Prosecutions of People Smugglers in Australia 2011–14

Andreas Schloenhardt* and Colin Craig†

Abstract

The prosecution of migrant smugglers is a central element of Australia’s efforts to combat the smuggling of migrants. The large number of migrant smuggling vessels arriving in Australia has triggered a great volume of prosecutions of the crew members operating these vessels and, in some cases, the prosecution of the organisers of these ventures. This article explores the available case law, analyses the application and interpretation of Australia’s ‘people smuggling offences’, and examines trends and developments in people smuggling prosecutions in Australia from 1 July 2011 to 31 December 2014.

I Introduction

The smuggling of migrants — referred to as ‘people smuggling’ by the Australian Government — has been one of the dominant issues in Australian politics and the Australian media for more than 15 years. Since 2008, the number of people arriving in Australia irregularly by boat, most of them asylum seekers from the Middle East and Sri Lanka, has grown rapidly, and has led to unprecedented policy and legislative developments aimed at punishing migrant smugglers and deterring smuggled migrants from attempting to reach Australia by boat.

The prosecution of migrant smugglers is a central element of Australia’s efforts to combat the smuggling of migrants to this country. The large number of ‘suspected irregular entry vessels’ (‘SIEVs’) arriving in Australia has triggered a great volume of prosecutions of the crew members operating these vessels and, in some cases, of the organisers behind the migrant smuggling ventures. These are the subject of this article.

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1 The term ‘smuggling of migrants’ is defined as ‘the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident’ in Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, opened for signature 15 November 2000, 2241 UNTS 507 (entered into force 28 January 2004) art 3(a) (‘Smuggling of Migrants Protocol’). The terms ‘smuggling of migrants’, ‘migrant smuggling’ and ‘people smuggling’ are used interchangeably throughout this article.
This article summarises and documents the available case law, analyses the application and interpretation of Australia’s ‘people smuggling offences’, and examines trends and developments in people smuggling prosecutions in Australia from 1 July 2011 to 31 December 2014. For this reason, the relevant case law of this period is examined both chronologically and thematically. This article serves to shed light on a topic of great public importance and about which there is limited research and a great deal of misleading political and media rhetoric. In addition to dismantling the myths and stereotypes about people smuggling and people smugglers, it also seeks to demonstrate that the prosecutions of people smugglers during this period failed in one of their main objectives: that is, to deter others from engaging in the ‘business of people smuggling’. Furthermore, it is argued that the efforts to bring to justice the organisers of people smuggling ventures to Australia have had very limited success, and that more regional and international engagement is needed to combat the smuggling of migrants more effectively.

The 2011–14 period is of particular significance for three main reasons. First, growing numbers of smuggled migrants arrived during this period, leading to an unprecedented volume of people smuggling prosecutions. Second, and as a result of this development, the Australian Attorney-General issued a direction in August 2012, instructing federal prosecutors not to institute or continue prosecutions in certain circumstances. Third, the change of Federal Government in Australia from the Labor Party to the Liberal-National Coalition resulted in the abolition of this direction and the institution of a great range of policy, legislative, and practical measures aimed at preventing irregular migrants from reaching Australia. These measures had a considerable impact on the levels and characteristics of people smuggling prosecutions in Australia, and that impact is examined in detail here.

This article follows and builds on an earlier analysis of prosecutions and sentencing of people smugglers in Australia in the period 2008–11. It takes a more focused approach by looking only at prosecutions. This is possible because of the far greater number of cases in the 2011–14 period. This also allows for greater insight into the modi operandi of people smuggling, into prosecutorial practice, and into the interpretation of Australia’s people smuggling offences. The present article also highlights some of the important changes in prosecutorial practice that were previously not foreseeable.

The research for this article is based primarily on reported cases and transcripts of proceedings from 73 cases. This includes first instance decisions, appeals, and several High Court cases. Where available and relevant, this information has been supplemented by official government sources, academic commentary, and media reports. All of the material used in this research is publicly available. The detail provided in relation to some cases is deliberate, not only to shed light into the proceedings against people smugglers, but also to provide some illustration of the way in which the smuggling of migrants to Australia is carried out, investigated, and prosecuted. Such information is often clouded in secrecy,

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and misunderstandings and misrepresentations are rife due to the restrictions placed by the Australian Government on the reporting of such matters.

This article is divided into five parts. Following this introduction, Part II provides some context and background by outlining Australia’s people smuggling offences and the main patterns of migrant smuggling to Australia. Part III examines prosecutorial practice in relation to people smuggling chronologically in the 2011–14 period. The main focus here is on the background, rationale, operation, and impact of the Attorney-General’s Direction of 27 August 2012 and relevant policy changes that occurred after the change of government in September 2013. Part IV provides a thematic review of cases, examining the offender profile, extradition proceedings, the prosecution of minors, judicial interpretation of Australia’s people smuggling offences, and defences raised in people smuggling trials. Part V concludes the article with some comments and recommendations.

II Background

A Levels and Characteristics of Migrant Smuggling to Australia

After a period of relatively few arrivals of migrant smuggling vessels in Australia, the number of SIEVs arriving in Australia started to rise again in 2008 (see Figure 1 below).

The smuggling of migrants to Australia follows a common pattern. It involves, for the most part, asylum seekers from Afghanistan, Iran, Iraq, Pakistan and other Middle Eastern countries who travel to Indonesia, sometimes via Thailand and Malaysia, to board migrant smuggling vessels bound for Australia. Although some of these vessels have been intercepted at or near the Australian mainland, the relatively short distances between Indonesia and the Australian offshore territories of Ashmore Reef and Christmas Island explain why the majority of vessels have been apprehended in the vicinity of these remote outposts. Since March 2009, a growing number of Sri Lankan nationals have also been smuggled to Australia by boat, either via Indonesia or on vessels destined for the coasts of Western Australia, Christmas Island, or the Cocos (Keeling) Islands.3

Figure 1: Unauthorised boat arrivals, Australia, 2008–10

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of vessels</th>
<th>Number of passengers (excludes crew)</th>
<th>Number of crew</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>7</td>
<td>161</td>
<td>not reported</td>
</tr>
<tr>
<td>2009</td>
<td>60</td>
<td>2726</td>
<td>141</td>
</tr>
<tr>
<td>2010</td>
<td>134</td>
<td>6555</td>
<td>345</td>
</tr>
<tr>
<td>2011</td>
<td>69</td>
<td>4565</td>
<td>168</td>
</tr>
<tr>
<td>2012</td>
<td>278</td>
<td>17202</td>
<td>392</td>
</tr>
<tr>
<td>2013</td>
<td>300</td>
<td>20587</td>
<td>not reported</td>
</tr>
<tr>
<td>2014</td>
<td>1</td>
<td>160</td>
<td>not reported</td>
</tr>
</tbody>
</table>

B The Legislative Framework

In Australia, the ‘offences of people smuggling’ are set out in the *Migration Act 1958* (Cth) (‘*Migration Act*’) and duplicated in almost identical form in the *Criminal Code Act 1995* (Cth) sch 1 (‘*Criminal Code*’). Relevant offences were first introduced with the *Migration Legislation Amendment Act (No 1) 1999* (Cth). Minor amendments aside, these offences remained unchanged until the introduction of the *Anti-People Smuggling and Other Measures Act 2010* (Cth), which substituted the existing offences with the current ss 233A–233E of the *Migration Act*.

Prior to the 2010 amendments, the people smuggling offence most commonly used in domestic prosecutions was former s 232A of the *Migration Act*, which created an offence for organising or facilitating the smuggling of five or more persons who do not hold a valid visa to enter Australia as required by s 42(1) of the *Migration Act*. Since the 2010 amendments, the two most common charges in people smuggling prosecutions involve the ‘offence of people smuggling’ in s 233A and the ‘aggravated offence of people smuggling (at least 5 people)’ in s 233C. The maximum penalty for offences under s 233A is imprisonment for 10 years. The maximum penalty for offences against s 233C is imprisonment for 20 years. Section 233C, like former s 232A, carries a mandatory minimum sentence of five years’ imprisonment or eight years for repeat offenders.5

Section 233B of the *Migration Act* contains an ‘[ag]gravated offence of people smuggling’ where a person subjects the smuggled migrant to ‘cruel, inhuman or degrading treatment’, or recklessly creates a danger of death or serious harm to the smuggled migrant. Section 233D makes it an offence to ‘provide

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5 *Migration Act* s 236B.
material support or resources to another person or an organisation (the receiver)’ if
the support or resources ‘aids the receiver, or a person or organisation other than
the receiver, to engage in conduct constituting the offence of people smuggling’.6
Under s 233E, it is an offence to conceal a non-citizen with the intention that the
non-citizen enters Australia illegally or to prevent that person’s discovery or to
harbour an unlawful non-citizen, a removee or deportee. To this day, only a small
number of prosecutions have been made under ss 233B, 233D and 233E.7

The Deterring People Smuggling Act 2011 (Cth) (‘Deterring People
Smuggling Act’) introduced new s 228B into the Migration Act to clarify that the
circumstance element of smuggling a non-citizen with no lawful right to come to
Australia is met if the non-citizen does not hold a valid visa to enter Australia —
regardless of whether Australia owes, or may owe, protection obligations to the
non-citizen under the Convention and Protocol Relating to the Status of Refugees
or for any other reason.8

In 2013, s 233B was amended to remove the aggravation of people
smuggling by the intention to exploit the smuggled migrant after entry into
Australia.9 This amendment reflects the view that any conduct involving
exploitation of the migrant is to be seen as a trafficking in persons offence that is
criminalised in div 271 of the Criminal Code.10

Also in 2013, several changes were made to criminal procedure affecting
persons accused of people smuggling.11 New s 236D was inserted into the
Migration Act clarifying that the prosecution bears the onus of proving, on the
balance of probabilities, that a defendant was an adult at the time of the offence if
the issue is raised in criminal proceedings. This had generally been the position
taken by the courts, but the issue had not always been dealt with consistently.12
Section 236C was inserted to clarify that in sentencing a person convicted of
people smuggling, a court must take into account any time that the offender has

