habermas argues that, as long as people agree with the overall framework of the legal order, the public tends to legitimate actions that arise from the framework of the legal code.

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2 Jürgen Habermas, *Legitimation Crisis*, trans. Thomas McCarthy (Beacon Press, Boston, 1975) p. 21. It should be noted that when Habermas uses the word “truth” in relation to public discourse, “truth” is about public agreement in establishing normativity.
Provided there is such support, Habermas argues, “the belief in legitimacy thus shrinks to a belief in legality”.\(^3\)

Habermas’ proposition, when applied to this thesis, suggests that if there was electoral support for the general direction of the Howard government’s refugee policies between 1999 and 2003, the public would also support legislation to accompany this new direction. From this perspective, it is arguable that legal rationalism has a dual role in relation to public legitimacy and legality through the law. First, there is the potential to influence public discourse through framing social life through the lens of legal rationalism. Such influence may be inferred from the argument of the case studies that legal rationalism was the main justification for the refugee policies of the Howard government. Second, as was argued in the previous two chapters, legal rationalism also influenced institutional practices through the legislation that accompanies these policy changes. However, whilst public acceptance of the government’s policy justifications may have arguably contributed to the writing of legally binding rules, it does not follow that the public approves of the rules themselves. More is needed before statute law reflects the will of the electorate. Thomas McCarthy’s comment points to how Habermas addresses this difference:

> In the case of the truth-dependency of belief in legitimacy, however, the appeal to the state’s monopoly on the creation and application of laws obviously does not suffice. The procedure itself is under pressure for legitimation. At least one further condition must therefore be fulfilled: grounds for this procedure of the legitimating force of this formal procedure must be given.\(^4\)

In other words, legitimacy through public discourse is not about the laws, but about governments seeking approval for passing the laws. In contrast with the previous two chapters, this chapter does not explore how the Howard government exercised legal control, but how it engaged the electorate through

\(^3\) Ibid., p. 98.  
\(^4\) Ibid.
persuasion and argument. This difference is illustrated by following example, where legitimacy was equally about statutes and court decisions as about public debate. The *Tampa* was framed as a legal issue, where the Prime Minister, along with the Ministers for Immigration and for Foreign Affairs stated that their course of action had its authority in firmly established legal code, and that they had no choice but to act according to law.\(^5\) However, such statements seem unconvincing when one takes into account the modifications in this period. Roz Germov and Francesco Motta wrote at the beginning of their 900 page book on refugee law:

> The text has been re-written three times since we began working on it four years ago. We often felt like giving up because of the frequency of legislative change and the sheer volume of case law that was developing on a weekly basis.\(^6\)

Approval through public discourse, however, was a different matter. Such approval depended on how the electorate accepted that the political framing of refugees was consistent with the four language claims that the Howard government made about its refugee policies. These claims were that refugee policies were about sovereignty issues, legal rationality, orderly process, and humanitarian outcomes. Rather than revisiting the case studies, it is now time to abstract from language claims and practices and ask if political framing translated to public approval, and if legal rationalism influenced this debate.

How then, does the public declare its views to its elected political leaders, and how do governments respond to such views? It seems unlikely that the public dictates, and politicians follow the results of opinion polls. Murray Goot

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suggests that the question of whether politicians follow public opinion does not address the complexity of the relationship that exists between opinion and the active part that governments play in shaping public opinion. Goot argues that there is a two-way street between opinion and policy: politicians frame an issue, which then sets the context for the answers. Goot thus suggests a two-way street of information between governments and the electorate that goes beyond governments passively taking survey data into account, and actively construct such opinions.

Goot gives the example where the framing of the refugee issue by the government during the 2001 election campaign in terms of national sovereignty “primed” the public debate and responses in terms of border protection, which achieved “just what the government wanted to hear” when refugees themselves accepted the government’s queue-jumping frame and distanced themselves from refugees on the boats. According to Goot, the relationship between framing and priming begins with framing an issue in terms that builds on publicly accepted values or opinions. Rhetoric is then introduced to put the issue in a favourable light, whilst controlling information so that the public’s assessment of the issue is limited by the information that has been released by politicians. By this process, “politicians don’t reshape their policies; rather, they attempt to bring the public on side by reshaping the arguments”. Goot continues that in the ensuing debate, the public accepts the arguments about the policy, rather than the policy itself.

Viewed from Goot’s perspective, this difference may explain fluctuations in approval or disapproval of public policies, where survey respondents approve of the justifications for the policy, rather than to the goals or practices of the policy. If one accepts Goot’s argument, then it seems that public discourse was

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8 Ibid., p. 197.
9 Ibid., pp. 197-98.
not about refugee policy. Instead, public discourse debated what the Howard government had framed as an assault on Australia’s borders. Not only were refugee and migration issues on the agenda. The Howard government also channelled public discourse increasingly into debating whether the refugees were deserving of Australia’s generosity, and added rhetoric that seriously questioned that refugees had the social attributes that compel the Australian public to reach out.

Public opinion about refugee issues between 1999 and 2003 was a matter of rhetoric and persuasion that, if persuasive enough, was reflected in opinion polls. Indeed, some longitudinal data exists that indicates that migration was a matter of public interest.10 The graph in Figure 2 was plotted from Newspoll data that was collected between 1989 and 2004. The raw data in Table B2 in Appendix B — *Defence and Immigration* show that voters were annually (except in 1996) given twenty topics, and asked to indicate what issues they considered voting on at federal elections. Figure 2 below shows a trend of the percentage of voters who indicated in these polls that “Immigration” was a voting issue for them. The graph shows that for about ten years, between 1989 and 1999, about 30 to 45 percent of voters indicated that they would vote on immigration issues. The sharp increase from 1999 to mid-2002 follows this general trend. However, between 2004 and 2005, voters’ interest plummets to less than 15 per cent; the lowest in 25 years.

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10 Katherine Betts’s analysis of longitudinal data drew my attention to the Newspoll data, from which I constructed Figures 2 and 3 to illustrate the relevant discussions in this chapter. The reference to the data was cited in Katharine Betts, "Boatpeople and Public Opinion in Australia," *People and Place* 9, no. 4 (2001).
Figure 2: Voters’ attitudes about importance of immigration as an election issue. Answer to the question, “Thinking about federal politics. Would you say each of the following issues is very important, fairly important or not important on how you personally would vote in a federal election?”

![Graph showing percentage of voters' attitudes about immigration importance from 1989 to 2005.]

Although the Newspoll reflects an interest in immigration instead of refugee issues, the data in Figure 2 between 1999 and 2005 correlate with the Howard government’s politicisation of refugee issues during this period. The increased interests among voters between 1999 and 2003 correlates with the publicised and politicised changes to refugee policy during this time. The increasing trend until well into 2002 suggests that the electorate remained interested, well after the 2001 federal election and after the Howard government had scaled down Operation Relex. Such interest indicates that the refugee issue had gained momentum in public discourse, and was maintained for the first months of 2004. The following sharp decline correlates with the publication of major
reports that revealed serious shortcomings with the delivery of the policy of mandatory detention: the report on children in immigration detention and by the Human Rights Commissioner, and two reports by the Auditor-General.\(^\text{11}\)

This declining trend gives tentative support to a recurring argument in most chapters of this thesis; the suggestion that it was in the Howard government’s interests to delay the release of information until the political saliency of an issue had faded. When the three reports with unfavourable information that were just cited were released, public interest was at a record low.

Whilst the percentages depicted in Figure 2 above do not differ markedly from other percentage values in 25 years, noteworthy is the length of time during which the public maintained an interest in immigration as a voting issue. This five-year period between 1999 and 2004 coincides with the period of major changes to policy practices and institutional practices to the bureaucracy and the legal system. So the sudden decline in mid-2004 seems all the more remarkable. Such decline could indicate that the electorate had resolved the issues raised in public discourse and the changes over the preceding five years, and the ideology which underpinned these changes had become an accepted part of public life. If this interpretation is correct, then it is also correct to state that this thesis has provided some insight into the institutional power that flowed on from political framing of refugees by the Howard government.

Discussion of opinion polls in this chapter, however, should be seen in a broader framework of structuring public debate, and not as direct indicators of what the public is thinking, because there are methodological issues. As Liz Young of the Statistics Group at the Parliamentary Library points out, public opinion polls are usually conducted by media outlets, and are therefore driven

formation of the public voice

by what is considered newsworthy.\footnote{Liz Young, The Political Significance of Opinion Polls. Parliament of Australia, Parliamentary Library. [Website]. 2001} Young notes that this tends to influence the topic, and that there is additional bias that comes from the wording of the questions, which in turn may influence the results. Despite these limitations, Young argues that these tests should not be discounted, because impartial analysts whose business and reputation depend on producing reliable data conduct the polls.

When commenting on public opinion, it is good practice to rely on trends and not on single instances, as the following example from a report by the ABC Radio National current affairs program PM shows.\footnote{PM [ABC Radio Broadcast]. 2001, 1 August) Australians Email Norwegian Newspapers. Reporter: Edmond Roy.} At the height of the Tampa issue, on 1 August 2001, the Norwegian newspaper Norway Post received a high volume of emails about this issue. The editor of Norway Post told PM that, according to the number of emails and phone numbers his newspaper received, “about 95 per cent are extremely critical of the Australian Government’s handling of the situation and about 5 per cent support the Government”. As will be discussed in the next section, such conclusion, whilst indicating the attitude of individuals who emailed the Norway Post, was at odds with public opinion at that time.

Other information corroborates an interest in immigration issues. Peter Mares views the child abuse allegations by staff at the Woomera detention centre as the catalyst for generating public debate about detention issues.\footnote{Peter Mares, Borderline: Australia’s Response to Refugees and Asylum Seekers in the Wake of the Tampa, Second ed. (Sydney: University of New South Wales Press, 2002) p. 15.} Mares writes that there was no public debate on detention in early 2000, before these issues attracted media attention from November 2000 onwards. After the publicity, The Australian newspaper set up a special Woomera website, and maintained the site for approximately six months.\footnote{Australian. (2000). Woomera in Crisis [Website].} This site contained almost sixty
articles, editorials, and letters to the editor that the newspaper published during that time.

The purpose of writing this section was to demonstrate public interest in immigration issues during the timeframe that is relevant to all chapters of this thesis. From the timeframe of this thesis, one may assume that such interest also indicates an interest in refugee issues. The remainder of this chapter asks: how did the Howard government manage public legitimation, as it sought to bridge the gap between public acceptance and political framing? As in other chapters, this chapter will also ask the extent, if any, that legal rationalism played in this fast-moving and intense political debate.

**Rhetorical threats**

This section explores initially explores how the Howard government framed refugees as a threat, and then explores the public debate about such perceived threat in the light of an upcoming federal election. Political scientist Katherine Betts disagrees with suggestions that the framing of the Howard government of the *Tampa* as a defence issue contributed to a public perception that refugee boats are a threat to Australia’s national security.16 By showing trends in public opinion from several sources, Betts argues convincingly that such link existed in public discourse eight months before the *Tampa* arrived. On this basis, Betts concludes that the “desire to close the door to boatpeople” did not just emerge from the *Tampa*, but was as a “slow and growing trend over the last quarter of a century”17.

I considered myself informed about refugee issues, yet was surprised to read Bett’s finding that public attitudes about defence and immigration issues were

17 Ibid., p. 45.
linked before the arrival of the *Tampa*. Therefore, I checked on the source that Betts quoted in the article cited in the previous paragraph. The result is Figure 3, which clearly supports Betts' analysis. The histogram of Figure 3 was constructed in a similar way to the graph in Figure 2 in the last section: by tracing the primary source that Betts had quoted and then plotting selected figures from Table B1 in Appendix B — *Defence and Immigration*.

**Figure 3:** Voters attitudes about importance of immigration and defence as an election issues.

Answer to the question, "Thinking about federal politics. Would you say each of the following issues is very important, fairly important or not important on how you personally would vote in a federal election?"

Constructed from Newspoll data. For raw data, see Appendix B, Tables 1 and 2.

Significant about Figure 3 is that for the first time in January 2001, in 25 years since the polls commenced in 1989, voters stated that "Defence" was an issue that would influence their voting behaviour. This correlation between Defence and Immigration occurred before the *Tampa*. It peaked in October 2002 and
February 2003, but remained relatively constant since at around 50 percent. One cannot conclude from Figure 3 that to voters, immigration issues had become defence issues, because Newspoll voters were not asked if they perceived such link.\textsuperscript{18} The following paragraph, therefore, should be read with caution.

Although the data in Figure 3 do not specifically state this, it is highly probable that throughout 2001, voters had linked refugee and defence issues. To begin, the Howard government had politicised refugee issues as an assault on Australia’s borders and as a threat to sovereignty since the refugee boats arrived in November 1999. The Woomera breakout in June 2000 and the riots inside detention centres that began in August 2000 and continued throughout 2001, may also have generated such perception. The terror attacks in America in September 2001 may have added fuel to an already existing perception. It becomes difficult to speculate on a link between immigration and defence issues beyond 2001, because the Afghan war in 2002 and the Iraq war in the following year may have also influenced voters’ perceptions.

Moving on from Figure 3, the Howard government linked defence and refugee issues with the \textit{Tampa}. Images of soldiers preventing refugee boats from arriving in Australia on the \textit{Tampa} and through \textit{Operation Relex}, and the comments by the Howard government within weeks of the pending election in November 2001, all enhanced such perception. Between September and November 2001, the military increasingly became a metaphor for defending nationalist sentiment. John Howard told Neil Mitchell on \textit{Radio 3AW} in Melbourne that asylum seekers “sometimes try to intimidate us with our own decency”, and indicated that giving in meant to “surrender our right as a sovereign country (and) our right to control our borders”.\textsuperscript{19} The Prime

\textsuperscript{18} The wording of the question for Table B2 in Appendix B is: “Thinking about federal politics, would you say each of the following issues is very important, fairly important or not important on how you personally would vote in a federal election?” (Italics added).

\textsuperscript{19} Cited in Marr and Wilkinson, \textit{Dark Victory}, p. 63.
Minister linked Australia’s “decency” with the right to maintain national sovereignty. John Howard’s statement also had another message: decency was maintained through the law, and they were using such decency as a weapon against Australia.

Not only was the link between the *Tampa* and a physical threat strengthened with the sight of soldiers. The Prime Minister, whilst technically not refusing to authorise medical personnel or supplies to the *Tampa* from Christmas Island, instructed the Australian Maritime Safety Authority to suspend with the usual procedure of sending civilian doctors and nurses to the *Tampa*.20 Instead, the Howard government, whilst monitoring the situation on the ship, delayed medical aid and authorised a medical team only as part of the military.21 In addition, a lawyer acting for the shipping company stipulated, among other conditions, that the *Tampa* would only depart if Australia made available “armed security for the crew”.22 The events of these few days enhanced the threat frame of the refugee issue, which the government had pursued all along.

