

STOP THE PLANES!?
DOCUMENT FRAUD AND MIGRANT
SMUGGLING BY AIR IN AUSTRALIA

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and Joseph Lelliott**



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The topic of migrant smuggling by air, which often involves the use of forged or false documents, is a phenomenon not well researched and understood in Australia as it is overshadowed by concerns over maritime migrant smuggling and calls for to ‘stop the boats’. Recent reports and law enforcement investigations, however, have revealed a significant number of schemes set up to facilitate and conceal the illegal arrival of smuggled migrants by air. This research paper provides an analysis of migrant smuggling and document fraud in the Australian context. The paper outlines international law and best practice guidelines pertaining to criminalisation and prevention of document fraud, and assesses Australia’s compliance with international standards. The paper examines available information on the occurrence of document fraud in Australia and identifies issues with, and potential reforms to, Australia’s response to document fraud. The paper concludes that greater governmental and academic focus is needed to fully analyse and quantify the subject area.

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I INTRODUCTION

In Australia, the topic of migrant smuggling – or people smuggling as it is referred to locally – is generally associated with the arrival of boats from Indonesia and Sri Lanka that bring asylum-seekers, mostly of Middle Eastern and Tamil background, to Christmas Island, Ashmore Reef, Cocos (Keeling) Islands, and, in lesser numbers, to the coasts of the Northern Territory or Western Australia. A phenomenon less known, but no less significant, is the smuggling of migrants to Australia by air, usually involving forged or false document. On March 28, 2012, the Australian Broadcasting Corporation (ABC) reported:

A smuggling operation that involved people from the Middle East being sold fake passports so they could travel to Australia has been uncovered by a joint police operation. So far six people have been arrested in Australia and Thailand. A married couple in Bangkok has been charged with producing false passports. The Australian Federal Police alleges the Australian based operatives were responsible for planning the unlawful arrival of numerous people. Raids were conducted in Sydney and Melbourne at the same time as police hit sites in Indonesia, Malaysia and Thailand after an eight month AFP investigation. [...]

[T]wo people were taken into custody in Sydney and two in Melbourne, alleged to be people smuggling facilitators who have planned the unlawful travel of numerous people to Australia. Meanwhile, in a house in Bangkok police allege they found up to 20 Iranian and UAE passports partly altered and equipment to make false documents. [...]

[T]he passports were being made for people of Middle Eastern origin already waiting in Malaysia and Indonesia, key transit points for asylum seekers and economic migrants. They believe they were being sent by courier to customers who have been using them to travel to Australia by both plane and boat.¹

Concerns about migrant smuggling by air and document fraud in Australia are further fuelled by popular television programs which (unjustifiably) insinuate that a large proportion of foreigners inspected by immigration control officers at Australia's airports arrive with false documents and/or misrepresent the purpose of their visit to Australia.

In international law, the smuggling of migrants by air, along with smuggling by sea and land, is comprehensively addressed in the United Nations (UN) *Protocol against the Smuggling of Migrants by Land, Sea and Air*² supplementing the *Convention against Transnational Organised Crime*.³ Article 3(a) of the Protocol defines the smuggling of migrants 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.' Article 6 obliges States Parties to criminalise the smuggling of migrants, the harbouring of illegal migrants, and 'when committed for the purpose of enabling the smuggling of migrants (i) producing a fraudulent travel or identity document; [and] (ii) producing, providing or possessing such a document.'

The purpose of this research paper is to explore the extent and characteristics of migrant smuggling by air to Australia and the occurrence of document fraud in this context. Furthermore, this paper provides detailed analysis of Australia's obligations under the *Smuggling of Migrants Protocol* and assesses the implementation and operation of relevant domestic laws against international best practice guidelines in order to determine the effectiveness of legislative, administrative, and criminal justice responses to this phenomenon. Based on this analysis, recommendations for law reform, policy change, and further research are made.

¹ ABC Radio National, 'Six arrested in multi-nation people smuggling operation', *AM*, 28 March 2012 (Zoe Daniels) <<http://www.abc.net.au/am/content/2012/s3465202.htm>>.

² Opened for signature 15 Dec 2000, 2241 UNTS 507 [hereinafter *Smuggling of Migrants Protocol*].

³ Opened for signature 15 Dec 2000, 2225 UNTS 209.

It has to be noted from the outset that the covert nature of migrant smuggling and document fraud make it difficult to quantify the level of this crime type let alone provide exact figures about the number of smuggled migrants arriving or attempting to arrive in Australia by air each year. Moreover, scholarly analysis and academic literature in this area is practically non-existent.⁴ Information on the subject matter of this research paper is primarily drawn from open-source material provide by the United Nations Office on Drugs and Crime (UNODC), various Australian Government departments, the media, and relevant case law.

It should also be stressed that this paper examines document fraud and migrant smuggling by air only to the extent that they occur together. This is because the *Smuggling of Migrants Protocol* is directed to criminalising organisers and facilitators of smuggling by means of document fraud;⁵ self-facilitated instances of migration and document fraud do not fall within the scope of the Protocol and are not further examined here.

This research paper comprises seven parts. Following this introduction, Part II identifies the general patterns and typology of migrant smuggling by air and document fraud. The available evidence in Australia is then explored in Part III. In Part IV, relevant articles of the *Smuggling of Migrants Protocol* and their interpretation are examined. Part V then analyses Australia's response to document fraud by analysing the implementation of international law into domestic law, and commenting on the criminal justice and border control responses to the issue. Lastly, Part VI contains observations and recommendations based on the evidence previously explored.

II PATTERNS AND TYPOLOGY OF MIGRANT SMUGGLING BY AIR

A General Observations

Simply put, the smuggling of migrant by air, as distinct from smuggling by sea or across land borders, involves the use of commercial or private passenger or cargo planes to facilitate the illegal entry of a person into another country. This can be carried out in a myriad of ways, including concealing migrants as stowaways in the cargo hauls, bathrooms, or near the landing gear of aeroplanes, though most commonly this form of smuggling involves the use of forged documents by smuggled migrants who travel on board commercial airlines. In some cases, smuggled migrants travel with no documents at all or destroy their documents en route. The use of false documents and destruction of documents usually serves to conceal the identity and/or nationality of the smuggled migrant. If forged documents are used, the smuggled migrant may be able to deceive immigration officers upon arrival and enter the destination country. If documents are destroyed en route, smuggled migrants usually report to officials on arrival in order to seek asylum and gain refugee protection.⁶ The smuggling of migrants by air may also be differentiated between accompanied and unaccompanied smuggling. In some cases, smuggled migrants, especially if they are furnished with false documents and cash to make them appear as tourists, are accompanied by members of migrant smuggling network to ensure they proceed through check-in and immigration controls, and to retrieve the documents and cash from them after arrival at the destination point.

This snapshot highlights some of complexities of migrant smuggling by air which researchers, policy makers, and investigators are only beginning to understand and which are often only rudimentarily addressed in domestic legal systems. In many countries, chief among them Australia, but also in places like Canada, Italy, and Spain, the focus of police, politicians, and the public alike has been

⁴ UNODC, *Organized Crime Involvement in Trafficking of Persons and Smuggling of Migrants* (United Nations, 2010) 29.

⁵ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols thereto* (United Nations, 2004) 340-341: 'mere migration of migrants' is not criminalised by the Protocol.

⁶ UNODC, *Migrant Smuggling by Air* (UNODC, 2010) 5.

almost exclusively on migrant smuggling by sea. In Austria, Germany, Greece, and the United States, the main focus has been on the smuggling of migrants across land borders by trucks, trains, busses, private vehicles, or simply by walking across uncontrolled parts of the border.

Since the late 1980s, much has been done to explain and address migrant smuggling by sea and land, while airborne smuggling has not been equally explored. Despite the fact that many countries witness the arrival of undocumented or documented migrants in the thousands, the topic has not – or not yet – attracted the same attention as other forms of smuggling.

UNODC, the United Nations Office on Drugs and Crime, has described migrant smuggling by air as ‘relatively safe and successful compared to other means of travel’,⁷ though this is only true so long as smuggled migrants travel among other passengers aboard commercial jetliners, but not if they are concealed in cargo hauls, bathrooms, or other compartments of aeroplanes, as has happened in some cases. Fortunately, such cases are rare and to this day there is no evidence to suggest that significant numbers of migrants have been smuggled to Australia in these ways. Consequently, it is fair to say that migrant smuggling by air using commercial airlines does not involve the same physical dangers and risks to life compared to the common way of migrant smuggling by sea from Indonesia to Australia using inexperienced crew and unseaworthy vessels, many of which have capsized and sunk en route.⁸

It is for this reason that migrant smugglers will often charge a premium for smuggling by air.⁹ Furthermore, the creation or ascertaining of fraudulent documents is a specialised role and commands a high price.¹⁰ These factors tend to preclude smuggling by air to wealthier migrant-customers.