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6 See also Andreas Schloenhardt and Thomas Cottrell, ‘Financing the Smuggling of Migrants in
7 See, eg, Department of Immigration and Border Protection (Cth), ‘Operation Sovereign Borders — Joint
Department of Immigration and Border Protection (Cth), ‘Joint Agency Task Force Monthly Update:
Department of Immigration and Border Protection (Cth), ‘Charges — Project TRICORD/Operation
8 Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 150
(entered into force 22 April 1954) (‘Refugee Convention’); Protocol Relating to the Status of
Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October
1967) (‘Refugee Protocol’).
9 Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Act 2013 (Cth) sch 2.
10 Explanatory Memorandum, Crimes Legislation Amendment (Slavery, Slavery-like Conditions and
People Trafficking) Bill 2012 (Cth) 65.
11 Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and
Other Measures) Act 2013 (Cth) sch 3.
12 See, eg, R v Abdul [2011] WADC 95 (21 June 2011), where it was held that the onus of proof
rested on the defendant.
spent in immigration detention between the commission of the offence and the date of sentencing.\textsuperscript{13}

The Crim\-\-\-\-es Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Act 2013 (Cth) introduced changes to the use of evidence in people smuggling prosecutions\textsuperscript{14} with the objective of reducing delays associated with obtaining witness statements and oral evidence from Border Protection personnel while they remain at sea.\textsuperscript{15} The amending legislation also removed wrist X-rays as a prescribed age determination procedure, after it was revealed that such procedures were inaccurate and had led to a number of Indonesian minors being convicted of migrant smuggling offences as adults.

III Chronological Review

A Developments 2011–12

The growing number of irregular boat arrivals in the years since 2008 led to an increase in the number of prosecutions under Australia’s people smuggling offences, placing considerable strain on the resources of the Commonwealth Director of Public Prosecutions (‘CDPP’).\textsuperscript{16} In the 2011–12 financial year, the CDPP reportedly spent $14 million trying alleged people smugglers … a ninefold increase in cost from 2009–10 … At least another $40m will be spent jailing more than 265 people sentenced since September 2008, although only about 2 per cent of those charged were accused of organising the trade.\textsuperscript{17}

Further cuts to the CDPP’s budget meant that trials were significantly delayed and persons charged with people smuggling offences had to be detained for extended periods while awaiting trial. The great backlog of cases in the Northern Territory and Western Australia, where most smuggling vessels arrived, also meant that cases had to be distributed to other states and territories, leading to pleas by the CDPP and state governments for further funding and intervention by the Australian Government.\textsuperscript{18}

A further issue that emerged in the 2011–14 period was the treatment and prosecution of Indonesian crewmembers who were, or were believed to be, minors.

\textsuperscript{13} Migration Act s 236C.
\textsuperscript{14} Ibid ss 236E–236F.
\textsuperscript{15} Explanatory Memorandum, Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Bill 2013 (Cth) 15, 63.
\textsuperscript{16} Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 18 October 2011, 156 (Chris Craigie, Commonwealth Director of Public Prosecutions). See also Schloenhardt and Martin, above n 2, 112–13.
\textsuperscript{17} Jared Owens, ‘Libs Show No Mercy for Young Smugglers’, The Australian (Sydney), 3 September 2012, 8.
This topic became the subject of an inquiry by the Australian Human Rights Commission (‘AHRC’), which presented its findings in July 2012. In its report, the AHRC expressed grave concerns about the procedures and processes used to determine the age of suspects and about the length of time for which suspects were detained, their place of detention, their access to legal advice and assistance, and the issue of guardianship.\footnote{AHRC, \textit{An Age of Uncertainty: Inquiry into the Treatment of Individuals Suspected of People Smuggling Offences Who Say That They Are Children} (2012) (‘\textit{Age of Uncertainty Report}’).}

The fact that prosecutorial practice did not have the desired effect and did nothing to stem the ‘flow’ of migrant smuggling vessels to Australia was also implicitly acknowledged by an Expert Panel on Asylum Seekers that was convened by the Australian Government in June 2012 to provide advice on how best to prevent asylum seekers from travelling to Australia by boat.\footnote{Angus Houston, Paris Aristotle and Michael L’Estrange, 	extit{Australian Government, Report of the Expert Panel on Asylum Seekers} (2012) 9 (‘\textit{Report of the Expert Panel on Asylum Seekers}’).} Recommendation 4 of the Panel’s report specifically called on the Australian Government to change ‘Australian law in relation to Indonesian minors and others crewing unlawful boat voyages from Indonesia to Australia’.\footnote{Ibid 15.} The Expert Panel suggested that such changes could include ‘crew members being dealt with in Australian courts with their sentences to be served in Indonesia, discretion being restored to Australian courts in relation to sentencing, or returning those crews to the jurisdiction of Indonesia’.\footnote{Ibid 43. These developments have also been outlined in \textit{DPP (Cth) v Sadiri} [2012] VCC 1546 (3 October 2012) [15].}

\section*{B The Attorney-General’s Direction}

On 27 August 2012, within days of the release of the \textit{Report of the Expert Panel on Asylum Seekers}, the Commonwealth Attorney-General, Ms Nicola Roxon, issued a direction under s 8 of the \textit{Director of Public Prosecutions Act 1983} (Cth). The \textit{Attorney-General’s Direction} instructed the CDPP not to institute, carry on, or continue to carry on prosecutions for offences under the aggravated people smuggling offence in s 233C of the \textit{Migration Act}.\footnote{Attorney-General (Cth), ‘Director of Public Prosecutions — Attorney-General’s Direction 2012’ in Commonwealth, \textit{Gazette}, No GN 35, 5 September 2012, 2318–19 (‘\textit{Attorney-General’s Direction}’).} This was only the fifth such direction issued since the establishment of the CDPP.\footnote{Commonwealth Director of Public Prosecutions, \textit{Annual Report 2012/13} (2013) 17 (‘\textit{CDPP Annual Report 2012/13}’).}

\subsection*{1 Content and Purpose}

The main purpose of the \textit{Attorney-General’s Direction} was to avoid the minimum mandatory sentence associated with the offences (under s 233C and former s 232A of the \textit{Migration Act}) for first-time offenders in cases where the accused was merely a crewmember on a migrant smuggling vessel and in which no persons died in relation to the smuggling venture. The Attorney-General instructed the CDPP only to use charges under s 233C in circumstances in which the accused was a

\begin{footnotesize}
\begin{itemize}
\item \footnote{AHRC, \textit{An Age of Uncertainty: Inquiry into the Treatment of Individuals Suspected of People Smuggling Offences Who Say That They Are Children} (2012) (‘\textit{Age of Uncertainty Report}’).}
\item \footnote{Ibid 15.}
\item \footnote{Ibid 43. These developments have also been outlined in \textit{DPP (Cth) v Sadiri} [2012] VCC 1546 (3 October 2012) [15].}
\item \footnote{Attorney-General (Cth), ‘Director of Public Prosecutions — Attorney-General’s Direction 2012’ in Commonwealth, \textit{Gazette}, No GN 35, 5 September 2012, 2318–19 (‘\textit{Attorney-General’s Direction}’).}
\item \footnote{Commonwealth Director of Public Prosecutions, \textit{Annual Report 2012/13} (2013) 17 (‘\textit{CDPP Annual Report 2012/13}’).}
\end{itemize}
\end{footnotesize}
repeat offender, or was more than merely a crewmember, or in cases in which a death occurred, and that the basic offence of people smuggling under s 233A should be used instead.\(^{25}\) The **Attorney-General’s Direction** applied to new prosecutions and to proceedings where a person had been convicted, but not yet sentenced. It did not apply to any proceedings, including appeals, in cases where the person had been sentenced prior to the date of the Direction.\(^{26}\)

The Direction was described as ‘a temporary measure until legislation can be enacted returning full discretion for sentencing to the courts’, as recommended by the Expert Panel on Asylum Seekers.\(^{27}\) Legislation to remove the mandatory minimum sentences from the people smuggling offences was, however, never presented.

The **Attorney-General’s Direction** quickly had the desired effect in reducing the backlog of people smuggling prosecutions and enabling prosecutors and judges to refrain from using charges involving mandatory minimum penalties in cases in which these penalties were seen as unfair and unwarranted. At the time the Direction was issued, it was anticipated that the CDPP would stop pursuing 130 first-time offenders.\(^{28}\) A year later, the CDPP reported that 100 people smuggling prosecutions were discontinued in the 2012–13 financial year.\(^{29}\) Despite the considerable increase in unauthorised boat arrivals over this period, as at 30 June 2014, only 28 people smuggling prosecutions were before Australian courts.\(^{30}\)

2 **Hasim v Attorney-General (Cth)**

The application of the **Attorney-General’s Direction** was at the heart of **Hasim v Attorney-General (Cth)**.\(^{31}\) This case involved an application for early release by three persons convicted under s 233C. The three applicants included Mr Hasim, the sole crewmember on SIEV 179, which was apprehended on 22 August 2010; Mr Asis Tong, who was involved in the arrival of SIEV 235, which was apprehended on 16 March 2011; and Mr Andi Ridwan, who was one of three crew on board SIEV 177, which was apprehended on 19 August 2010. The three men pleaded guilty in the District Court of Queensland in Brisbane in separate trials and were sentenced to the mandatory minimum term of five years’ imprisonment.\(^{32}\)

Between 5 December 2012 and 8 January 2013, counsel for the three men filed applications to the Attorney-General for an early release from prison on licence under s 19AP of the **Crimes Act 1914** (Cth). The applications made reference to the early guilty pleas of each defendant, comments by the sentencing judges about the undesirability of mandatory minimum sentences, and, in

\(^{25}\) **Attorney-General’s Direction**, above n 23, 2318 [5].
\(^{26}\) Ibid 2318 [2]–[3].
\(^{27}\) Owens, above n 17.
\(^{28}\) Ibid.
\(^{29}\) CDPP Annual Report 2012/13, above n 24, 68.
\(^{31}\) (2013) 218 FCR 25.
\(^{32}\) Ibid 28.
In rejecting the applications for release, a delegate of the Attorney-General noted that while individuals like the three men convicted before the Direction might feel disadvantaged, they were sentenced according to the applicable regime at the time. The fact that prosecution policy later changed was part of the criminal justice process and did not constitute ‘exceptional circumstances that justify early release’. It was further emphasised that the Attorney-General had ‘chosen not to interfere with decisions already made by the courts’ and that the Direction explicitly had no retrospective effect.