Whilst the terrorist attacks on American soil in September 2001 did not precede the link of refugees with security issues, the Howard government utilised the event to construct such link. Peter Mares suggests that the media became a platform for linking refugee boats with terrorists.23 Mares quotes Alan Jones asking on the following day, on 12 September 2001, how many asylum seekers were terrorist sleepers, and Defence Minister Peter Reith linked both matters “within forty-eight hours” of the attacks on New York. Mares writes that John Howard held back initially, but “revived” the terrorist link just days before the November 2001 election, and the electorate rewarded him for “the tough line on the boat people”. When the Prime Minister entered the debate about refugees and defence, he said enough to generate media reports

20 Ibid.
21 Ibid.
22 Ibid., p. 69.
that it could be a terrorist link, but then distanced himself from these reports. Just before the election, on 7 November 2001, the Prime Minister told the Courier Mail “illegal entrants on the boats may or may not be linked with terrorist organisations”. On the same day, John Howard’s website clarified the Prime Minister’s position. The website stated that John Howard did not wish to “force or over force the link”, or to state that there were terrorists on the boats, but that he “could give no guarantee that there weren’t”. John Howard’s statement was enough to keep alive refugees as a defence issue just days before the election.

It may appear, incorrectly, from the discussion in this section so far that legal rationalism did not contribute to the formation of public opinion. The opinion polls between 1999 and 2003 were conducted whilst the Howard government justified its refugee policies in terms of legal necessities. The law is not only about rules, regulations and judicial interpretation, but as an institution, defines Australia as a society. With refugees politically framed as a threat to law-and-order, it is not surprising that refugees were viewed negatively in public discourse. Thus concludes Mary Crock in an exploration of how cultural and social factors contributed to the public perception of refugees over the preceding 25 years:

The extraordinary side of the refugee story in Australia has … everything to do with the law or, rather, with the intersection of Australia’s legal institutions in their dealings with refugees. There is a sense in which refugees have threatened to bring Australia’s judicial system to its knees, both literally and juridically.

If the Howard government resorted to legal rationalism to justify its refugee policies to the electorate, as has been argued throughout this thesis, then the

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25 Ibid.
question arises: how did public discourse legitimate these policies? One day after the SAS troops took control of the *Tampa* and also sent medical aid, on 30 August 2001, ABC television’s *7.30 Report* reported that “90 per cent of calls – that’s over 110,000 callers” answered “yes”, when the “Channel 10 ‘Boat People Crisis Poll’” asked “should Australia turn away the boat people?”.

The Nielsen poll found that 77 per cent did not want to let the *Tampa* passengers into Australia, and 74 per cent approved of how the Prime Minister handled the matter. In the following month, after the High Court confirmed that the government had acted lawfully in keeping the *Tampa* out, the Howard government prepared the *Border Protection Act*, legislation that would deny entry to refugee boats in future. When the Opposition defeated passage of the first draft of the bill in the Senate on the basis of the privative clause, which, according to Opposition Leader Kim Beazley, contained legislation that “overrides all law”, the fervour of public opinion turned against him and his Labor colleagues.

Beazley recalls:

> The calls were terrible… The emotions were raw … People were sobbing and screaming down the line … The phones were feral from this point right to the end of the election campaign. Labor members would go home to the electorates at the end of this first week and be spat on in the streets. Beazley said, 'it was unprecedented in my experience. Never had it in my career.'

Such emotive response, whilst it indicated public support for the Howard government, also suggested that the Labor Party had violated the taken-for-granted assumption. It is possible that at that time, the electorate had accepted the defence-frame and also the exclusion-frame, which I will discuss in the next section. The response was all the more remarkable because public opinion was not fixed, and poll results changed within days. The ABC radio program

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PM estimated that on 31 August, based on “an analysis of talkback radio over the last week”, 78 percent of callers supported the government’s handling of *Tampa*, but that support dropped to 47 percent after the government sent the troops on the ship.31 Though there seemed support for the broader issues, PM’s managing director said in the broadcast just cited that support was “a level that we've not seen for any other government initiative since they’ve been in power”.

With regard to broader issues, Birrell and Betts argue that public sentiment was not only directed at refugees, but against any increase of “newcomers” to Australia.32 The opinion polls quoted in the article just cited show that, with only a few exceptions in the 1960s and between 1996 and 2000, people thought since 1954 that there were “too many” people in Australia. Birrell and Betts note that in 1996, almost 70 per cent of the poll sample thought there were “too many” inhabitants, and this rate steadily dropped to 43 per cent by the year 2000. As much as the data cited by Birrell and Betts lead to the conclusion that public sentiment was not directed against refugees, the data do not indicate that the public had become accepting of refugees. Just how to assess public opinion about refugees was far from clear. Katharine Betts observed that political analysts did not predict such a high level of support for the government’s policies from the content of letters to the editors in “mainstream forums at the time of the *Tampa*.”33

It seems from the discussion so far that indicators of public opinion did not consistently indicate support for the refugee policies of the Howard government, and that the public may not have supported every aspect of the policies. This may be due to a failure of the polls to reflect a difference in opinion about the broad and the specific aspects of refugee policies. Two

33 Betts, "Boatpeople and Public Opinion in Australia," p. 43.
examples illustrate this difference. In the first example, public concerns were raised when the Howard government consulted with local residents about opening the detention centre at Woomera.\footnote{Amanda Vanstone. (1999, 9 November). \textit{Woomera to Accommodate Illegal Arrivals} (Media Release, MPS 161/99).} Woomera residents expressed concerns “about the level of security, the possible spread of disease and the level of comfort offered to the illegal immigrants”\footnote{Paul Starrick, “Refugees Welcome; Woomera Popular Choice for Detention Centre,” \textit{Advertiser}, 11 November 1999.}. Similar issues emerged in the second example from an opinion poll on building the Baxter detention centre near Port Augusta in South Australia.\footnote{Natascha Klocker, “Community Antagonism Towards Asylum Seekers in Port Augusta, South Australia,” \textit{Australian Geographical Studies} 42, no. 1 (2004): pp. 7-9.} In a random sample of over four hundred Port Augusta residents, over 75 per cent indicated that they disapproved (“disagree” or “strongly disagree”) of asylum seekers being housed at the Baxter detention centre near Port Augusta. It appears from the article just cited that, whilst most approved of the government policies, they did not want refugees in their local area, citing “security and safety” as main concerns.

It appears from the previous two examples that in Woomera and later in Baxter, the issue to the electorate was not the policy of mandatory detention, but receiving assurances about perceived safety concerns. The remainder of this section moves from percentages obtained in opinion polls and discusses the broader, non-numerical aspects of public legitimation of refugee policies. Two months before the 2001 federal election, it was suggested on the \textit{PM} radio program that keeping the \textit{Tampa} out would translate into considerable electoral advantage to the Liberal Party. John Howard denied a connection between the \textit{Tampa} and the polls:

\begin{quote}
No, it’s not. That is absolutely absurd. It’s not. This has got nothing to do with the upcoming election. I wish that this problem were not ours. I don’t find it easy. It’s a very difficult issue. We’re trying to balance our legitimate right to preserve our border
\end{quote}
Some commentators disagreed, and suggested that a strong link existed. Paul Williams argued that the Howard government not only improved its electoral standing from an approval rating that had fallen to 40 percent, but also “legitimately claimed a mandate to introduce a raft of ‘border protection’ legislation”. Gary Johns expressed a similar view when he wrote: “The electorate chose a Prime Minister to reflect its concern about who comes to Australia, and who gets to stay”. Keith Suter recognised the *Tampa* issue “at the heart of the election campaign” and argued that this led to an unexpected win for the Liberal coalition government. Guy Rundle argued in his *Quarterly Essay* that the *Tampa* assisted John Howard to generate an expression of unity through the perception that the *Tampa* constituted an external attack on Australia. Marr and Wilkinson suggested that the perception of unity was consolidated through “the rhetoric of scapegoats, of enemies, and aliens”.

Journalist Peter Mares wrote of “a khaki election” after “the September 11 terror attacks on New York and Washington [that] pushed defence concerns to the top of the political agenda”.

James Jupp related John Howard’s response to the *Tampa* to gaining votes. In the article, Jupp argues that the government’s new refugee policies recaptured the one million voters, who in the 1998 federal election turned from the Liberal Party and voted for Pauline Hanson’s One Nation Party. Jupp built his

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42 Marr and Wilkinson, *Dark Victory*, p. 131.  
argument by pointing out similarities between Hanson’s proposed, and Howard’s actual refugee policies. These key elements consisted of the forcible removal of asylum seekers from Australia, the processing of asylum claims in camps abroad at Australia’s expense, the denial of family reunion to bona-fide refugees, and the redefinition of borders that resulted in the excision legislation of the *Border Protection Act*. Jupp also notes that presenting the rationales for these policies occurred through the use of different language. Accordingly, the Howard government framed the rationales for these policies as a need to maintain “the integrity of the system” in an attempt to prevent opening “the floodgates to huge numbers of new arrivals”, and to prevent “people smuggling [as] a growing criminal threat to national borders” and to retain control over the process.45

Robert Manne went as far as arguing that the Howard government was re-elected in 2001 on the *Tampa* issue alone.46 George Megalogenis disagreed with Manne’s view just cited and, whilst concurring that “the *Tampa* flipped the tables”, nevertheless concludes that “Howard didn’t need the *Tampa* … he would have won without it”.47 Without agreeing or disagreeing with either argument, I wish to pursue the broader context in which Megalogenis discusses the public legitimation of the Howard government’s refugee policies.48 Megalogenis counters Manne’s proposition by writing that all of Howard’s elections “were reduced to a single issue … Keating in 1996, tax reform in 1998, border protection in 2001, and interest rates in 2004”. To focus on the single issue of the election campaign, however, would be detracting from John Howard as a “brilliant politician” who “took the pulse of the nation” and, “the longer he ruled, the more comfortable he was with the electorate’s contradictions”.49

49 *Ibid*. 

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The reference to “contradictions” in the previous sentence suggests that public legitimation of government policies was more than reading the wishes of the electorate, but to unite the electorate behind a new purpose. Such purpose that overcomes contradictions within the electorate, should it indeed exist, would most likely transcend pre-occupations with approval ratings at opinion or questions about which political party one prefers. Such purpose would also address a broader platform of unity than the ideology of legal rationalism that was postulated in this thesis: the fetishising of rules and procedures of legal rationality, and the misuse of legal rationality for other ends. Public legitimation would instead incorporate what Megalogenis in the previous paragraph calls “the pulse of the nation”. Could refugee policy be part of a politically managed nationalism that had exclusion of non-nationals as a basic, though unstated, assumption? This question will be addressed in the next section.

**Of contest and agreement**

This section discusses the contributing factors of how refugees were framed as outsiders. The Howard government framed refugees as rich and undeserving “economic migrants” who preferred to engage the services of people smugglers and defied the law-and-order stereotype by jumping the queue. It is suggested that this exclusionary stereotype was promoted in public discourse especially at the time before the 2001 federal election, when another stereotype was briefly added: one that promoted the framing of refugees as psychologically incompatible with Australians. The arrival of the *Tampa* three months before the election took public discourse to a new level, according to Peter Mares:
The Tampa affair polarised public opinion like few issues before it, and it worked to the government’s advantage. There was little doubt that the knee-jerk response of most voters was to support John Howard’s decision to refuse to allow the rescued asylum seekers to land at Christmas Island … On 10 November John Howard was swept back into office for a third term – a victory that had seemed unlikely just a few months earlier.50

Rather than asking what was so powerful about the Tampa, it may be more useful to ask: what factors featured most prominently in public discourse at that time? Don McMaster’s research, published about six months before the arrival of the Tampa, identified a trend in modern immigration policies that he explained in terms of creating an Australian national identity.51 More specifically, McMaster observed exclusionary practices that couched refugee issues around notions of citizenship.52 Mary Crock observes that in Justice Beaumont’s judgement on the Tampa case, the word alien “appears no less than 27 times in the 30 paragraphs of his judgement”.53

One can see how legal rationalism, through its emphasis on couching refugee debate in terms of legal rules and procedures, may have masked an underlying ideology of nationalism. Yet there is an argument that that the framing of refugees by the Howard government as a threat to sovereignty even had legal substance: Dauvergne argues that the commitment of governments to the Convention on the Status of Refugees is a sovereign decision by itself.54 Furthermore, governments have control over how the Convention is realised within their borders. Dauvergne argues that what is framed as arguments about sovereignty, illegality and border control, is actually political argumentation designed to show the strength of a nation.

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50 Mares, Borderline: Australia’s Response to Refugees and Asylum Seekers in the Wake of the Tampa, p. 134.
52 Ibid., pp. 169-70.
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The question arises: how does the electorate decide whom to exclude? Jürgen Habermas seeks to answer this question by exploring how the public legitimates what is acceptable in society. It will be recalled that, according to Habermas, rules are established through public discourse, where members of society decide what governs their behaviour. Validity is achieved by agreement, when argumentation is rational and without coercion. The Habermas model works on evaluation of rational argumentation against democratic principles, which sets the “ethical dimensions of everyday life”. If such evaluation occurs through the law, where the rules determine whom to include and exclude, then the legal system would also play a part in how the public debates nationalism. From this perspective, it is possible that legal rationalism masked occurred as an ideological projection of nationalism, with nationalism as the ideology that was driving the inconsistent applications of legal rationality that were observed in the case studies.

Nationalism, in this sense, is an ideology that consists of a patriotism that goes beyond nationality and citizenship. Rather than asking why the Howard government resorted to legal rationalism, it is more consistent with the tenet of this thesis to ask if the government introduced into public discourse exclusionary stereotypes that may be consistent with nationalism. It is suggested that some of the exclusion criteria that the Howard government advanced in public discourse not only assisted with legitimation of refugee policies by the electorate. It is also suggested that such exclusion criteria went beyond the exclusion criteria set by a legal-rational approach derived from legislation and policy practices. As will be seen shortly, the Howard government introduced into public discourse refugee stereotypes that were broader than questions of refugee determination and travel documentation.

56 Ibid., p. 75.
Marian Maddox observes how the government tolerated the debate that stereotyped Muslim as the symbolic Other. In a radio interview with John Laws on radio 2UE on 21 November 2001, John Howard did not actively promote exclusionary stereotypes, yet did little to discourage them. Maddox cites the example from the radio broadcast, where John Howard commented on “the Reverend Fred Nile’s suggestion that Muslim women should not be allowed to wear full body and head coverings in public”. Maddox continues that in this interview, “John Howard gave his customary reassurances of Australian decency, tolerance and commitment to equality”. Then, Maddox goes on, the Prime Minister also acknowledged that Fred Nile represented “the views of a lot of people”, and acknowledged the validity of such views by saying: “I understand what he’s getting at”. It was obvious from Maddox’ discussion that the radio interview was not about fashion, but about cultural and religious differences that had implications about whether Muslims had a place in Australian society.

During one event, the children overboard affair, the Howard government actively promoted an exclusionary stereotype, going further than the example cited in the previous paragraph. Senior members of the Howard government presented the stereotype to the public almost exclusively as a moral issue and claimed an incompatibility with Australian values. These were the facts, as presented by Commander Norman Banks of the Australian Navy to a subsequent Senate Inquiry: on 6 October 2001, an air force surveillance plane spotted the Oblong, or Siev 4 in the language of the Department of Immigration and Multicultural Affairs, with 223 people on board. The soldiers were ordered to “deter the Siev and its passengers from seeking access to Christmas Island”. HMAS Adelaide approached, but the continued to move toward Christmas Island, despite warning shots and messages over the loudspeaker.