B Document Fraud

Document fraud is a central feature of migrant smuggling by air, as the vast majority of countries and airlines require passports, visas, or other identity papers to be presented at check-in and again at emigration and immigration control points. Even in those jurisdictions that permit visa-free entry for certain nationalities or allow entry without a passport, other identify cards or official documents need to be produced to clear relevant border controls. Document fraud thus becomes a necessity if and when a would-be migrant does not possess authentic papers or if such papers would not permit the person to check-in, depart, or to enter another country.

Forged documents may be provided by migrant smugglers – or may be obtained by smuggled migrants – in one of two ways. The first avenue is to obtain otherwise genuine documents from official sources by supplying false information and/or by way of corruption.¹¹ In some instances, immigration officers and consular staff may be bribed to provide genuine passports and visas, or to provide the documentation necessary for the migrant to attain genuine documents, such as birth certificates. Equally, police and airline staff may accept payments for turning a blind eye to

⁷ UNODC, *Migrant Smuggling by Air* (UNODC, 2010) 8.

⁸ See generally, Andreas Schloenhardt, *Migrant Smuggling: Illegal Migration and Organised Crime in Australia and the Asia Pacific Region* (Martinus Nijhoff Publishers, 2003) 139; for case examples see, Tony Kevin, *A Certain Maritime Incident: The Sinking of SIEV X* (Scribe, 2004); Debbie Guest, ‘Visa provides safety for disaster survivor’ *The Australian*, 7 August 2012, 6; Aljazeera, ‘Asylum seekers feared dead off Australia’ *Aljazeera* (online), 14 August 2012 <<http://www.aljazeera.com/news/asia-pacific/2012/08/201281445418470592.html>>.

⁹ UNODC, *Migrant Smuggling by Air* (UNODC, 2010) 8; Khalid Koser, ‘Strengthening Policy Responses to Migrant Smuggling and Human Trafficking’, (Discussion Paper No 10, Geneva Centre for Security Policy, 2008) 11-12.

¹⁰ UNODC, *Issue Paper Migrant Smuggling by Air* (UNODC, 2010) 8.

¹¹ Andreas Schloenhardt, *Migrant Smuggling: Illegal Migration and Organised Crime in Australia and the Asia Pacific Region* (Martinus Nijhoff, 2003) 135.

fraudulent documents.¹² In a similar fashion, misrepresentations may be made or false documents presented to relevant officers and agents in order to gain genuine documents.

The second form of document fraud involves the fraudulent production of documents or forgery of genuine documents, usually in return for the payment of substantial fees. For example, genuine passports may be obtained from persons of similar appearance, sold to the smugglers or directly to the smuggled migrants, and then reported lost or stolen by the seller. Alternatively, passports may be forged by way of photo-substitution or by altering other information or biometric data contained in a passport that was once genuine. Forged passports are usually supplied and sold by specialists. The quality of these forged documents varies, with some being of a very high quality, and others being of a lower quality and easily detectable. If a smuggled migrant merely wants to reach the country and then claim asylum, the forgery does not need to be particularly convincing as there is no attempt to deceive immigration officials at the point of entry. On the other hand, if the person seeks to enter destination country undetected then the document must be of a high quality.¹³ Smuggled migrants may also change their documents en-route, for example by travelling to one airport hub on genuine documents, then being given further fraudulent documents in order to travel further on to the destination country.¹⁴

Visas may be forged or fraudulently obtained. They can be arranged in advance, sometimes with the help of corrupt or shambolic educational or business institutions. Visa applications may be supported by additional fraudulent documents intended to prove the false identity of the smuggled migrant or to misrepresent the true purpose of their intended travel.¹⁵

III AUSTRALIAN EVIDENCE

A *Statistics*

There are, at present, no statistics about the number of persons smuggled into Australia by air each year. This is due, in part, to the clandestine nature of this crime and the use of sophisticated document fraud that may not be apprehended at immigration control points at Australia's airports and seaports. But even if such documents are detected, it is not always clear whether the use of forged documents is indeed facilitated by migrant smugglers, or whether these documents have been supplied or acquired for other reasons. In the 2010-11 financial year, for example, 84 people were refused entry at Australian airports for presenting false or altered documents,¹⁶ though it is not clear how many of these were linked to migrant smuggling by air.

The Department of Immigration and Citizenship (DIAC) provides annual statistics on the number of so-called 'unauthorised air arrivals' in Australia and on detection of forged and fraudulent documents at embarkation points which – while not conclusive – may shed some light into the levels of migrant smuggling by air to Australia. Figure 1 displays this data for the period between 1999 and 2011.

¹² UNODC, *Issue Paper Migrant Smuggling by Air* (United Nations, 2010) 11.

¹³ UNODC, *Issue Paper Migrant Smuggling by Air* (United Nations, 2010) 4, 9.

¹⁴ Andreas Schloenhardt *Migrant Smuggling: Illegal Migration and Organised Crime in Australia and the Asia Pacific Region* (Martinus Nijhoff Publishers, 2003) 138.

¹⁵ UNODC, *Issue Paper Migrant Smuggling by Air* (United Nations, 2010) 10.

¹⁶ Question taken on notice to Senate Standing Committees on Legal and Constitutional Affairs (Budget Estimates Hearing – Immigration and Citizenship Portfolio), Parliament of Australia, Canberra, 21-22 May 2012, BE12/0288.

Figure 1: Unauthorised air arrivals into Australia and detection of forged and fraudulent documents, DIAC 1999-2011.¹⁷

Financial year	Number of unauthorised air arrivals	Persons using forged/fraudulent documents
1999-2000	1695	no data
2000-01	1512	no data
2001-02	1193	no data
2002-03	937	311
2003-04	1241	242
2004-05	1632	207
2005-06	1598	143
2006-07	1388	180
2007-08	1189	143 (‘irregularly documented’)
2008-09	1284	155
2009-10	1573	169 (‘improperly documented’)
2010-11	1809	126

On average, approximately 1200–1500 unauthorised arrivals are apprehended at Australian airports each year. This includes a variety of circumstances, including persons arriving with no travel documents, such as visas and passports, as well as persons arriving with documents that may have expired or are otherwise no longer valid (for example, persons arriving with a tourist visa intending to gain employment in Australia for which a business visa would be needed). Also included in the number of unauthorised air arrivals are those persons who arrive with forged or fraudulent travel or identity papers.

Figures relating to persons using forged or fraudulent documents are collected separately and appear to primarily comprise persons detected by Australian airline liaison officers (ALOs) working at overseas embarkation points. It is thus difficult to see these figures in context. What can be said is that, on average, approximately 150-200 persons are detected per year with only minor variations between individual reporting periods. What is not known is the number of those persons using very sophisticated forgeries that have not been apprehended by immigration and customs officials. DIAC hypothesises that the relative decrease in detections in more recent years can be attributed to the deterrent effect of the ALO presence at points of embarkation,¹⁸ though it is not possible to validate this statement. As mentioned earlier, these figures must not be mistaken for the levels of migrant smuggling by air in Australia.

Apart from these (fragmentary) DIAC statistics, there is no other collection of data that could shed further light into the levels and patterns of migrant smuggling by air into Australia. In particular, there are no records by the Australian Federal Police (AFP) or the Commonwealth Director of Public

¹⁷ Department of Immigration and Multicultural Affairs (DIMA), *Population Flows: Immigration Aspects 2000 Edition* (2000) 56; Department of Immigration and Multicultural and Indigenous Affairs (DIMIA), *Annual Report 2002-03* (2003) 57; DIMIA, *Annual Report 2003-04* (2004) 81–82; DIMIA (Cth), *Annual Report 2004-05* (2005) 109–110; DIMA, *Annual Report 2005-06* (2006) 141–142; DIAC (Cth), *Annual Report 2006-07* (2007) 109; DIAC, *Annual Report 2007-08* (2008) 100–101, 108; DIAC, *Annual Report 2008-09* (2009) 106, 112; DIAC, *Annual Report 2009-10* (2010) 139–144; DIAC, *Annual Report 2010-11* (2011) 139, 142.

¹⁸ DIAC, *Annual Report 2009-10* (2010) 139.

Prosecutions (CDPP) about the number of investigations and prosecutions pertaining to migrant smuggling by air.

B Case Reports

The most substantive information about the characteristics and scale of migrant smuggling by air and related document fraud in Australia stems from reported and unreported case law, together with several media reports that have been published in recent years.

1 Investigations

The most prominent of these cases was brought to light in a series of media features by the ABC in March 2012.¹⁹ In this case, the AFP, in cooperation with the Royal Thai Police, made several arrests relating to migrant smuggling network which allegedly supplied forged documents to persons intending to migrate to Australia. Thai authorities arrested two people in possession of twenty altered passports, along with equipment for creating false documents. It was alleged the men were producing and supplying Iranian and United Arab Emirates passports in order to smuggle people to Australia by plane or boat. Four people were arrested in Australia as part of the same operation, though it was later revealed that they did not possess false documents, nor the ability to produce them. It was alleged that these four people were the Australia-based organisers and they were subsequently charged for offences including aggravated people smuggling under s 233C of the *Migration Act 1958* (Cth).