The three men applied to the Federal Court for an order to review the rejections. Their principal argument was that the change of prosecutorial policy that occurred as a result of the Direction led the applicants to suffer an unfairness or disadvantage ‘by being treated differently, as to minimum sentences and minimum non-parole period, as compared with the treatment to be afforded to persons engaging in like conduct after the commencement of the direction but before sentencing’. It was argued that had the prosecution of the three men not concluded before 27 August 2012 — for instance, if they had not pleaded guilty — they would have only been liable to prosecution under the lesser offence in s 233A of the Migration Act. This, it was argued, would amount to ‘exceptional circumstances’ that would have to be considered in determining applications under s 19AP of the Crimes Act 1914 (Cth). The Court rejected these arguments, held that there was no demonstrated error on the part of the decision-maker, and dismissed the application.

C Prosecutions under the Coalition Government

From the day of its announcement, the Attorney-General’s Direction lacked the support of the Liberal and National parties, then in opposition. Shortly after the Direction was announced, several spokespersons for the Liberal Party announced that if elected, they would revive mandatory minimum sentencing for people smugglers along with the ‘full suite of measures’ to combat the smuggling of migrants introduced in 2001 by the Federal Government under Prime Minister John Howard.

On 4 March 2014, the new Commonwealth Attorney-General, Mr George Brandis (Liberal Party), revoked the Direction, thus reinstating prosecutions under

33 Ibid 30–1.
34 Ibid 31 [23].
36 Ibid 31 [28] (emphasis in original).
37 Ibid 32.
38 Owens, above n 17.
s 233C and the mandatory minimum sentences. The revocation does not apply to any proceedings, including appeals, which commenced prior to 4 March 2014.

IV Thematic Review of Cases

A Offender Profile

The vast majority of those arrested, charged, and convicted in relation to the smuggling of migrants in Australia are people who work as crew on the vessels that carry smuggled migrants from Indonesia to Australia. Of the 305 persons convicted of people smuggling offences between 1 June 2010 and 20 October 2014, 295 were crewmembers and only 10 were organisers. This is similar to the offender profile in cases prosecuted between 2008 and 2011.

1 Crew

The case law and literature paint a consistent picture of the typical crewmember of smuggling ventures to Australia which also confirms findings of earlier research on this issue; most are young Indonesian men with limited education who work as fishermen, farmers, or labourers and live in relative poverty in coastal villages. In many cases, they are sole providers for large families and struggle to support themselves and their families financially. In these circumstances, they are easily lured by the promises made by those who approach them offering money if they agree to work as captain, crew, cook, or deckhand on one of the vessels used to smuggle migrants to Australia. The amounts of money offered to the crew, depending on their role, range between IDR100 000 and IDR2 million — significant amounts of money for which they would normally have to work several months or years.

Although there are instances in which captains and crew of migrant smuggling vessels detected in Australia are repeat offenders, many crewmembers

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43 Schloenhardt and Martin, above n 2, 138–9.
45 See, eg, Transcript of Proceedings (Sentence), R v Henuk (Supreme Court of Queensland, 298/2011, Philippides J, 26 March 2012); Transcript of Proceedings (Sentence), DPP (Cth) v Abang [2012] VCC 1424 (17 September 2012); Transcript of Proceedings (Sentence), DPP (Cth) v Henok [2012] VCC 1432 (19 September 2012); Transcript of Proceedings (Sentence), DPP (Cth) v Sadiri [2012] VCC 1546 (3 October 2012); R v GT [2012] WACC 18 (30 October 2012);
are not or not fully aware of the purpose, circumstances, and destination of the boat journeys. In some cases, the recruiters and main organisers lie about these matters; in others, they provide little or no information.\(^{46}\) Several reported cases document circumstances in which crewmembers believed that they were recruited to work on cargo vessels, or that their journey would only involve travel within the Indonesian archipelago.\(^{47}\) There are also instances in which the crew or the migrants are transferred between vessels at sea and the crew only come to realise that their vessel is carrying smuggled migrants bound for Australia once they are already well underway.\(^{48}\) Where crewmembers are aware of the purpose of the journey, they often do not realise the illegality of their actions or have been misled about the consequences they will face when apprehended by Australian authorities.\(^ {49}\)

2 Organisers

The persons who organise the smuggling of migrants to Australia are very rarely identified, arrested, and prosecuted for their activities. The fact that only 3.3% of all persons convicted for people smuggling in Australia between 1 June 2010 and 20 October 2014 involved organisers suggests that the main players and ‘kingpins’ can operate with relative impunity.\(^ {50}\)

(a) Ali Khorram Heydarkhani

The most significant people smuggling trial in recent years is that of Mr Ali Khorram Heydarkhani.\(^ {51}\) He was convicted in relation to the arrival of five migrant

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\(^{46}\) See, eg, Zamudin v The Queen (2013) 302 ALR 88, 95–6.

\(^{47}\) See, eg, Bahar v The Queen (2011) 45 WAR 100, 103–4; Transcript of Proceedings (Sentence), R v Do Yok (District Court of South Australia, Barrett DCJ, 11 September 2012); Transcript of Proceedings (Sentence), DPP (Cth) v Eik [2012] VCC 1469 (18 September 2012) [9]–[11], [13]; R v Latif; Ex parte DPP (Cth) [2012] QCA 278 (19 October 2012) [5]; Bin Radimin v The Queen (2013) 235 A Crim R 244, 248 [18]–[22] (‘Bin Radimin’); Jopar v The Queen (2013) 275 FLR 454, 470 [77]–[79] (‘Jopar’).

\(^{48}\) See, eg, Transcript of Proceedings (Sentence), R v Henuk (Supreme Court of the Northern Territory, 21109803 and 21109801, Riley CJ, 22 November 2011) 2; Bin Radimin (2013) 235 A Crim R 244, 247 [9]–[10]; Jopar (2013) 275 FLR 454, 470 [77].

\(^{49}\) See, eg, Transcript of Proceedings (Sentence), R v Mahendra (Supreme Court of the Northern Territory, 21041400, Blockland J, 1 September 2011) 3–4; Transcript of Proceedings (Sentence), R v Henuk (Supreme Court of the Northern Territory, 21109803 and 21109801, Riley CJ, 22 November 2011) 2; Transcript of Proceedings (Sentence), DPP (Cth) v Paijan [2012] VCC 2155 (19 September 2012) [9]; Transcript of Proceedings (Sentence), DPP v Auwi [2012] VCC 1445 (21 September 2012) [6]; Transcript of Proceedings (Sentence), R v HH (District Court of Western Australia, 1425/2011, Scott DCJ, 26 September 2012) 2. See generally Schloenhardt and Davies, above n 41, 954–5; Peter Munro, ‘People Smuggling and the Resilience of Criminal Networks in Indonesia’ (2011) 6(1) Journal of Policing, Intelligence and Counter Terrorism 40, 45–6; Missbach and Sinanu, above n 3, 76–7; Age of Uncertainty Report, above n 19, 30–2; Barker, above n 3, 38; Schloenhardt and Ezzy, above n 41, 136–7, 143.

\(^{50}\) Answers to Questions on Notice to Senate Standing Committee on Legal and Constitutional Affairs, ‘People Smuggling Offences’, above n 42, 1.

smuggling vessels, including SIEV 221, which arrived at Christmas Island on 15 December 2010 in extreme weather conditions and crashed against the cliffs at Rocky Point, killing 50 of the passengers on board. Mr Heydarkhani was originally charged with four counts of aggravated people smuggling under s 233C of the Migration Act, and 85 counts of people smuggling under s 233A.\(^52\) The charges under s 223C related to SIEV 221 and three other migrant smuggling vessels intercepted between 12 July and 3 November 2010: SIEVs 169, 205 and 206.

On 4 November 2011, the Australian Federal Police (‘AFP’) issued a further 10 aggravated people smuggling charges against Mr Heydarkhani.\(^53\) This was the first time that a person had been charged under s 233B of the Migration Act, an aggravated offence of people smuggling, introduced in 2010 to provide higher sentences for people smuggling in circumstances that give rise to danger of death or serious harm. Five of these charges related specifically to the deaths that occurred on SIEV 221. The additional five charges concerned another vessel, SIEV 226, intercepted on 4 January 2011, in which Mr Heydarkhani was implicated.

On the first day of his trial, Mr Heydarkhani pleaded guilty to the charges under s 233C that related to the arrival of SIEVs 169, 205, and 206.\(^54\) He also pleaded guilty to two counts for offences under s 233B. These counts related to one victim of the SIEV 221 incident and one victim who had travelled on SIEV 226. In sentencing the defendant, Scott DCJ emphasised that Mr Heydarkhani’s conduct in organising the five obviously unseaworthy boats made it ‘difficult to imagine a more uncaring and reckless attitude towards the safety and lives of other human beings’, placing it in ‘the worst category of offending in respect of offences of this nature’.\(^55\) He also noted that the accused’s primary motivation had been financial gain. The departure of SIEV 226 from Indonesia just days after the SIEV 221 tragedy also provided proof of Mr Heydarkhani’s lack of serious contrition.\(^56\) On 22 October 2012, he was sentenced to 14 years’ imprisonment.\(^57\) His appeal against the sentence was dismissed.\(^58\)


\(^55\) Transcript of Proceedings (Sentence), R v AKH (District Court of Western Australia, 1474 of 2011, Scott DCJ, 22 October 2012) 11–12.