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Over the following days, the press reported that passengers from the Oblong had thrown their children into the water when HMAS Adelaide approached. The Age newspaper reported that the government claimed that this was “a premeditated way to force themselves into the country”. The same newspaper article added that Immigration Minister Ruddock said that boat passengers had thrown “a number of children” into the sea, in a “clearly planned and premeditated” attempt to force their way into Australia. When questioned three days later by a reporter on the veracity of such claim, Defence Minister Peter Reith produced two photographs of children and adults in the water, and said: “the fact is the children were thrown into the water”, and added there also was video evidence of this.

It was revealed later that the facts did not support the story that the Howard government promoted about one month before the November 2001 federal election: Commander Banks told a Senate Inquiry in March 2002 that the published photograph was cropped from a larger photograph that was taken as the Oblong was sinking “nose down”, and that the video, released on 8 November 2001, contained no evidence that children were thrown into the water. Yet even when doubts arose about the children overboard allegations, the Howard government continued its unprecedented anti-refugee campaign. Prime Minister Howard declared on three consecutive days “that he didn’t want ‘people like that in Australia’”. Foreign Minister Downer said that no civilised person would ever “dream of treating their own children in that way”.

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63 Ibid.
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The previous two paragraphs indicate how the Howard government introduced into public discourse information that went beyond legal rationalism and justifications of refugee policy: it was a matter of turning public sentiments against refugees and to legitimate their exclusion from Australia. Four years later, when delivering the 2005 Earle Page Memorial Oration, historian Keith Windschuttle re-visited the children overboard story.64 Windschuttle points to a section in David Marr and Marian Wilkinson’s book *Dark Victory*, where the authors state that their research has revealed several precedents to the government’s claims of children overboard:

Marr and Wilkinson reveal one case of a three-year-old child thrown overboard, four cases of boat people threatening to try to throw children overboard, and one case where they deliberately set fire to the boat, putting 100 people who could not swim into the sea, including several children, a twelve-month old and two-week-old baby. The children overboard business was a scandal alright, but the culprits were not John Howard or Philip Ruddock.65

In children overboard, the government recast previous facts as if they had occurred at that time, and presented them in the context of the upcoming election. So it is difficult to concur with Windschuttle’s conclusion in the above citation “that the oft repeated claim that the government lied about the children being thrown overboard, is itself a lie”. Had the children overboard allegations been correct, as Marion Maddox observes, it would have been one case among those of several thousand people who approached Australia’s shores.66 Instead, Maddox writes, “they all had become ‘people like that’”, so that children overboard “seemed tailor-made” to build an exclusionary stereotype.

65 Ibid., p. 22.
One can see from the above example how the power of rhetoric in public discourse depends on control over the timing and release of carefully selected information. In previous chapters, it was argued that the Howard government controlled public discourse through controlling the timing of the release of independent reports about government performance and accountability. These were reports released by the National Audit Office, the Ombudsman and the Human Rights Commissioner. In this section, there emerges another type of information controlled by the government: the selective presentation of information on refugee issues that the media can report as news.

Crucial to the formation of public opinion is an unrestricted media. The government says it objects to reporters having access of detention centres, to respect the privacy of those detained. Such objection would be plausible, were it not for the release of information by the government in a way that sought to justify government policy. Although *Operation Relex* was conducted out of public view, the government later released “dozens of hours” of “video tapes of asylum seekers – in close up, clearly identifying them” when it suited the government.67 This also became evident when the *Tampa* was off the coast of Christmas Island. All media comments were strictly controlled, and at that time were handled directly by the Defence Minister.68 The following example, taken from the *Courier Mail* newspaper, shows how easy it is to take selective information out of context.69 The example is about video footage that was played during a court case: “Authorities gave *Tampa* asylum seekers a pot of jam and filmed them diving for it to portray them as wild people during a hunger strike aboard HMAS *Manoora*”. The article continues that an eyewitness also told the court that people shown in this video had not eaten for ten days.

The ability to selectively direct media attention, especially when combined with the power to exclude other information at that time, makes political rhetoric a powerful tool in achieving public legitimation for government policies. It has to do with how governments “prime” public opinion at the time, as noted from Murray Goot’s work quoted earlier in this chapter. For instance, one government report primed the debate by framing refugees as “illegals” even before they arrived in 1999. Viewed in this context, the findings of another government report may not come as a surprise: although the number of unauthorised air arrivals was far higher than the number of unauthorised boat arrivals, most of the media attention concentrated on boat arrivals as a people smuggling issue. Such media attention was consistent with the language claims by the Howard government that framed as “illegals” those uninvited refugees who arrived by boat, but ignored those who arrived by plane. This trend was especially notable between 1999 and 2002, where the government’s language claims discussed in the case studies were about boat arrivals.

For the reminder of this chapter, I wish to reflect on the reciprocal nature of priming public debate between the Howard government and the public during the timeframe of the case studies. In the first example, longitudinal data published by Newspoll indicates a powerful relationship between public opinion and the importance of the debate at that time. The data show that at least 50 per cent of the sample indicated during a telephone survey just after the *Tampa* arrived at the end of August 2001 that all boats should be sent back.

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72 Department of Immigration and Multicultural Affairs. (Unknown). Unauthorised Arrivals. [Departmental Website].
73 Newspoll Data. (2004, 15 August). [Newspoll Website]. Question 1. “Thinking now about asylum seekers or refugees trying to enter Australia illegally. Which one of the following are you personally most in favour of with regards to boats carrying asylum-seekers entering Australia? Do you think Australia should [a] turn back all boats carrying asylum-seekers, [b] allow some boats to enter Australia depending on the circumstances [c] allow all boats carrying asylum-seekers to enter Australia? (a, b, c in brackets added).” Question 2. “Now about the Howard Coalition Government’s actions in 2001 surrounding the Tampa issue and how you currently feel about this. Do you personally agree or disagree with the actions of the Howard Coalition Government in 2001 on the Tampa issue?”
This increased to 56 per cent in October 2001. The poll results just cited occurred in a specific context when the Howard government primed the refugee debate: Newspoll collected the second sample with even higher approval ratings for the government’s policies than in the first sample shortly after the attacks on America in September 2001, around the time of the children overboard affair, and a few weeks before the Federal election.

One year later, when the debate and the politicising of the refugee events as a “crisis” had subsided, and the government had ordered an Ombudsman’s investigation into allegations that approximately 200 Australian citizens or residents had been detained under immigration law, the poll results changed considerably. Then, Newspoll results cited at the beginning of the previous paragraph showed that only 35 percent of the sample approved of sending all boats back, and 48 percent indicated that some boats should be allowed “to enter Australia, depending on the circumstances”. It appears from these data that in September and October 2001, when the Howard government primed public debate about refugee policy in terms of national security and an assault on Australia’s legal system, public legitimation for the government’s policies was at its highest. However, the cited Newspoll source also indicated that the vast majority (90 per cent in 2001 and 86 per cent in 2002) remained opposed to allowing “all boats carrying asylum seekers to enter Australia”, and approved of a screening process for all entrants to Australia. One may infer from the Newspoll results that similar public legitimation of government policy may occur as occurred in 2001, if another event occurred that was also framed by a government as an assault on Australia.

Public legitimation of refugee policies between 1999 and 2003, in contrast with the relatively more permanent legitimation through the institutions of law and bureaucracy, thus depended on the intensity of public debate. Yet there must also be some congruence between institutional and public legitimation. An article by Adrienne Millbank suggests that the Howard government may have
breached this gap between public and institutional legitimation. Millbank argues that the government’s response to the *Tampa* may have been so successful that it may even become the world’s best-practice model because other European countries have attempted to implement part of that model; most significantly the concept of detention abroad without ever allowing asylum seekers into the country. Millbank partly attributes the political success of the model to the government’s rhetoric of “calling asylum seekers queue jumpers, without denying that they may be refugees”. Such rhetoric is not inconsistent with the legal-institutional aspects of policy legitimation: Millbank continues that Australia has shown that a “sizable inflow of asylum seekers … can be stopped, while the country (at least technically) remains within international treaty obligations”.

A few examples illustrate this interplay between the intensity of public debate and institutional legitimation. It is suggested from the outset that the Howard government was not “fixed” in one or the other form of legitimation, but consistent with the legitimation sought through legal rationalism, responded selectively to the timing and context of the debate. On 19 October 2001, the refugee boat *Siev X* sank on its way to Christmas Island. Among the 46 survivors was Sundous, but her three children were among the 353 people who did not make it. Her intention was to follow her husband, Mr Al-Zalimi, who already lived in Sydney on a Temporary Protection Visa. Under the terms of the visa, Al-Zalimi was free to leave Australia and be with his wife after these tragic events. But would be denied permission to come back, and would need to re-apply for his refugee protection. Al-Zalimi asked the government for special permission to vary his visa condition, so he could comfort his wife in Indonesia after their tragic loss. The government refused. Tony Jones of *Lateline* asked the Prime Minister if “the images of him going back would have somehow mitigated against the tenor of your campaign”. John Howard denied...
that he took “advice on the political impact on something like that”, and said that the question was “close to offensive”.  

One year later, a similar story unfolded, but there was no pending election. In this example, a refugee applicant was detained at the Baxter detention centre. His wife and children were on their way to Australia, but only got as far as Bali. The wife died during the Bali bombing in October 2002, but the two children survived. Despite the compelling circumstances, the Immigration Minster refused a visiting visa for the children, in case refugee supporters would “campaign for them to be able to be permanently with their father here in Australia”. However, coincidence favoured the family in “a victory for public pressure aided by a fortuitous twist”. According to the newspaper report just cited, the Prime Minster was photographed in Bali, unaware he was holding hands with both children. This photograph was circulated as the symbol of the heartless refugee policies of the Howard government. Immigration Minister Amanda Vanstone subsequently exercised ministerial discretion and gave permanent residency to the family.

Significant about the examples in the previous two paragraphs is that when these events occurred, there were no significant differences between the relevant legislation or the polices that applied to these events. The political contexts and the government’s policy practices, however, differed markedly. As late as six months before the arrival of the first refugee boats of the case studies in November 1999, the Howard government framed its refugee policies differently. For about one year after announcing the arrival of Kosovar refugees in April 1999, the Howard government continued to frame the

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Kosovars as people in need. It seemed that public opinion was on side then, as it was throughout the timeframe of the case studies, despite a marked differences in policies. It is even possible that, after initially framing refugees as welcome visitors, the public would react differently to refugees who were framed as a threat to national sovereignty and to law-and-order.

As the Kosovars arrived, Immigration Minister Ruddock announced that he would not lock up the Kosovars, and also said “he would welcome people befriending the visitors and taking them on outings”. The Kosovars did not need health and security checks, and were therefore not framed as diseased and criminal stereotypes. The *Courier Mail* even called them “temporary Aussies”. They were greeted with “inflatable jumping castles for the children, access to the Internet, money to make telephone calls and the welcoming presence of the Prime Minister and Mrs Howard”, as well as generous donations. Even when the government later removed the Kosovars from Australia and detained those who resisted such removal, the government did not portray them as dangerous escapees, as was the case after the Woomera escapes in June 2000. The *Courier Mail* reported that in response to three Kosovars who had escaped from immigration detention, a government representative said this was “no big drama and that the refugees would be found”.

Public legitimation of government policies, it seemed, was congruent with how the Howard government has framed the Kosovar refugees. However, the long-held public resentment against newcomers that was reflected in ongoing opinion polls over almost half a century returned quickly. The Kosovars were

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79 Miles Kemp, "Woomera and Hampstead Bases to Take 750 in Refugee Airlift," *Advertiser*, 10 April 1999.  
81 Peter Charlton, "Rousing Welcome for Our Temporary Aussies," *Courier Mail*, 8 May 1999.  
welcome, but only temporarily. The Howard government did not invite them to become part of Australia. Those Kosovar refugees who resisted being returned home were no longer framed as welcome visitors, but as ungrateful. Philip Ruddock’s comments about an incident at a refugee camp indicate this change:

How dare ‘those people’ … complain about Singleton when they came from tents where running water is not available, where toilet facilities were built for an emergency situation ... and there was significant overcrowding and risk of disease’.84

The Kosovars’ story concluded when Immigration Minister Amanda Vanstone granted permanent protection to the remaining 36 of an initial number of 4,000 refugees more than two years after the above incident.85 The refugees from Kosovo were invited to come to Australia, but the refugees from the Middle East who arrived between 1999 and 2003 were not. However, as the following example of East Timorese refugees shows, mode of arrival was not the only determinant of how the Howard government framed refugee issues in public discourse. Moreover, the Howard government’s framing of the East Timorese in early to mid-2003 cannot be explained by the lessening of political salience. At that time, the Howard government pursued the “involuntary repatriation of 227 Iranian detainees in Australian detention centres”.86 Afghan refugees had been offered a similar package at that time. This package consisted of a cash incentive between $2,000 and $10,000.87

Against this political backdrop, the Australian government approached the East Timorese refugees. Peter Mares explains that the East Timorese presented to the Howard government an ongoing legacy from the previous Hawke and

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Keating Labor governments: some had arrived by boat after they survived the Santa Cruz massacre of 1991, or prior to that in 1989. Most came between 1994 and 1995 on tourist visas, and had lived in Australia since. But the government stopped processing their refugee applications when East Timor became independent in 2002.

Unlike the Kosovars, the East Timorese had become part of Australia. In contrast to refugees from the Middle East, the East Timorese were not faceless people locked up in immigration detention centres but had lived in the Australian community for approximately ten years. Their children attended Australian schools and had never been to East Timor. In a massive show of community support, “the government had come under pressure for refusing permanent residency to the 1,600 East Timorese” and Philip Ruddock “announced he had granted “reprieves to 379 East Timorese”. However, the future of the remaining 1,200 people was uncertain. As the Howard government intensified the pressure to deport East Timorese refugees, community support grew. Staff of the Richmond West Primary School publicly argued that they should stay and mayors of eight city councils signed a joint letter at a public function and asked the government for a quick determination. The matter was fully resolved one year later, when the remaining sixty East Timorese received a permanent residency visa, after Immigration Minster Amanda Vanstone exercised her discretion to intervene.

As can be seen from the examples in this section, the public refined and at times challenged the exclusionary stereotype that the Howard government constructed about refugees. The public accepted the construction of refugees

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as outsiders when refugees were literally outside the public domain. However, the exclusion was challenged when the public met the people, saw their photographs or had detailed information about their hardship. In the examples discussed in this section, the Howard government was prepared to make temporary exceptions, whilst persisting with the general direction of policy. A similar strategy of exception was observed in the case studies, when the public challenged the Howard government’s policy justifications that were in this thesis explained by a pattern of legal rationalism.

**Conclusion**

The goal of this chapter was to analyse the engagement of the Howard government with public discourse. The analysis showed that the exclusionary frame was an important component of that argument, together with the defence frame. The rhetorical recourse to legal rationality in this process consisted of appearing as a “neutral” requirement to abide by the requirements of law-and-order. Yet a less obvious component was the ideological use of legal rationality where political framing implied that the value system of refugees was incongruent with the value of Australians to observe law-and-order processes. This deferred legal rationalism came especially to the fore during those moments in public discourse, when the Howard government used not a legal rationality argument, but an exclusion argument. It was observed in this chapter that the Howard government promoted the exclusion argument especially during the children overboard, and the *Tampa* episodes. Through the framing process, an implicit argument was projected that refugees were incompatible with the symbolism that legal rationality represents in Australian society.
Legal rationalism, masquerading as legal rationality, transcended the construction of self and other, of caring for those in need, legitimated the use of state power that resulted in deprivation of liberty and exclusion of refugees. However, there were times when public discourse limited the use of government power in this process, as much as there were times when the Howard government limited the power of public discourse by restricting the media. Restricting media access meant that the government had the power to set the parameters of the debate and to control the information that could be discussed at those crucial times when public discourse defined the limitations of the extent to which refugees should be excluded.