Following these arrests, further reports surfaced which suggest notable occurrences of document fraud in the process of migrant smuggling to Australia by plane.²⁰ The ABC specifically singled out the alleged smuggling of Chinese migrants into Australia, ‘supported by a network of corrupt officials from China to migration agents in Australia’.²¹ The report suggested that migrant smugglers use fraudulently obtained visas and a variety of other forged documents to smuggle their clients into Australia by air and then help them apply for protection visas (which are designed for refugees fleeing from persecution).²²

While it is not possible to state how many persons have been charged in Australia with offences relating to migrant smuggling by air, there are occasional reports about individuals who have been investigated and charged under relevant provisions. One such case is that of Ms Kanani who was charged in 2009 under s 233(1)(a) of the *Migration Act 1958* (Cth) in relation to an alleged fake passport ring. Together with co-worker Ms Lara Triglia, Ms Kanani was accused of approving fraudulent passports applications lodged at Australia Post outlets, and then going overseas to sell them.²³ Ms Kanani pleaded guilty to all charges. Also in 2009, the Australian Crime Commission

¹⁹ ABC Radio National, ‘Six arrested in multi-nation people smuggling operation’, *AM*, 28 March 2012 (Zoe Daniels) <<http://www.abc.net.au/am/content/2012/s3465202.htm>>; see also Pia Akerman, ‘people smugglers arrested’, *The Australian*, 28 March 2012, 6.

²⁰ Matthew Carney, ‘Plane arrivals in widespread rorting of asylum system’, *ABC News* (online), 16 March 2012 <<http://www.abc.net.au/news/2012-03-15/chinese-fly-into-australia-to-make-27dodgy27-asylum-clai ms/3892416>>.

²¹ See also UNODC, *Smuggling of Migrants: A Global Review* (United Nations, 2011) 33, 60: Although noting the lack of information on the smuggling of migrants in East Asia and the Pacific, this paper asserts that the majority of smuggled migrants, and smugglers themselves, are Chinese.

²² Matthew Carney, ‘Plane arrivals in widespread rorting of asylum system’, *ABC News* (online), 16 March 2012 <<http://www.abc.net.au/news/2012-03-15/chinese-fly-into-australia-to-make-27dodgy27-asylum-clai ms/3892416>>.

²³ Belinda Kontominas, ‘Iraqi refugee pleads guilty to people-smuggling charges’, *The Sydney Morning Herald* (Sydney), 29 July 2010, 4; Vikki Campion, ‘Postie’s counter asylum racket: AFP swoop on two women over fake passport claims’, *The Daily Telegraph* (Sydney), 4 May 2009, 1.

(ACC), a national agency to collect intelligence on and combat organised and serious crime, reported about a man by the name of Mr Arun Kumar who was found guilty of producing false documents,²⁴ though it is not clear whether his activities were linked to the smuggling of migrants in any way.

2 Judicial decisions

An analysis of judicial decisions relating to immigration matters provides further insight into the patterns of migrant smuggling by air and document fraud in Australia. Specifically, there are several cases that went before the Federal Magistrates Court on appeal from the Refugee Review Tribunal (RRT) as well as several decisions from the RRT itself that point to further evidence about this phenomenon. The following cases were chosen insofar as they are representative of the wider problem.

Several of these cases support claims made in recent media reports about smuggling of Chinese migrants. For example, the case of *SZNTK v Minister for Immigration and Citizenship* [2010] FMCA 970 involved a Chinese national who was given a false identity and a false passport issued in another person's name and put on a plane to Sydney, where, approximately one month after arrival, he applied for a protection visa. In *SZOPW v Minister for Immigration and Citizenship* [2011] FMCA 48 a Chinese woman used a Snakehead, a term used for Chinese migrant smuggling syndicates, to procure a fake passport to enter Australia. Upon arrival she was given a British Passport with which to claim asylum.²⁵ Several similar cases involving Chinese nationals make reference to the use of fraudulently obtained visas and supporting identification documents.²⁶ The case of *SZONB v Minister for Immigration and Citizenship* [2011] FMCA 13, for instance, involves the purchase of a fraudulent visa along with other documents with which the smuggled migrant was to obtain a business visa once he was in Australia. He later attempted to do so, but after several failed attempts applied for a protection visa instead.

Numerous cases that came before the RRT point to similar patterns of Chinese nationals who, facilitated by migrant smugglers, acquire false documents for the purpose of entering Australia by air.²⁷ For example, the *RRT Case 1102969* concerned a Chinese woman who had paid a large amount of money for a false passport with which to enter Australia. This case noted the availability of fraudulent documents in China, citing a 2009 Canadian study which stated 'just about any document can be forged in China and many are'.²⁸ The *RRT Case 1102969* further stated the cost of a false Chinese passport varied between US\$ 10,000 and 80,000, with the cost increasing for assisted passage with multiple passports.²⁹ *RRT Case 1001501* also details the use of fake passports used to enter Australia.³⁰ *RRT Case 1001501* concerned a Chinese-Tibetan woman who acquired a variety of false

²⁴ ACC, *Annual Report 2008–09* (ACC, 2009) 159.

²⁵ Patrick R Keefe, 'The Snakehead' (24 April 2006) 82(10) *The New Yorker*, 68–85.

²⁶ Other cases include *SZORT v Minister for Immigration and Citizenship* [2011] FMCA 126; *SZOUI v Minister for Immigration and citizenship* [2010] FMCA 816; *SZQEE v Minister for Immigration and Citizenship* [2011] FMCA 739. The latter two cases used fraudulently obtained student guardian visas to enter the country.

²⁷ See, for example, *RRT Case 1001501* [2010] RRTA 481 (24 May 2010) (Member Smyth); *RRT Case 1102969* [2011] RRTA 923 (3 November 2011) (Member Mullin); *RRT Case 1108375* [2012] RRTA 228 (11 April 2012) (Member Duignan).

²⁸ *RRT Case 1102969* [2011] RRTA 923 (3 November 2011) [56] (Member Mullin) quoting Immigration and Refugee Board of Canada, *China: The manufacture, procurement, distribution and use of fraudulent documents, including passports, "hukou", resident identity cards and summonses in Guangdong and Fujian in particular (2005–May 2009)* (24 June 2009) <<http://www.unhcr.org/refworld/docid/4a7040b72.html>>.

²⁹ *RRT Case 1102969* [2011] RRTA 923 (3 November 2011) [57] (Member Mullin).

³⁰ *RRT Case 1001501* [2010] RRTA 481 (24 May 2010) [26], [115] (Member Smyth); *RRT Case 1108375* [2012] RRTA 228 (11 April 2012) [27] (Member Duignan).

Nepalese documents in order to travel to Australia. She stated her father paid a police officer about AU\$ 2,500 for a Nepalese passport and citizenship card.

The phenomenon of migrant smuggling by air involving Chinese nationals using false travel and identity documents is long-standing, and has been explored in more detail in relation to smuggling to the United States and Japan.³¹ Some of this information may no longer be current and may often differ from the Australian experience. In a 2011 case, Federal Magistrate Driver, however, made the following observations:

Various push factors drive asylum seekers from Fujian province in China in substantial numbers while pull factors draw them to Australia [...]. The [Refugee Review] Tribunal would have been aware (as this court is aware) of many similar cases in which applicants are shepherded from Fujian province to Australia, are met at the airport in Sydney and taken to Chinatown where the process of them seeking protection is put in train using the services of either unregistered migration agents operating illegally or registered migration agents with very few scruples. It is disturbing that this large scale and sophisticated people smuggling operation does not receive the same attention that is directed to people smuggling from south and central Asia. The only difference between these operations is that people smuggled from China arrive by air apparently legally (although frequently using false documents). It is relatively easy for Australia to detect people smuggling operations at sea at the border because the people being brought to this country wish to be detected and processed. It is harder to deal with the people smuggling operation from China because the people being smuggled are not detected at the border. Despite a heavy policy emphasis in this country on “border protection” the fruits of that policy seem to be largely limited to protection of sea borders against people to actively seek detection and thereby protection. The capacity of the Australian authorities to protect air borders against sophisticated people smuggling operations, where the object is to evade detection at the border, appears poor.³²

In addition to the smuggling by air of migrants from mainland China, there are also a considerable number of reports involving smuggled migrants from other countries. *RRT Case 1106553*, for instance, outlines how a man from Uzbekistan paid his smuggler, referred to as Mr F, substantial amounts money to be escorted on the trip, and for the manufacture of false documents.³³ Additionally, *RRT Case 1113831* involves a Nepalese woman who had used a false Nepalese passport to enter Australia.³⁴

The case of *SZPJ v Minister for Immigration and Citizenship* [2012] FCA 18 provides a detailed account of an Afghan man who travelled to Pakistan where his uncle arranged for a migrant smuggler to take him to Australia. He was initially given an Iranian passport to travel to Dubai, and a Japanese passport with which to travel to Australia, where he sought asylum. His application for a protection visa was unsuccessful and an appeal against this decision failed because the Court held that his claims about persecution were fabricated. The use of false documents for smuggled migrants departing from Pakistan has also been reported in relation to Afghan, Iraqi and other Middle Eastern nationals who are equipped with false documents for the flights between Pakistan and Malaysia or Indonesia and then continue the journey to Australia by boat.³⁵

³¹ See, for example, Ko-lin Chin, *Smuggled Chinese: Clandestine Immigration to the United States* (Temple University Press, 1999); Ian Peck, ‘Removing the Venom from the Snakehead: Japan’s Newest Attempt to Control Chinese Human Smuggling’ (1998) 31(4) *Vanderbilt Journal of Transnational Law* 1041–1078; Paul J Smith (ed), *Human Smuggling: Chinese Migrant Trafficking and the Challenge to America’s Immigration Tradition* (CSIS, 1997); Sheldon X Zhang & Mark S Gaylord, ‘Bound for the Golden Mountain: The Social Organisation of Chinese Alien Smuggling’ (1996) 25(1) *Crime, Law & Social Change* 1–16.