\(^56\) Ibid.

\(^57\) Ibid 12–13.

\(^58\) Heydarkhani v The Queen (2014) 240 A Crim R 195, 203 [52]–[53].
(b) Smuggled Migrants Turning into Migrant Smugglers

Given the small number of prosecutions of organisers, it is difficult to make generalisations about their background and motivations. What can be noted is that in all reported cases, the organisers — all male — were once themselves smuggled migrants who, like the migrants they smuggled, came from Afghanistan, Iraq, Iran, Pakistan, or Sri Lanka and sought to reach Australia in order to claim asylum. Some of them remained in Indonesia or other transit countries while others continued to Australia.

_Director of Public Prosecutions (Cth) v Haidari_ is a typical example of a case in which the accused arrived in Australia as a smuggled migrant, was granted refugee status, and later became involved in the smuggling of other migrants to Australia. The accused in this case was an Iraqi Kurd who fled from the regime under President Saddam Hussein to Iran. After facing further discrimination by Iranian authorities, he travelled to Malaysia and later to Australia with the aid of smugglers. He naturalised in 2007 and settled in Melbourne. Mr Haidari organised two migrant smuggling vessels, including SIEV 77 (apprehended on 26 November 2009) and SIEV 124 (apprehended on 31 March 2010). He was arrested after accepting payment from an undercover police officer posing as a prospective client. On 27 July 2012, Mr Haidari pleaded guilty to three people smuggling charges and one charge relating to drug importation. He was sentenced to 11 years and six months’ imprisonment with a non-parole period of eight years. The Crown later unsuccessfully sought to appeal the sentence.

The case against Mr Ewaz Ali Rezaie follows a similar pattern. In June 2012, Mr Rezaie, a 45-year-old Afghan Hazara who had come to Australia to seek asylum, was arrested in the Inverbrackie Detention Centre in South Australia and extradited to Melbourne to face people smuggling charges. He was accused of being the smuggler known as ‘Haji Muhammad’ or ‘Haji Hussein’ in Jakarta and was initially charged for his involvement in organising the smuggling of passengers on board SIEV 287, which arrived in Australia on 6 December 2011. It was also alleged that Mr Rezaie attempted to smuggle a family of four in a separate venture. Mr Rezaie had himself arrived in Australia with his family on 19 January 2012 on board SIEV 299. By the time his case went to trial, Mr Rezaie had been charged with four counts of people smuggling under s 233A and two counts of aggravated people smuggling under s 233C for his involvement in organising the smuggling of migrants on three vessels. On 4 April 2014, he was found guilty of

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one charge under s 233A. On 11 June 2014 he was sentenced to three years’ imprisonment with a non-parole period of two years.

The case of Mr Jaber Vali Mandalawi stands in contrast to the cases of Messrs Haidari, Rezaie, and Heydarkhani. Mr Mandalawi pleaded guilty to eight offences of people smuggling contrary to s 233A for his role in organising the arrival of two smugglings vessels (SIEVs 231 and 241) while in Indonesia, and facilitating the smuggling of two further persons after arriving in Australia. SIEV 231 was intercepted on 25 February 2011 and SIEV 241 on 22 April 2011. Less than two months later, Mr Mandalawi was himself smuggled to Australia on board SIEV 252, which was intercepted on 7 June 2011. He was eventually recognised as a refugee and released from immigration detention on 4 January 2012. After a 12-month investigation, Mr Mandalawi was arrested and charged on 20 September 2012.

Mr Mandalawi was a stateless Faili Kurd who had fled from persecution in Iran to Iraq and later to Indonesia. After arriving in Jakarta in February 2011, he discovered that he had been defrauded of some of the money he had paid to be smuggled to Australia and had insufficient funds to pay the smugglers in Indonesia to complete the journey to Australia. A smuggler offered Mr Mandalawi passage to Australia on a later vessel if Mr Mandalawi performed some errands for him. Thus he became involved in handing over money to the smuggled migrants to purchase food, moving at least one smuggled migrant from one villa to another, and passing on messages. A court later accepted that Mr Mandalawi earned no money for assisting the smuggler and was motivated only to secure his own passage to Australia, which he never in fact received from the smuggler.

After he was released from immigration detention, Mr Mandalawi settled in Brisbane where he was later arrested. He pleaded guilty to one charge of people smuggling in relation to facilitating the journey of one of the smuggled migrants who arrived on SIEV 252 with Mr Mandalawi and who, along with his wife, had received assistance from Mr Mandalawi to be taken to Australia. Mr Mandalawi put this man in touch with a smuggler in Indonesia and negotiated a better price on his behalf. Mr Mandalawi also pleaded guilty to a charge of people smuggling for connecting his sister in Iran with smugglers and providing her with advice about how to travel to Australia. In sentencing Mr Mandalawi, Andrews DCJ noted that the value of his assistance to the smuggler and his degree of criminality was less than that of a captain or crewmember. He was sentenced to 18 months’ imprisonment with a non-parole period of two years.

Transcript of Proceedings (Sentence), R v Mandalawi (District Court of Queensland, 173055/2012, Andrews DCJ, 4 April 2014).
Transcript of Proceedings (Sentence), R v Mandalawi (District Court of Queensland, 173055/2012, Andrews DCJ, 4 April 2014).
imprisonment and was released immediately, having served more than this period in pre-sentence custody.\(^{70}\)

The fact that some migrant smugglers were once themselves smuggled migrants or, in other cases, sought to smuggle themselves alongside other migrants can make it difficult to distinguish between the two roles.\(^{71}\) In most cases, the only distinguishing feature of the organisers is the fact that, unlike the crew and passengers, they do not board the smuggling vessels and maintain their directing role from a transit country or organise the smuggling of migrants from Australia.\(^{72}\)

(c) **Smuggling of Other Relatives and Friends**

The smuggled-migrants-turned-migrant-smugglers frequently use the knowledge acquired during their own smuggling experience to facilitate the irregular migration of other countrymen and women, often including their family and friends. The smuggling of relatives and friends is a common phenomenon worldwide and raises complex legal questions, especially in cases in which the smugglers obtain no financial or material benefit from their involvement in the smuggling venture.\(^{73}\) In Australia, this issue has only gained limited attention by the courts, partly because Australia’s people smuggling offences, unlike international law and best practice guidelines, do not require proof that the smuggler obtained a financial or material benefit.\(^{74}\)

In the case of Mr Lamis Hameed Alli Baighi, for instance, five of the migrants smuggled on one of the vessels in late 2009 were family members of the accused who were later granted permanent residency in Australia.\(^{75}\) Mr Baighi, a Kurd who had fled Iran in 2001 and had been granted protection in Australia, was arrested on 6 October 2011 as part of the same police operation as Mr Haidari.\(^{76}\) Mr Baighi was charged with one count of people smuggling contrary to the former s 233(1)(a) and two counts of aggravated people smuggling contrary to former

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70 Ibid.
71 See, eg, Warnakulasuriya v The Queen (2012) 261 FLR 260 (‘Warnakulasuriya’).
74 Smuggling of Migrants Protocol art 3(a). See also Schloenhardt and Davies, above n 41, 981–2.
s 232A in relation to three vessels that were intercepted in Australian waters between November 2009 and January 2010. In March 2014, it was alleged that Mr Baighi was involved in more than 30 migrant smuggling vessels to Australia, though there is no further information to corroborate this claim. At trial, the Court was told that Mr Baighi ‘performed a whole lot of little jobs’ for the smuggled migrants including accommodating and transporting them and providing them with food and water. Mr Heydarkhani also testified against Mr Baighi as part of his plea deal and gave evidence that Mr Baighi picked up asylum seekers for him at Indonesian airports, arranged their accommodation, and kept track of his clients and their expenses. A jury found Mr Baighi guilty of one of the charges under former s 232A, not guilty of the other, and was unable to reach a verdict with respect to the charge under for s 233(1)(a). This charge was later dropped.

Mr Baighi was sentenced to the mandatory minimum term of five years’ imprisonment with a non-parole period of three years. Judge Dean remarked that he could understand why someone like Mr Baighi ‘would want to assist his family or his wife’s family to travel or leave circumstances of persecution’ and criticised the sentence he was required to impose as more severe than was warranted.

(d) Operation Delphinium

On 29 August 2013, the AFP executed a number of search warrants in Victoria, South Australia, Western Australia, and New South Wales as part of an investigation called ‘Operation Delphinium’ and arrested five men suspected of being involved in organising or facilitating the arrival of up to 132 migrant smuggling vessels. This was the largest investigation into migrant smuggling in Australia to that day.

Among the five accused was Mr Barkat Ali Wahide, a 31-year-old Afghan man who was charged in Perth with two counts of people smuggling relating to the arrival of vessels in January and May 2012. Mr Sayed Shahid Ali, a 37-year-old Pakistani who was in the Inverbrackie Detention Centre at the time of his arrest was charged with two counts of people smuggling and also with dealing with the proceeds of crime. He was subsequently extradited to Perth where he was tried with Mr Wahide. The charges against the two men related to the arrival of SIEV 326,

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77 Steve Butcher, ‘People-Smuggling Trial’, The Age (Melbourne), 30 January 2014, 10.
79 Butcher, above n 77.
81 ‘Judge Criticises Mandatory Sentences for People Smuggling’, above n 75; Caruana, above n 75.
82 Caruana, above n 75; Adam Cooper, ‘Jail Term Ironic: Judge’, The Age (Melbourne), 12 March 2014, 12.
85 Edwards and Perpitch, above n 84.
which was intercepted on 6 May 2012.\textsuperscript{86} The two men pleaded not guilty to all counts.\textsuperscript{87} On 5 September 2014, a jury found each man guilty of one count of people smuggling contrary to s 233A.\textsuperscript{88} Both men were sentenced to three years and six months’ imprisonment with non-parole periods of two years and five months.\textsuperscript{89}

Another 34-year-old man was arrested in connection with ‘Operation Delphinium’ and was charged with four counts of people smuggling allegedly committed between February 2009 and March 2012.\textsuperscript{90} He pleaded not guilty to all charges. On 4 November 2014, just days before he was due to stand trial, prosecutors dropped all charges against him for reasons that have not been publicly disclosed.\textsuperscript{91} A fourth man to be arrested was a 40-year-old Afghan living in western Sydney. He was charged with 10 people smuggling offences relating to the arrival of a number of smuggled migrants between 2009 and 2010.\textsuperscript{92} The fifth person, an unnamed 21-year-old Iranian national, was arrested, but later released without charge.\textsuperscript{93}

\section{Extradition Cases}

In 2011–14, Australian authorities had some success in the extradition of migrant smugglers from other countries for prosecution in Australia. While complete statistics on the number of extraditions are not available, the publicly available information shows that in this period, extraditions occurred from Germany,
Indonesia, Malaysia, and the United Arab Emirates. At the time of writing, several extradition requests were still pending, some for several years.