There emerges a suggestion that the exclusionary stereotypes of refugees that the Howard government promoted in public discourse occurred in a larger context of nationalism, which also defines and excludes some social groups as outsiders. This suggestion was not fully explored in this thesis, but may prove fertile ground for future research. Future research could address what could not be explained in this chapter by legal rationalism: the public display of patriotism in the refugee debate and the fervent desire to prevent those framed as outsiders from becoming part of Australia’s national identity.
Conclusion to Section 2 — Themes
The analysis of Section 2 — *Themes* built on the argument of the case studies that the Howard government justified its refugee policies to the electorate by using a process called legal rationalism. Embedded in this discussion was the question as to whether legal rationalism also holds together the different layers of institutional practices, in addition to the day-to-day political justifications by which members of the Howard government justified their refugee policies between 1999 and 2003. It was argued in Section 2 — *Themes* that there was evidence for the conceptual presentation of an interaction effect that was predicted in Table 2 at the introduction to this section, for three main reasons: framing practices, structural changes, and control of public discourse.

First, the Howard government attained a political goal. The framing of practices within the institutions of law and bureaucracy increasingly mirrored the political arguments by which the Howard government had framed its policy responses to refugee issues. For instance, the influence of legal rationalism can be seen within the Nauruan legal system, where incarcerated refugees are technically not detained, but were forcibly placed there on a visitor’s visa. The High Court of Australia accepts this position, and has used this framing as a principle when delivering its own determination, which also serves as precedent for future court rulings. In Australian courts, there was already acceptance by the judiciary that immigration detention is not indefinite
but open-ended, although in practice, some people have spent more than five years in detention. This came about by the judiciary accepting the conceptual framing that immigration detention is an administrative necessity for efficient processing of refugee claims.

A second reason for arguing that legal rationalism has found its way from policy justifications to institutional framing practices comes from the structural changes within the institutions, to accommodate these practices. Some of these changes were part of broader changes to the Public Service. However, the changes to the accountability process, by which the Ombudsman, Human Rights Commissioner and Auditor-General investigate government practices, have aided the ideology of legal rationalism in institutional practices. This was done partly through structural changes that affected the investigative powers of these bodies, and partly due to legal constraints on how the investigative bodies release their information to the public. This was aided by a shift in the accountability of the refugee assessment process from a judicial to a bureaucratic model where the Minister for Immigration has ultimate control over the process through special discretionary powers.

In the politically charged climate that was directed at keeping refugees out of Australia, there emerged a legal and administrative structure that was least accommodating to the interests of refugees, whilst maximally protecting the interests of the state. Perhaps most damaging to refugees in the systemic process where the electorate is the ultimate arbiter on the acceptability of public policy, was the third mechanism by which legal rationalism influenced institutional practices. This was the Howard government’s exploitation of anti-refugee sentiment within the electorate, where the ultimate message was that porosity of state borders meant opening the borders to unacceptable outsiders, and that the refugee policies of the Howard government were the only acceptable means to prevent this. This was done through exploiting anti-refugee sentiments in the electorate that has been well documented: through
longitudinal research over five decades, and through openly racist institutional practices in the five decades before that. Public discourse thus was a powerful tool in electioneering when framing the wishes of the electorate to coincide with the Howard government’s political framing of refugee policies.

In public discourse, the influence of legal rationalism was less readily seen than in the law and bureaucracy. One could argue, though not very persuasively, that the influence of legal rationalism in public discourse was more indirect, perhaps because the policy justifications had established their own credibility by becoming corroborated by the institutions of the state. Such credibility, however, does not necessarily translate into electoral favour. The persuasion came from convincing the electorate that preventing refugees from crossing Australia’s borders meant to protect Australians from the ‘other’.

This analysis did not establish a strong basis for arguing a direct connection with refugee policy and electoral favour. The strongest argument for such connection came from the policy justifications in response the Tampa, which preceded the 2001 federal election by just over two months and resulted in a landslide win for the Howard government. Yet there is evidence that the refugee policies resonated with public opinion, even if it becomes difficult to translate such resonance into votes. Such convincing public display of agreement with public policy as was the case during the formulation of refugee policies between 1999 and 2003, however, readily translates into a popularity that was advantageous to the Howard government.

If the process of legal rationalism assisted the Howard government to successfully justify its refugee policies, then what are the implications if such approach were to become extended to other areas of political framing? To begin, the challenge that confronts the utilisation of political power through a process of legal rationalism is that this came at a price. One consistent observation that has emerged in this thesis is that placing legal rationalism into
the centre of justifications for refugee policies assisted the Howard government to control when and how information was released to the public. This was information about the delivery of the policy, about the institutional processes that shape public policy, and information about the outcomes of accountability measures that feed back into public discourse.

The challenge that comes to widening the successful use of legal rationalism lies in the effects that legal rationalism has already exerted on the institutions that control government power. In this systemic tension between the judiciary and parliament, there is a danger that, if political process overpowers judicial process, such a power shift may affect not only outsiders, but also Australian citizens. To some extent, this has already happened, through the detention of Australian citizens under immigration law. The government’s almost exclusive control over refugee policies, with a concomitant detraction from legal principle to a focus on the mechanics of the law that has widened the powers of non-judicial forums, may be more cost-effective than the court system. Yet non-financial costs are likely to express themselves in diminishing the rights of the individual and asserting the rights of the state. How and to what extent this affects citizens depends on the extent to which the electorate is willing to control state power. It is problematic when the ideological use of legal rationality blurs the distinctions between persuasive rhetoric and becomes enmeshed with institutional power that sets the foundation for manipulating public discourse, so that legal rationalism, rather than the electorate, has the potential to set the parameters of democratic process.
Chapter 8
Conclusion
Conclusion

The central concern of this thesis is to understand a political process of identifying and modifying social norms, and how these normative changes became justified and fed through the institutions where normativity was contested. This thesis claims that this change was driven in large part by legal rationalism, an ideological process that reflected the political framing of refugees rather than legal rationality in relation to refugee policy. Much time was devoted to testing the proposition by the Howard government that these changes were a combination of four factors, of which legal rationality was only one part.

The thesis in relation to legal rationalism was derived from a combination of observing the government's justificatory claims and from the theoretical insights derived from the colonisation thesis of Jürgen Habermas. Three case studies analysed how the Howard government justified its refugee policies to the electorate. In order to strengthen the argument about legal rationalism in this thesis and to argue that legal rationalism dominated the language claims and practices of refugee policy, additional material was included that went beyond the boundaries of the three case studies. Such material will also be included in this chapter.
The purpose of this thesis was to give breadth and depth to answering the question: how, and to what extent, did the Howard government resort to legal rationalism when justifying its refugee policies to the electorate, if at all? The case studies concluded that the Howard government’s recourse to legal rationality actually constituted legal rationalism. This conclusion was based on two features of legal rationalism that emerged throughout the case studies. First, there was an at times overbearing appeal to the rules and procedures of the law, as if these rules and procedures were an end in themselves and therefore the reason for conducting the refugee policies. Second, an analysis of the justificatory language claims revealed that some practices were inconsistent with these dominant language claims. Both parts of the findings became the reason for arguing that the Howard government resorted to legal rationalism, and suggested that this may have been consistent with how the government had framed the refugees. From the evidence of the case studies, it was argued that the Howard government presented a series of apparently legally rational arguments that were located outside conventional understandings of legal rationality. This argument led to the suggestion that the Howard government may have resorted to legal rationalism for reasons of electoral gain, or perhaps utilised an opportunity to feed an ideological goal into the practice of legal rationality.

If legal rationalism was more consistent with political framing practices than legal rationality, how then were these framing practices incorporated into institutional practices? The Themes section explored the institutional frame that constrained and enabled normative practices to occur within these institutional boundaries and through human agency. The question was: were there institutional factors that contributed to the practice of legal rationalism? This question was discussed in Section 2 — Themes.

The pattern of these factors emerging in Part 2 suggested that there were institutional factors that aided the Howard government in legitimating its
refugee policies to the electorate. These factors were about the process of driving change through the structure of those institutions of the state where refugee policy is delivered and contested. The discussion identified a political process, exercised through the authority of public office, which brought key aspects of refugee policy increasingly under control of the Howard government. This was done partly through new legislation and partly through the government legitimating its legal rationalist agenda on the basis of these institutional changes. Political process, it was argued, was behind the altering of jurisdictions and accountability structures, overregulation and micro-management by the Executive, until the institutional process was brought under government control. The resulting changes, it was argued, subsequently set the institutional parameters for enabling legal rationalist practices in refugee policy.

The remaining question is to ask: how does the political process within the institutions, as an enabling factor of legal rationalism, relate to the Habermas colonisation thesis? This question will be answered in the two parts of this chapter. The discussion of the first section on the significance of legal rationalism suggests that colonisation did occur. However, the discussion from the previous two sections suggest that colonisation occurred within the legal and political systems, where one system of dominance replaced another. This conclusion differs from the colonisation thesis, where Habermas predicts that the system will colonise the lifeworld. Further exploration of the extent of legal rationalism links this discussion with concurrent developments in other areas of political analysis. The outcome is a final illustration of how the legal rationalist ideology has informed refugee policy, propelled by a political process in an ongoing quest where governments seek public legitimation for the way in which they frame their public policies. This chapter concludes with a suggestion for a solution to resolve the tension created by the functional requirements of institutions and the requirement for governments to push their ideology of a better world through the institutions of the state.
Legal rationalism revisited

Ultimate authority for the institutions of law and parliament comes from the people, through the participation in public discourse. The Habermasian model of public opinion, according to William Outhwaite, keeps state power in check. Accordingly, Habermas recognises “two forms of publicity which today characterises the political sphere … as the gauge of a process of democratisation”. This model of “the exercise of social power and domination” is governed by “the mandate of democratic publicity”. This model recognises two communication inputs: “the system of informal, personal, non-public opinions” and “that of formal, institutionally authorised opinions”. Evidence in Chapter 7 — Formation of the Public Voice brought out how, through favouring information from the formal channels and discounting information from the informal channels, and also through influencing the content and the release of official information, the Howard government established control over a political process that included the practice of legal rationalism.

The discussion in this thesis has ignored the debate of how normativity was negotiated within the Howard government. This was largely due to the fact that such debate was not evident from the official statements of members of the Howard government and from the official records discussed in this thesis. The case studies sought to establish a plausible argument that, by constructing from ideal types a heuristic referent point for normativity, legal rationalism could be inferred, or refuted. This method narrowed the scope of the argument to an analysis of justificatory language claims and practices by members of the Howard government during four years of refugee policy from 1999 to 2003.

From the pattern of justifications, the case studies section concluded that legal rationalism emerged as the uneven but dominant pattern in policy practices, with the institutions contributing to and enabling legal rationalism through institutional practices.

Table 3 depicts an interaction effect between two layers of refugee policy: the policy practices where legal rationalism emerged as the dominant pattern, and the institutional factors that enabled the practice of legal rationalism. This interaction effect emerged from the framing practices. On the one hand, refugees were depicted as invaders, inept parents, as an antithesis to human values. On the other hand, institutions of the state that addressed the legal-rational aspects of these framing practices were unable to address the ideological framing that skewed institutional practices toward a shifting and selective practice of legal rationality.

Table 3. Schematic presentation of legal rationalism in the case studies and Themes, corresponding to subheadings within each chapter.

<table>
<thead>
<tr>
<th>Public Policy</th>
<th>Bureaucracy</th>
<th>Law</th>
<th>Discourse</th>
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<tbody>
<tr>
<td></td>
<td>Dominance of Legal Rationalism</td>
<td></td>
<td>Institutional factors enabling legal rationalism</td>
</tr>
<tr>
<td>Tampa Children</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Woomera</td>
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</tbody>
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At first glance, Table 3 incorrectly suggests that legal rationalism, as it became expressed though public policy at ground level, shaped the institutional factors that operated within the larger domain of public policy. Whilst there may be some truth in this statement, it was argued at the beginning that the direction of the hypothesis was not specified, and that, therefore, the analysis of the three case studies did not imply causality. Legal rationalism did not cause these institutional factors, but constituted a complex layer that added a new dimension to the policy practices in the case studies and the institutional
practices in Section 2 — Themes. The case study design follows the logic of pattern matching, that “compares an empirically based pattern with a predicted one (or with several alternative predictions)”\(^2\). This type of case study design is analytical, and does not imply causality. Having established that Table 3 represents a reciprocal, rather than a causal relationship among patterns in the dimensions of institutional and policy delivery, it now seems in order to digress for a moment and to explore how this two-way process may influence future research designs in a three dimensional layering.

It is now time to stretch the analysis to take into account the influence of the framing of an issue at the micro-level and of the political process that permeates every level of this presentation. To get a more comprehensive view of legal rationalism, one can imagine how in its three dimensions, the frame can stretch, accommodate and give as it experiences various stresses. The Table also suggests that it requires tremendous stress or the removal of several supporting blocks for the frame to collapse. Rather than the flat image presented in Table 3, there emerges a three-dimensional matrix, of multiple determinations.

The analysis showed that political process influenced every layer at the ground level and the institutions within this complex matrix of interaction, including the development of legal rationalism itself. Had there not been the clear thread of political process, then the effects of legal rationalism would have remained confined to the events of the case studies and the listing of institutional factors. If one accepts the two-way effect of structuration, then the supporting frame in the background that combined justifications and events at micro-level with a generalised institutional framework has the potential to enhance the reach of legal rationalism beyond the issues discussed. Such enhancement of legal rationalism is logically possible, because of the potential to disperse the

influence of legal rationalism into almost any area of public policy. The model of analysis used in this thesis could then be extended, especially to other areas where the delivery of public policy is conducted by government officials, or those who act as quasi-government officials on contract to governments.

If legal rationalism fed into the different layers of practices, and aided the development of the supporting frame, is there a way for analysts to predict a direction that influences the progression of legal rationalism? The evidence of the case studies pointed to political process, which mentored legal rationalism through the various mazes of the development of refugee policy. There were instances where the Howard government changed what would be expected with legal rationality. Framing refugees as law-breakers and a threat to national sovereignty and to law-and-order did not initiate a response that led the government to deal with asylum seeking as a criminal matter. Instead, political process directed the interpretation of this framing toward deterring refugees. Common to these events is that neither legal rationality nor orderly process accorded with these documented practices. Political process emerges as a diffuse layer that drove most of the events discussed in the case studies. Political process then was the driving force that not only influenced the practices at institutional level, but also fine-tuned the way in which legal rationalism expressed itself in language claims and policy practices at ground level. Whilst the framing was designed to achieve the stated goals, the political process behind the frame was designed to achieve an orderly process as long as it meant keeping out uninvited refugees.