³² *SZOPW v Minister for Immigration and Citizenship* [2011] FMCA 48 [21] (Driver FM).

³³ *RRT Case 1106553* [2012] RRTA 40 (31 January 2012) [26] (Member Duignan).

³⁴ *RRT Case 1113831* [2012] RRTA 255 (20 April 2012) [22] (Member Jacovides).

³⁵ See, for example, *Ahmadi v The Queen* (2011) 254 FLR 174; *R v Daoed* [2005] QCA 459; and *R v Al Jenabi* [2004] NTSC 44.

Similar cases involve nationals from South Asia, including Bangladesh, India, and Sri Lanka, who are furnished with false documents by migrant smugglers to obtain Australian visas overseas.³⁶ Many of these cases also point to the prevalence and availability of false documents in the applicants' countries of origin,³⁷ which is, perhaps, indicative of the scale of migrant smuggling involving document fraud.

It may come as a surprise to some readers that these cases before the RRT and federal courts do not automatically lead to criminal investigations and prosecutions of the migrant smugglers furnishing their clients with false documents or otherwise facilitating their journey between sending and destination country. It is not known whether Australian law enforcement authorities follow up on the evidence presented in these cases, but it should be noted that most of the alleged smugglers and those involved in the production and supply of false documents are located abroad, outside the reach of Australian authorities. Moreover, many of the statements made in these immigration-related cases may be insufficient for law enforcement agencies to act upon, or may not be credible.

C Government Reports

Annual reports by government agencies such as DIAC and the AFP feature further references to the general problem, but provide little insight into specific manifestations. DIAC's *2010-11 Annual Report* stresses the significance of border management, including 'combating people smuggling' as a principal objective, and emphasises as important a 'whole of government, layered approach to border management' as well as work done in conjunction with international organisations such as UNODC, the Bali Process, and the Association of Southeast Asian Nations (ASEAN).³⁸ The report does not, however, reveal any further information about either detections of migrant smuggling by air or the attendant use of document fraud, or how the Department confronts the challenges associated with this phenomenon. The Annual Reports of previous years are similarly deficient.

Similar observations can be made about reports by the AFP, which contain little information on the topics of migrant smuggling by air and document fraud. The *Annual Report* for 2010–11, for instance, details the AFP's overall response to migrant smuggling and highlights the fact that substantial amounts of government funding were given to the AFP to comprehensively combat migrant smuggling. Combatting migrant smuggling by air and document fraud, however, does not appear to feature prominently – and perhaps not at all – in this strategy, which instead focuses almost exclusively on the investigation and prosecution of crew members of illegal entry vessels bringing smuggled migrants, most of them asylum seekers, to Australia.³⁹

In light of the available evidence contained in case reports and media features it is surprising – and perhaps alarming – that government agencies in Australia appear to have little knowledge of the actual patterns and scale of migrant smuggling by air and document fraud. There is no suggestion here that this type of crime is particularly widespread in Australia, but it appears that the Government's (and, for that matter, also the Opposition's) preoccupation with migrant smuggling by sea means that other, more clandestine and sophisticated forms of migrant smuggling have not been equally explored and may indeed have been overlooked in policy making and, perhaps, in law enforcement. Whether Australia's response to migrant smuggling by air meets – or falls short of – international standards will be explored in the following parts.

³⁶ *SZOMT v Minister for Immigration and Citizenship* [2011] FMCA 3, *SZOUL v Minister for Immigration and Citizenship* [2011] FCA 945, *SZQUID v Minister for Immigration and Citizenship* [2012] FCA 458; *RRT Case 1203964* [2012] RRTA 312 (18 May 2012) [29] (Member Short).

³⁷ See, eg, *SZNTK v The Minister for Immigration and Citizenship* [2010] FMCA 970, [6]; *SZOMT v Minister for Immigration and Citizenship* [2011] FMCA 3 [28]; *SZOUL v Minister for Immigration and Citizenship* [2011] FCA 945 [18].

³⁸ DIAC, *Annual Report 2010-11* (2011) 134, 137.

³⁹ AFP, *Annual Report 2010-11* (2011) 53–54.

IV PROTOCOL REQUIREMENTS AND THEIR INTERPRETATION

In international law, the smuggling of migrants by air, along with smuggling by sea and land is comprehensively addressed by the United Nations (UN) *Protocol against the Smuggling of Migrants by Land, Sea and Air*.⁴⁰ This Protocol, together with two separate protocols relating to trafficking in persons and trafficking in firearms and ammunition, supplement the *Convention against Transnational Organised Crime*.⁴¹ The Convention entered into force on September 29, 2003; the Protocol followed on January 28, 2004.

The stated purpose of the *Smuggling of Migrants Protocol* 'is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.'⁴² At the centre of the Protocol stands the obligation in Article 6 to criminalise the smuggling of migrants and related conduct. Special prevention and suppression measures pertaining to the smuggling of migrants by sea are set out in Articles 7–9. The Protocol also requires adoption of measures targeted at improving border control capabilities, information gathering, and law enforcement, through Articles 10–14. Under Articles 16 and 19, States Parties must adopt appropriate measures to preserve and protect the rights of smuggled migrants. In Article 18, the Protocol also provides a framework for the repatriation of smuggled migrants.⁴³

While the Protocol seeks to address migrant smuggling in all its forms, it contains several provisions that are particularly relevant to the smuggling of migrants by air and the use of false and forged documents to facilitate such smuggling. Specifically, Article 6(1) of the Protocol obliges States Parties to criminalise the smuggling of migrants, the harbouring of illegal migrants, and 'when committed for the purpose of enabling the smuggling of migrants (i) producing a fraudulent travel or identity document; [and] (ii) producing, providing or possessing such a document.' Articles 12 and 13 contain specific measures relating to the security, control, legitimacy, and validity of travel and identity documents. Article 11 creates specific obligations for commercial carriers, such as airlines. Relevant terminology is defined in Article 3 of the Protocol.

Given the special relationship between the *Smuggling of Migrants Protocol* and the *Convention against Transnational Organised Crime* (often referred to as the Protocol's 'parent'), the Protocol's provisions have to be interpreted together with the Convention, and the provisions of the Convention apply, *mutatis mutandis*, to the Protocol.⁴⁴ As a result, several provisions relating to investigative techniques and law enforcement cooperation may carry particular significance for the prevention and suppression of migrant smuggling by air, though these are not further explored here.

A Definitions

1 *Smuggling of Migrants*

As mentioned earlier, Article 3(a) of the *Smuggling of Migrants Protocol* provides that the term 'smuggling of migrants'

⁴⁰ Opened for signature 15 Dec 2000, 2241 UNTS 507 [hereinafter *Smuggling of Migrants Protocol*].

⁴¹ Opened for signature 15 Dec 2000, 2225 UNTS 209.

⁴² *Smuggling of Migrants Protocol* art 2.

⁴³ For a complete analysis of the Protocol see, Andreas Schloenhardt & Jessica E Dale, 'Twelve Years On: Revisiting the UN Protocol against the Smuggling of Migrants by Land, Sea and Air' (2012) 67 *Zeitschrift für Öffentliches Recht/Austrian Journal of Public Law* 129–156.

⁴⁴ *Smuggling of Migrants Protocol* art 1.

shall mean 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.

Article 3(b) further defines ‘illegal entry’ as the crossing of borders without complying with the necessary requirements for legal entry into the receiving State. Illegal thus only refers to non-citizens; the Protocol does not cover entry requirements placed on nationals and permanent residents of the receiving State.

The Protocol further limits the concept of smuggling of migrants to activities that are done for the purpose of ‘obtaining, directly or indirectly, a financial or other material benefit’. The *Interpretative notes for the official record (travaux préparatoires) of the negotiations for the United Nations Convention against Transnational Organized Crime and the Protocols thereto* state that this limitation was

included in order to emphasise that the intention was to include the activities of organised criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations.⁴⁵

The reference to ‘other material benefit’ is relevant to the criminalisation of migrant smugglers who request sexual favors rather than financial payment for the provision of smuggling services.