The small number of extradition cases, and the limited information available on the circumstances of the arrest of the accused and on the communication and negotiations between Australia and the extraditing country make it impossible to make generalisations about the way in which extradition for people smuggling offences is carried out and the main obstacles that are encountered during this process.

A number of observations from the extradition cases can, however, be made. All cases concern persons — all male — who were involved as organisers of one or more migrant smuggling ventures from Indonesia to Australia. These men, like other organisers, mostly operated from transit countries and were themselves of the same background as the people they smuggled. Another common feature of the extradition cases is the long period that passes from the time the individuals are first arrested to the day they are eventually extradited to Australia. This is largely due to the main legal challenges, appeals, and other obstacles that can delay extradition proceedings, but also due to difficult bilateral relationships and disagreements about the scope, application, and dual criminality of migrant smuggling offences. The following case examples further highlight these points.

(a) Sayed Omeid

Perhaps the most significant extradition case in the 2011–14 period is that involving Mr Sayed Omeid, an Iraqi national of Kurdish background who was wanted by Australian authorities since at least 2001. Australian media articles alleged that he was one of the main migrant smuggling organisers who, together with Mr Hasan Ayoub, was believed to be responsible for ‘nearly every boat arriving at Christmas Island’ at the time.\(^94\) Mr Omeid was arrested and charged on 17 September 2010 after he was stopped and found to be in possession of fraudulent passports. When Australian authorities became aware of his arrest, an extradition request was made to Indonesia, alleging that Mr Omeid had been involved in the arrival of SIEVs Flinders, Nullaware and Conara, which arrived in Australian between 25 March and 22 August 2001.

Mr Omeid denied that he was the person wanted in the extradition documents and argued that the extradition request was too vague to be legally valid.\(^95\) He was ultimately extradited to Perth on 31 October 2013.\(^96\) He was the first person to be extradited from Indonesia to Australia on people smuggling charges. On 10 September 2014, he pleaded not guilty in the Perth Magistrates Court to three counts of organising groups of non-citizens to be brought to

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\(^94\) Peter Michael, ‘Snakeheads Trade in Human Misery’, *Sunday Mail* (Brisbane), 2 September 2001, 11.
\(^95\) Rory Callinan and Peter Alford, ‘People-Smugglers Sent to Prison; Fines Not Imposed’, *The Australian* (Sydney), 5 July 2011, 2.
Australia under former s 232A. In March 2015, he pleaded guilty to two of the charges against him. The third charge was withdrawn at that time. On 20 May 2015, Mr Omeid was sentenced to 10 years’ imprisonment with a non-parole period of six years and six months.

(b) Sayed Abbas

Mr Sayed Abbas is alleged to be one the most prolific migrant smugglers operating in Indonesia. As many as 40 separate smuggling ventures from Indonesia to Australia have been attributed to him, most of which occurred in 2008 and 2011. Mr Abbas is an ethnic Hazara who fled from Afghanistan to Quetta, Pakistan in 1999 and arrived in Indonesia in 2011. He sought to reach Australia to seek asylum and made three unsuccessful attempts to join a migrant smuggling vessel. After these attempts were frustrated, he remained in Indonesia and allegedly became involved in migrant smuggling activities.

Australian authorities first requested his arrest and extradition from Indonesia in 2009. On 11 May 2010, Mr Abbas, aged 28 at the time, was arrested in Jakarta. He was released on bail some time around March 2011, awaiting an appeal against the extradition order before the Supreme Court of Indonesia. It was reported that he resumed his migrant smuggling activities at that time. Australian authorities allege that he was responsible, inter alia, for the arrival of SIEV 254 (a migrant smuggling vessel intercepted on 8 July 2011) and SIEV 260 (intercepted on 7 August 2011). As a result, a further request for his arrest and extradition was made to Indonesia and Mr Abbas was arrested again on 24 August 2011.

Indonesian authorities also sought to prosecute Mr Abbas, charging him with a range of immigration offences in July 2009. He was initially acquitted, but the prosecution successfully appealed this acquittal in the Supreme Court of Indonesia and Mr Abbas was convicted and sentenced to two-and-a-half years’

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102 Peter Alford, ‘Leading People-Smuggler Detained’, The Australian (Sydney), 25 August 2011, 3; Alford and Maley, ‘Jakarta to Send Suspect Trafficker Here for Trial’, above n 100.
imprisonment in January 2011. On 8 September 2011, it was reported that Mr Abbas’ extradition would be delayed in order for him to first serve his sentence of imprisonment in Indonesia. Around the same time, reports emerged that Mr Abbas continued to organise migrant smuggling vessels while in prison. Several news sources alleged that he was responsible for the arrival of SIEV 265, which was intercepted northeast on 23 September 2011. Another vessel that sank off the coast of Java on 17 December 2011, killing as many as 200 people, was also allegedly organised by Mr Abbas.

After serving his term of imprisonment, Mr Abbas appeared at an extradition hearing on 8 May 2013. The extradition request from Australia involved 27 charges. Mr Abbas denied involvement in these ventures, maintaining that he was a victim of mistaken identity. His lawyers also opposed the extradition, arguing that he would not get a fair trial in Australia. He further claimed that he had acted as an informant for the AFP before they used the information he provided against him. His lawyers later also argued that he should not be extradited because he was a refugee. On 11 July 2013, the South Jakarta District Court refused to grant the extradition request on the ground that Indonesia’s extradition laws did not cover offences relating to migrant smuggling.

Indonesian prosecutors lodged an appeal against this decision. In addition, Australian authorities lobbied the President of Indonesia to make an executive determination that the District Court’s decision should be disregarded and Mr Abbas extradited to Australia. The appeal to overturn the District Court’s decision was allowed in March 2014 and an order to extradite Mr Abbas to Australia was subsequently issued. Mr Abbas was eventually extradited to Australia in 2015 and, at the time of writing, was awaiting his trial in Perth.

106 Peter Alford, ‘Smuggler Wants to Be Sent Home’, The Australian (Sydney), 9 May 2013, 1; Peter Alford and Telly Nathalia, ‘People-Smuggler Let Go by Australia is “Back in Business”’, The Australian (Sydney), 16 May 2013, 2.
Maythem Kamil Radhi

A further extradition case involving long delays and extensive legal proceedings was that of Mr Maythem Kamil Radhi, an Iraqi refugee who was one of three alleged organisers of a migrant smuggling vessel dubbed SIEV X, which sank in international waters south of Java on 19 October 2001, killing 353 people.110 His role in this venture is said to have involved negotiating with the smuggled migrants, receiving payments from them, transporting and accommodating them in Indonesia, and helping them board the vessel.111 On 9 January 2002, Mr Radhi handed himself in to police in Jakarta, but was released on 24 May 2002 due to a lack of evidence.112

On 16 February 2011, a Brisbane Magistrate issued a warrant for Mr Radhi’s arrest.113 He had been resettled as a refugee from Indonesia to New Zealand in March 2009 and was arrested in Auckland on 28 July 2011.114 On 19 March 2012, Moses J of the Manukau District Court ordered that Mr Radhi be extradited to Australia to face charges under former s 232A of the Migration Act.115 He successfully appealed this order in the High Court of New Zealand on 11 February 2013.116 Justice Wylie allowed the appeal on the basis that the alleged conduct Mr Radhi was wanted for would not have met the requirements of the offence of people smuggling under s 142(fa) of the Immigration Act 1987 (NZ) because that offence required actual arrival in the country and none of the passengers on board SIEV X had entered Australian waters.117 Furthermore, Wylie J held that the alleged conduct would not have amounted to a criminal attempt and, in any event, the New Zealand people smuggling offence was not punishable by a sentence of a sufficient length for it to support an extradition under New Zealand law.118

New Zealand Police subsequently sought leave to appeal the decision by the High Court, challenging the finding that s 142(fa) of the Immigration Act 1987 (NZ) required actual arrival in New Zealand and the way in which the punishment of this offence was calculated. New Zealand Police further argued that Wylie J had erred in finding Mr Radhi could not be extradited for criminal attempt.119 The

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113 Radhi v Police [2013] NZHC 163 (11 February 2013) [8].
117 See Extradition Act 1999 (NZ) ss 4(2), 45; Radhi v Police [2013] NZHC 163 (11 February 2013) [47]–[49].
118 Radhi v Police [2013] NZHC 163 (11 February 2013) [52]–[53], [58], [65]–[66].
Court of Appeal allowed the appeal on all three grounds, setting aside the decision of Wylie J, and remitting the case to the District Court for further determination. Mr Radhi then sought leave to appeal against the decision of the Court of Appeal in the Supreme Court of New Zealand, but on 29 September 2014 the Supreme Court rejected this application on the grounds that the proposed appeal raised no question of general public importance and that no substantial miscarriage of justice would occur if the appeal was not heard. At the time of writing a further determination about the extradition of Mr Radhi to Australia had yet to be made.