This political process, as was observed throughout this thesis, relied on the Howard government tightly controlling the processes of accountability, micro-managing information from detention centres - changing jurisdictions and passing legislation in response to court judgements, until this political process became increasingly under government control throughout the three institutions that determined the direction of refugee policy. Such power to
isolate the different layers of practice within these different areas resulted in a tight control over the discourse, so that the way in which the government framed an issue could not easily be disputed at the time. Achieving the goal of these political purposes by members of the Howard government relied on the ability of the government to fine-tune this process in any direction, including the direction of exceptions.

Legal rationalism may threaten the acceptance of its own legitimacy if it is removed far enough from the norms and processes of legal rationality. This is especially so if legal rationalism moves from refugee policy and colonises other areas of public policy. If it were to drive political process through policies that affect Australian citizens in the way that it has affected refugee policy, then legal rationalism has the potential to undermine public confidence in the legal process. The emerging picture would be one of the law becoming separated from public decision-making, where framing practices have become a matter of sensationalist confrontation. Such practices, however, divorce legal rationality from normativity and from the principles behind legal-rational decision-making, and replaces these with political process that feeds a legal rationalist agenda consistent with the ideology of the governing political party. The significance of such extension of legal rationalism would impede the ability of the legal system to judge on principles, and instead manipulate the institutions of the state through arbitrariness of legal and political processes. Such precedent already exists, as has been the argument of this thesis. Were future governments to extend a similar model of legal rationalism into legislation over Australian citizens, then marginalised people are likely to suffer the most adverse effects, because they are least likely to argue their case through the legal and political structures.

The potential for such extension of legal rationalism, as emerged during Chapter 7 — *Formation of the Public Voice*, would need to rely on more than the fundamental weakness of the legal system to judge according to ideologically
manipulated rules than the principles behind legal process. As the discussions of the *Tampa*, children overboard and children in detention have shown, the extension of legal rationalism would rely on governments making extensive use of appealing to universal values, and then arguing that targeted groups do not have these values. The ultimate arbiters in this process are members of the electorate and their tolerance of a political process that drives such ideology.

**Political process as a colonising agent**

One claim of this thesis was that legal rationality could become colonised by legal rationalism. As set out in Chapter 1 — *Theoretical and Political Background*, Habermas postulates two steps for colonisation to occur: uncoupling and displacement. First, system logic becomes uncoupled from its normative content, and second, the dominant logic then displaces normativity. This can be seen where policy and institutional practices mutually enforce each other, as shown in the interaction effect, where political process was driving both layers of practices. Perhaps the greatest advantage in using political process was the ability of the Howard government to control information - information from the policy practices and back through the institution of public discourse. At times, there was suppression of or delay in, the release of information, or information was presented in such a way that it was too cumbersome to access and hence irretrievable. With political process controlling these variables, the skewed information was then translated into practices that uncoupled the law from its underlying purpose.

There were several instances of uncoupling. Child protection issues for instance became defined in such a way that there was no clash with migration law. State sovereignty became a matter of legally moving borders for the sole purpose of closing these borders to refugees with the military, rather than
police, acting as the law-enforcement agency. Activating the law through political process removed this tension between sovereignty requirements and child legislation and refugee protection. This was the second step to colonisation, where one part of the law colonised the other. Legal rationalism then expressed itself not in the value of its ability to uphold law-and-order, but in its ability to make use of the legal apparatus for political and ideological ends, whilst utilising military deployment in a civilian matter to achieve law-and-order in peacetime. Utilising the military for civilian purposes, it should be remembered, was not the result of a more security conscious world since 11 September 2001, but occurred six weeks before this event.

When adapting Habermas to the methodology of this thesis, the first step to colonisation was the uncoupling of legal rationality from its normative base. As will be seen shortly from several examples, uncoupling was achieved by utilising some legal-rational aspects of the legal system itself - through court decisions and statutes. Political process could not directly influence how judges interpreted the law. This would have compromised the independence of the judiciary and contravened the separation of powers doctrine and placed the Howard government in breach of the Constitution. Instead, the influence of political process was notable where, as was discussed in Chapter 6 — *Politicisation of the Law*, the Howard government responded to a court judgement that it disapproved of by passing new legislation that would prevent judges from interpreting the law in a similar way in future.

Perhaps the best example of the power of political process to steer legal-rational process into a direction desired by politicians came from one of the cases of the Bakhtiyari children. \(^3\) In the cited case, the High Court overturned a decision by the Family Court to release children from immigration detention. When the Howard government had the authority to detain the children, it then

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released them from the detention centre back into detention in the community. The issue was no longer the care and protection of children, which was the normative base for legislation. With the legal safeguard of the normative base uncoupled from the legislation, the normativity of protecting the children became a matter of political process and the legal authority to exercise discretion over activating such process. In this case, the decision of the High Court that the Family Court had no jurisdiction over children in immigration detention centres resolved an institutional conflict between Parliament and the judiciary. However, the ruling also uncoupled from the legal system an important principle of legal rationality - the normative requirement that legislation ensures the protection of children. For practical purposes, the High Court ruling in the Bakhtiyari case meant that there was no legally enforceable remedy to ensure the care and safety of children in immigration detention centres, nor a legal requirement to provide such remedy. The government’s decision to move the children from the Woomera detention centre into detention in the community was discretionary, activated by political process rather than legal requirement. The ideology of legal rationalism had colonised legal rationality.

Just four months after the case discussed in the previous paragraph, a similar development occurred where legislation was uncoupled from the normative requirement to protect adults from harsh effects that occur from the exercise of enforcing legislative requirements. In this case, legal counsel for Mr Behrooz argued that he was not legally detained under immigration law, because the conditions of detention were so intolerable that this did not amount to lawful detention. The High Court rejected this argument. Justice Kirby, the only dissenting judge, stated that “to deny the appellant the argument that he now propounds would … involve the Australian judiciary washing its hands of his case and any lawfulness … in the conditions

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of his detention…”.

Again, there is a tension between interpreting the statute or the principles behind it. In the Behrooz case, the tension between legal-rational interpretations of legal statutes and principles behind legislation was overcome through a dominance of migration law over legislation that may otherwise have protected Mr Behrooz from the harsh effects of detention on his mental health. Here, the rights of the state dominate over the rights of the individual.

Stanley Cohen’s work on denial shows how political framing practices may overcome this tension. According to Cohen, governments use two main strategies that create a systematic framework that denies information they prefer to keep hidden from public view: denial of the events, and denial through the law. In “blank denial”, governments deny that an event did occur, or that it occurred in the way it was claimed to have occurred. This strategy leads to a “legitimate controversy” over “claims and counter-claims”. Cohen’s second strategy consists of an “interpretive denial [that] comes from the language of legality itself”. When the “interpretative” strategy is used, governments may argue that something was necessary for security reasons.

Especially throughout the case studies, it became evident that the Howard government resorted to these denial strategies, which helped push refugee policy in the direction of the legal rationalist ideology. There was for instance the claim that the passengers of the boat that landed on Melville Island in December 2003 did not lodge a valid refugee claim, because their words did not match the legalistic requirements to initiate such claim. Or there was the government’s spin that detained children were not subjected to abuse, at least not at the hands of government, despite an out-of-court settlement in the

\[5 \text{ Ibid., paragraph 139.} \]
\[7 \text{ Ibid., p. 104.} \]
\[8 \text{ Ibid., p. 106.} \]
\[9 \text{ Ibid., p. 107.} \]
\[10 \text{ Ibid., p. 110.} \]
Badraie case, after the Immigration Minister Ruddock initially blamed the child’s stepmother for Shayan’s recurring illness. Cohen puts into a different framework how governments circumvent accountability structures by uncoupling their justifications from the norms of government and social and institutional practices through suppression of information or putting slants on this information. With a political process of systematic “denial” and political framing that informed institutional practices in the legal system, legal rationalism colonised legal rationality. The legislative requirements of migration law took precedence over other legal requirements.

In this practice of colonising, migration legislation also dominated legislation for making available medical requirements. The normative base for meeting medical requirements became dominated by the principle of meeting immigration requirements. A court case illustrates how, once legal rationalism practices become mainstreamed, medical practices also become uncoupled from their normative base.\footnote{S v. Secretary, Department of Immigration & Multicultural & Indigenous Affairs [2005] FCA 549 (5 May 2005).} Especially paragraphs 257 to 258 of the transcript of the case illustrate uncoupling. Accordingly, detention authorities did not comply with medical advice to move two persons from an immigration detention centre to a psychiatric hospital for treatment. The court held that “S and M … did not have to settle for a lesser standard of mental health care because they were in immigration detention”. Yet the evidence indicated that health care “to S and M was, and remained, clearly inadequate”. The court attributed this to “a complex outsourcing arrangement” without “regular and systematic auditing” of the provision of medical services that essentially consisted of “monitoring and working procedures to deal essentially with the intermediate and the ad hoc”.

Under the logic of legal rationalism, medical treatment of refugee applicants as detainees is under order of Parliament, rather than legal and professional
norms of medical charters. The acceptance by the courts that the health of the two men identified as “S” and “M” became adversely affected as the result of their detention brings out a normative value about the relationship of social and legal status of the patient with the delivery of health care. This value is derived directly from the practice of framing refugees as law-breakers and as a threat to sovereignty, so that individual health requirements of persons so framed are not a primary consideration. The dominance of migration law then overcomes a tension that the legal system may otherwise address in circumstances where the health of persons becomes damaged as the direct consequence of government legislation and discretion.

Michael Ignatieff raises the question of how far governments are able to meet human needs, including the needs of strangers. To this debate must be added the human need for freedom from indefinite immigration detention for the purpose of meeting administrative requirements of refugee applications. Ignatieff questions the value of an approach that is entirely rights-based, unless there is recognition that a rights-based approach also expresses collective values. Through forging a relationship with strangers, refugees depicted by the Howard government as the antithesis to Australian values overcomes the disparity between the justification for refugee policy and institutional practices.

Ignatieff proposes an approach of responsibility for the Other as human being, not just technical accountability derived from a rule-driven approach. In this recognition of human beings resides the normative purpose of legal rationality. When applied to this thesis, Ignatieff’s approach thus differs from a relationship of Australia with refugees in terms of sovereignty, law-and-order, humanitarian considerations and orderly process. This was the normative relationship in which the Howard government framed refugees – a relationship that became the cornerstone for refugee policy and the ideal type in the case

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studies. By contrast with Ignatieff’s model, humanitarian considerations were least likely to translate into on-the-ground practices in a policy approach that served as thinly disguised rhetoric for legal rationalism.

An argument that normativity, as identified by the Howard government and summarised here as *ideal types*, cannot function without the narrow framing of sovereignty, visa requirements, border-crossing and persecution claims within a tight set of legal rationality, pales into insignificance when one considers the exceptions that the Howard government has made to legal rationality, and overlaid it with the government’s legal rationalist ideology. However, the restoration of a strictly rule-driven policy would not restore legal rationality to its normative base, to the extent that these rules in and of themselves would operate legalistically for their own sake, rather than for the normative purpose that underlies any system of legal rationality in the first place. Furthermore, the manner in which the refugee rules are written at present were designed from the perspective of an ideology that seeks to exclude strangers, rather than arrive at any form of mutual recognition.

Mutual recognition would enhance the notion of trust, not only between government and citizens with regard to placing information into public discourse. It would also engender trust between government and those who are seeking to engage Australia’s protection, as individuals worthy of recognition. Such an approach would not require abandoning legal rules or orderly process. It would, however, require a conceptually different interpretation of legal rationality; one that abandons assumptions of a threat response that requires military intervention at the borders or open-ended detention without seeking to invoke any notion of proportionality between threat and response, in accordance with legally rationalised rules and procedures within a framework of legal institutions.
Habermas argues that citizens lobby their government for political and legal change, and thereby achieve a society that translates the values of that society into legally binding rules. But how may the more diffuse system of values be reconciled with the notion of predictable and non-arbitrary legal rationality? Legal commentator Martin Krygier argues that “the rule of law is incomplete”, unless the values and traditions that the law represents consist of “equality before the law, procedural fairness or due process”, and are exercised in a system where these legal traditions are honoured. 14 Accordingly, the significance of the law lies in its interaction with extra-legal components; its “sociological and political, rather than purely legal, consequence”, where the rule of law exists as “a frame in the exercise of social power” that is informed by “social and political questions” in any given society 15. This analysis has shown that the opposite occurred in refugee policy, where the law was used to remove these principles that Krygier considers essential to the legal system.

This thesis has shown several tensions between free debate and the political-institutional framework that operate at the levels of political ideology, legal rationality and public debate. Whilst it may be argued that these changes came about as the result of informed debate, such debate was also thwarted — by direct government control over most aspects of the legal and communication processes until a unique version of legal rationality was achieved, with exceptions and rhetorical slants that created an excluded and undesirable Other. How far can legal rationalism go? This was a rhetorical question, because legal rationalism, as any other social phenomenon, will go as far as citizens allow it to.

15 Ibid., p. 232.
Postscript: the ongoing consequences of legal rationalism

If the ideology of legal rationalism has colonised legal rationality through manipulating public discourse, as has been argued, it is worthwhile to look at how the Howard government conducted its discourse after it achieved institutional change. This thesis was about how politicians set the norms, which are then debated. As Habermas puts it:

Practical discourse is not a procedure for generating justified norms but a procedure for testing the validity of norms that are being proposed and hypothetically considered for adoption … Practical discourses are always related to the concrete point of departure of a disturbed normative agreement. These antecedent disruptions determine the topics that are up for discussion.

Work on the period following the timeframe of the thesis suggests that legal rationalism is still practiced, but that it also has its limitations from within the system. As will be seen shortly, discussions were no longer about justifying the ideology of legal rationalism or the practices that derived from this ideology. Instead, it was a matter of fine-tuning the practices and limiting their effects on some individuals. Parliament debated these limitations in early 2004, after the Howard government had been re-elected for another term. 2004 was also the year when, as was noted in Chapter 7 — Formation of the Public Voice, public interest in refugee matters was at an all-time low.

In August 2004, Immigration Minister Vanstone announced a new visa category for those refugee applicants who were unable to renew their refugee protection after their Temporary Protection Visa had expired. The

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beneficiaries of this visa were bona-fide refugees who had failed to convince the Howard government that they needed ongoing protection after the three years of the Temporary Protection Visa had expired. On the surface, the visa appeared to be a humanitarian gesture, aimed at those refugees who, since their release from immigration detention centres, demonstrated a willingness to integrate with Australian society. The visa stipulated that applicants would be allowed to remain in Australia for an additional eighteen months and would be eligible to apply for a permanent visa, provided either they had worked in a rural area for one year, or they contemplated marriage to an Australian citizen.\(^\text{17}\) As Immigration Minister Vanstone put it, this was an opportunity for “a second bite at the cherry”.\(^\text{18}\) Listeners to the ABCs radio program *The World Today* heard that this visa was not a policy change, but an indication of the government’s generosity to erstwhile applicants that “Australia opens their arms to people like that”\(^\text{19}\).