2 Travel and Identity Documents

Relevant Articles in the *Smuggling of Migrants Protocol* consistently refer to the term(s) ‘travel or identity document’. The *Interpretative Notes* further clarify that the term “‘travel document” includes any type of document required for entering or leaving a State under its domestic law and the term “‘identity document” includes any document commonly used to establish the identity of a person in a State under the laws or procedures of that State.’⁴⁶

According to Article 3(c) of the Protocol a travel or identity document is fraudulent if it

- (i) has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorised to make or issue the travel or identity document on behalf of a State; or
- (ii) has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or
- (iii) is being used by a person other than the rightful holder.

‘Producing a false travel or identity document,’ means making or creating the fraudulent document, or causing it to be created. For example, a smuggler could obtain an authentic or genuine passport, remove the photograph on the passport and substitute a picture of the migrant. Or, the smuggler could be running a criminal enterprise such as a fraudulent passport factory. ‘Procuring’ means obtaining or causing a result by effort. For example, the smuggler could obtain the document for someone else. ‘Providing’ means giving. For example, the smuggler could give the document to the migrant or to another smuggler in the smuggling network.⁴⁷ The *Interpretative Notes* further remark that:

⁴⁵ UN General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions; Addendum: Interpretative notes for the official record (travaux préparatoires) of the negotiations for the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, UN Doc A/55/383/Add.1 (3 Nov 2000) [hereinafter *Interpretative Notes*] [88].

⁴⁶ *Interpretative Notes*, [89], [104], [106].

⁴⁷ UNODC, *In-depth Training Manual on Investigating and Prosecuting Smuggling of migrants* (2011) Module 1, 8.

(c) The words “falsely made or altered” should be interpreted as including not only the creation of false documents, but also the alteration of legitimate documents and the filling in of stolen blank documents. Furthermore, the intention was to include both documents that had been forged and genuine documents that had been validly issued but were being used by a person other than the lawful holder.⁴⁸

The *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* further note that:

- (c) Whether a document is ‘falsely made’ or ‘improperly issued’ will depend in some cases on how national law treats cases where an official acts illegally or without authorisation. If a consular official issues a travel document beyond his or her powers, systems that would treat this as non-issuance would consider the document as having been made by someone not authorised to do so, falling under subparagraph (i). Systems that considered the basic issuance to have occurred would see the same document as having been ‘improperly issued’ under subparagraph (ii). What is important is that drafters of national legislation consider the approach taken by national law and ensure that all of the possible scenarios result in documents that are treated as ‘fraudulent’ and that there are no gaps;
- (d) Documents that have been altered must have been changed in some way that is material to the other offences established in accordance with the Protocol, such as changing the identity or photograph of the holder or the dates for which it was valid. If the document is ‘altered’, this must have been by someone not authorized to do so;
- (e) ‘Fraudulent’ documents also include documents that are genuine, but improperly issued through misrepresentation, corruption or duress. Here also the approach of drafters will depend to some degree on how domestic law treats cases where an official acts illegally or without authority;
- (f) Finally, ‘fraudulent’ documents include papers that are formally valid and have been validly issued, but are being used by someone other than the person to or for whom they were issued, whether the document in question has been altered (e.g. by changing a photograph) or not.⁴⁹

The purpose of these complex explanations is to ensure that countries comprehensively proscribe and criminalise any form of travel and identity document fraud, ranging from creating new documents, altering existing documents, to using another person’s document, and obtaining documents fraudulently, corruptly or coercively.

B Criminalisation

Article 6 of the *Smuggling of Migrants Protocol* sets out a comprehensive list of obligations that must be satisfied in order to appropriately criminalise the smuggling of migrants. Specifically, Article 6(1) identifies three categories of offences that must be established in domestic law, including:

- smuggling of migrants offences: Article 6(1)(a);
- document fraud offences: Article 6(1)(b); and
- the offence of enabling of illegal residence (or harbouring): Article 6(1)(c).

Article 6(1) limits the application of relevant offences to ‘intentional’ offences. Article 34(3) of the *Convention against Transnational Organised Crime*, with which the *Smuggling of Migrants Protocol* must be read, however, provides that ‘each State Party may adopt more strict or severe measures’. States Parties are thus free to create offences that require less onerous mental elements than ‘intention’, such as recklessness or, perhaps, negligence.

Of particular significance to this study is Article 6(1)(b) of the Protocol, which provides that ‘producing a fraudulent travel or identity document’⁵⁰ and ‘procuring, providing or possessing such a

⁴⁸ *Interpretative Notes*, [90], [106].

⁴⁹ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (2004) [hereinafter *Legislative Guides*] 345-6.

⁵⁰ Article 6(1)(b)(i) *Smuggling of Migrants Protocol*.

document'⁵¹ should be criminalised when they are committed for the purpose of the smuggling of migrants. The reference to 'smuggling of migrants' means that the document offences must relate to the procurement of illegal entry into a State Party where that person is not a national or a permanent resident.⁵² There is also the requirement that the smuggling of migrants, and therefore the document offence, is committed for 'financial or other material benefit'.⁵³ The *Interpretative Notes* remark that Article 6(1)(b)

was adopted on the understanding that subparagraph (ii) would only apply when the possession in question was for the purpose of smuggling migrants as set forth in subparagraph (a). Thus, a migrant who possessed a fraudulent document to enable his or her own smuggling would not be included.⁵⁴

This is an important aspect of the principle of 'non-criminalization of migrants' enshrined in Article 5 of the *Smuggling of Migrants Protocol* which states that 'migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol'. The *Legislative Guides* note that it

is the intention of the drafters that the sanctions established in accordance with the Protocol should apply to the smuggling of migrants by organized criminal groups and not to mere migration or migrants, even in cases where it involves entry or residence that is illegal under the laws of the State concerned [...].⁵⁵

The *Smuggling of Migrants Protocol* also requires States Parties to criminalise the attempt to commit the crime, the participation as an accomplice in the crime, and the organization or directing of other persons to commit the crime: Article 6(2). Articles 5 and 10 of the *Convention against Transnational Organised Crime* further extend criminal liability to include corporations (legal persons), and persons who participate in an organized criminal group.

Article 6(3) of the *Smuggling of Migrants Protocol* creates obligations to incorporate 'aggravating circumstances' 'that endanger, or are likely to endanger, the lives or safety of the migrants concerned or that entail inhuman or degrading treatment, including for exploitation, of such migrants' into the offences established by the Protocol. This can be achieved by creating aggravated smuggling of migrants offences, or by inserting provisions that require courts to consider more severe penalties where there has been an aggravating circumstance.⁵⁶

C Validity and Legitimacy of Documents

The inspection of travel and identity documents by government authorities, especially at border control points, is an important tool to detect and prevent the smuggling of migrants. Accordingly, it is essential that government authorities have the skills, procedures, and equipment in place to properly examine identity documents and detect cases of document fraud. Furthermore, to pre-empt the forgery of identity and travel documents it is important that official documents are of a quality and contain security features so that they cannot be easily forged or altered.

Several kinds of technology that are new or under development offer considerable potential for the creation of new types of document that identify individuals in a unique manner, can be rapidly and accurately read by machines, and are difficult to falsify because they rely on information stored in a database out of the reach of offenders, rather than on information provided in the document itself.⁵⁷

⁵¹ Article 6(1)(b)(ii) *Smuggling of Migrants Protocol*.

⁵² Article 3(a) *Smuggling of Migrants Protocol*.

⁵³ Article 3(a) *Smuggling of Migrants Protocol*.

⁵⁴ *Interpretative Notes*, [93].

⁵⁵ *Legislative Guides*, 340.

⁵⁶ *Legislative Guides*, 346.

⁵⁷ UNODC, *Toolkit to Combat Smuggling of Migrants* (2010) Tool 7, 39–42.

Article 12 of the *Smuggling of Migrants Protocol* requires States Parties to ensure that their travel and identity documents are of a quality that they cannot easily be falsified or misused and prevent their unlawful creation, issuance, and use. This includes such measures as technical elements to make documents more difficult to falsify, forge, or alter; and administrative and security elements to protect the production and issuance process against corruption, theft, or other means of diverting documents.⁵⁸ Article 13 obliges States Parties to verify within a reasonable time frame the legitimacy and validity of travel and identity documents as requested by other States Parties.

D *Obligations of Commercial Carriers*

The *Smuggling of Migrants Protocol* requires States Parties to adopt legislative or other measures to prevent commercial carriers from being used by migrant smugglers.⁵⁹ Article 11(2)–(5) contains several requirements to ensure that persons travelling across international borders hold the necessary documents. While the exact nature of measures dealing with commercial carriers is left to the discretion of individual States, Article 11(3) advocates regulations that require commercial carriers to ensure that their passengers are in possession of the travel documents that may be needed to enter the destination country, such as passports and visas. There is, however, no obligation on carriers to assess the validity or authenticity of the documents.⁶⁰ Article 11(4) suggests that carriers are sanctioned if they fail to comply with these requirements,⁶¹ although there should be no liability on carriers for transporting undocumented refugees.⁶²

The requirements in Article 11(1)–(5) reflect similar obligations in international aviation regulations. For example, air carriers are required to ensure that their passengers are properly documented and meet the immigration requirements at the destination point. Standards supplementing the *Convention on International Civil Aviation*⁶³ provide that undocumented or otherwise inadmissible passengers, including those travelling with fraudulent documents, are to be returned to the custody of the air-carriers which should return the persons at their expense to the point of departure or another place where the returnees are admissible. Carriers that are found transporting undocumented passengers can be fined if they neglect to verify the documentation of their passengers. Carriers cannot be fined, however, if their passengers possess fraudulent documents. The emphasis of these standards is on the possession of documents, not on their authenticity. Commercial airlines are not burdened with the obligation to apprehend false and altered travel and identity documentation. If, however, fraudulent documents are found, carriers are required to seize them and return them to the authorised agencies of the issuing country.