(d) Other Extradition Cases

Mr Said Mir Bahrami was involved as an organiser of SIEVs 218, 227 and 228, which were apprehended on 9 December 2010, 7 January 2011 and 6 February 2011 respectively. He was a man of Afghan background who had fled from the country during the rule of the Taliban regime. He eventually arrived in Indonesia where he registered as a refugee with the United Nations High Commission for Refugees (‘UNHCR’) and later became involved in migrant smuggling activities. Malaysian authorities arrested Mr Bahrami in Kuala Lumpur in August 2011 and the Australian Government requested his extradition to face 25 charges for people smuggling offences. On 19 December 2011, the Sessions Court ordered that he be extradited to Australia. He then filed a writ of habeas corpus in the High Court of Kuala Lumpur arguing that the extradition order did not comply with Malaysian law because there was insufficient evidence for him to be extradited. The High Court refused this application. Mr Bahrami appealed this decision to the Federal Court, but on 15 August 2012 this appeal was also rejected. When Mr Bahrami was extradited in November 2012, this was the first successful extradition from Malaysia to Australia for people smuggling offences. On 18 July 2014, the District Court of New South Wales found Mr Bahrami guilty of five counts of people smuggling contrary to s 233A. He was sentenced to 11 years and three months’ imprisonment with a non-parole period of seven years and three months.

121 Radhi v Police [2014] NZSC 135 (29 September 2014) [4]–[5].
123 AFP, Annual Report 2012–13, above n 72, 71.
125 Brenden Hills, ‘Smuggler or Just “A Mistake”’, The Sunday Telegraph (Sydney), 8 June 2014, 21.
} It appears that the man had himself been smuggled to Australia at some point, settled in Perth, and left for Malaysia and then Indonesia in February 2010. On 18 April 2013, the AFP obtained an Interpol arrest warrant. German authorities arrested the man on 21 January 2014 and he was extradited shortly thereafter.\footnote{Department of Immigration and Border Protection (Cth), above n 124.} In Australia, he was charged with one count of aggravated people smuggling under s 233C and seven counts of people smuggling under s 233A.\footnote{Department of Immigration and Border Protection (Cth), ‘Operation Sovereign Borders — Joint Agency Task Force Update’ (Media Release, 20 June 2014) <http://newsroom.border.gov.au/releases>; Michael Keenan, ‘Minister Confirms AFP’s First Extradition from Germany for People Smuggling Offences’ (Media Release, 20 June 2014) <http://www.ministerjustice.gov.au/Mediareleases/Pages/2014/Second%20Quarter/20June2014-MinisterConfirmsAfpsFirstExtraditionFromGermanyForPeopleSmugglingOffences.aspx>; Dan Box, ‘Iraqi Smuggler Extradited from Germany’, \textit{The Australian} (Sydney), 20 June 2014, 2.} Criminal proceedings were ongoing at the time of writing.

\section{Prosecution of Minors}

\subsection{Context and Issues}

Among the Indonesian men who crew the migrant smuggling vessels to Australia are a considerable number of minors. In many cases, the crew travel without any identity documents and do not carry any other proof of their age, resulting in additional challenges to prosecutors. The prosecution policy of the CDPP is that the prosecution of any minor should always be regarded as a ‘severe step’.\footnote{Age of Uncertainty Report, above n 19, 28, quoting CDPP, \textit{Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecutions Process} (November 2008) 9. See also CDPP, \textit{Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecutions Process} (9 September 2014) 7 <https://www.cdpp.gov.au/sites/g/files/net391/f/Prosecution-Policy-of-the-Commonwealth_0.pdf>.} In relation to migrant smuggling, this means that minors should only be charged with people smuggling offences in ‘exceptional circumstances’ on the basis of ‘significant involvement in a people smuggling venture’ or ‘involvement in
multiple ventures’. Minors are also exempt from mandatory minimum penalties under s 236B(2) of the Migration Act and different rules apply to the incarceration of minors during remand and following a conviction.

Allegations that Indonesian minors were mistakenly tried and prosecuted for people smuggling as adults became the focus of greater media and public attention after an Australian newspaper reported in November 2010 that four Indonesian men who claimed to be minors had been imprisoned as adults in Western Australia. The article quoted a paediatric radiologist critical of the wrist X-ray analysis relied on by the AFP to determine the age of crewmembers arriving on migrant vessels in Australia. The use of this method has been fiercely criticised for its inaccuracies and very limited scientific basis. Concerns about the reliance on wrist X-rays were first raised in an Australian Senate Legal and Constitutional Legislation Committee inquiry in 2001, but the practice continued despite the inquiry expressing serious reservations.

2 Inquiry into the Treatment of Individuals Suspected of People Smuggling Offences Who Say That They Are Children

In late 2010, the AHRC began to explore the issue of age determination. On 17 February 2011, the then President of the AHRC, Ms Catherine Branson, began correspondence with the then Attorney-General, Mr Robert McClelland, expressing concerns about the use of wrist X-ray analysis for the purposes of age determination. The Attorney-General responded by establishing an interdepartmental working group to investigate the issue. This led to the development of an enhanced age assessment process that included offering voluntary dental X-rays, targeted age assessment interviews by the AFP and increased efforts to obtain documentary evidence of age from Indonesia, in addition to the continued use of wrist X-rays. The Attorney-General, however, declined to conduct a review of previous age determinations.

Throughout 2011, further reports about the wrongful treatment and conviction of minors as adults, and their incarceration in adult prisons, continued to make headlines. In some cases, Australian defence lawyers travelled to

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136 Ibid 19.

Indonesia to obtain affidavits and other proof of age documentation that led to the charges against their clients being dropped.\(^{138}\) In several age determination hearings conducted in Western Australia in late 2011, crewmembers who had been charged as adults were later found to be minors. In two of these cases, the Court was also critical of wrist X-ray evidence presented by the Commonwealth.\(^{139}\) Given the refusal by the Attorney-General to conduct a review of relevant cases, the AHRC announced on 21 November 2011 that it would conduct an inquiry into the treatment of individuals suspected of people smuggling offences who said that they were children.\(^{140}\) The report of this inquiry was presented in July 2012.

The inquiry concluded that expert opinion evidence based on wrist X-ray analysis was not probative of whether an individual is over 18 years of age and should not be accepted in court.\(^{141}\) It further noted that, as early as February 2002, the CDPP could and should have seen the possibility that wrist X-ray analysis evidence was flawed. By mid-2011, there was significant material available to the CDPP to support this conclusion, and the CDPP ought to have been aware that such evidence could not be relied on.\(^{142}\) The AFP nevertheless continued to rely on wrist X-rays and use it as evidence for treating crewmembers as minors even if the person claimed to be under age and no other proof was available. In several cases, this led to the conviction of individuals as adults.\(^{143}\) The AHRC concluded that the practice of relying on wrist x-ray analysis for age assessment purposes has resulted in the investigation, prosecution and prolonged detention of a significant number of young Indonesians who are likely to have been children at the time of the people smuggling offence of which they were suspected.\(^{144}\)

The AHRC found Australia’s treatment of individuals suspected of people smuggling offences who said that they were children had led to numerous breaches of both the *Convention on the Rights of the Child*\(^{145}\) and the *International Covenant on Civil and Political Rights*.\(^{146}\)

The AHRC inquiry made 17 recommendations, including that wrist X-rays be removed as prescribed procedures for age determination admissible as evidence of age in legal proceedings. It also recommended amendments to the *Migration Act* to clarify that the prosecution bears the onus of proving, on the balance of

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\(^{138}\) *Age of Uncertainty Report*, above n 19, 270–2.


\(^{140}\) *Age of Uncertainty Report*, above n 19, 20.

\(^{141}\) Ibid 83–4.

\(^{142}\) Ibid 138–40.

\(^{143}\) Ibid 218.

\(^{144}\) Ibid 219.


probabilities, that a defendant was an adult at the time of the offence if the issue is raised in criminal proceedings.147

3 Consequences and Developments

On 2 May 2012, prior to the release of the AHRC inquiry’s report, the new Attorney-General, Ms Nicola Roxon, announced that her department would conduct a review of a number of cases involving Indonesian crewmembers convicted of people smuggling and held in adult prisons whom the AHRC and the Indonesian Government were concerned might have been minors.148 On 29 June 2012, the Attorney-General reported that the review of 28 convicted crewmembers had led to 15 crew being released from prison on licence and returned to Indonesia because there were doubts that they may have been minors when they arrived in Australia. Two further persons were released early on parole, three crew completed their non-parole periods, and eight crew remained in prison as there was no evidence to support suggestions that they were minors at the time of their arrival.149

The AFP ceased using wrist X-rays as a method of determining age in August 2011, unless the defendant specifically requested this method.150 At some point in 2011 or 2012, the CDPP also adopted a policy of not placing wrist X-ray evidence before the courts in age determination hearings.151 An Australian Senate inquiry into the detention of Indonesian minors in Australia conducted in 2012 later endorsed the AHRC’s recommendations of abolishing the use of wrist X-rays and clarifying that the prosecution bears the onus of proof of age.152 Legislation implementing these changes was passed in 2013.153

C Elements of the People Smuggling Offences

Several cases decided in the 2011–14 period examined and interpreted the elements of Australia’s people smuggling offences under div 12A of the Migration Act.154

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147 Age of Uncertainty Report, above n 19, 334.
152 Ibid 60, 63.
153 Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Act 2013 (Cth); Crimes Amendment (X-ray) Regulation 2013 (Cth).
A number of recent cases explored the question whether the offences under s 233C and former s 232A require proof that the smuggled migrants (that is, the unlawful non-citizens) crossed the boundary of Australia’s territorial sea or whether the offences can also be made out if the migrant smuggling vessel is detected and the crew arrested before entry into Australia has occurred. In *R v Mahendra*, Blokland J of the Supreme Court of the Northern Territory held that s 233C ‘clearly contemplates facilitation that falls short of entry, or indeed “arrival” at Australia’. In this case, the accused was a crewmember on SIEV 157, which was intercepted on 8 June 2010.