However, the claim to generosity masked the issue that applicants would also relinquish any appeals rights about their refugee status when they applied for the visa. Neither did the visa benefit those who have been unable to secure work, neglected to learn English, or did not intend to marry an Australian citizen. There was no government indication from the Howard government that its refugee policies would markedly depart from the exclusionary practices that were set up between 1999 and 2003. Six months before announcing the new visa, Immigration Minister Vanstone indicated a conflict between personal preferences and the higher goal of her duties:

> “Individually, you might want to open your heart, but my job is not to be, in a sense, Mother Teresa,” says Vanstone. “My job is to have an ordered migration program that will maintain acceptance in the Australian community and be in Australia’s best interest. And you can’t make policy by meeting people individually and deciding


\(^{18}\) Ibid.

whether you like them or not because there’s heaps of people who want to come and we can’t have them all”.20

Here, the Minister announced her intention to work within the law-and-order frame that was largely constructed by her predecessor Philip Ruddock. However, Amanda Vanstone omitted to mention her personal powers of intervention, which have always been part of the rules of this orderly program. Personal intervention is the exercise of ministerial discretion that “balances what is now an otherwise inflexible set of regulations to allow the minister a public interest power to grant a visa in individual circumstances”21. Although the Minister cannot delegate decision-making powers to other people, the process is not as cumbersome as Minister Vanstone implied in her statement to the press cited above. In 2003, the “ministerial intervention unit” employed fifty staff members.22 Indeed, Minister Vanstone had exercised her personal discretion frequently within a short time of taking over the ministerial portfolio. Yet for some refugees, the prospect of indefinite detention was ongoing.

The new visa was preceded by ongoing dissent over migration policies from within the coalition parties. Two Coalition parliamentarians publicly stated that the government “should show more compassion”.23 Another asked for a general amnesty for refugees on Temporary Protection Visas.24 Other parliamentarians also called for an amnesty and for a policy change, so that all refugee applicants would be released from detention after meeting initial health and security checks.25 Amanda Vanstone reaffirmed that the camps needed to stay open to deter people smugglers.26 At the time these discussions were

22 Ibid.
taking place, the release of a report by the Human Rights Commissioner on the effects of detention on children was around the corner, and public discourse was marred by “unauthorised” information about the detention and deportation of an Australian citizen, which led to the Palmer Inquiry.27

Dissent among parliamentarians of the Coalition Party entered public discourse again in early 2005, and the Howard government resolved the tension by making small concession to the dissenters. In response to its critics, the Howard government announced another visa category; the Removal Pending Visa. The new visa meant that applicants could only apply if they renounced all claims to refugee rights and were released from detention if they agreed to leave Australia as soon as practical.28 Two months later, ten people were released under these provisions, and Immigration Minister Vanstone announced that another seven would be released.29 Within one week of this announcement by Vanstone, Philip Ruddock, now Attorney-General, heralded the passage of new legislation to further restrict appeals rights in immigration cases.30 Two weeks later, the debate about how to implement the conditions of Removal Pending Visas resulted in the government doing away with the stipulation that applicant’s waiver their appeal rights.31 However, release under this visa under this legislation depended on sole discretion of the government.

One newspaper article expressed the human and political dimensions of this conflict.32 Accordingly, 31-year-old Peter Qasim had spent seven years in detention. Mr Qasim was stateless, and his repeated requests over the previous 18 months to return to India went unanswered. During his time in detention, Qasim became depressed and suicidal to the extent that he needed admission

30 Michelle Grattan, "Ruddock to Get Tough on Migrant Appeals," Age, 5 June 2005.
to a psychiatric hospital. The article cited at the beginning of the paragraph described the efforts that eventually secured Mr Qasim’s release, after Minister Vanstone had already ruled out his eligibility for release under the terms of the Removal Pending Visa: The Minister changed her determination after Qasim’s lawyer and psychiatrist joined the public campaign that was started by Coalition parliamentarian Petro Georgiou and prominent businessman Dick Smith.

The discussions at parliamentary level really were about bargaining. Whilst the lobbying for Mr Qasim’s release was in progress, the parliamentarians challenged the arbitrariness of ministerial discretion. Georgiou prepared two private members bills, aimed at judicial review after ninety days of detention and the review of all child detainees.33 Significant about the private members bill was that the dissident parliamentarians sought to depart from the conventional practice of the Minister presenting the bill and initiating relevant discussion. If successful, the resulting new legislation would have fundamentally changed not only the potentially indefinite timeframe for detention, but also returned major aspects of the oversight over policy delivery to the judiciary. “Up to twenty” parliamentarians indicated to the Prime Minister that they supported the proposed policy changes.34 Some were prepared to cross the floor and vote with the Opposition on this matter.35 On the day before Georgiou was to present his bill to parliament, the Prime Minister opted for a compromise and arrived at agreement with the dissident parliamentarians that avoided the introduction the private members bill. John Howard subsequently announced that the policy of mandatory detention remained intact, but that families with children would be placed into an alternative form of detention in the community.36 In the cited interview, the

34 Samantha Maiden, “PM Open to Detention Overhaul,” Australian, 1 June 2005.
Prime Minister spoke of “very good changes” that retained the “balance between sensitivity and the national interest”.  

The Prime Minister’s willingness to negotiate at this point may indicate an intention to have the Coalition Party appear united before the electorate. However, the “changes” agreed to during the compromise were only cosmetic changes. There was no more talk of judicial review over the timeframe of mandatory detention. The removal of families with children from detention centres to alternative detention in the community was already practiced during 2001 and 2002, when the Howard government faced criticism over the detention of children. The fact that this issue was raised again in mid-2005 suggests that any changes to that effect were a short-lived, yet effective bargaining tool to appease the government’s critics.

Moreover, it would seem that the only initiative that was not arbitrary was the willingness of the Howard government to minimise disapproval over its refugee policies. The policy to exclude refugees continued relentlessly. In February 2004, Immigration Minister Vanstone announced an extension of the excision legislation of the *Border Protection Act* and excised even the waterways around the coast:

> That would simply mean that instead of coming into our waters people actually have to get their feet on Australian soil — I think that’s a sensible practical solution. It would mean that people simply couldn’t come into an Australian port and therefore access our immigration laws.

In mid-January 2006, one refugee boat achieved what the legislation was designed to prevent. Refugees from West Papua arrived on the mainland in Queensland. The purpose of the voyage was clearly displayed. There was no mistake that this was a refugee boat: a banner on the boat clearly stated that the

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passengers were seeking refugee protection from Australia.\textsuperscript{39} Despite such clear statement of intention by the passengers, the Department of Immigration and Multicultural Affairs declared that “no application has yet been lodged” and “the purpose of the voyage” was not clear\textsuperscript{40}. This comment raises the speculation about whether or not the government intended to send them back, just as it turned around a boat with Kurdish people in December 2003 at Melville Island. However, on the following day, \textit{The Age} reported that Indonesian soldiers had killed five school children who came from the area of West Papua where the asylum seekers came from.\textsuperscript{41} One of the dead children was a close relative of the men, who had been sent to the Christmas Island detention centre.\textsuperscript{42} Another newspaper reported that two men died in reprisal killings in the region and that there were beatings by the Indonesian military.\textsuperscript{43} Australian authorities subsequently gave refugee status to 42 of the 43 passengers.\textsuperscript{44} The fate of the remaining person remained doubtful for another four months, until he also had his refugee status confirmed on appeal.\textsuperscript{45}

The decision to accept the West Papuan refugees caused a diplomatic incident, and Indonesia temporarily recalled its ambassador from Australia for eleven weeks.\textsuperscript{46} During this time of tensions with Indonesia, Prime Minster Howard announced significant changes to assessment criteria in refugee decisions. John Howard indicated that future refugee assessment decisions would take into account “what’s in this country’s best interests and in the best interests of a longer-term relationship” between both countries.\textsuperscript{47} The newspaper article just cited spelt out that such changes could mean that Australia may in future “take

\textsuperscript{39} Ian Mapoon, “Save Our Souls, Plead West Pauans,” \textit{Australian}, 19 January 2006.
\textsuperscript{41} Andra Jackson and Mark Forbes, “Two Papua Children ‘Shot Dead’,” \textit{Age}, 21 January 2006.
\textsuperscript{42} \textit{Ibid}.
\textsuperscript{44} Andra Jackson, “Free at Last, West Papuan Refugees Rejoice in New Dawn,” \textit{Age}, 4 April 2006.
\textsuperscript{45} Craig Skehan, “Tribunal Allows Papuan to Stay,” \textit{Sydney Morning Herald}, 1 August 2006.
\textsuperscript{47} Louise Dodson, Mark Forbes, and Craig Skehan, “In the National Interest: PM Takes Tougher Line on Asylum,” \textit{Sydney Morning Herald}, 8 April 2006.
into account the view of the countries applicants are fleeing”. The Federal
government announced plans that in future, all boat arrivals would be sent to
offshore detention centres. 48 The reasons for this change remained unclear.
The Prime Minister denied that these plans occurred as the result of pressure
from Indonesia, whilst Immigration Minister Vanstone linked this decision
with retaining Indonesia’s cooperation “in relation to border protection”. 49

This intention was blocked, when the Howard government negotiated another
softening of its policies with the dissenting parliamentarians. These changes
included shorter processing times of refugee claims, the placement of children
in community detention instead of immigration detention centres, and greater
powers for the Ombudsman. 50 However, the manner in which the government
compromised its intention deserves mention. The lower house had already
passed the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006. It was
doubtful that the Bill would pass the next hurdle and be approved in the
Senate. An increasing number of senators declared they would vote against the
proposed legislation and businessman Ian Melrose supported a massive media
advertising campaign that opposed the proposed legislation. 51 Some
commentators predicted that the Prime Minister faced “the biggest and most
embarrassing Senate defeat of his 10 years in power”. 52 However, “just hours
before” the bill was to be debated in the Senate, John Howard withdrew the
intended legislation, to avoid a “humiliating defeat”. 53

This compromise resulted in the policy changes summarised at the beginning
of the previous paragraph. Although the Howard government withdrew the

50 Cath Hart and Steve Lewis, "Rebels to Force Howard's Hand," Australian, 10 August
2006.
51 Mark Metherell and Mark Forbes, "Howard Faces Humiliating Defeat on Asylum
52 Louise Dodson, "All in a Day's Work for the Master Fixer," Sydney Morning Herald, 15
August 2006.
53 Phillip Coorey and Mark Forbes, "Danger in PM's Retreat: Jakarta," Sydney Morning
Herald, 15 August 2006.
Conclusion

legislation, it is worthwhile to reflect on how far the government was prepared to take its new refugee policies. Journalist Michael Gordon discussed the case for and against debating the legislation.\(^\text{54}\) the purpose of this legislation was to send all uninvited refugees to detention centres outside of Australia for the processing of their asylum claims, including those who arrive on the Australian mainland. Georgiou claimed that the negotiated changes to the policy were not enforceable in Nauru, and this could mean that some successful refugee applicants would remain there, detained indefinitely. According to Immigration Minister Vanstone, the proposed legislation would ensure the appropriate allocation of scarce resources to refugees most in need. The Minister also claimed that the new system would be fairer to all onshore refugees:

> There is no reason to treat someone who, by dint of good winds and tides, manages to make it to the Australian mainland differently from a person who strikes bad weather and arrives at an island a stone's throw off the coast. It is fair to treat all unauthorised boat arrivals in the same way.\(^\text{55}\)

What Minister Vanstone in the above quote heralded as fairness, effectively meant closing Australia even to those few refugees whose boats occasionally slipped past the military surveillance of Australia’s coast. The thwarted plan also meant that uninvited refugees would never again have access to the Australian legal system, and would be subject to the outcome of the refugee polices that the Howard government pursued since the time period of the case studies. Rather than treating refugees more fairly, it appears that the government’s motive was to introduce even harsher policies. Just as Philip Ruddock in 1999 claimed that his new policies were about resources for refugees, the newspaper article cited in the previous paragraph with Amanda Vanstone’s comments begs the question of how the need for refugee protection can be assessed by their mode of travel to Australia.\(^\text{56}\)

\(^{54}\) Michael Gordon, "Risking Political Death but Undeterred," Age, 10 August 2006.

\(^{55}\) Ibid.

The few examples from the Howard government’s response to refugee boats since the end of the case studies are not inconsistent with the claim of this thesis that refugee policy has become increasingly uncoupled from its normative purpose to protect refugees. The trend has been toward policies that exclude, rather than regulate, the entry of refugees to Australia. Some signs suggest that future refugee protection could become a bargaining tool for Australian governments with the governments of the persecuting state from which refugees have fled. This would put a new meaning to the concept of rights of the state where the rights of individuals pale into insignificance.
Appendices
Appendices

Appendix A — Onshore Refugees

Of approximately 10,000 people who arrived by boat, about 70 per cent were accepted by Australian authorities as refugees. When the figures were released, about 20 per cent remained in detention and the outcome of their refugee applications were unknown. Not shown are numbers of arrivals who either did not enter Australia, or who did not remain in Australia.

Table A1: Number of boat arrivals between 4 January 1999 and 2 July 2003, of onshore refugees and people remaining in detention by 12 September 2003.

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Arrivals</th>
<th>Refugees (% of total)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arrivals</td>
<td>10,289</td>
<td></td>
</tr>
<tr>
<td>Refugees</td>
<td>7,339</td>
<td>71.32 %</td>
</tr>
<tr>
<td>Detention</td>
<td>2,085</td>
<td>20.26 %</td>
</tr>
</tbody>
</table>

Figures calculated from Fact Sheet 74a. Produced by the Public Affairs Section of the Department of Immigration and Multicultural and Indigenous Affairs. Revised 12 September 2003. Last update: 15 September 2003 at 08:36 AEST.


Raw data for calculating numbers in Table A1, copied from Fact Sheet 74a, cited above.
Symbols used:
Baby* = born after boat's arrival;
children = under 18, at boat's arrival;
ref = entry through refugee status (protection visa);
humanit = entry on humanitarian grounds;
entry = entry on other grounds;
bridging visas = visas giving temporary lawful status;
TPV = temporary protection visa
release = release into community pending appeal;
departs = departures from Australia;
det. = in detention/custody (ie under investigation/awaiting repatriation to safe third country/having been refused refugee status/with application, appeal or litigation pending;
Unknown = yet to be determined.

Note: the italicised boat name used is the code name used by DIMIA to identify each boat. It is not the real name of the boat.

1989

1. 28 November 1989, Broome (Pender Bay) 26-20 adults, 6 children - plus 1 baby* (8 Chinese, 10 Vietnamese, 8 Cambodian). 9 ref, 2 entry, 6 departs.

1990

2. 31 March 1990, Broome (Beagle) 119 - 95 adults, 24 children - plus 16 babies* (34 Chinese, 8 Vietnamese, 77 Cambodians). 37 ref, 18 entry, 80 departs.
3. 1 June 1990, north of Darwin (Collie) 79 - 49 adults, 30 children - plus 2 babies* (15 Chinese, 64 Cambodian) 22 humanit, 12 entry, 47 departs.

1991

4. 4 March 1991, Darwin (Dalmatian) 33 - 21 adults, 12 children - plus 3 babies* (11 Chinese, 8 Sino-Vietnamese, 13 Macau citizens, 1 Hong Kong citizen). 18 ref, 2 entry, 16 departs.
5. 6 March 1991, Darwin (Echo) 34 - 20 adults, 14 children - plus 2 babies* (1 Vietnamese, 34 Cambodians). 26 ref, 1 humanit, 2 entry, 7 departs.
Appendices

7. 26 April 1991, Darwin (George) 77 - 48 adults, 29 children - plus 4 babies* (2 Chinese, 11 Vietnamese, 64 Cambodian) 35 ref, 6 humanitarian, 9 entry, 1 bridging visas, 34 departs.