IV AUSTRALIAN IMPLEMENTATION AND COMPLIANCE

Australia signed the *Smuggling of Migrants Protocol*, along with the *Convention against Transnational Organised Crime*, on December 21, 2000, and formally ratified the Protocol on May 24, 2004. Significant parts of the Protocol were implemented into domestic law with the *Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002* (Cth), supplementing relevant provisions already existing at that time.

⁵⁸ *Legislative Guides*, 374.

⁵⁹ *Legislative Guides*, 373.

⁶⁰ *Interpretative Notes*, [103]; *Legislative Guides*, 373.

⁶¹ *Legislative Guides*, 373, 374. See further, UNODC, *Model Law against the Smuggling of Migrants* (2010) 12–13, 57–61.

⁶² *Interpretative Notes*, [103].

⁶³ 15 UNTS 275, Annex 9.

A Criminalisation of Migrant Smuggling

In Australia, legislation relating migrant smuggling (as defined in Article 3(a) of the *Smuggling of Migrants Protocol*) is, by and large, limited to a series of so-called ‘people smuggling’ offences in the *Migration Act 1958* (Cth) which, following Australia’s ratification of the *Smuggling of Migrants Protocol*, are duplicated in almost identical form in the *Criminal Code* (Cth).

The term ‘people smuggling’ is not separately defined in Australian law, though the basic offence of people smuggling in s 73.1(1) of the *Criminal Code* is, according to s 73.1(3), to be seen as effectively defining the term. Accordingly, people smuggling involves situations where:

- (a) the first person organises or facilitates the entry of another person (the other person) into a foreign country (whether or not via Australia); and
- (b) the entry of the other person into the foreign country does not comply with the requirements under that country’s law for entry into the country; and
- (c) the other person is not a citizen or permanent resident of the foreign country.

This definition reflects the key features of the Protocol definition, though it is limited to smuggling into a foreign country, and not into Australia.

Offences relating to migrant smuggling into Australia, which are most commonly used in domestic prosecutions, are set out in Division 12, Subdivision A of the *Migration Act 1958* (Cth). Until 1999, offences pertaining to illegal immigration under this Act provided relatively minor penalties for the bringing of undocumented migrants and stowaways to Australia, and for the harbouring of prohibited immigrants and deportees. Relevant offences were first introduced with the *Migration Legislation Amendment Act (No 1) 1999* (Cth)⁶⁴ which raised the penalties for existing immigration offences and created new, aggravated offences for ‘people smuggling’ – a term not used at that time. Further amendments followed with the enactment of the *Border Protection Legislation Amendment Act 1999* (Cth).⁶⁵

Section 232A was added to the *Migration Act* in 1999 to specifically target persons who organize and facilitate the bringing of groups of undocumented migrants to Australia.⁶⁶ The section created an offence for organizing 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) *Migration Act 1958* (Cth). The offence – and its equivalent today – attracts a penalty of 20 years imprisonment and a mandatory penalty of five years for first time offenders.⁶⁷ If less than five persons are brought into Australia, organizers and facilitators can be held responsible under s 233(1)(a).⁶⁸ Whilst these offences were added and used primarily to suppress migrant smuggling by sea, they are equally applicable to smuggling by air.

Minor amendments aside, these offences remained unchanged until the introduction of the *Anti-People Smuggling and Other Measures Act 2010* (Cth) which sought to ‘strengthen the Commonwealth’s anti-people smuggling legislative framework by ensuring an appropriate range of offences are available to target and deter people smuggling activity and by creating greater

⁶⁴ No 89 of 1999.

⁶⁵ *Border Protection Legislation Amendment Act 1999* (Cth), No 160 of 1999. See further, Andreas Schloenhardt, *Migrant Smuggling* (Martinus Nijhoff, 2003) 165.

⁶⁶ Australia (Cth), Senate, Migration Legislation Amendment Bill (No 2) 1998 [= *Migration Legislation Amendment Act (No 1) 1999*] Replacement Supplementary Explanatory Memorandum (1998-99) outline and [9]; Fiona David, *Human Smuggling and Trafficking* (AIC, 2000) 20.

⁶⁷ Section 233C *Migration Act 1958* (Cth), introduced by *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth), No 126 of 2001. The minimum penalty for repeat offenders is 8 years. The minimum non-parole period for first time offenders is 3 years, and 5 years for repeat offenders.

⁶⁸ See further, Andreas Schloenhardt, *Migrant Smuggling* (Martinus Nijhoff, 2003) 169–170.

harmonisation across Commonwealth legislation.’⁶⁹ This Act repealed the offences relating to migrant smuggling, and substituted them with the current ss 233A to 233D.

Section 233A *Migration Act 1958* (Cth) now reflects the people smuggling offence in s 73(1) of the *Criminal Code* (Cth) for Australia-bound smuggling:

- (1) A person (the *first person*) commits an offence if:
 - (a) the first person organizes or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of another person (the *second person*); and
 - (b) the second person is a non-citizen; and
 - (c) the second person had, or has, no lawful right to come to Australia.
- ...
- (2) Absolute liability applies to paragraph (1)(b).
- ...
- (3) For the purposes of this Act, an offence against subsection (1) is to be known as the offence of people smuggling.

In addition to this basic offence, the *Migration Act* also provides for several aggravated offences of people smuggling⁷⁰ and criminalises supporting the offence of people smuggling.⁷¹ Penalties for people smuggling offences range from imprisonment for 10 years or a fine of AU\$ 110,000 fine or both to imprisonment for 20 years and an AU\$ 220,000 fine or both. A number of the offences contain mandatory minimum sentences and non-parole periods.⁷²

One of the results of the *Anti-People Smuggling and Other Measures Act 2010* (Cth) was the removal from the *Criminal Code* (Cth) of the requirement that an accused has obtained (or is intending to obtain) a profit from the migrant smuggling operation. This requirement – a principal characteristic of migrant smuggling and, as mentioned earlier, a central feature of the definition in the *Smuggling of Migrants Protocol* – was a physical element of ss 73.1–73.3A of the *Criminal Code* since their introduction in 2002 (but was never an element of the offences in the *Migration Act 1958* (Cth)). The removal of this requirement is seen by many as a critical flaw in Australia’s people smuggling offences. The lack of any profit motive means that the legislation also targets persons who act with the best humanitarian intentions and those coming to the rescue of smuggled migrants, especially on the high seas.⁷³

B Document Fraud and Forgery Offences

1 Offences under the *Criminal Code* (Cth)

Division 73, Subdivision B of the *Criminal Code* (Cth) contains a set of ‘document offences related to people smuggling and unlawful entry into foreign countries’. These offences implement relevant obligations under the *Smuggling of Migrants Protocol* into Australian law and, specifically, criminalise document fraud and forgery offences as called for by Article 6(1)(b) of the Protocol.⁷⁴

Section 73.7 of the *Criminal Code* (Cth) comprehensively defines the meaning of ‘false travel or identity documents’ to include documents or any part of a document that:

⁶⁹ Explanatory Memorandum, Anti-People Smuggling and Other Measure Bill 2010 (Cth), 1.

⁷⁰ *Migration Act 1958* (Cth) ss 233B Aggravated offence of people smuggling (exploitation, or danger of death or serious harm etc.); 233C Aggravated offence of people smuggling (at least 5 people).

⁷¹ *Migration Act 1958* (Cth) s 233D.

⁷² *Migration Act 1958* (Cth) s 236B.

⁷³ Australian Lawyers for Human Rights (2010) *People Smugglers: saviours or criminals? A report on 16 convicted people smugglers in Australia between 2001 and 2006*, 15–16; Commonwealth, *Parliamentary Debates*, Senate, 13 May 2010, (Senator Nick Xenophon).

⁷⁴ Explanatory Memorandum, Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Bill 2002 (Cth) 10.

- (a) [...] (i) purports to have been made in the form in which it is made by a person who did not make it in that form; or
- (ii) purports to have been made in the form in which it is made on the authority of a person who did not authorise its making in that form; or
- (b) [...] (i) purports to have been made in the terms in which it is made by a person who did not make it in those terms; or
- (ii) purports to have been made in the terms in which it is made on the authority of a person who did not authorise its making in those terms; or
- (c) [...] (i) purports to have been altered in any respect by a person who did not alter it in that respect; or
- (ii) purports to have been altered in any respect on the authority of a person who did not authorise its alteration in that respect; or
- (d) [...] (i) purports to have been made or altered by a person who did not exist; or
- (ii) purports to have been made or altered on the authority of a person who did not exist; or
- (e) [...] purports to have been made or altered on a date on which, at a time at which, at a place at which, or otherwise in circumstances in which, it was not made or altered.