In *R v Ahmad*, Blokland J adopted a different interpretation of former s 232A. In this case, the accused was charged for his role as a crewmember on SIEV 146, a vessel that was intercepted on 11 May 2010 outside Australia’s territorial sea. At trial, Blokland J held that, unlike s 233C, former s 232A did require proof of actual entry into Australia. Her Honour’s decision was based on a difference in the drafting of the two provisions insofar as the legal status of the smuggled migrants in Australia is concerned. Because SIEV 146 had been apprehended prior to reaching this boundary, Blokland J ordered a stay of prosecution.

The decision in *R v Ahmad* was overturned by the Court of Criminal Appeal of the Northern Territory. Justice Mildren held that if there were to be a requirement of entry into Australia “the concept of “proposed entry” [in s 232A] would have no work to do and be otiose. Similarly, the expression “coming to Australia” in its ordinary meaning refers to the journey to Australia rather than actual entry’. Justices Southwood and BR Martin also noted that the offence under former s 232A could be ‘committed in a variety of ways, including by conduct that falls short of the subject persons actually entering Australia’. As a result of this decision, the relevant elements of s 233C and former s 232A apply in identical ways.

The decision in *R v Ahmad* has been followed by appeal courts in Queensland and South Australia. It has also been applied in several cases involving charges under s 233C.

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156 Ibid 304 [4]–[6]. An application for special leave to appeal the conviction of Mr Mahendra was made to the High Court, but was unsuccessful: *Mahendra v The Queen* [2012] HCATrans 249 (5 October 2012).
158 Ibid 366.
159 *R v Ahmad* (2012) 31 NTLR 38, 43–4 [17].
160 Ibid 47 [40].
2  (No) Lawful Right to Come to Australia

The requirement of Australia’s people smuggling offences that the smuggled migrants have no ‘lawful right to come to Australia’ has been a particularly contentious element. A considerable number of cases — and a growing body of literature — discuss the question of whether asylum seekers who are found to be refugees have a lawful right to come to Australia, such that the smuggling of refugees would not qualify for criminal liability under Australia’s people smuggling offences.163

*R v Husen Baco*164 involved the prosecution of the Indonesian crew of SIEV 150, a vessel that was intercepted on 16 May 2010. Counsel for the accused argued that the asylum seekers had a lawful right to come to Australia by virtue of the *Refugee Convention*,165 the *Smuggling of Migrants Protocol*, and the *Universal Declaration of Human Rights*.166 The Supreme Court of the Northern Territory rejected these arguments. It held that the ‘lawful right to come to Australia’ must be a right under Australian law, and that the international provisions relied on had not been incorporated into Australian law.167 Justice Kelly also expressed the view that even if the provisions had been incorporated, they did not confer a right to apply for asylum or enter Australia for that purpose.168 Similar arguments were also raised — and rejected — in *R v Ambo*,169 *R v Ladoke*,170 and several first instance decisions of courts in Queensland and Western Australia.171

The interpretation of the ‘lawful right to come to Australia’ also stands at the heart of *PJ v The Queen*.172 That case involved an interlocutory appeal by Mr Jeky Payara, who had been committed to stand trial facing a charge of aggravated people smuggling under s 233C.173 The charge related to his alleged involvement in the arrival SIEV 187; a vessel that was intercepted on 20 September 2010. The appeal involved the question whether the element of ‘no lawful right to come to Australia’ in s 233C(1)(c) was satisfied by showing that the passengers lacked valid visas to enter Australia.174 While this case was listed to be heard by the Court of Appeal of Victoria, the Australian Government rushed retrospective legislation through Parliament to foreclose the possibility of the Court finding that the passengers had a right to enter Australia by virtue of Australia’s obligations under the *Refugee
The Deterring People Smuggling Act inserted a new s 228B into the Migration Act providing that for the purposes of the people smuggling offences in the Migration Act, a non-citizen has no lawful right to come to Australia if they do not hold a valid visa, regardless of whether Australia has, or may have, protection obligations to the non-citizen under the Refugee Convention as amended by the Refugee Protocol or any other reason. The retrospective application of this provision made the question for determination by the Court of Appeal moot. Not surprisingly, the introduction of the Deterring People Smuggling Act was strongly criticised by experts and human rights groups for its retrospective amendment of the criminal law and the rushed passage of the bill through Parliament at a time when PJ v The Queen, a matter to which the Commonwealth was a party, was listed for determination by the courts.

3 Knowledge of the People-smuggling Destination

In a considerable number of cases, the persons accused of people smuggling have claimed that they did not know the destination of their journey or, if they did know the destination, that they were not aware that the destination was part of Australia. This matter is of particular relevance for smuggling ventures to the offshore territories of Ashmore Reef and Christmas Island, which are usually referred to by their Indonesian names by the persons who crew the smuggling vessels and on the maps they use to navigate. The courts have also recognised that, as mentioned earlier, most of the crew are poor Indonesian fishermen with little or no formal education who cannot be expected to know the precise boundaries of Australian territory and Australian territorial waters. The close proximity of Ashmore Reef and Christmas Island to Indonesia may also lead some to believe that they are indeed part of Indonesian territory.

Recent decisions confirm that Australia’s people smuggling offences require proof that the accused positively knew that the intended destination of the smuggling venture was a place in Australia. It does not suffice to show that the accused knew the destination, but was unaware that it was part of Australia. The most significant case on this point is that of PJ v The Queen. In this case, the Court held that the conduct s 233C was concerned with was ‘conduct directed at bringing about the arrival of the relevant passengers at, or their entry into, the country to which (to the offender’s knowledge) they may well have no lawful right of entry’.
Since the decision in *PJ v The Queen*, the question of whether the prosecution could prove that the accused knew the destination was Australia and/or whether the trial judge adequately instructed the jury on this element has been raised in several appeal cases. In *Sunada v The Queen*, the two accused had been charged under former s 232A for their involvement in the arrival of SIEV 101, which was intercepted on 4 February 2010. On two occasions, the trial judge directed the jury that ‘[i]t is enough if the Crown can prove that the accused knew that they were coming to Ashmore Reef, however called. The Crown does not have to prove that they knew that it was part of Australia’. On appeal, it was held that former s 232A should be interpreted in the same way as s 233C and that, in light of the decision in *PJ v The Queen*, the trial judge had misdirected the jury about the elements of the offence.

In *Alomalu v The Queen*, the accused successfully appealed against his conviction on the grounds that it was unreasonable and could not be supported having regard to the evidence, and that the trial judge had erred in failing to direct the jury about the mental elements of the offence. The appellant had been convicted under s 233C for being a crewmember on SIEV 198, which was intercepted on 21 October 2010. The New South Wales Court of Criminal Appeal found that while Mr Alomalu might have known that the intended destination of this smuggling venture was Ashmore Reef, there was no evidence to show that he knew it was part of Australia. The Court held that there was a miscarriage of justice because the trial judge failed to direct the jury that they needed to be satisfied the accused knew that Ashmore Reef was part of Australia.

The decision in *PJ v The Queen* was also followed by the South Australian Court of Criminal Appeal in *R v Zainudin*. This case followed the arrival of SIEV 246, which was apprehended on 7 May 2011. One of the accused, Mr Zainudin, successfully appealed his conviction under s 233C. The Court found that while the jury was entitled to infer that he had intentionally steered the vessel towards an island southwest of Java, there was no basis to infer that he knew this island was called ‘Christmas Island’ or that it was part of Australia. It was therefore not open to the jury to draw an inference of knowledge beyond reasonable doubt.

In a further, unreported case before the County Court of Victoria, a jury found the two defendants not guilty after they argued that they did not know the destination of the smuggling vessel was Australia. The two accused were charged under s 233C for their role as crewmembers on SIEV 216, a vessel that was apprehended

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185 Ibid [3].
186 Ibid [6]–[7].
188 Ibid 165 [37]–[38].
190 (2012) 115 SASR 165.
on 30 November 2010. In August 2012, prosecutors in Victoria dropped charges under s 233C against a further four men who were involved in the arrival of SIEVs 173 and 222 after their lawyers argued that the men could not be convicted because there was no evidence that they knew their destination was Australia.193

In several other cases, persons convicted for people smuggling sought to appeal their conviction on the basis of the decision in *PJ v The Queen*, but had their appeals dismissed. In these cases, the appeal courts held that on the facts of the case, it was not open to the jury to accept that the accused knew the destination was Ashmore Reef or Christmas Island but to find that the accused did not know that the destination was a part of Australia. The facts were therefore distinguishable from those which required the judge to give the direction in *Alomalu v The Queen*. The appeals in *Taru Ali, Bin Radimin and Bin Sulaeman v The Queen*, which involved convictions of crewmembers involved in the arrivals of SIEVs 185, 207 and 196 respectively, were dismissed for this reason.194

4 Knowledge of the Legal Status of the Smuggled Migrants

In *Husen Baco*,195 Kelly J of the Northern Territory Supreme Court discussed the mental element of former s 232A of the *Migration Act* in relation to the legal status of the persons whose entry into Australia had been organised or facilitated. The appellants argued that the offence required proof that they had specifically intended to bring non-citizens without valid visas to Australia and that it was not sufficient to show that they were merely reckless as to this circumstance. Their argument was based on the structure of former s 232A and the use of the default fault elements under s 5.6 of the *Criminal Code*, which apply to those physical elements of federal offences for which the offence description does not specify a fault element. Counsel for the appellants suggested that former s 232A did not specify a fault element for the physical element of ‘five or more people to whom subsection 42(1) applies’ (non-citizens without valid visas) and that it had to be shown that the appellants specifically intended to bring people in this category to Australia. This suggestion, however, appears to ignore that former s 232A(1)(b) contained an explicit reference to recklessness and Kelly J also rejected the appeal on the basis that it was sufficient to show that the appellants were reckless as to the legal status of their passengers.196