1992

10. 10 May 1992, Darwin (Jeremiah) 10 - 8 adults, 2 children (Chinese). 2 ref, 8 departs.
11. 21 May 1992, Saibai Island/Torres Strait, Torres Strait (Kelpie) 11 - 8 adults, 3 children - plus 1 baby* (Polish). 12 departs.
13. 28 October 1992, Dauan, Dauan Island/Torres Strait (Mastiff) 11 - 9 adults, 2 children - plus 1 baby* (Romanian). 2 ref, 10 departs.
15. 3 November 1992, Saibai Island/Torres Strait (Otter) 2 adults (1 Somali, 1 Nigerian). 2 departs.

1993

17. 5 December 1993, Broome (Quokka) 24 - 20 adults, 4 children - plus 3 babies* (Chinese). 9 ref, 6 humanitarian, 12 departs.
18. 20 December 1993, Troughton Is, WA (Roger) 4 adults (Turkish nationals). 4 ref.

1994

19. 1 February 1994, Cape Talbot, WA (Sting) 4 adults (Bangladeshi). 2 refs, 2 departs.
22. 7 July 1994, Broome (Vagabond) 17 adults (Vietnamese ex-Galang), 5 ref, 2 entry, 10 humanitarian.
24. 9 September 1994, Cape Leveque, WA (Xenon) 31 - 27 adults, 4 children (Vietnamese, ex-Galang). 30 departs, 1 escapee.
26. 26 October 1994, Broome (Zebra) 22 adults (Vietnamese, ex-Galang). 22 departs.
34. 23 December 1994, Darwin (Heron) 90 - 51 adults, 39 children (Sino-Vietnamese). 90 departs.
36. 28 December 1994, Darwin (Kookaburra) 72 - 46 adults, 26 children (Sino-Vietnamese). 72 departs.

1995

38. 9 March 1995, Darwin (Mudlark) 52 - 34 adults, 18 children - plus 1 baby* (Sino-Vietnamese). 53 departs.
40. 17 March 1995, Ashmore Islands (Oriole) 5 adults (Afghan). 5 ref.
42. 29 May 1995, Darwin (Quail) 18 - 16 adults, 2 children (East Timorese). 18 bridging visas.
43. 25 August 1995, Ashmore Islands (Rosella) 6 adults (Turkish). 6 ref.

1996

44. 17 January 1996, Ashmore Islands (Sandpiper) 4 adults (Iraqi). 4 ref.
45. 6 February 1996, Christmas Island (Teal) 46 - 34 adults, 12 children (Chinese). 46 departs.
57. 7 September 1996, Ashmore Islands (*Iris*) 7 adults (Iraqi). 7 ref.
58. 9 September 1996, Ashmore Islands (*Juniper*) 5 adults (Iraqi). 5 ref.
59. 25 September 1996, Tudu Island/Torres Strait (*Kerria*) 21 - 11 adults, 10 children (Irian Jaya - Indonesian Province). 21 departs
60. 3 October 1996, Ashmore Islands (*Lambertia*) 8 adults (Iraqi). 8 ref.
61. 8 October 1996, Ashmore Islands (*Melaleuca*) 24 - 23 adults, 1 child (16 Iraqi, 8 Pakistani). 16 ref, 8 departs.
62. 11 December 1996, Ashmore Islands (*Nandina*) 12 adults (10 Iraqi, 1 Algerian, 1 Moroccan). 11 ref, 1 depart.

1997

63. 15 January 1997, Saibai Island/Torres Strait (*Oleria*) 4 adults (Iraqi). 4 refs.
64. 10 February 1997, Ashmore Islands (*Pilliga*) 7 adults (2 Iraqi, 1 Iranian, 4 Algerian). 7 refs.
65. 6 March 1997, Darwin (*Quercus*) 70 - 54 adults, 16 children (70 Chinese). 70 departs.
67. 30 April 1997, Darwin (*She Oak*) 44 - 36 adults, 8 children (Chinese). 44 departs.
68. 13 June 1997, Torres Strait (*Telopea*) 139 - 134 adults, 5 children (Chinese). 139 departs.
70. 25 July 1997, Christmas Island (*Viola*) 15 adults (8 Iraqi, 1 Afghan, 4 Algerian, 1 Sudanese, 1 Bangladeshi). 13 refs, 1 det, 1 depart.
71. 4 September 1997, Christmas Island (*Waratah*) 25 - 17 adults, 8 children - plus 1 baby* (3 Iraqi, 17 Afghan, 4 Algerian, 1 Sudanese). 24 refs, 2 departs.

1998

74. 4 January 1998, Tudu Island/Torres Strait (*Zostera*) 30 - 20 adults, 10 children (30 Irian Jaya - Indonesian Province). 30 departs.
76. 7 February 1998, Ashmore Islands (*Barcoo*) 4 adults (1 Algerian, 1 Moroccan, 2 Senegalese). 3 departs, 1 ref.
77. 19 February 1998, off NW Kimberley Coast (*Clyde*) 11 - 10 adults, 1 child (11 Chinese). 11 departs.
Appendices

78. 21 February 1998, off NW Kimberley Coast (Diamantina) 7 adults (Chinese). 7 departs.
79. 9 April 1998, Ashmore Islands (Eyre) 6 adults (Bangladeshi). 6 departs.
80. 9 May 1998, Gove (Fitzroy) 9 adults (Bangladeshi). 9 departs.
81. 27 May 1998, Ashmore Islands (Gieneig) 7 adults (Bangladeshi). 7 departs.
82. 5 June 1998, Ashmore Islands (Hawkesbury) 10 adults (Bangladeshi). 10 departs.
83. 3 July 1998, Ashmore Islands (Indulkana) 5 adults (4 Bangladeshi, 1 Indonesian). 5 departs.
84. 6 July 1998, off NW Kimberley Coast (Jardine) 3 adults (2 Bangladeshi, 1 Indonesian) 3 departs.
85. 4 September 1998, off NW Kimberley Coast (Kiewa) 6 adults (Bangladeshi). 6 departs.
86. 9 September 1998, Saibai Island/Torres Strait (Lachlan) 4 adults (1 Bangladeshi, 3 Indians). 2 det, 1 ref, 1 depart.
87. 11 September 1998, Ashmore Islands (Murrumbidgee) 2 adults (Bangladeshi). 2 departs.
88. 24 November 1998, Ashmore Islands (Namoi) 7 adults (Si Lankan). 7 departs.
89. 30 November 1998, Ashmore Islands (Ord) 15 adults (4 Iraqi, 11 Turks). 14 refs, 1 depart.

1999

91. 4 January 1999, off NW Kimberley Coast (Queen) 9 - 5 adults, 4 children (Iraqi). 9 refs.
92. 4 January 1999, Coburg Peninsula, NT (Roper) 3 adults (Iraqi). 3 refs.
93. 4 January 1999, Townsville,QLD (Snowy) 2 adults (1 Kazakhstani, 1 Papua New Guinean). 2 departs.
94. 12 January 1999, Port Hedland (Tumut) 4 adults (Chinese). 4 departs.
95. 3 February 1999, Hammond Island/Torres Strait (Urriarra) 5 adults (Afghan). 5 refs.
96. 15 February 1999, Ashmore Islands (Vanrook) 10 - 10 adults, (5 Afghans, 3 Algerians, 1 Iraqi, 1 Pakistani). 7 refs, 2 det, 1 depart.
97. 21 February 1999, Ashmore Islands (Warrego) 32 adults (Turkish). 19 refs, 13 departs.
98. 21 February 1999, Christmas Island (Xavier) 13 adults (9 Iraqis, 4 Algerians). 13 refs.
99. 24 February 1999, NW Kimberley Coast (Yarra) 3 adults (Bangladeshi). 3 departs.
100. 10 March 1999, off NW Kimberley Coast (Zetland) 12 - 5 adults, 7 children (Afghan). 12 refs.
102. 12 March 1999, Holloway's Beach, Cairns (Bogong) 26 adults (Chinese). 26 departs.
103. 26 March 1999, Ashmore Islands, (Constantine) 8 adults (2 Iraqis, 2 Kuwaitis, 3 Afghans, 1 Bangladeshi). 7 refs, 1 det.
104. 10 April 1999, Scott's Head, Macksville, NSW, (Dandenong) 60 adults (Chinese). 60 departs.
105. 13 April 1999, off NW Kimberley Coast, (Essendon) 10 - 9 adults, 1 child (Afghan). 10 refs.
106. 16 April 1999, Cape Leveque, (Franklin) 3 adults (Bangladeshi). 3 departs.
107. 21 April 1999, Ashmore Islands, (Gambier) 3 adults (Turkish). 3 refs.
108. 24 April 1999, Ashmore Islands, (Hotham) 15 adults (1 Bangladeshi, 2 Pakistani, 12 Iraqi). 12 refs, 3 departs.
109. 7 May 1999, Ashmore Islands, (Isa) 54 - 53 adults, 1 child (43 Turkish, 6 Iraqi, 4 Afghan, 1 Kuwait). 39 refs, 2 det, 13 departs.
111. 17 May 1999, NSW Coast adjacent to Port Kembla, (Kosciuszko) 82 - 81 adults, 1 child - plus 1 baby* (Chinese). 83 departs.
113. 20 May 1999, Ashmore Islands (Majura) 7 adults (Bangladeshi). 4 det, 1 ref, 2 depart.
114. 24 May 1999, Ashmore Islands (Nelson) 10 adults (5 Iraqi, 4 Afghan, 1 Pakistani). 10 refs.
115. 27 May 1999, Doughboy River (Ossa) 78 - 77 adults, 1 child (Chinese). 78 departs.
116. 1 June 1999, Cape Leveque (Pinnacle) 9 adults (Bangladeshi). 9 departs.
118. 7 June 1999, Ashmore Islands (Roe) 10 adults (Afghan). 10 refs.
119. 11 June 1999, Christmas Island (Selwyn) 8 - 7 adults, 1 child (Afghan). 8 refs.
120. 12 June 1999, Ashmore Islands (Tabletop) 76 - 74 adults, 2 children (57 Turkish, 10 Afghan, 9 Iraqi). 6 det, 35 refs, 35 departs.
121. 13 June 1999, Yam Island/Torres Strait (Urah) 3 adults (Chinese). 3 departs.
122. 22 June 1999, Saibai Island/Torres Strait (Vigors) 2 adults (Sri Lankan). 1 depart, 1 det.
124. 29 June 1999, Ashmore Islands (X-Keten) 53 - 46 adults, 7 children (40 Iraqi, 12 Afghan, 1 Algerian). 51 refs, 1 det, 1 TPV.
125. 12 July 1999, Ashmore Islands (York) 6 adults (Indian). 5 departs, 1 det.
127. 20 July 1999, Christmas Island (Augustus) 5 - 4 adults, 1 child (Sri Lankan). 5 refs.
128. 21 July 1999, Ashmore Islands (Buller) 7 adults (5 Afghan, 2 Iranian). 6 refs, 1 depart.
129. 28 July 1999, Ashmore Islands (Calder) 14 adults (Turkish). 14 departs.
130. 31 July 1999, Ashmore Islands (Druitt) 44 adults (32 Iraqi, 6 Afghan, 5 Kuwaiti, 1 Sri Lankan). 1 det, 42 refs, 1 depart.
131. 11 August 1999, Ashmore Islands (Eliza) 16 adults (11 Afghan, 4 Sri Lankan, 1 Pakistani). 1 det, 10 refs, 3 departs, 2 TPV.
132. 14 August 1999, Christmas Island (Fox) 140 - 126 adults, 14 children (140 Iraqis). 130 refs, 6 det, 3 TPV, 1 depart.
133. 23 August 1999, Ashmore Islands (Grenfell) 8 adults (Iraqi). 8 ref.
134. 26 August 1999, Ashmore Islands (Hawthorn) 12 adults - plus 1 baby* (Afghan). 13 TPV.
135. 30 August 1999, Ashmore Islands (Ida) 24 - 22 Adults, 2 children - 
(20 Afghans, 2 Palestinian, 2 Sri Lankan).
136. 31 August 1999, Ashmore Islands (Jagged) 86 - 71 Adults, 15 
Children- (79 Iraqi, 2 Iranian, 2 Afghan, 2 Kuwait, 1 Bahr).
137. 3 September 1999, Ashmore Islands (Kembla). 35 - 34 Adults, 1 
child. (34 Afghan, 1 Sri Lankan 
138. 14 September 1999, Bonaparte Archipelago (Leura) 14 adults 
(Afghan). 14 TPV.
139. 17 September 1999, Ashmore Islands (Macedon) 6 adults (4 Iraqi, 
1 Bangladeshi, 1 Myanmar). 1 det, 4 TPV, 1 depart.
140. 19 September 1999, Ashmore Islands (Nebo) 8 adults (8 Turkish). 
1 det, 5 depart, 2 TPV.
141. 21 September 1999, Ashmore Islands (Owen) 6 adults (5 
Pakistani, 1 Afghan). 5 depart, 1 TPV.
142. 24 September 1999, Ashmore Islands (Panorama) 49 - 46 adults, 
3 minors, (30 Iraqi, 10 Bangladeshi, 7 Afghans, 1 Syrian, 1 Indonesian). 10 
det, 33 TPV, 3 refs, 1 bridging visa, 2 depart.
143. 26 September 1999, Ashmore Islands (Quakers) 8 - 7 adults, 1 
minor (6 Indian, 2 Indonesian). 8 depart.
144. 2 October 1999, off NW Kimberley Coast (Richmond) 21 adults 
(Afghan). 21 TPV.
145. 5 October 1999, off NW Kimberley Coast (Stromlo) 23 adults, 1 
child (Afghan). 24 TPV.
146. 7 October 1999, Scott's Reef (Tamborine) 62 - 57 adults, 5 minors 
(51 Afghan, 6 Iraqi, 3 Sri Lankan, 2 Syrian). 49 TPV, 9 refs, 1 bridging visa, 
3 depart.
147. 11 October 1999, Ashmore Islands (Unbunmaroo) 110 - 82 adults, 
21 minors - plus 1 baby* (102 Iraqi, 8 Afghan). 3 det, 100 TPV, 8 refs.
148. 13 October 1999, Kuri Bay, off NW Kimberley coast (Victoria) 12 - 
10 adults, 2 minors - plus 1 baby* (Afghan). 13 TPV.
149. 18 October 1999, Broome (William) 24 - 22 adults, 2 minors 
(Afghan). 20 TPV, 4 refs.
150. 22 October 1999, Ashmore Islands (Xarag) 3 adults (2 Sri Lankan, 
1 Pakistani). 3 depart.
151. 22 October 1999, Ashmore Islands (Yule) 140 - 136 adults, 4 
minors (126 Afghan, 14 Iraqi). 3 det, 137 TPV.
152. 24 October 1999, off NW Kimberley Coast (Zephyr) 26 adults 
(Afghan). 26 TPV.
153. 1 November 1999, Ashmore Islands (Adelong) 355 - 324 adults, 
29 minor - plus 2 babies* (299 Iraqi, 46 Afghan, 4 Iranian, 2 Algerian, 1 
Palestinian, 1 stateless). 20 det, 324 TPV, 11 refs.
154. 5 November 1999, Ashmore Islands (Bogabilla) 75 - 68 adults, 7 
children (63 Afghan, 12 Iraqi). 5 det, 70 TPV.
155. 7 November 1999, Ashmore Islands (Cootamundra) 82 adults (80 
Iraqi, 1 Palestinian, 1 Kuwaiti). 4 det, 78 TPV.
156. 8 November 1999, Ashmore Islands (Dapto) 25 - 23 adults, 2 
children, (Afghan). 25 TPV.
157. 8 November 1999, Christmas Island (Eumungerie) 156 - 134 
adults, 22 children - plus 3 babies* (133 Iraqi, 16 Iranian, 3 Palestinian, 3 
Kuwaiti, 1 Jordan). 10 det, 142 TPV, 7 depart.
158. 11 November 1999, Ashmore Islands (Finley) 23 - 23 adults 
(Afghan). 23 TPV.
159. 17 November 1999, Ashmore Islands (Goodoonga) 31 - 24 adults, 7 children (27 Afghan, 4 Iraqi). 31 TPV.
160. 18 November 1999, Ashmore Islands (Henty) 33 - 30 adults, 3 children (17 Afghan, 15 Iraqi, 1 Iranian). 2 det, 31 TPV.
162. 19 November 1999, Ashmore Islands (Jerilderie) 23 - 21 adults, 2 children (Afghan). 23 TPV.
164. 26 November 1999, Ashmore Islands - formerly Ashmore Islands (Lockhart) 151 - 127 adults, 24 children (132 Afghan, 18 Iraqi, 1 Iranian). 8 det, 1 depart, 142 TPV.
165. 26 November 1999, Adele Island - NW Kimberley Coast (Mudgee) 28 - 25 adults, 3 children (Afghan). 1 det, 27 TPV.
167. 1 December 1999, Ashmore Islands (Orange) 6 adults (Indian). 6 depart.
168. 6 December 1999, Ashmore Islands (Pokataroo) 135 - 114 adults, 21 children (Iraqi). 9 det, 125 TPV, 1 depart.
169. 8 December 1999, Ashmore Islands (Quirindi) 7 adults (Afghan). 7 TPV.
170. 16 December 1999, Ashmore Islands (Rappville) 127 - 118 adults, 9 children (103 Afghan, 20 Iraqi, 1 Pakistani, 3 Kuwaiti). 13 det, 113 TPV, 1 entry.
171. 16 December 1999, Vanistaat Bay, NW Kimberley Coast (Scone) 58 - 32 adults, 26 children (Afghan). 57 TPV, 1 ref.
172. 18 December 1999, Ashmore Islands (Tumbarumba) 53 - 33 adults, 19 children - plus 1 baby* (50 Iraqi, 2 Algerian). 2 det, 51 TPV.
175. 21 December 1999, Ashmore Islands (Warrawee) 35 - 20 adults, 15 children (Iraqi). 4 det, 31 TPV.
176. 21 December 1999, Powerful Island/Torres Strait (Xmas) 4 adults (Iraqi). 2 det, 2 TPV.