In short, this section ensures that relevant offences apply to all forms of forgery and alteration of travel and identity documents.

Sections 73.8–73.11 of the *Criminal Code* (Cth) set out four separate offences including:

- making, providing or possessing a false travel or identity document: s 73.8;
- providing or possessing a travel or identity issued or altered dishonestly or as a result of threats: s 73.9;
- providing or possessing a travel or identity document to be used by a person who is not the rightful user: s 73.10; and
- taking possession of or destroying another person’s travel or identity document: s 73.11.

The common thread among these offences is the fault element, which establishes the connection between the conduct relating to document fraud and forgery and migrant smuggling. Each offence requires proof that the accused (‘the first person’)

intends that the document will be used to facilitate the entry of another person (the other person) into a foreign country, where the entry of the other person into the foreign country would not comply with the requirements under that country’s law for entry into the country.⁷⁵

Unlike the general people smuggling offences in ss 73.1–73.3A of the *Criminal Code* (Cth) and ss 233A–233D of the *Migration Act 1958* (Cth), the document fraud and forgery offences also require proof that

the first person made, provided or possessed the document:

- (i) having obtained (whether directly or indirectly) a benefit to do so; or
- (ii) with the intention of obtaining (whether directly or indirectly) a benefit.⁷⁶

It is unclear why these offences continue to require proof of a financial or other benefit element when other people smuggling offences in Australia do not. It can only be speculated that this is a result of oversight rather than a genuine attempt align these offences with the specific requirements under the *Smuggling of Migrants Protocol*.

Extensions to criminal liability for attempt, participation, and the like, as required by Article 6(2) of the *Smuggling of Migrants Protocol* are comprehensively legislated in Chapter 2 of the *Criminal Code* (Cth), which also applies to the offence under the *Migration Act 1958* (Cth) and other federal statutes.⁷⁷ There are no specific aggravations to the offences in ss 73.8–73.11 of the *Criminal Code*

⁷⁵ *Criminal Code* (Cth) ss 73.8(b), 73.9(c), 73.10(b), and 73.11 (emphasis removed).

⁷⁶ *Criminal Code* (Cth) ss 73.8(c), 73.9(d), and 73.10(d); see also *Criminal Code* (Cth) s 73.11(c).

⁷⁷ *Criminal Code* (Cth) s 2.1.

(Cth). The penalty for offences under ss 73.8–73.11 is imprisonment for ten years, 1000 penalty units, or both.

As with the offences under ss 73.1–73.3A, the document fraud and forgery offences in ss 73.8–73.11 only relate to the smuggling of migrants into a foreign country, not to smuggling into Australia. Furthermore, s 73.12 extends the geographical application of these offences to conduct occurring wholly outside Australia if a result of the conduct occurs wholly or partly in Australia or on board an Australian aircraft or ship, or if at the time of the alleged offence, the person is a citizen or resident of Australia or a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory: s 15.2 *Criminal Code* (Cth).

2 Offences under the Migration Act 1958 (Cth)

Sections 234 and 234A of the *Migration Act 1958* (Cth) set out several offences for ‘false documents and false or misleading information etc relating to non-citizens’. These offences cater specifically for document fraud, forgery, and misrepresentations to government officials made in connection with immigration into Australia. These offences differ substantially from those in the *Criminal Code* (Cth) and, unlike the *Smuggling of Migrants Protocol*, make no specific reference to people smuggling. The *Migration Act* offences also do not specifically refer to travel or identity documents and instead also cover any other documents and information presented (such as invitations, education certificates, financial statements and other supporting documentation).

Section 234 operates as a basic offence, while s 234A is an aggravated offence applicable to situations that involve five or more smuggled migrants. Neither offence is a model of clarity and there are some discrepancies in the scope of these offences. Put simply, s 234 of the *Migration Act 1958* (Cth) criminalises certain fraudulent conduct that is carried out to facilitate the entry or stay of another person or of the accused into Australia. Under s 234(1) it is an offence to:

- (a) present, or cause to be presented, to an officer or a person exercising powers or performing functions under this Act a document which is forged or false;
- (b) make, or cause to be made, to an officer or a person exercising powers or performing functions under this Act a statement that, to the person’s knowledge, is false or misleading in a material particular; or
- (c) deliver, or cause to be delivered, to an officer or a person exercising powers or performing functions under this Act, or otherwise furnish, or cause to be furnished for official purposes of the Commonwealth, a document containing a statement or information that is false or misleading in a material particular.

Liability arises if such conduct occurs

in connection with the entry, proposed entry or immigration clearance, of a non-citizen (including that person himself or herself) into Australia or with an application for a visa or a further visa permitting a non-citizen (including that person himself or herself) to remain in Australia.

Under s 234(2) it is an offence to transfer or part with possession of a document in order to help another person gain entry into Australia. The offences under s 234 attract a penalty of ten years imprisonment, 1,000 penalty units, or both.

Section 234A of the *Migration Act 1958* (Cth), essentially, criminalises the same conduct as s 234(1) and (2) if that conduct is done in connection with the entry into or stay in Australia of a group of five or more non-citizens. Offences under s 234A carry a penalty of twenty years of imprisonment, 2,000 penalty units, or both. The offence carries a mandatory minimum penalty of five years for first offenders with a non-parole period of three years. For repeat offenders, the mandatory minimum is eight years imprisonment with a non-parole period of five years: s 236B.

C Other Enforcement Measures

The Australian Government has instigated a so-called ‘whole of government approach’ to border protection, which brings together a range of relevant federal and state/territory agencies engaged in aerial and coastal surveillance, immigration, customs, and quarantine control, as well as law enforcement.⁷⁸ DIAC, the Australian Customs and Border Protection Service, and the AFP employ specially trained operatives to recognise and combat the use of fraudulent documents at Australian airports. In addition, the AFP provides investigators and intelligence and financial analysts to anti-people smuggling strike teams posted in Canberra, Sydney, Melbourne, and Perth.⁷⁹

DIAC also maintains several operational and electronic systems to detect instances of document fraud at Australian immigration control points, overseas ports, and in Australian missions abroad. These include the Advance Passenger Processing, and Regional Movement Alert systems.⁸⁰ DIAC also maintains biometric data sharing programmes and international databases in which lists of lost and stolen passports, and offenders, are stored.⁸¹ Finally, DIAC maintains Airline Liaison Officers (ALOs) in overseas airports who ‘provide identity checking of many Australia-bound passengers at key international gateways.’⁸² As at June 30, 2011, there were twenty officers placed at twelve overseas airports.⁸³

Australian citizens are issued with up-to-date ePassports.⁸⁴ Biometric security features have increased Australia’s capacity to detect identity fraud and document fraud, with a chip embedded in the passport storing a digitised photograph as well as the holder’s name, sex, date of birth, nationality, passport number, and the passport expiry date.⁸⁵ The photograph used for a new ePassport can be compared with images from past travel documents of the holder, and the photograph is also stored on a database so that border control officials can compare it with the photograph stored on the ePassport’s chip. These features render the creation of fraudulent documents and their subsequent alteration considerably more difficult.

In combination, these measures meet the requirements relating to the validity and legitimacy of travel and identity documents in Articles 12 and 13 of the *Smuggling of Migrants Protocol* and ensure that international standards are met. The creation of inter-agency strike teams and national coordinating bodies also bring Australia’s efforts in line with relevant provisions in the *Convention against Transnational Organised Crime*.

D Commercial Carriers

Australian law requires that commercial carriers ensure that their passengers are in possession of the travel documents required to enter Australia. Under s 229(2) of the *Migration Act 1958* (Cth), carriers face a penalty of AU\$ 10,000 if they fail to do so. They may also elect to pay an AU\$ 5,000 fine as an alternative to prosecution.⁸⁶ According to DIAC, this measure has been highly effective in

⁷⁸ Department of Immigration and Citizenship, ‘Annual Report 2010-11’ (14 October 2011) 134; Australian Federal Police, ‘Annual Report 2010-11’ (31 October 2011) 53.

⁷⁹ Australian Federal Police, ‘Annual Report 2010-11’ (31 October 2011) 53.

⁸⁰ Department of Immigration and Citizenship, ‘Annual Report 2010-11’ (14 October 2011) 141.

⁸¹ Department of Immigration and Citizenship, ‘Annual Report 2010-11’ (14 October 2011) 135.

⁸² Department of Immigration and Citizenship, ‘Annual Report 2010-11’ (14 October 2011) 132.

⁸³ Department of Immigration and Citizenship, ‘Annual Report 2010-11’ (14 October 2011) 142.