The 2010 reform of the people smuggling offences further precluded the arguments raised in *Husen Baco*. In respect of the circumstance element under s 233C(1)(b) — that at least five of the smuggled persons are non-citizens — s 233C(2) now provides that absolute liability applies. No fault element is specified in respect of the element in s 233C(1)(c) that the non-citizens referred to in para (b)

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195 (2011) 29 NTLR 221.
196 Ibid 232–4 [37]–[43].
had, or have, no lawful right to come to Australia, so the default mental element of recklessness applies.\textsuperscript{197}

\section*{D Defences}

In a number of prosecutions, persons accused of people smuggling sought to raise general defences under the \textit{Criminal Code}, including mistake of fact (s 9.1), duress (s 10.2), and sudden or extraordinary emergency (s 10.3).\textsuperscript{198}

\subsection*{1 Mistake of Fact}

The four Indonesian accused in \textit{Bahar v The Queen} were involved in the arrival of SIEV 45, which was apprehended on 23 June 2009.\textsuperscript{199} At trial, three of them unsuccessfully argued that they had been acting under a mistake of fact when they engaged in the migrant smuggling venture. In 2011, they appealed their convictions under former s 232A on the basis that the trial judge ‘failed to adequately or at all’ direct the jury on the defence of mistake of fact under s 9.1 of the \textit{Criminal Code}. They argued that they were unaware of the purpose and destination of this venture and had no intention to smuggle migrants to Australia. The Western Australian Court of Appeal rejected the appeal and held that it was unnecessary to direct the jury on the issue of mistake because the fault elements of the charge against the appellants could clearly be established: at all material times the appellants had positive knowledge of the purpose of their voyage and the intention to facilitate this voyage.\textsuperscript{200}

\subsection*{2 Duress}

The defence of duress was briefly entertained in \textit{R v Mahendra} (but ultimately did not go to the jury).\textsuperscript{201} The accused and co-accused told the Court that during the journey to Australia they considered returning the vessel to Indonesia after the captain had disembarked. The passengers of the vessel made threatening gestures which compelled them to continue to Australia. Mr Mahendra’s attempt to raise the defence of duress under s 10.2 of the \textit{Criminal Code} remained unsuccessful as the judge held that there was insufficient evidence to discharge the evidential burden. The Court did, however, acknowledge that the defence would have gone to the jury had there been more compelling evidence.\textsuperscript{202}

In \textit{R v Pandu}, the defence of duress was raised in similar circumstances.\textsuperscript{203} This case, and the related case of \textit{Kia v The Queen}, involved four accused who were charged under former s 232A for their involvement in the arrival of SIEV 43,

\begin{itemize}
  \item \textsuperscript{197} \textit{Criminal Code} s 5.6(2). See Explanatory Memorandum, Anti People Smuggling and Other Measures Bill 2010 (Cth) 13.
  \item \textsuperscript{198} For a detailed discussion, see Schloenhardt and Davies, above n 41, 959–66.
  \item \textsuperscript{199} \textit{Bahar v The Queen} (2011) 45 WAR 100.
  \item \textsuperscript{200} \textit{Ibid} 105–7 [20]–[28] (McLure P, Martin CJ and Mazza J agreeing).
  \item \textsuperscript{201} \textit{R v Mahendra} (2011) 211 A Crim R 462.
  \item \textsuperscript{202} \textit{Ibid} 470 (Blokland J).
  \item \textsuperscript{203} \textit{R v Pandu} (Unreported, District Court of Western Australia, Eaton DCJ, 21 May 2010).
\end{itemize}
which was apprehended on 25 May 2009. The accused gave evidence that several attempts to turn the boat back to Indonesia were met by hostile actions and gestures by some of the passengers. The judge allowed the defence of duress to go to the jury, instructing the jurors that for the defence to operate, there must have been a belief held by each accused that each would be either killed or thrown overboard if the boat deviated from the original path. Further, the accused must have believed that there was no reasonable way of rendering the threat ineffective, and that continuing to travel towards Australia was a reasonable response to the threat in all of the circumstances that they faced. The jury, however, found all four accused guilty.

3 Sudden or Extraordinary Emergency

In Warnakulasuriya, the accused sought to raise the defence of ‘sudden or extraordinary emergency’ under s 10.3(1) of the Criminal Code against charges under former s 232A. The accused was a Sri Lankan national who arrived in Australia on 22 April 2009 on board SIEV 37. The defence was raised because it was claimed that the accused did little more than help persons fleeing from persecution in Sri Lanka to a place of safety. The Court heard that Mr Warnakulasuriya was affiliated with Sri Lanka’s main opposition party and was also briefly involved with the separatist Liberation Tigers of Tamil Eelam (‘LTTE’) and decided to organise a vessel to take himself and other people he knew to Australia in fear of harm and persecution. The jury, however, returned a guilty verdict. In 2011, Mr Warnakulasuriya appealed his conviction, arguing that the judge misdirected the jury on the defence under s 10.3 of the Criminal Code. The Western Australian Court of Appeal found that the trial judge indeed gave misleading directions on the meaning of the word ‘emergency’. The Court allowed the appeal, quashed the conviction and ordered a retrial. It also confirmed that s 10.3(2) is based on the defendant’s ‘reasonable belief’ that circumstances of sudden or extraordinary emergency exist. This entails a subjective requirement that the accused positively held that belief, and an objective element requiring that the belief was reasonable in the circumstances. No further information about the retrial of Mr Warnakulasuriya was available at the time of writing.

V Observations and Conclusion

The smuggling of migrants remains a contentious, complex and costly issue for Australia. This article has shown that while the incidence of ‘suspected illegal entry vessels’ arriving in Australia has decreased considerably in recent years, people smuggling continues to pose considerable challenges to prosecutors and the
judiciary. With many cases yet to go to trial and many appeals still to be heard, the
issue will remain a prominent one for several years to come.

The criminal justice response to the smuggling of migrants in Australia has
a unique and controversial history, and both sides of the political spectrum have —
with varying degrees of success — sought to use this topic to demonstrate that they
are ‘tough on border control’ and intent on ‘breaking the people smuggler’s
business model’.210 The analysis in this article, however, demonstrates, that the
reality of prosecution for people smuggling to Australia is quite removed from
such rhetoric.

There is, in particular, no evidence to suggest that the prosecution of people
smugglers in Australia has had any measurable deterrent effect on those most
commonly engaging or likely to engage in smuggling activities. None of the severe
penalties stipulated in the legislation, rigorous prosecution, the high conviction
rate, or the lengthy gaol terms that have characterised Australia’s criminal justice
response to people smuggling since 2001 have been able to reduce the allure and
incentives for young Indonesian men from poor, rural backgrounds — some of
them minors — to become engaged as captain or crew on migrant smuggling
vessels to Australia.

The available case law also casts doubt over the expressions like ‘the people
smuggler’s business model’ as there is not much evidence to show that the
smugglers adopt a particular business model, or that the majority of persons
convicted for people smuggling are savvy business people who make vast profits
from their criminal activities. In contrast, it appears that many migrant smuggling
ventures are poorly organised and doomed to fail from the outset. It has been
shown that the great majority of persons convicted for people smuggling in
Australia are poor, desperate young men who do not form part of ongoing
transnational criminal enterprises.

The attempt to shift investigation and prosecution efforts to more senior
people smugglers by way of directing the CDPP to discontinue or not to commence
prosecutions against minor, first-time offenders is a laudable endeavour. While the
timing, scope, and execution of the Attorney-General’s Direction are questionable,
this initiative should have been followed by more far-reaching policy shifts and
legislative change, some of which were flagged in the Report of the Expert Panel
on Asylum Seekers. The political climate at the time and the change of government
in September 2013, however, made these long-overdue reforms impossible.

Several other, less far-reaching proposals for reform have also been raised
in the 2011–14 period, but were not seriously considered due to the political
stalemate and the unbalanced and often partial media reporting and public debate.
These include, inter alia, suggestions to make a distinction between the legal
treatment of crew and that of organisers of migrant smuggling ventures, and to

210 See, eg, Chris Bowen, Minister for Immigration (Cth), ‘High Court Decision’ (Press Conference,
enact a specific provision that would enable judges to set aside mandatory minimum penalties where it would be unjust to impose the mandatory minimum.\textsuperscript{211}

Efforts to identify, arrest, extradite and prosecute some of the main organisers and directors of people smuggling to Australia have not been marked by great success in the 2011–14 period. While such efforts have been more frequent since 2011 and have involved a greater range of countries, many practical obstacles and legislative hurdles continue to enable the ‘people smuggling masterminds’ to evade prosecutions and operate with relative impunity. The need for wider and more in-depth bilateral and multilateral engagement, especially with countries such as Indonesia and Malaysia, is self-evident, but has not been helped by Australia’s unilateral decision to return migrant smuggling vessels to the point of embarkation once they are intercepted en route to Australia.\textsuperscript{212}

Open debate and transparency about Australia’s response to the smuggling of migrants have become severely hampered by the Australian Government’s decision to conceal relevant data and information about people smuggling for ‘operational reasons’.\textsuperscript{213} Since December 2013, it has become nearly impossible to gauge the true levels of migrant smuggling to Australia, to obtain information about the causes and background of persons seeking to be smuggled to Australia, to discover the circumstances and conditions under which they travel to this country, and to find out about government agencies’ roles and responses to these matters. There is a real concern that it will not be possible to independently document and analyse the phenomenon of migrant smuggling to Australia and to critically assess the prosecution of people smugglers for the years 2015 and beyond.


\textsuperscript{212} See also Andreas Schloenhardt and Colin Craig, ‘“Turning Back the Boats”: Australia’s Interdiction of Irregular Migrants at Sea’ (2015) 27(4) \textit{International Journal of Refugee Law} 536.