2000

177. 5 January 2000, Ashmore Islands (Yanco) 118 - 103 adults, 15 children. 12 det, 105 TPV, 1 depart.
178. 7 January 2000, NW of Darwin (Zahlie) 44 - 42 adults, 2 children. 44 TPV.
179. 17 January 2000, Hibernian Reef (Albany) 25 - 23 adults, 2 children. 25 TPV.
180. 22 January 2000, Cape Fourcroy (Busselton) 54 - 47 adults, 7 children. 39 depart, 15 humanit.
181. 26 January 2000, Cape Bougainville (Caiguna) 38 - 32 adults, 6 children. 4 det, 34 TPV.
Appendices

182. 1 February 2000, Christmas Island (Donnybrook) 281 - 231 adults, 50 children - plus 3 babies*. 44 det, 232 TPV, 8 depart.
183. 11 February 2000, Ashmore Islands (Eneabba) 47 - 41 adults, 6 children - plus 1 baby*. 3 det, 45 TPV.
184. 16 February 2000, Christmas Island (Fimiston) 22 - 21 adults, 1 child. 5 det, 17 TPV.
185. 16 February 2000, Ashmore Islands (Gnowangerup) 14 adults. 1 depart, 13 TPV.
187. 6 March 2000, Ashmore Islands (Iluka) 21 adults. 1 det, 11 TPV, 9 depart.
188. 19 March 2000, Ashmore Islands (Joondalup) 47 - 31 adults, 16 children. 3 det, 44 TPV.
189. 22 March 2000, Cape Leveque, WA (Kalgoorlie) 34 - 24 adults, 10 children. 5 det, 29 TPV.
190. 26 March 2000, Ashmore Islands (Leederville) 70 - 62 adults, 8 children - plus 2 babies*. 26 det, 45 TPV, 1 depart.
191. 28 March 2000, Ashmore Islands (Manjimup) 19 adults. 19 TPV.
192. 03 April 2000, Ashmore Islands (Nannup) 62 - 46 adults, 16 children - plus 2 babies* 14 det, 2 bridging visas, 47 TPV, 1 depart.
193. 24 April 2000, Ashmore Islands (Ongerup) 4 adults. 2 det, 1 depart, 1 escape.
194. 26 April 2000, Ashmore Islands (Pingelly) 78 - 72 adults, 3 children. 3 det, 63 TPV, 3 depart.
195. 09 May 2000, Ashmore Islands (Quinninup) 66 - 52 adults, 14 children - plus 1 baby*. 6 det, 1 ref, 60 TPV.
196. 16 May 2000, Ashmore Islands (Rockingham) 17 - 15 adults, 2 children. 17 TPV.
197. 01 June 2000, Ashmore Islands (Stonyville) 36 - 32 adults, 4 children - plus 1 baby*. 9 det, 27 TPV, 1 depart.
198. 19 June 2000, Ashmore Islands (Tambellup) 112 - 84 adults, 28 children. 32 det, 78 TPV, 2 depart.
199. 27 June 2000, Christmas Island (Utakarra) 3 adults - plus 1 baby*. 4 det.
200. 10 July 2000, Ashmore Islands (Varley) 30 - 30 adults. 16 det, 13 TPV, 1 ref.
201. 11 July 2000, Ashmore Islands (Wagerup) 36 - 33 adults, 3 children. 16 det, 14 TPV, 6 depart.
202. 11 July 2000, Cairns (Xwa) 23 - 22 adults, 1 child. 23 depart.
203. 17 August 2000, Ashmore Islands (Yakamia) 74 - 54 Adults, 20 children. 68 det, 6 TPV.
204. 04 September 2000, Ashmore Islands (Zanthus) 77 - 69 adults, 8 children. 31 det, 46 TPV.
205. 14 September 2000, Water North West Western Australia (Augathella) 101 - 71 adults, 30 children - 1 baby*. 15 det, 87 TPV.
206. 24 September 2000, Ashmore Islands (Bedourie) 2 - 2 adults. 2 TPV.
207. 27 September 2000, Ashmore Islands (Charleville) 47 - 37 adults, 10 children. 38 det, 9 TPV.
208. 02 October 2000, Ashmore Islands (Dirranbandi) 14 - 10 adults, 4 children. 1 det, 13 TPV.
209. 07 October 2000, Ashmore Islands (Emerald) 94 - 84 adults, 10 children. - 1 baby* 64 det, 25 TPV, 6 depart.
210. 15 October 2000, Ashmore Islands (Fruitgrove) 33 - 28 adults, 5 children, 20 det, 12 TPV, 1 depart.
211. 25 October 2000, Ashmore Islands (Gargett) 32 - 25 adults, 7 children, 4 det, 26 TPV, 2 depart.
212. 28 October 2000, Ashmore Islands (Helidon) 116 - 98 adults, 18 children, 70 det, 46 TPV.
213. 02 November 2000, Ashmore Islands, (Innisfail) 69 - 62 adults, 7 children. 64 det, 5 TPV.
214. 10 November 2000, Ashmore Islands, (Jondaryan) 24 - 9 det, 15 TPV.
215. 16 November 2000, Ashmore Islands, (Kilkivan) 48 - 22 det, 26 TPV.
216. 27 November 2000, Ashmore Islands, (Leichardt) 100 - 51 det, 45 TPV.
217. 15 December 2000, Boigu Islands/Torres Strait, (Nambour) 3 - 3 det.
218. 16 December 2000, Ashmore Islands, (Maroochydore) 117 - 84 adults, 33 children. 117 det.
219. 17 December 2000, Ashmore Islands (Ormeau) 92 - 72 adults, 20 children. 74 det, 18 TPV.
220. 18 December 2000, Ashmore Islands, (Proserpine) 35 - 35 adults, 35 det.
221. 18 December 2000, Ashmore Islands, (Quinalow) 97 - 78 adults, 19 children. 97 det
222. 21 December 2000, Ashmore Islands, (Rosalie) 32 - 30 adults, 2 children. 32 det.
223. 21 December 2000, Ashmore Islands, (Sapphire) 30 - 26 adults, 4 children. 30 det.
225. 27 December 2000, Ashmore Islands, (Urangan) 49 - 38 adults, 11 children. 49 det.
226. 30 December 2000, Ashmore Islands, (Virginia) 177 - 108 adults, 69 children. 173 det, 4 TPV.
227. 31 December 2000, Ashmore Islands, (Wallangarra) 68 - 49 adults, 19 children. 40 det, 28 TPV.

2001

228. 03 January 2001, Ashmore Islands, (XQLD) 51 - 34 adults, 17 children. 5 det. 45 TPV, 1 depart.
229. 06 January 2001, Ashmore Islands, (Yarrabah) 84 - 63 adults, 21 children. 8 det, 72 TPV, 4 depart.
231. 30 January 2001, Ashmore Islands, (Aberfeldie) 49 - 39 adults, 10 children. 3 det, 45 TPV, 1 escape.
232. 06 March 2001, Ashmore Islands, (Birchip) 115 - 79 adults, 32 children. 11 det, 98 TPV, 2 departs.
233. 07 March 2001, Ashmore Islands, (Culgoa) 179 - 151 adults, 28 children. 23 det, 156 TPV.
234. 08 March 2001, Ashmore Islands, (Darlimurla) 62 - 46 adults, 16 children. 9 det, 53 TPV.
235. 24 March 2001, Ashmore Islands, (Echuca) 169 - 121 adults, 48 adults. 10 det, 158 TPV, 1 depart.
236. 25 March 2001, Christmas Islands, (Flinders) 196 - 135 adults, 61 children. 14 det, 181 TPV, 1 depart.
237. 27 March 2001, Christmas Islands, (Gelantipy) 22 - 18 adults, 4 children. 21 TPV, 1 depart.
238. 27 March 2001, Kerr Island/Torres Strait, (Hesket) 14 - 4 adults, 10 children. 14 TPV.
239. 9 April 2001, Ashmore Islands, (Illowa) 82 - 56 adults, 26 children. 4 det, 76 TPV, 1 depart, 1 escape.
240. 13 April 2001, Ashmore Islands, (Jumbunna) 43 - 35 adults, 8 children. 9 det, 2 depart, 32 TPV
241. 18 April 2001, Exmouth, (Kinnabulla) 24 - 24 adults. 5 det. 10 departs, 9 TPV
242. 18 April 2001, Ashmore Islands, (Lillimur) 94 - 82 adults, 12 children. 7 det. 87 TPV.
243. 20 April 2001, Ashmore Islands, (Mallacoota) 120 - 85 adults, 35 children. 35 det, 75 TPV.
244. 23 April 2001, Christmas Islands, (Nullaware) 198 - 166 adults, 32 children. 10 det. 1 depart, 185 TPV, 2 escapes.
245. 4 May 2001, Ashmore Islands, (Otttrim) 65 - 38 adults, 27 children. 19 det. 46 TPV.
246. 4 May 2001, Saibai Island/Torres Strait, (Patchewolloc) 2 - 2 adults. 1 depart. 1 escape.
247. 9 May 2001, Christmas Island, (Quambatook) 131 - 110 adults, 21 children. 131 TPV.
248. 20 May 2001, Ashmore Islands, (Rokeby) 1 - 1 adult. 1 det.
249. 4 June 2001, Ashmore Islands, (Serpentine) 54 - 29 adults, 25 children. 8 det. 46 TPV.
250. 5 June 2001, Bathurst Island, (Tamluegh) 5 - 5 adults, 5 depart.
252. 14 June 2001, Christmas Island, (Vinifera) 231 - 181 adults, 50 children. 10 det. 221 TPV.
253. 30 June 2001, Ashmore Islands, (Wahgunyah) 108 - 99 adults, 9 children 15 det. 92 TPV, 1 BVE.
254. 2 August 2001, Ashmore Islands (Xvic) 76 -64 adults, 12 children. 28 det. 48 TPV.
255. 4 August 2001, Christmas Island (Yambuk) 147 - 97 adults, 50 children, 2 det. 145 TPV,
256. 13 August 2001, Ashmore Island, (Zvic) 60 - 47 adults, 13 children. 18 det. 42 TPV,
257. 16 August 2001, Christmas Island, (Alonnah) 345 - 191 adults, 154 children. 21det. 324 TPV.
258. 20 August 2001, Ashmore Island (Bacala) 225 - 152 adults, 73 children. 3 departs, 45 det, 175 TPV, 2 escapes.
259. 22 August 2001, Christmas Island (Conara) 359 - 264 adults, 95 children. 125 det, 232 TPV, 2 escapes.
260. 15 September 2002, Cocos (Keeling) Islands (Dulcot) 65 - 65 Adults. 45 departs, 19 det. 1 TPV.
261. 2 July 2003, Waters off WA (Emita) 53 - 38 adults, 15 children. 53 det.
Appendix B — Defence and Immigration

Immigration issues attracted interest among the electorate. However, defence as an election issue is a relatively new phenomenon that emerged during the time-frame of the case-studies.

Table B1: Perception among voters who identified immigration and defence issues as election issues between May 1999 and October 2002.

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Source for Table B1: Newspoll data: Political and Issues Trends, Importance of Federal Issues, taken between 1989 and 2002. Response to the question: Thinking about federal politics. Would you say each of the following issues is very important, fairly important or not important on how you personally would vote in a federal election? Downloaded 8 February 2006, from http://www.newspoll.com.au/cgi-bin/display_poll_data.pl?url_caller=trend&mode=trend&page=show_polls&question_set_id=4

Figures depicted in Table B1 were copied from Table B2 below. Whilst the figures in Tables B1 and B2 are identical, it is easier to see a trend in Table B1.
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Table B2: Political issues and trends, importance of federal issues, copied from Newpoll data as cited above. Highlights have been added

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Appendix C — Ministerial Interventions.


**Figure C1:** Number of Ministerial Interventions, Requests for Ministerial Intervention and Negative Decisions Affirmed by the Tribunals 1992-2003.

Source [as per primary source]: Tables 8T and 9T DIMIA Submission to the Select Senate Inquiry into Ministerial Discretion in Migration Matters. Prior to 1996 statistics were not kept in a format that enables comparisons to be made between Ministers for number of requests.
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