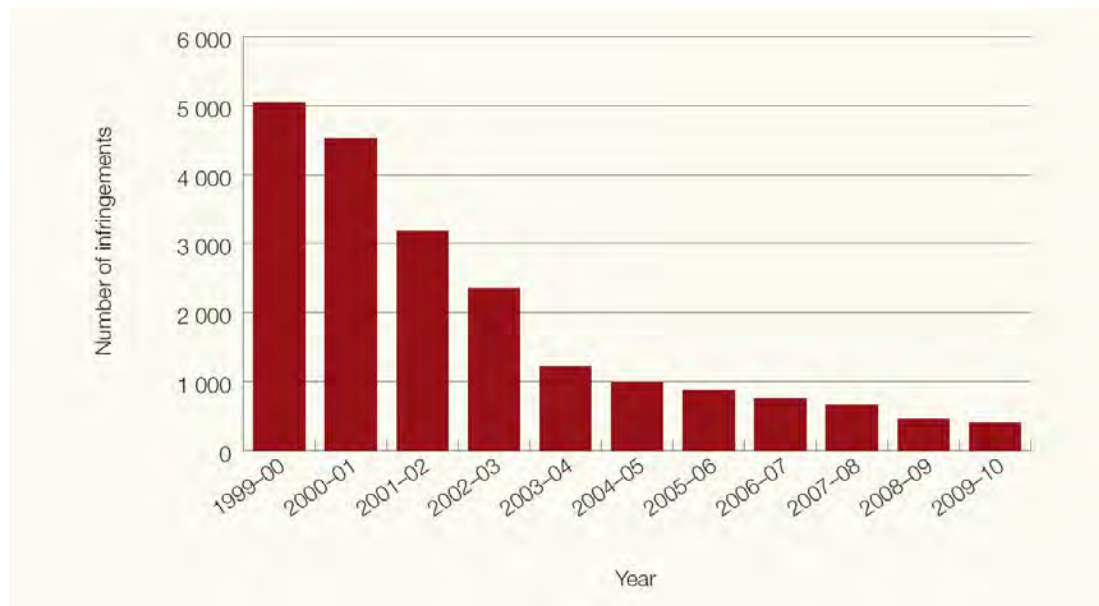
⁸⁴ Alexander Downer, ‘Australia Launches ePassports’ (Media Release, FA 132, 25 October 2005) <http://www.foreignminister.gov.au/releases/2005/fa132_05.html>.

⁸⁵ Department of Foreign Affairs and Trade, Commonwealth Government, *The Australian ePassport*, Australian Passport Office <<http://www.dfat.gov.au/dept/passports/>>.

⁸⁶ Department of Immigration and Citizenship (Cth), *Annual Report 2010-11* (2011) 141.

decreasing the number of infringement notices issued to airlines, from a high of over 5,000 in the 1999–2000 financial year, to only 378 in 2010–11.⁸⁷

Figure 2: Infringement notices issued to carriers, DIAC 1999-2010⁸⁸



In combination, these measures ensure Australia’s compliance with carrier obligations under Article 11 of the *Smuggling of Migrants Protocol*.

V OBSERVATIONS AND RECOMMENDATIONS

Australia has a comprehensive legislative and law enforcement framework relating to migrant smuggling by air and document fraud which, by and large, meets the requirements in the *Smuggling of Migrant Protocol* and international best practice guidelines. Australia comprehensively criminalises every aspect of migrant smuggling and the document fraud offences, some of which pre-date the introduction of the Protocol, are sufficiently broad to capture the obligations under Article 6(b).

The Australian offences, however, depart from the expectations set by the *Smuggling of Migrants Protocol* in two fundamental ways. (1) In Australia, relevant people smuggling offences also criminalise instances in which the alleged smugglers made no financial or other material gain or acted for purely humanitarian reasons. (2) Relevant document fraud and forgery offences are large de-linked from the definition of people smuggling and cast a net much wider than that anticipated by the Protocol.

The first point – the criminalisation of migrant smuggling in the absence of a financial or material profit motive – places the offences in ss 233A–233D of the *Migration Act 1958* (Cth) and ss 73.1–73.3A of the *Criminal Code* (Cth) at odds with the explicit language of Article 6(1) of the *Smuggling of Migrants Protocol* which limits relevant offences to those ‘committed intentionally and in order to obtain directly or indirectly, a financial or other benefit’. Australia’s laws are capable of – and possibly designed with a mind to – creating liability for those who may smuggle migrants for humanitarian reasons and also criminalise migrants who help each other (especially family and friends) to flee to Australia, be it by air or by sea. The Immigration Advice and Rights Centre, a non-government organisation, cites a recent example where a wife and child came to Australia by boat, but

⁸⁷ DIAC, *Annual Report 2009–10* (2010) 141; DIAC, *Annual Report 2010–11* (2011) 141.

⁸⁸ DIAC, *Annual Report 2009-10* (2010) 141.

the husband remained in Malaysia to repay the debt owed to smugglers. It was submitted that the husband could be liable for the offence of supporting people smuggling and that, should he seek to join his family in Australia, his entry could be denied on character grounds.⁸⁹ A similar case was referred to the Victorian Court of Appeal on September 12, 2011.⁹⁰ During a criminal trial involving charges of people smuggling, counsel for the accused argued that their clients gained no profit and acted purely for humanitarian reasons when they brought groups of asylum-seekers by boat from Indonesia to Australia where they were all later granted protection visas. The concerns raised by these cases apply equally to instances of migrant smuggling by air motivated by humanitarian concerns rather than intention to profit.

Of equal concern is the second point which relates to the disconnection between document fraud offences and migrant smuggling. While it is acknowledged that separate document fraud and forgery offences are necessary to protect the integrity of Australia's immigration and border control systems, the existing offences create a real possibility that smuggled migrants, rather than their smugglers, become criminally liable for arriving in Australia with falsified or illegally obtained travel or identity documents. Such criminalisation could violate the obligation under Article 5 of the *Smuggling of Migrants Protocol* which explicitly states that:

Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.

The *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* further note that it

is the intention of the drafters that the sanctions established in accordance with the Protocol should apply to the smuggling of migrants by organized criminal groups and not to mere migration of migrants, even in cases where it involves entry or residence that is illegal under the laws of the State concerned [...].⁹¹

The principle articulated in Article 5 is limited to criminal prosecutions relating to the smuggling of migrants offences set out in Article 6 of the Protocol; it does not grant blanket immunity to smuggled migrants. Consequently, smuggled migrants should not be held criminally liable for being the object of smuggling of migrants (Article 6(1)(a)), for offences involving document fraud (Article 6(1)(b)), and for remaining in the host country clandestinely or otherwise illegally (Article 6(1)(c)). Smuggled migrants may, however, face criminal prosecution for any offence unrelated to migrant smuggling. Article 6(4) of the *Smuggling of Migrants Protocol* explicitly ensures that 'nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.'⁹² For example, migrants who cause criminal damage or harm to others in the course of being smuggled could legitimately be liable to prosecution without contravening Article 5.⁹³ Rather, Article 5 aims to preclude State Parties from subjecting smuggled migrants to criminal prosecution simply for their involvement in having been smuggled. It has been suggested elsewhere that:

To fully recognise its obligations under Article 5 requires a comprehensive shift in Australia's attitude towards smuggled migrants and towards irregular migration and asylum seekers more generally. Smuggled migrants should be exempted from criminal prosecution for people smuggling offences unless they engage or participate in these offences for financial or material benefit. This would also increase the

⁸⁹ Immigration and Advice Centre, Submission No 7 to Senate Legal and Constitutional Committee, *Inquiry into the Anti-People Smuggling and Other Measures Bill 2010*, 16 April 2010, 3.

⁹⁰ Victoria Legal Aid, *Response to Deterring People Smuggling Bill 2011* (November 2011) <http://www.legalaid.vic.gov.au/dir_lr_20111109_ResponseDeterringPeopleSmugglingBill.pdf> 4.

⁹¹ *Legislative Guides*, 340.

⁹² *Smuggling of Migrants Protocol*, art 6(4).

⁹³ David McClean, *Transnational Organized Crime* (Oxford University Press, 2007) 389.

likelihood that smuggled migrants cooperate with the authorities in identifying their smugglers and testifying against them.⁹⁴

A further concern that crystallises from this research is the lack of general and specific information on the incidence of migrant smuggling by air and document fraud in Australia. Aside from drawing mostly anecdotal inferences from media and administrative case law, there is no concrete method by which to ascertain the extent of this phenomenon. This analysis has shown that there is sufficient evidence to show that document fraud is used to smuggle migrants into Australia by plane, and there is reason to believe that the real figure of this crime type is larger than the government and the general public appreciates. To understand and appreciate the levels and characteristics of migrant smuggling by air and document fraud – and to develop more effective countermeasures – it is essential that government agencies from a variety background, such as law enforcement, immigration, customs, and foreign affairs take a more proactive role in researching, investigating, and understanding this phenomenon. Such steps must go hand-in-hand with more and more rigorous independent research and analysis, not just in Australia.

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An electronic version of this research paper is available at www.law.uq.edu.au/migrantsmuggling.

⁹⁴ Andreas Schloenhardt & Hadley Hickson, 'Non-Criminalisation of Smuggled Migrants: Rights, Obligations, and Australian Practice under Article 5 of the Protocol against the Smuggling of Migrants by Land, Sea, and Air' (2012) 25 *International Journal of Refugee Law* (forthcoming).